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VIABILITY OF ARBITRATION OF BUSINESS & HUMAN RIGHTS DISPUTES

By Sanjini Jain* and Bhavinee Singh**

ABSTRACT

The United Nations Forum on Business and Human Rights was held on 27-29 November, 2017 and convened in Geneva with the central theme for discussion being "Access to Effective Remedy." With the growing importance of the United Nations Guiding Principles on Business and Human Rights (UNGPs), a working group of people specializing in international law proposed to make arbitration the means through which human rights abuses in businesses could be addressed. This paper argues that though international arbitration could be a good way of solving disputes of this nature, one cannot ignore the ill effects it could have on the victims of human rights abuses. This paper will give a brief introduction and background about the Human Rights and who is responsible for protecting these rights and its relevance in the increasingly globalized world we live in. It will also touch upon how this has given rise to a new discipline of Business & Human Rights (BHR), how did it emerge and focus on the third pillar of UNGPs-Access to Remedy with a focus on non-judicial grievance mechanism for the victims. Part II of this paper will discuss arbitration as a mode of solving BHR disputes and the human rights concerns that arise out of using this mode of dispute resolution. Part III examines the procedural and practical considerations that come to the forefront when using Alternative Dispute Resolution and how it aggravates the situation for victims of human rights abuses. Part IV discusses the substantive

* Sanjini Jain, Business and Human Rights Lawyer; B.A., LL.B. (Institute of Law, Nirma University), LL.M. (University of Washington School of Law).

** Bhavinee Singh, Assistant Lecturer, Jindal Global Law School, OP Jindal Global University, India; David J. Bederman Fellow in International Law, Emory University; B.A., LL.B. (Institute of Law, Nirma University), LL.M. (Emory University, School of Law).

considerations and where the law related to arbitration and law related to HR come in direct conflict. Part V discusses how could arbitration proceedings be used in a manner to possibly protect human rights of the parties involved. Since there is no present legal position applicable on this issue currently, the paper will offer some solutions on what could be a "just" way in which business and human rights disputes should be addressed in contemporary times. With the increasingly globalized world that we live in, these disputes do not necessarily arise in all the parties residing and belonging to the same jurisdiction. The paper will conclude with plausible solutions to address the loopholes present if the international arbitration mechanism is used in its current form.

INTRODUCTION

Globalization—the international integration of goods, technology, labor, and capital—is everywhere. In any large city in any country, Japanese cars ply the streets, a telephone call can arrange the purchase of equities from a stock exchange half a world away, local businesses cannot function without U.S. computers, and foreign nationals have taken over large segments of service industries. Over the past twenty years, foreign trade and the cross-border movement of technology, labor, and capital have been massive and irresistible.[1] Globalization has allowed companies across the globe to increase their operations and expand their workforce with low investments. It has played an integral role in developing economies of the world like India and China through increased exports and proliferation of jobs. The labor market is one of the main channels through which globalization can affect developing countries.[2] Increased import penetration, export sales, competition in services, foreign direct investment and exchange rate fluctuations prompted by international

[1] MATTHEW J. SLAUGHTER & PHILLIP SWAGEL, *Does Globalization Lower Wages and Export Jobs?,* ECONOMIC ISSUES NO. 11 INTERNATIONAL MONETARY FUND (Sep. 1997), https://www.imf.org/EXTERNAL/PUBS/FT/ISSUES11/issue11.pdf.

[2] MARTÍN RAMA, GLOBALIZATION AND WORKERS IN DEVELOPING COUNTRIES Policy Research Working Paper 2958, The World Bank 5 (2003), http://documents.worldbank.org/curated/en/846921467988877048/pdf/multi0page.pdf.

capital movements could all, in principle, have an impact on employment and labor earnings.[3]

Economically, according to the Stolper-Samuelson theorem, when a rich capital-abundant country (such as the United States) trades with a poor country that has abundant cheap labor (such as China), wages in the rich country fall and profits go up.[4] The theorem's economic logic is simple: free trade is tantamount to a massive increase in the rich country's labor supply because the products made by poor country workers can now be imported. Additionally, demand for workers in the rich country falls as rich country firms abandon labor-intensive production to the poor country. The net result is an effective increase in labor supply and a decrease in labor demand in the rich country, and wages fall.[5] Therefore, while it might not seem surprising for big multinational corporations to have a presence almost all over the globe to outsource their labor to countries providing cheap labor, it raises concerns about labor laws, children's and women's rights, and more importantly accountability of corporations in contemporary times.

According to Juan Somavia, the former director of International Labour Organization (ILO), there is increasing pressure on businesses from consumers who are choosing to buy from companies with good social practices. "There is growing awareness for the need of a fair globalization, because the present course is widely recognized as being morally unacceptable and politically unsustainable," he told his audience in Geneva. "To be sustainable, enterprises have to be socially competitive."[6] "Doing good and doing well are mutually reinforcing," said Mr. J.-M. Salazar-Xirinachs,

[3] *Id*.
[4] *See An Inconvenient Iota of Truth*, THE ECONOMIST (Aug. 6, 2016), https://www.economist.com/economics-brief/2016/08/06/an-inconvenient-iota-of-truth.
[5] THOMAS PALLEY, THE GLOBAL LABOR THREAT, GLOBAL POLICY FORUM (Sep. 29, 2005), https://www.globalpolicy.org/social-and-economic-policy/labor-rights-and-labor-movements/46713.html.
[6] *Multinationals and Socially Responsible Labour Practices: Better Business— Looking Back, Looking Forward*, INTERNATIONAL LABOUR ORGANIZATION (Apr. 01, 2008), https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_091639/lang--en/index.htm.

Executive Director of the ILO's Employment Sector.[7]

The simple idea of human rights is that everyone should be treated with dignity.[8] This is the core idea of the modern version of human rights that grew out of the Universal Declaration of Human Rights (UDHR) after the second world war.[9] Human rights are enshrined in international treaties and customary law, which are binding on states.[10] In this sense, the international legal framework, which primarily consists of international human rights treaties, does not impose any binding legal obligations on businesses. The burden of ensuring that the businesses follow international human rights law obligations is primarily on the states. The UNGPs tries to strengthen this by ascertaining that states individually are the primary duty-bearers under international human rights law, and collectively the trustees of the international human rights regime.[11]

Under the duty to protect, States are expected to take a number of actions to ensure the protection of human rights in the context of business activities.[12] These actions range from general regulatory and policy functions to a number of actions required in specific contexts, such as:

(i) When the State is contracting for public services;
(ii) When the State is conducting commercial transactions;
(iii) When it offers support or owns business enterprises; or

[7] *Multinationals and Socially Responsible Labour Practices: Better Business— Looking Back, Looking Forward*, INTERNATIONAL LABOUR ORGANIZATION (Apr. 01, 2008), https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_091639/lang--en/index.htm.
[8] Bandhua Mukti Morcha v. Union of India and Ors, (1991) 3 SCR 524 (India).
[9] Ikinasio Tautakitaki, THE THREE PILLARS OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: A 'NON-BINDING' INTERNATIONAL CONTRACT ON THE STATE DUTY TO PROTECT HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS AND THE ACCESS THE REMEDY FOR VICTIMS OF ABUSE, 49 Victoria U. of Wellington Legal Research Paper, Student/Alumni Paper 1,4 (2016), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2817598.
[10] *See* What is a "State"?, GLOBAL POLICY FORUM, https://www.globalpolicy.org/nations-a-states/what-is-a-state.html (Explaining a state is more than a government. Governments change, but states endure. A state is the means of rule over a defined or "sovereign" territory. It is comprised of an executive, a bureaucracy, courts and other institutions).
[11] UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 7 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[12] UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 11.

(iv) When companies domiciled in its territory or jurisdiction operate in a context of armed conflict. Duty to Protect also calls on States to guarantee policy adherence regarding business and human rights across State functions and among levels of administration, and to take adequate measures to ensure access to effective remedy.[13]

Laws of most of the states across the globe incorporate in their domestic legal system laws such as labor laws, environmental laws, non-discriminatory laws, health and safety laws etc. to ensure businesses have a legally binding responsibility not only towards their employees but also towards society at large. At the same time, national laws may not address all internationally recognized human rights. They may be weak, they may not apply to all people, and they may not be enforced by governments and the courts.[14] The UNGPs seek to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.[15]

In March 2011, UN Special Representative on Business & Human Rights John Ruggie drafted and issued "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.*"[16] These guiding principles were endorsed by The UN Human Rights Council's resolution on 16 June 2011.[17] The Human Rights Council also

[13] GUIDE TO IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN INVESTMENT POLICYMAKING, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 4 (2016), https://blogs.lse.ac.uk/investment-and-human-rights/files/2016/04/LSE_UNGPs_Guide_en.pdf.
[14] *Id.*
[15] *Id*.
[16] *UN "Protect, Respect and Remedy" Framework and Guiding Principles*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human rights/un-protect-respect-and-remedy-framework-and-guiding-principles.
[17] *Background & History of Guiding Principles*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, (last visited Sep. 11, 2019, 5:33 PM), https://www.business-humanrights.org/en/un-guiding-principles/background-history-of-guiding-principles.

established the UN Working Group on business & human rights.[18]

The UNGPs are based on 3 pillars:

1. the state duty to protect against human rights abuses by third parties, including business;

2. the corporate responsibility to respect human rights; and

3. greater access by victims to effective remedy, both judicial and non-judicial.[19]

Alongside the State's efforts, businesses should provide for or cooperate in the remediation of adverse impacts on human rights as part of their responsibility to respect human rights.[20]

Law without remedy is far from ideal, particularly when human rights are at stake and victims require redress for the violations they have suffered.[21] Therefore it is crucial to discuss how are human rights violated when the forum provided for redressal of grievances is not effective itself.

ACCESS TO REMEDY

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the UNGPs.[22] This right has also been

[18] *Id.*

[19] *UN "Protect, Respect and Remedy" Framework and Guiding Principles*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human rights/un-protect-respect-and-remedy-framework-and-guiding-principles.

[20] GUIDE TO IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN INVESTMENT POLICYMAKING, *supra* note 1313.

[21] IOANA CISMAS & SARAH MACRORY, *The Business and Human Rights Regime under International Law: Remedy Without Law?* 1 JAMES SUMMERS & ALEX GOUGH EDS., NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT, 2018, https://brill.com/view/book/edcoll/9789004340251/BP000015.xml.

[22] *OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (last

recognized in other internationally recognized legal instruments. Article 8 of the UDHR states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[23] Article 2(3) of the International Covenant on Civil and Political Rights states that

> "Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted." [24]

There are also regional legal instruments such as Article 13 of the European Convention on Human Rights which establishes the right to an effective remedy, stating that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[25] This is one of the key provisions underlying the Convention's human rights protection system, along with the requirements of Article 1 on the obligation to respect human rights

visited Sep. 11, 2019, 6:16 PM), https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx

[23] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 8 (Dec. 10, 1948).

[24] G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1996).

[25] *Guide to Good Practice in Respect of Domestic Remedies,* COUNCIL OF EUROPE 7 (2013), https://www.echr.coe.int/Documents/ Pub_coe_domestics_remedies_ENG.pdf.

and Article 46 on the execution of judgments of the European Court of Human Rights (ECtHR).[26]

Therefore, it is imperative that there is recognition of the importance of access to legal remedy for victims. Since 2014, the Office of the UN High Commissioner for Human Rights (OHCHR) has led a project entitled the Accountability and Remedy Project (ARP), which is aimed at supporting more effective implementation of the Third Pillar of the UNGPs.[27] It was launched with a view to contributing to a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses.[28] The project led to the publication of guidance for states on improving judicial mechanisms at the domestic level.[29] Addressing barriers to accountability and effective remedy for business-related human rights abuses has also been central to discussions on the development of an internationally legally binding instrument to regulate the activities of transnational corporations and other business enterprises with respect to human rights.[30]

Major international and regional human rights treaties demand that an effective remedy be available for individual victims of human rights violations. A remedy involves two elements: (1) a victim's

[26] *Id.*
[27] UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 22.
[28] UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 22. (Releasing a paper that outlines the proposed scope for ARP III and five work streams to focus the work: Work stream 1: Practical steps that mechanisms can take to meet the "effectiveness criteria" of UNGP 31; Work stream 2: Understanding the interface between the work of non-State-based grievance mechanisms and the powers and functions of State-based institutions; Work stream 3: Understanding how companies and other organizations can work together through non-State-based grievance mechanisms to improve the prospects for effective remedy; Work stream 4: Safeguarding rights-holders, human rights defenders and others from retaliation and intimidation as a result of the actual or potential use of non-State-based grievance mechanisms; and Work stream 5: Meaningful stakeholder involvement in the design and implementation of remedial outcomes. Analysis of these 5 work streams will be done for three types of grievance redressal mechanism: I) Enhancing effectiveness of judicial mechanisms in cases of business-related human rights abuses; II) Enhancing effectiveness of State-based non-judicial mechanisms in cases of business-related human rights abuse; III) Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse.
[29] IMPACTS OF THE INTERNATIONAL INVESTMENT REGIME ON ACCESS TO JUSTICE, UNITED NATIONS WORKING GROUP ON BUSINESS AND HUMAN RIGHTS 7 (2018), http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Document-Final.pdf.
[30] *Id.*

access to the appropriate authorities to have his claim fairly heard and decided and; (2) the redress or relief that he can receive.[31]

The presumption that courts are the principal forum for dispute resolution continues to be eroded with the increase in the availability of alternate forms of dispute resolution which promise speedier resolution. Alternative forms of dispute resolution (ADR), including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration), continue to proliferate and are increasingly institutionalized, leading to their characterization as 'appropriate' or 'proportionate' dispute resolution. Interestingly, despite these developments, the position of international human rights law (IHRL) on two key questions regarding ADR and proportionate dispute resolution (PDR) is unclear. These questions are, first, the standards of justice expected of ADR/PDR (whether entered into voluntarily or mandatorily), and second, the permissible circumstances in which parties to a dispute can be required to use ADR/PDR instead of, or before, accessing courts.[32]

NON-JUDICIAL GRIEVANCE MECHANISM: ARBITRATION AS A MODE OF SOLVING BHR DISPUTES

As economies across the globe expand beyond their domestic markets, the global market has evolved to become more organized and regulated. Since the risk of a host State government controlling a foreign investor's investment is substantial, this global expansion necessitated provisions of fundamental protections to foreign investors. To alleviate these concerns, countries initiated the practice of entering into formal arrangements which granted essential protections to foreign investors and investments.[33] The first

[31] EFFECTIVE REMEDIES TO HUMAN RIGHTS VIOLATIONS, INT'L CTR. FOR TRANSITIONAL JUSTICE 1 (2009), https://www.ictj.org/site/ default/files/ICTJ-Global-Rights-Remedies-2009-English.pdf.
[32] Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR*, 26 EJIL 581, 1 (2015), https://doi.org/10.1093/ejil/chv039.
[33] NISHITH DESAI ASSOCIATES, BILATERAL INVESTMENT TREATY ARBITRATION AND INDIA 4 (2019), http://www.nishithdesai.com/ fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India_PRINT-2.pdf

generation of these treaties were Friendship, Commerce and Navigation Treaties (FCNs), which put obligations on the investment receiving country, i.e., host state, to treat foreign investments on the same level as investments from any other state, including in some occasions treatment that was as favorable as the host nation treated its own national investors.[34]

The second generation of these treaties are Bilateral Investment Treaties (BITs), which set forth actionable standards of conduct that applied to governments in their treatment of investors from other states, including fair and equitable treatment (also referred to as national treatment, which provides that a host state shall treat foreign and domestic enterprises equally), protection from expropriation, free transfer of means and fill protection and security.[35] BITs trace their origins to the late 1950s, and were developed in an effort to supplement the slender protections afforded by customary international law to foreign investors.[36] West Germany and Pakistan became the first countries to sign a BIT in 1959.[37] These investment treaties are generally single-purpose instruments protecting foreign investors and their assets, rather than imposing duties or legal responsibilities on foreign investors with respect to their actions in the host country.[38]

As a rule, investment treaties are one-sided instruments.[39] They are concerned with limiting the measures that may be taken by governments against foreign investors or foreign-owned

[34] Henok Gabisa, *The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?*, THE INTERNATIONAL LAWYER 157, 167 (2014), https://scholar.smu.edu/cgi/viewcontent. cgi?article=1603&context=til.
[35] *Id.*
[36] LUKE ERIC PETERSON, *Human Rights and Bilateral Investment Treaties* INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT 12 (2009), https://www.business-humanrights.org/sites/default/files/media/documents/human-rights- and-bilateral-investment-treaties-peterson-2009.pdf
[37] Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection of Investments 6575 U.N.T.S. (1959).
[38] PETERSON, *supra* note 36, at 12.
[39] *Human Rights, Trade and Investment Matters*, AMNESTY INTERNATIONAL 20 (2006), https://www.amnestyusa.org/files/pdfs/hrtr adeinvestmentsmatters.pdf.

investments.[40] The treaties contain a series of rights for inward capital protection against expropriation, guarantees of non-discrimination, and freedom to transfer funds out of a host state, but they lack any counter-balancing investor responsibilities.[41] In the event of investor misconduct which impacts the rights of individuals or groups in the territory where the investment takes place, the BITs offer little comfort to those victims—investor protections are not conditional on minimum investor responsibilities, nor do they provide any mechanism for challenging investor wrong-doing.[42]

In general, BITs address four substantive issues: (1) conditions for the admission of foreign investors to the host State; (2) standards of treatment of foreign investors; (3) protection against expropriation; and (4) methods for resolving investment disputes.[43]

Although human rights obligations do not form a core part of the investment treaty, it does not imply that they do not have any impact upon human rights. While designed to promote and protect international investment, the impacts of BITs extend beyond the treatment of foreign investment and investors.[44] Most obviously, the protections and guarantees that BITs provide to foreign investors have the potential to implicate States' capacity to regulate domestically and, in turn, impact a broad range of legal, economic, constitutional and social issues.[45] Effects on domestic regulatory capacity can also affect States' ability to implement and adhere to other international legal obligations, creating the potential for interaction and conflict of international norms.[46] In this regard, the

[40] *Id*. at 12.
[41] *Id*.
[42] *Id*.
[43] George M. von Mehren et al., *Navigating Through Investor-State Arbitrations: An Overview of Bilateral Investment Treaty Claims*, DISP. RESOL. J., Feb.-Apr. 2004, at 69-70, https://www.squirepattonboggs.com/~/media/files/insights/publications/2004/ 04/navigating-through-investorstate-arbitrations/files/tbls29publicationsfileupload56898951bitpdf/fileattachment/bit.pdf.
[44] Stratos Pahis, *Bilateral Investment Treaties and International Human Rights Law: Harmonization through Interpretation*, INT'L COMMISSION OF JURISTS 2 (2011), https://www.icj.org/wp-content/uploads/2012/06/treaties-themetic-report-2012.pdf.
[45] *Id*.
[46] *Id*.

relationship of BITs with international human rights law is particularly significant and complex. Because each set of laws relate to the treatment of different but overlapping groups, are underpinned by different but overlapping values, and implicate domestic regulation in different but overlapping ways, BITs and international human rights laws have significant potential to both interact and conflict with one another.[47]

The power of sovereign governments to enact or change legislation within their domestic territories gives the developing host country government a powerful bargaining advantage over private foreign direct investors.[48] The Report of the Group of Eminent Persons to study the Impact of Multinational Corporations on Development and on International Relations[49] states that "developing countries have, of course, the power through legislation, to modify the terms of agreements."[50] However, host countries often have comparatively weak bargaining power and little experience in negotiating the complex and comprehensive contractual and legislative regime for large-scale investment projects.[51]

Relationships between foreign direct investors and developing host country governments are not static. On the contrary, as the bargaining power of the host country government increases, the terms on which foreign direct investments are treated are also subject to change.[52] Further, the UNGPs, in its Commentary to Principle 9,[53] state that Economic agreements concluded by States,

[47] *Id*.
[48] Frederick M. Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 Syr. J. Int'l L. & Com. 319, 327 (1975), https://surface.syr.edu/jilc/vol3/iss2/3/.
[49] The Impact of Multinational Corporations on Development and on International Relations, U.N. Doc. E/5500/Rev. 1, ST/ESN6 (1974).
[50] Abbott, *supra* note 48, at 328.
[51] Thomas Wälde, *Negotiating for Dispute Settlement in Transnational Mineral Contracts: Current Practice, Trends, and an Evaluation from the Host Country's Perspective*, TRANSNAT'L' DISP. MGMT. (2003), https://www.transnational-dispute-management.com/article.asp?key=953#citation.
[52] Abbott, *supra* note 48, at 329-30.
[53] UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 11, at 8 (Explaining that States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts).

either with other States or with business enterprises—such as BITs, free trade agreements or contracts for investment projects—create economic opportunities for States. They can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation or puts them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.[54]

IHRL imposes a duty on states to protect people from violations of human rights by state and non-state actors.[55] Thus, the UN High Commissioner for Human Rights has stressed, in recognition of this duty, that States 'have responsibilities to ensure that the loss of autonomy does not disproportionately reduce their capacity to set and implement national development policy.[56] Implementation of this duty also makes private actors indirectly responsible for their conduct at the international level and directly responsible at the domestic level.

While there were some minimal protections guaranteed to foreign investors who might find themselves suffering abuse at the hands of a host country, there were also continuing disagreement as to more specific forms of treatment that should be extended by host governments. For example, at the United Nations, governments from developed and developing countries clashed sharply over whether governments could nationalize foreign investment in the natural resources sector without paying full compensation to foreign investors.[57] However, it has only been in the past two decades that foreign investors have begun to make use of these treaties: by

[54] UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, supra note 11, at 11.
[55] See Ronen, Yael (2013) "Human Rights Obligations of Territorial Non-State Actors," Cornell International Law Journal: Vol. 46: Iss. 1, Article 2. Available at: http://scholarship.law.cornell.edu/cilj/vol46/iss1/2.
[56] COMM'N ON HUMAN RIGHTS, LIBERALIZATION OF TRADE IN SERVICES AND HUMAN RIGHTS: REPORT OF THE HIGH COMMISSIONER 9 (2002).
[57] PETERSON, *supra* note 36 at 12.

invoking the dispute settlement mechanisms contained within the treaties.[58] By using the treaties to challenge a wide range of measures and policies put into place by host state authorities, these emerging investor-state arbitrations may also raise unanticipated and sometimes sensitive questions to be resolved. While a number of the most controversial disputes initiated by investors have challenged environmental or public health measures which harm investor interests, scenarios can also be seen where human rights and human security issues may be implicated in investment treaty disputes between investors and host states.[59]

BITs AND THEIR DISPUTE RESOLUTION MECHANISM

The relationship between human rights and foreign investment law is recognized as complex, yet commentators generally agree that international investment law and arbitration have an adverse impact on the promotion and protection of human rights.[60]

These international arbitration provisions were initially built into trade agreements in an attempt to attract foreign investment to States where the judicial systems were perceived as corrupt. Without such provisions, corporations worried about having a lack of legal recourse if they were wronged. Providing the option to go to an international tribunal, such as the World Bank's International Centre for Settlement of Investment Disputes ("ICSID"),[61] instead of domestic courts gave corporations the protections and guarantees they sought in order to commit to investing in less-developed States.[62] Notably, however, governments are consistently losing

[58] Luke Eric Peterson & Kevin R. Grey, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, INT'L INST. FOR SUSTAINABLE DEV. 5 (2003), https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf.
[59] *Id.*
[60] James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. OF COMPARATIVE & INT'L L. 77, 77 (2007).
[61] *See* About ICISD, ICISD, https://icsid.worldbank.org/en/ (last visited Nov. 4, 2019).
[62] Devan Braun, *International Arbitration: An Impediment for Human Rights and Environmental Law*, RIGHTSCAPES (Dec. 16, 2016), https://rightscapes.wordpress.com/2016/12/16/international-arbitration-an-impediment-for-human-rights-and-environmental-law/.

cases in these fora, or are forced into unfavorable settlements with corporations using the international arbitration system.[63]

ICSID is the only public multilateral institution that provides arbitration services in the context of international investment.[64] The Permanent Court of Arbitration[65] is another public multilateral organization that provides a variety of dispute resolution services for disputes that involve States, international organisations and also private parties. However, unlike ICSID, its mandate is not restricted to international investment.[66]

The investor-state dispute settlement (ISDS) regime has come under severe criticism in recent years, especially in terms of the perceived limits it places on States' abilities to regulate in the public interest.[67] The workhorse of the ISDS system is investment treaty arbitration; the treaties between States that define and describe the reciprocal rights and obligations of the state-parties vis-à-vis each other and their investors.[68] These treaties come in a variety of forms, including bilateral investment treaties (BITs) between two states and multilateral investment treaties (MITs) between more than two states, including multilateral trade agreements with investment chapters – like the North American Free Trade Agreement (NAFTA).[69]

In principle, investment treaties create obligations only for the host state.[70] Among the few investment treaties that do so, human rights are addressed in two different ways. First, certain treaty clauses, such as Article 1114(1) of the North American Free Trade Agreement

[63] *Id.*
[64] *Resolving Investment Disputes*, LSE CENTRE FOR THE STUDY OF HUMAN RIGHTS https://blogs.lse.ac.uk/investment-and-human-rights/connections/resolving-investment-disputes/arbitration/.
[65] PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/home/ (last visited Sep. 30, 2019).
[66] LSE CENTRE FOR THE STUDY OF HUMAN RIGHTS, *supra* note 75 at XX. XX- This is a blog page- no page numbers are given.
[67] Timothy J. Feighery, *Investor-State Arbitration and Human Rights*, 21 VAND. J. ENT. & TECH. L. 417, 418 (2019).
[68] *Id.* at 424.
[69] *Id*.
[70] Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox*, 37 N.C. J. INT'L L. & COM. REG. 1107, 1110 (2011).

(NAFTA), allow a host state under its respective regimes to enact measures aimed at protecting human rights.[71] For instance, Article 1114(1) of NAFTA states-

> "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

However, even such clauses are interpreted only to the extent that they are in consonance with the investment treaty terms. Second, other treaty clauses provide that the provisions of the investment treaty do not limit the regulatory power of states regarding the protection of human rights. Article 10(1) of the Canadian BIT Model provides such an example.[72] Investment tribunals rarely examine host state arguments based on international human rights law in great depth.[73]

In 1971, the Uruguayan novelist Eduardo Galeano described Latin America as "the region of open veins," in the light of the historically controversial relationship between the Latin American countries and foreign powers, especially the United States of America and Europe. Galeano depicted a negative interpretation of the impact of free trade and foreign investment on the region by stating that "everything, from the discovery until our times, has always been transmuted into European—or later United States—capital, and as such has

[71] *Id.* at 1111.
[72] *Id.*; *see also* Model Agreement for the Promotion and Protection of Investments, art. 10(1) (2004) (Can.), available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (Providing that subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: to protect human, animal or plant life or health).
[73] Edward Guntrip, Urbaser v. Argentina: *The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration*, EJIL: TALK! (Feb. 10, 2017), https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/.

accumulated in distant centers of power.[74]

The permissive terms of investment treaties and the relatively low costs of incorporating a subsidiary abroad or migrating to another jurisdiction has enabled some companies to push the boundaries of legitimate investment protection in the event of a dispute with a host State.[75] Abuse of process will arise where a corporate claimant makes or restructures its investment in order to gain access to a dispute with the host State that is foreseeable, but may not yet have crystallized.[76] This was the issue in the case of *Pac Rim Cayman LLC v. Republic of El Salvador*.[77] In 2009 Pac Rim Cayman LLC brought an ISDS case against El Salvador at the World Bank Group's arbitration venue, ICSID. The company, now a wholly-owned subsidiary of the Canadian-Australian company OceanaGold, sued El Salvador for alleged losses of potential profits as a result of not being granted a mining concession for a gold project. The government of El Salvador did not issue the concession because the company failed to meet key regulatory requirements.[78] The tribunal found that the claimant changed its seat of incorporation from the Cayman Islands to the United States for the principal purpose of gaining access to the protection of investment rights under the Central American Free Trade Agreement (CAFTA).[79]. It ultimately dismissed El Salvador's abuse of process objection based on its finding that the claimant's restructuring occurred before the dispute became a high probability. The *Pac Rim* case attracted much attention from the media because several civil society groups organized opposition against the mining company. The government of El Salvador refused to grant a mining concession in response to

[74] EDUARDO GALEANO, OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT 2 (25th Ann. ed., 1997).
[75] Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 ICSID REV. 1, 3 (2017), https://www.shearman.com/~/ media/Files/NewsInsights/Publications/2017/01/icsidreviewsiw036full.pdf.
[76] *Id.* at 4.
[77] *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12 (2016).
[78] The International Allies Against Mining in El Salvador, *ICSID Tribunal Finds in Favor of Government of El Salvador in Arbitration Process*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (Oct. 14, 2016), https://www.ciel.org/news/no-winners-pac-rim-mining-company-vs-el-salvador/; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12.
[79] GAILLARD, supra note 75, at 4.

strong public concerns that the mine could contaminate a major source of drinking water. The case fed into the general controversy of states' right to regulate, and specifically the right to regulate of smaller and economically weaker states that possess important natural resources, as is the case of El Salvador.[80] Marcos Orellana of the Center for International Environmental Law (CIEL) also opined "By allowing transnational companies to blackmail governments to try to force them to adopt policies that favor corporations, investor-state arbitration undermines democracy in El Salvador and around the world. Regardless of the outcome, the arbitration has had a chilling effect on the development and implementation of public policy necessary to protect the environment and the human right to water."[81]

The award rendered by ICSID in *Urbaser v. Argentina*[82] was the first case to pave way for making corporations accountable for human rights violation under the public international law.[83] The dispute submitted to this Tribunal related to a Concession for water and sewage services to be provided in the Province of Greater Buenos Aires. It was granted in early 2000 to Aguas Del Gran Buenos Aires S.A. (AGBA), a company established by foreign investors and shareholders, including Urbaser, Consorcio de Aguas Bilbao Bizkaia and Bilbao Biskaia Ur Partzuergoa (the Claimants) in the present proceeding. The Claimants asserted that they faced numerous obstructions on the part of the Province's authorities, which rendered the efficient and profitable operation of the Concession extremely difficult.[84] The emergency measures taken by Argentina in the context of the 2001–2002 economic crisis caused financial losses to the claimants, and the Concession was finally running into deadlock.

[80] Stephanie Schacherer, *Pac Rim v. El Salvador*, INV. TREATY NEWS (Oct. 18, 2018), https://iisd.org/itn/2018/10/18/pac-rim-v-el-salvador/.
[81] *Id.*
[82] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 330 (Dec. 8,2016).
[83] *See* Kevin Crow & Lina Lorenzoni Escobar. *International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?*, 36 B.U. INT'L L.J. 87, 88 (2018).
[84] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, (Dec. 8, 2016).

AGBA and its shareholders made numerous requests for a new valuation of its tariffs and for a complete review of the Concession. However, the negotiating process did not lead to a successful outcome. In July 2006, the province finally terminated the Concession.[85] Citing obstruction and persistent neglect of AGBA's shareholders' interests, the Claimants alleged violations of the BIT, namely:

- Article III.1, on the prohibition to adopt unjustified or discriminatory measures;
- Article IV.1, on the obligation to afford fair and equitable treatment to the referred investments; and
- Article V, which forbids any illegal and discriminatory expropriation of foreign investments, imposing obligations to compensate.[86]

The Claimants further observed that, albeit they are not mandatory, the Guidelines on the Treatment of Foreign Investments are also to be considered (CUL-36).[87] Their purpose is to promote investments. They are a complement to bilateral or multilateral treaties. Although prior arbitration decisions do not have the force of a precedent, they are still instrumental in determination of general principles of law. These general principles of law then become sources of international law.[88] On merits, the tribunal noted that while the treaty had imposed the primary obligation on the host state, however that would not imply that the investor had no obligations at all. However, the tribunal

[85] Stefanie Schacherer, *Urbaser v. Argentina*, INV. TREATY NEWS (Oct. 18, 2018), https://www.iisd.org/itn/2018/10/18/urbaser-v-argentina/ (Terminating the concession had also led to financial loss of the claimants).

[86] Sujoy Sur, *Urbaser v. Argentina: Analysing the Expanding Scope of Investment Arbitration in Light of Human Rights Obligations*, EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION BLOG (May 2, 2017), https://efilablog.org/2017/05/02/urbaser-v-argentina-analysing-the-expanding-scope-of-investment-arbitration-in-light-of-human-rights-obligations/.

[87] Also raises concerns about how corporations try to impose non-binding instruments on the State and at the same time use the very same documents to absolve themselves of the responsibility.

[88] *See* Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Spain v. Argentina), ICSID Case No. ARB/07/26, Award, 549 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

ultimately rejected Argentina's counter claim that the investor had breached any human rights obligations in the form of restricting right to water. The case is noteworthy since the tribunal applied various international law principles and did not restrict itself to only international investment law principles to adjudicate upon the matter.

AN INDIVIDUAL'S RIGHT IN THE BITs SYSTEM

Modern BITs would seem to be the archetype of treaties conferring rights on individuals, taken in a broad sense including companies and other entities of a private kind, that result in international legal personality as defined by the International Court of Justice: "*What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims*."[89] The case of *Germany v. United States of America*[90] ("*LaGrand Case*") may arguably have led to one of the most important judgments of the International Court of Justice (ICJ) in recent decades. Not only did the ICJ state, for the first time in the history of its existence, the binding nature of provisional measures issued under Art. 41 of the ICJ Statute, but its judgment of 27 June 2001 also confirmed that international treaties—other than human rights instruments—may confer enforceable rights on individuals. The *LaGrand* judgment further gained a certain prominence in the law of State responsibility—the codification of which was soon to be completed by the International Law Commission (ILC) when the judgment was released—for the judgment's rather progressive approach concerning the means of reparation to which Germany was entitled.[91]

The rule established in the *LaGrand* judgment was that a state that breaches its obligations to another under the Vienna Convention on

[89] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 17, 7 (April 11).
[90] *See generally* LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 822, (June 27).
[91] PIERRE-MARIE DUPUY & CRISTINA HOSS, Max Planck Encyclopaedias of International Law, LAGRAND CASE (GERMANY V. U.S.) (Dec. 2009).

Consular Relations by failing to inform an arrested alien of the right to consular notification and to provide judicial review of the alien's conviction and sentence also violate individual rights held by the alien under international law.[92]

In order to comply with the Court's judgment, the US found itself placed in a very delicate situation. In the judgment, it remained unclear what concrete steps should be taken within the criminal procedures of the US in order to ensure compliance with the Court's finding, since the Court left it up to the respondent State to employ the means of its own choosing.[93]

However, even here, the Court seemed a bit reluctant to extend the sphere of human rights. Jurisdiction over one of Germany's claims required a finding that the Convention conferred individual rights on the LaGrand brothers as a matter of international law. This led to a lively debate on whether the right to consular notification was a human right. The Court declined to decide this question. It found that the Convention by its terms conferred individual rights on the brothers, and it simply did not need to decide whether these could be viewed as human rights.[94]

The willingness of investment arbitration tribunals to account for human rights issues in their decision making seems more limited where such issues are raised as a defence by host States.[95]

REGULATORY FRAMEWORK OF THE UNITED NATIONS AND ITS EFFICACY

Human rights advocates criticize IHRL traditionally built on a state-centric regime—for not effectively addressing negative corporate

[92] SEE https://www.icj-cij.org/en/case/104
[93] *See* DUPUY & HOSS, *supra* note 127, at XX. – my subscription has ended for this article. Unable to access the exact page number.
[94] John R. Crook, *The Int'l Ct. of Just. and Hum. Rts.*, 1 NW. J. INT'L HUM. RTS., no. 1, (2004) 4 http://scholarlycommons.law.northwestern.edu/njihr/vol1/iss1/2.
[95] Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. OF INT'L DISP.L Settlement 277, 8 (2015).

human rights violations and their impact on individuals.[96] To address this problem, the United Nations has contributed to 'norm setting' in the international society since its establishment.[97] Back in 2003, The "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"[98] were approved 13 August 2003 by the United Nations Sub- Commission on the Promotion and Protection of Human Rights.[99] The Norms were considered by the UN Commission on Human Rights in April 2004 – the Commission "express[ed] its appreciation to the Sub-Commission for the work it has undertaken in preparing the draft norms" and said they contained "useful elements and ideas for consideration."[100] It did not approve them, and said that the norms had "no legal standing."[101] However, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights represented a landmark step in holding businesses accountable for their human rights abuses and constituted a succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights, humanitarian law, international labor law, environmental law, consumer law, anti-corruption law, and so forth.[102] The decisions and actions of transnational corporations affect individuals' human rights worldwide. Through their economic might, transnational corporations established ample participatory rights in international law.[103]

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[96] David S. Bettwy, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for an Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239, 240 (2012).
[97] Mariko Shoji, *Global Accountability of Transnational Corporations: The UN Global Compact as a Global Norm*, 8 U.N. GLOBAL COMPACT 29, 30 (2015).
[98] *See* U.N. Sub-Comm. on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N., 19 U.N. Doc.E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003) [hereinafter U.N. Sub-Comm.].
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] David Weissbrodt and Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int'l L. 901, 901 (2003).
[103] Juli Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the*

In a report from the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, the experts described the wide range of circumstances under which corporations' liability for complicity in human rights abuses has been scrutinized.[104]

Another initiative by the United Nations for making businesses accountable is through the UN Global Compact Principles.[105] The UN Global Compact supports companies to:

1. Do business responsibly by aligning their strategies and operations with Ten Principles on human rights, labour, environment and anti-corruption; and
2. Take strategic actions to advance broader societal goals, such as the UN Sustainable Development Goals, with an emphasis on collaboration and innovation.[106]

The UN Global Compact comprises of ten principles[107] and are derived from: the UDHR, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.[108] However the efficacy of these principles still remains and has come under criticism for being a "blue-wash" tool.[109] The Asia-Pacific region, one of the primary core targets of the UN; in spite of this, there are little or no

Global Rule Makers, 37 J. MARSHALL. REV. 1205, 1206 (2004).

[104] International Commission of Jurists, *Facing the Facts and Charting a Legal Path: Report of the International Commission of Jurists Expert Legal Panel on Corporate complicity in International Crimes*, at 17 (2008).

[105] *The Ten Principles of the UN Global Compact,* UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Sep. 11, 2019).

[106] Our Mission, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission (last visited Sep. 11, 2019).

[107] UN GLOBAL COMPACT, supra note 105.

[108] *Id.*

[109] *See* Nina Bandi, *United Nations Global Compact: Impact and its Critics,* COVALENCE (Sep. 13, 2007), https://www.covalence. Ch/docs/UnitedNationsGlobalCompact.pdf; *see also NGOs Criticize "Blue Washing" by the Global Compact*, GLOBAL POLICY FORUM (Jul. 4, 2007), https://www.globalpolicy.org/global-taxes/32267-ngos-criticize-qblue-washingq-by-the-global-compact.html.

improvements in labor standards and environmental sustainability.[110] China, having one of the largest, fastest and most sophisticated manufacturing systems on earth, still remains the top polluting country in the world and largest violator of the labor laws and standards and its global textile and technology manufacturers such as H&M, Zara, Apple and Samsung continue to find ways to increase production and profits.[111] A recent scandal over an explosion at Foxconn, the nation's largest factory employer, killed four people and injured 18 as a direct result of the company's failure to maintain safe working conditions.[112] Similar situations have occurred in Bangladesh: the 2012 Dhaka fire in the Tazreen Fashion factory[113] and the 2013 Rana Plaza collapse[114] were both due to non-compliance of safety standards and resulted in the deaths of more than 1,200 people. Other violations such as discrimination against minorities, child labor, and sexual abuses against women are a norm in many parts of the developing world. However, all these corporations are continuing to claim progress in their Corporation Progress Reports (CPOs).[115]

The limitations of the Compact is highlighted with reference to these aspects: the general and limited scope of its ten principles, and the extent of corporate (non)response as well as (non)seriousness shown towards the Compact.[116] Due to the binding nature of the norms, the international business community vehemently opposes

[110] Renata Bolotova, *Has the UN Global Compact succeeded? What if it is failing?*, THE NEW CONTEXT (Sep. 28, 2015), https://thenewcontext.org/has-the-un-global-compact-succeeded-what-if-it-is-failing/.
[111] *Id.*
[112] See, e.g., Liu Zhiyi, The Fate of a Generation of Workers: Foxconn Undercover, ENGADGET (Richard Lai trans., May 19, 2010, 7:03 PM), http://www.engadget.com/ 2010/05/19/the-fate-of-a-generation-of-workers-foxconn-undercover-fully-tr/ (describing the experience of an undercover reporter at a Foxconn factory).
[113] Julfikar A. Manik & Jim Yardley, *Bangladesh Finds Gross Negligence in Factory Fire*, N.Y. TIMES (Dec. 17, 2012), https://www.nytimes.com/2012/12/18/world/aisa/bangladesh-factory-fire-caused-by-gross-negligence.html.'
[114] Jim Yardley, *Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame*, N.Y. TIMES (May 22, 2013), https://www.nytimes.com/2013/05/23/world/asia/report-on-banglades-building-collapse-finds-widespread-blame.html.
[115] Bolotova, *supra* note 110.
[116] Surya Deva, *Global Compact: A Critique of UN's Public-Private Partnership for Promoting Corporate Citizenship*, 34 Syracuse J. Int'l L. & Com. 107, 111 (2006).

them because of their enforceability and not surprisingly, the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE) issued a joint statement opposing the Norms and their "legalistic approach."[117] They came under attack by human rights activists and went on to say "In a misleading and factually inaccurate statement the International Chamber of Commerce and the International Organisation of Employers attack the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. In what amounts to an extraordinary attack on international human rights standards, the ICC and IOE bring discredit to their own organisations and do a disservice to their members."[118]

Far from representing a 'negative approach to business', the Norms provide an opportunity for companies to demonstrate their adherence to the values of society.[119] The distortions and factual inaccuracies of the ICC/IOE portray a dangerous lack of understanding of the world in which companies operate today and of the risks with which they are confronted.[120] The ICC/IOE document seems to reflect a view that some of the most powerful actors in the world, large multinational corporations, would be immune from international human rights scrutiny.[121] It is an exercise in irresponsibility which can only be damaging to the interests of the companies these organisations are supposed to serve.[122]

IMPACT OF BUSINESS ON HUMAN RIGHTS

[117] Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the*
Global Rule Makers, 37 J. MARSHALL L. REV. 1205, 1207 (2004).
[118] Geoffrey Chandler, *Response to the Joint Views of the International Chamber of Commerce (ICC) and International Organisation of Employers (IOE) on the United Nations Human Rights Norms for Companies*, BUS. & HUM. RTS. RESOURCE CTR. (Apr. 2004), https://www.business-humanrights.org/sites/default/files/reports-and-materials/Chandler-response-to-IOE-ICC-April04.htm.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

The table[123] draws on the publication by the UN Office of the High Commissioner for Human Rights, International Business Leaders Forum and the Castan Centre for Human Rights Law, Human Rights Translated: A Business Reference Guide (2008) and is intended to help stimulate thinking by users of the UN Guiding Principles Reporting Framework about how a business may be involved with negative human rights impacts.[124]

What we can derive from the understanding of the table is the impact businesses have on potentially every sphere of one's life even if they might not be directly involved with the business. International investment protection and human rights are not as foreign to each other as some make it appear, preferring to see this branch of the law as a cluster of more or less de-politicized 'self-contained regimes', splendidly isolated from the dynamics and tensions of the rest of the legal universe, including human rights.[125] After all, the ultimate concern at the basis of both International investment treaties and Human Rights is one and the same: the protection of the individual against the power of the State.[126] But also in economic terms, foreign investment and human rights are not to be seen as separate as it might appear at first glance. One of the more comprehensive empirical studies of BITs has shown that their success in actually attracting foreign investment depends to a considerable degree upon the political environment in a potential host State; rule of law and respect for human rights in tandem with investor protection can thus form a sort of virtuous circle in improving welfare.[127] Nowadays, human rights compliance is a priority in any decent host State's public policy agenda and thus it cannot but affect the regulatory spaces of a host State vis-a`-vis foreign investors and

[123] Please find it in Appendix I at the end of the paper.
[124] The Relationship between Businesses and Human Rights, SHIFT & MAZARS, https://www.ungpreporting.org/wp-content/uploads/2015/07/UNGPRF_businesshumanrightsimpacts.pdf.
[125] Bruno Simma, *Foreign Investment Arbitration: A Place For Human Rights?*, 60 INT'L & COMP. L. Q. 573, 576, https://www.cambridge.org/core/services/aop-cambridge-cocore/content/view/49981B123BC7A6CA848D074421F628B9/S0020589311000224a.pdf/foreign_investment_arbitration_a_place_for_human_rights.pdf
[126] *Id*.
[127] *Id*.

other States.[128]

The tension between investment protection and human rights thus translates into a problem of aiming at two 'moving targets': for the foreign investor, how to accurately estimate the political risks of the investment before, or at the time of, its establishment in the host State so as to enable the investor to 'price' the contract cost correctly according to its projected returns on investment; and for the host State, how to determine the optimal degree of police powers and regulatory authority to be retained during the life of the investment, needed to perform its international human rights obligations.[129] What is desirable, indeed necessary, therefore is that host States and foreign investors must mutually consider other strategies available within the framework of the international investment regime to harmonize investment protection with human rights compliance.[130]

PROCEDURAL AND PRACTICAL CONSIDERATIONS

CAN NON-PARTIES TO AN ARBITRATION RAISE HUMAN RIGHTS CONCERNS?

Even where the two parties are complicit in ignoring the human rights implications of the investment activity – and may prefer to focus their submissions to the Tribunal upon their commercial dispute - there may be procedural scope for non-parties to an arbitration to bring forward human rights facts and arguments for a Tribunal's consideration. However, non-disputing party participation in investor-state arbitration raises difficult questions as to how a tribunal can balance a number of competing considerations, including: confidentiality; transparency; concerns as to equality of participation; cost; the need for efficient proceedings; and the risk of additional politicization of the dispute.[131]

[128] *Id* at 578.
[129] *Id* at 579.
[130] *Id* at 580.
[131] *Third party intervention in investment arbitration: Tribunal admits NGO submissions in*

Traditionally, the ICJ has been extremely reluctant to allow amicus briefs filed by organizations other than States due to reasons which are partly legal and partly political.[132] However, it has been argued that it would be in the long-term institutional interest of the Court to show that its decisions and opinions take into account the public interest, in addition to the concerns of the litigating parties.[133]

Many international courts and adjudicatory bodies, such as the Inter-American Court of Human Rights ("IACrtHR") and the ECtHR, accept amicus materials.[134] Amicus participation is also allowed in many international investment arbitrations.[135] For example, Chapter 11 tribunals under the NAFTA may accept amicus briefs.[136] NAFTA Chapter 11 is truly "revolutionary" in another aspect. It represents the first multilateral treaty to provide individuals and corporations direct access to a dispute settlement mechanism before a tribunal of an international nature. It should be noted that such access already exists in the context of bilateral investment treaties.[137]

The NAFTA, a free trade agreement between Canada, Mexico, and the United States of America, entered into force in 1994, led the way in the movement toward the acceptance of third parties in investor-state arbitration.[138]

In the NAFTA case of *Methanex Corporation v. United States of America*,[139] where Methanex, a producer of Methonol, an important

Gabriel Resources' claim against Romania concerning mining project, Herbert Smith Freehills (Feb. 07, 2019), htttps://hsfnotes.com/arbitration/2019/02/07/third-par ty-intervention-in-investment-arbitration-tribunal-admits-ngo-submissions-in-gabriel-resources-claim-against-romania-concerning -mining-project/.

[132] Jorge E. Viñuales, *Human Rights and Investment Arbitration: The Role of Amici Curiae*, 8 INT. L. REV. COLOMB. DERECHO INT'L. BOGOTA 231, 239 (2006), http://www.corteidh.or.cr/tablas/R22694.pdf.

[133] *Id.* at 240.

[134] Steven Kochevar, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L. J. 1653, 1657 (2013).

[135] *Id.*

[136] *Id.*

[137] Patrick Dumberry, *The NAFTA Investment Dispute Settlement Mechanism and the Admissibility of Amicus Curiae Briefs by NGOs*, 4 ESTUDIOS SOCIO JURÍDICOS, 58 (2002).

[138] Fernando Dias Simões, *A Guardian And A Friend? The European Commission's Participation in Investment Arbitration*, 25 MICH. ST. INT'L. L. REV. 233, 235 (2017).

[139] Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001) para. 26 [hereinafter Methanex Corp., Amicus Order].

ingredient in the production of MTBE, a gasoline constituent was concerned about a ban. The state of California banned the use of MTBE due to environmental and Methanex argued that this was expropriation as the ban took away their MTBE market share. In this case it was held that an arbitrator has broad powers when deciding transparency-related procedural questions.[140] The UNCITRAL tribunal here allowed environmental Non-Governmental Organizations (NGOs) to submit amicus curiae filings concerning the State of California's ban on a gasoline additive.[141] The U.S. government acknowledged that investment disputes are to be distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties.[142] As such, it is necessary to appropriately balance the attractive features of investment arbitration, such as privacy and efficiency, with acknowledgment of and accommodation for the impact of investor-State arbitration on broader public policy and third-party interests. Nevertheless, on the whole there appears to be a more compelling case for introducing a degree of third-party participation into investor-State arbitration proceedings than into international commercial arbitration.[143] It remains to be seen whether the award in the *Methanex Case*[144] will have significant consequences for other types of investor-State arbitration mechanisms. The outcome, however, depends greatly on the position that States will adopt in future arbitration cases involving similar requests from NGOs or other non-

[140] Cornel Marian, *Balancing Transparency: The Value of Administrative Law and Matthews-Balancing to Investment Treaty Arbitrations,* 10 PEPP. DISP. RESOL. L. J. 275, 278 (2010).
[141] Methanex Corp., Amicus Order, *supra* note 139 139 , at 21.
[142] Euginea Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third- Party Participation,* 1 Berkeley Journal of International Law 29 (2011).
supra note **Error! Bookmark not defined.**.
[143] *Id*.
[144] *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345, Inside US Trade, 19 August 2005, 12, IIC 167 (2005), 3rd August 2005, Ad Hoc Tribunal (UNCITRAL).

State actors.[145]

In *Aguas del Tunari SA v. The Republic of Bolivia*[146], the government privatized water and sewerage services for the city of Cochabamba, Bolivia. A concession contract was drawn up between the parties for the same and this concession contract was rescinded due to alleged actions and omissions. In this case, several NGOs and individuals submitted a petition to the tribunal requesting authorization to participate as parties—or, alternatively, to be granted amicus curiae status—invoking the public character of the dispute and the public interests that might be affected. The tribunal rejected the request for amicus curiae participation, reflecting the traditional tenets of confidentiality and party autonomy.[147] The tribunal did not specifically rule on whether it could, on its own initiative, accept the amicus submission, having relied "on a rather restrictive interpretation of the consensual nature of investment arbitration."[148] The tribunal could have accepted third party submissions based on its broad procedural powers under Article 34 of the ICSID Rules; instead, the tribunal decided to engage in a balancing exercise between the parties' contractual right to resolve their dispute privately and the public interests associated with the dispute, ultimately deferring to the parties in case they wished to voluntarily waive their right to keep the proceedings confidential.[149] The second time non-parties requested permission to take part in the proceedings as amicus curiae under the ICSID Rules was in the *Suez/Vivendi v. Argentina* case.[150] Placing reliance on article 44[151] of the ICSID Convention, the tribunal permitted amicus curiae submission.

[145] Patrick Dumberry, *supra* note 137 at 79.
[146] Aguas dal Tunari SA v. The Republic of Bolivia, ICSID Case No. ARB/03/02 (Oct. 21, 2005).
[147] Fernando Dias Simões , *supra* note 138 at 237.
[148] *Id.* at 238.
[149] *Id*.
[150] *Id.* at 239; Suez v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, (May 19, 2005).
[151] Convention on the settlement of investment disputes between States and nationals of other States art. 44, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090 (stating that "if any question of procedure which is not covered by this Section or the Arbitration Rules or any rules agreed upon by the parties, the Tribunal shall decide the question").

In *Gabriel Resources v Romania*,[152] the tribunal found that the most important factor for it to permit the participation of amici is the preservation of a public interest, if any. In this connection, the tribunal could also limit the scope of a non-party submission to ensure that it does not exceed the appropriate purpose or the purpose which is important for the tribunal.[153]

Even where a tribunal considers that civil society participation is justified, it may also need to determine the scope of that participation.[154] Depending on the treaty and the arbitration rules governing the procedure, this could range from granting leave to submit a written submission only (as in this case), through being granted opportunity to respond to specific questions put to the non-disputing party by the tribunal, to being able to actively participate in the hearing.[155] A tribunal may also have to decide the extent to which they may have access to the documentary record.[156] Amicus curiae submissions are only a small step toward transparency in international proceedings. Integration has proceeded to a depth that requires participation by civil society so as to prevent discontent in the State territories and the vilification of international trade and investment.[157]

[ANALYSIS] INTERNATIONAL INTERVENTION IN PROTECTING HUMAN RIGHTS

International Arbitration has become instrumental in protecting human rights of the vulnerable population in the recent times. There

[152] Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania, ICSID Case No. ARB/15/31, (December 7, 2018).
[153] *Id.*
[154] *Third party intervention in investment arbitration: Tribunal admits NGO submissions in Gabriel Resources' claim against Romania concerning mining project*, HERBERT SMITH FREEHILLS NOTES (Feb. 07, 2019), https://hsfnotes.com/arbitration/2019/02/07/third-party-intervention-in-investment-arbitration-tribunal-admits-ngo-submissions-in-gabriel-resources-claim-against-romani a-concerning-mining-project/.
[155] *Id.*
[156] *Id.*
[157] Alberto Varillas, *Oil and Gas Contracts in Peru: New Methodologies to Calculate Royalties*, INTER-AMERICAN TRADE REP., July-Aug. 2003 at 14 (2003).

has been a lot of movement at an international level on how the process of international arbitration could be improved and further strengthened to better protect these rights. Some notable developments have been discussed below.

- Internationally, the Working Group on International Arbitration of BHR disputes has been extremely prominent in making arbitration more friendly and released a working paper that addresses the nature of international arbitration and provided recommendations on how it could overcome some of the major deficiencies in existing legal systems, such as political influence, difficulties in enforcing awards, corruption, and unfamiliarity with international human rights law, that pose obstacles to justice for businesses and victims alike.[158]

  They critique the existing ISDS for numerous reasons, including its opaque processes, potential conflicts of interest among its arbitrators, its history of excluding NGOs from participation and its rulings that deny legitimate state regulatory activities, including those aimed at protecting human rights.[159] There are many features of BHR Arbitration that distinguish it from ISDS arbitration. First, BHR Arbitration does not seek to curtail the regulatory role of the state in protecting the human rights of its people, but instead to add another layer of protection for them. Second, unlike ISDS, BHR Arbitration is about corporate accountability, not greater rights to companies against the host state. Third, victims who have historically been excluded as parties in ISDS proceedings could initiate or join in BHR Arbitration. Fourth, it would not be an opaque process but a transparent one. And finally,

[158] Robert C. Thompson, *International Arbitration of Business and Human Rights Disputes - Answers to Key Questions*, INSTITUTE FOR HUM. RTS.& BUS. (Sep. 1, 2017), https://www.irhb.org/other/remedy/international-arbitration-answers-to-key-questions.

[159] THE WORKING GRP. ON INT'L. ARB. OF BUS. & HUM. RTS., INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTES QUESTIONS AND ANSWERS, 12 (2017), http://www.l4bb.org/news/Q&A.pdf.

arbitrators could be selected for their familiarity with human rights norms, as discussed above. Its principal function would be to protect, not thwart, human rights.[160]

- OECD Due Diligence Guidance on Responsible Business Conduct- This Due Diligence Guidance for Responsible Business Conduct (Guidance) is based on the OECD Guidelines for Multinational Enterprises (OECD Guidelines for MNEs). The OECD Guidelines for MNEs are non-binding recommendations addressed to multinational enterprises by governments on responsible business conduct (RBC). They acknowledge and encourage the positive contributions that business can make to economic, environmental and social progress, and also recognize that business activities can result in adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance. The OECD Guidelines for MNEs therefore recommend that businesses carry out risk-based due diligence to avoid and address such adverse impacts associated with their operations, their supply chains and other business relationships. They help businesses (enterprises) to understand and implement due diligence for RBC as foreseen in the OECD Guidelines for MNEs (due diligence). The OECD Guidelines for MNEs provide enterprises with the flexibility to adapt the characteristics, specific measures and processes of due diligence to their own circumstances. Enterprises should use this Guidance as a framework for developing and strengthening their own tailored due diligence systems and processes, and then seek out additional resources for further in-depth learning as needed.[161]

[160] *Id.*

[161] OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT, 9 (2018), http://mneguidelines.oecd.org/ OECD-Due-Diligence-Guidance-for-Responsible-Business-

RECOMMENDATIONS

The focal point of the entire discussion comes down to the terms of contracts between the parties. The primary remedy for non-performance of a contractual obligation is compensation; it is rare for a court or tribunal to order specific performance of the obligation.[162] Assessing the damages payable when there is a breach of an obligation to human rights may be difficult. In addition, damages payments from one contracting party to another where victims do not receive any remedy create obvious reputational risks.[163]

International investment agreements are only one of the tools that make up the regulatory regime for international investment. Another important tool is State–investor contracts, which are used extensively, particularly in countries with emerging economies. In 2007, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie identified State–investor contracts as important instruments through which States and businesses can manage human rights risks arising from an investment. During four years of multi-stakeholder consultations, he developed the principles for responsible contracts[164] with a view to enabling those parties negotiating State–investor contracts to integrate the management of human rights risks into contract negotiations more effectively.[165] They identify principles[166] to help

Conduct.pdf#_ga=2.44981156.167079505.1559422802-1103645897. 1537917836.

[162] Anthony Crockett, *Human Rights Clauses in Commercial Contracts,* LAB. FOR ADVANCED RESEARCH ON THE GLOB. ECON.- INV. & HUM. RTS. PROJECT (Jun. 04, 2014), https://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/6667/.

[163] *Id.*

[164] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Principles for responsible contracts: Integrating the Management of Human Rights Risks into State–Investor Contract Negotiations – Guidance for Negotiators,* U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011).

[165] UN Human Rights Comm'm, *Principles for Responsible Contracts Integrating the Management of Human Rights Risks into State–Investor Contract Negotiations Guidance for Negotiators*, p. 2, U.N. Doc. HR/PUB/15/1 (2015), https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf

[166] *Id. (Explaining* principles include:

1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.

States and business investors integrate the management of human rights risks into investment project contract negotiations, together with their key implications as well as a recommended checklist for such negotiations.[167]

CONCLUSION

The experiences of both States and business investors point to the advantages of considering human rights risks early, before projects get under way and before adverse impact occurs. The negotiation is an opportune time to set out the expectations and responsibilities of the parties regarding all kinds of risks, including those related to human rights. Moreover, the proper management of human rights risks will have implications for other contractual issues, so it is best to consider them coherently along with economic and commercial issues. Lastly, considering human rights early will help ensure that States maintain adequate policy space in the investment contract, including the protection of human rights, while avoiding claims

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2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.

3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.

4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.

5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.

6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.

7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.

8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.

9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.

10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications).

[167] *Id* at 7.

relative to the contract in binding international arbitration.[168]

The nature and range of potential adverse human rights impacts the ability of parties to take steps to address the risk of such impacts. This will vary depending on the context within which a business operates; so, there are no one-size-fits-all solutions. While contracts are not the only means by which an enterprise may be able to influence the conduct of its business partners, contractual provisions directed at ensuring respect for human rights are increasingly common.[169] Contractual provisions could be in the form of ensuring to have an appropriate dispute resolution clause which does not bind the affected party to a particular mode of dispute resolution which might hinder their rights. Therefore, as lawyers, it is our primary duty to educate our clients about the importance of human rights and its impact on businesses and help in drafting socially responsible contracts. From an economic point of view also, there is a strong case for conducting human rights due diligence in order to sustain the business in an increasingly aware consumer market. A collaborative effort from different stakeholders is the only way to ensure justice for all in the society.

APPENDIX I

Relevant human right	Brief explanation of the right	Examples of how business might be involved with an impact on the right

[168] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *supra* note 164.
[169] Anthony Crockett, *supra* note 162.

Right of self-determination	• A right of peoples, rather than individuals. • Peoples are entitled to determine their political status and place in the international community. • It includes the rights to pursue economic, social and cultural development, to dispose of a land's natural resources and not to be deprived of the means of subsistence. • A particular right of indigenous peoples to self-determination has been specifically recognized by the international community.	• Engaging in business activities on land that has traditional significance to the peoples that inhabit an area when that land was acquired by Government without due consultation with the local population. • Any activity that might have impacts on indigenous peoples' lands, whether through acquisition, construction or operation, may give rise to impacts on their right to self-determination.
Right to life	• Right not to be deprived of life arbitrarily or unlawfully. • Right to have one's life protected, for example, from physical attacks or health and safety risks.	• The lethal use of force by security forces (State or private) to protect company resources, facilities or personnel. • Operations that pose life-threatening safety risks to workers or neighboring communities through, for example, exposure to toxic chemicals. • The manufacture and sale of products with lethal flaws.
Right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment	• An absolute right, which applies in all circumstances. • Torture has been held to involve a very high degree of pain or suffering that is intentionally inflicted for a specific purpose. • Cruel and/or inhuman treatment also entails severe suffering. • Degrading treatment has been held to involve extreme humiliation of the victim.	• Conducting business in countries where State security or police forces protecting company assets do not respect this right. • Failure to foster a workplace that is free from severe forms of harassment that cause serious mental distress. • Manufacture and sale of equipment misused by third parties for torture or cruel treatment or for medical or scientific experimentation without their consent.
Right not to be subjected to slavery, servitude or forced labor	• Slavery exists when one human effectively owns another. • Freedom from servitude covers other forms of severe economic exploitation or degradation, such as in the trafficking of workers or debt bondage. • Rights to freedom from slavery and servitude are absolute rights.	• Businesses may unknowingly benefit through their supply chains from the labour of workers who have been trafficked and are forced to work as slaves, for example, on agricultural plantations. Women and children may be subject to particularly severe impacts in such situations. • A company may be involved in the transportation of people or goods that facilitates the trafficking of individuals.

	• Forced or compulsory labour is defined by the ILO as all work or service that is extracted under menace of any penalty and for which the person has not voluntarily offered themselves. • Providing payment does not mean that work is not forced labor if the other aspects of the definition are met.	• Forced labour can arise in any sector where an employer puts workers in a position of debt bondage through company loans or the payment of fees to secure a job and/or where the company withholds workers' identity documents. This is a particular risk in the case of migrant workers, a recognized vulnerable group.
Rights to liberty and security of the person	• These rights involve the prohibition of unlawful or arbitrary detention. • 'Lawful' detention is understood to mean that it must be authorized by an appropriate government body, such as the courts, and be capable of being challenged by the detainee. • 'Arbitrary' detention is always prohibited. • Security of the person includes protection from physical attacks, threats of such attacks, or other severe forms of harassment, whether or not a person is detained.	• Threatening staff with physical punishment or tolerating severe harassment of some employees, for example, of trade union members or members of a minority ethnic group. • A company whose supplier routinely allows sexual abuse of female workers to go unaddressed in their workplace.
Right of detained persons to humane treatment	• This right requires detention authorities to take special measures for the protection of detainees (such as separating juveniles from other detainees).	• Companies involved in the construction, operation or maintenance of detention facilities (such as a prison or immigration detention facility) where detainees are mistreated.
Right not to be subjected to imprisonment for inability to fulfil a contract	• This right applies where a person is incapable of meeting a private contractual obligation. • It restricts the type of punishment that the State can impose.	• Companies may be linked to such an impact where this right is not protected by the State, for example, where a small local supplier is genuinely unable to meet their contractual obligations and the company takes action against them.
Right to freedom of movement	• Individuals who are lawfully in a country have the right to move freely throughout it, to choose where to live and to leave. • Individuals also have the right not to be arbitrarily prevented from entering their own country.	• Relocation of communities because of company operations where that is conducted in an arbitrary or unreasonable manner, without adequate notice, consultation (and, at least in the case of indigenous peoples, consent), or compensation.

		• Employers withholding workers' identification documents.
Right of aliens to due process when facing expulsion	• Aliens (meaning foreigners) who are legally present in a country are entitled to due process (meaning fair legal procedures) before being forced to leave.	• Where companies rely on migrant workers (either directly or through a third-party agency), there may be a risk of their operations being linked to such an impact.
Right to a fair trial	• Required in both civil and criminal proceedings, this includes the right to a public hearing before an impartial tribunal. • Additional protections are required in criminal proceedings.	• A business tries to corrupt the judicial process by destroying relevant evidence or by seeking to bribe or otherwise influence judges or witnesses to take certain actions or make certain statements.
Right to be free from retroactive criminal law	• The State is prohibited from imposing criminal penalties for an act that was not illegal when it was committed, or from imposing higher penalties than those that were in force at the time.	• Companies may be linked to such an impact, for example, where political dissidents protest about some aspect of a company's operations and the State creates new, punitive measures to prosecute them.
Right to recognition as a person before the law	• All individuals are entitled to 'legal personality', or independent legal recognition.	• Companies may be linked to such an impact, for example, where they benefit from a State-led land acquisition process that pays compensation only to male heads of households because the property of married women is treated as belonging to their husbands under domestic law.
Right to privacy	• Individuals have a right to be protected from arbitrary, unreasonable or unlawful interference with their privacy, family, home or correspondence and from attacks on their reputation. • The State is allowed to authorize restrictions on privacy in line with international human rights standards, but 'arbitrary' restrictions are always prohibited.	• Failing to protect the confidentiality of personal data held about employees or contract workers, customers or other individuals. • Requiring pregnancy testing as part of job applications. • Providing information about individuals to State authorities, without that individual's permission, in response to requests that are illegal under national law and/or not in line with international human rights standards. • Selling equipment or technology that can be used to track or monitor individuals' communications and movements to a State with a poor human rights record.
Rights to freedom of	• Individuals have a right to choose, practise and observe their chosen	• A company's policy prevents workers from wearing clothing or other symbols

thought, conscience and religion	religion or belief, to be an atheist or not to follow any religion or belief. • It includes the right to worship and to observe rituals, such as the wearing of particular clothing.	that express their faith, even though these do not interfere with legitimate safety or performance issues. • A company does not allow its workers to seek reasonable time off for their religious holidays.
Rights to freedom of opinion and expression	• The right to hold opinions free from outside interference is an absolute right. • The right to hold opinions free from outside interference is an absolute right. • Individuals have a right to seek, receive and impart ideas in whatever media or form. The State is allowed to authorize restrictions in line with international human rights standards.	• Operating in a country where workers are routinely prevented by law from expressing their opinions in the public domain. • Censoring online or other content at the demand of the State where those requests are illegal under national law and/or not in line with international human rights standards. • Engaging in litigation against individual workers, community members or other stakeholders who have spoken critically about the company where there is an extreme imbalance in the parties' means to fund a legal case.
Rights to freedom from war propaganda, and freedom from incitement to racial, religious or national hatred	• These rights prohibit certain speech that is not protected by the right to freedom of expression. • Individuals are prohibited from advocating racial, religious or national hatred that amounts to an incitement to discrimination, hostility or violence.	• Companies that provide the platform or technology for individuals to express hatred against a particular religious group and to incite others to take certain action against them.
Right to freedom of assembly	• Individuals have the right to peacefully assemble for a specific purpose or where there is a public discussion, to put forward ideas or to engage in a demonstration, including marches. • The State is allowed to authorize restrictions in line with international human rights standards.	• Situations where public or private security services protecting company assets forcibly prevent or breakup peaceful demonstrations by the local community against a company's operations.
Right to freedom of association	• Protects the right to form or join all types of association, including political, religious, sporting/recreational, non-governmental and trade union	• A company operates in an area where the State seeks to undermine a local political party that opposes the company's activities by bringing false accusations against its leaders.

	associations. (See also the right to form and join trade unions below.) • The State is allowed to authorize restrictions in line with international human rights standards.	• (See also the examples below under the right to form and join trade unions.)
Rights of protection of the family and the right to marry	• The concept of a family varies. This includes the rights to enter freely into marriage and to start a family.	• Company policy discriminates against women on the basis of their marital or reproductive status. • (See also the examples below under the right to a family life.)
Rights of protection for the child	• A child has the right to be registered, given a name and to acquire a nationality. • Children must be protected from sexual and economic exploitation, including child labor. • ILO standards prohibit hazardous work for all persons under 18 years. They also prohibit labor for those under 15, with limited exceptions for developing States.	• Business activities that involve hazardous work (such as cutting sugar cane or mining) performed by persons under the age of 18. • Where child labour is discovered, a company can negatively impact other rights (such as the rights to an adequate standard of living, or security of the person) if they fail to take account of the best interests of the child in determining the appropriate response. For example, simply dismissing the child (or cutting the contract with the relevant supplier) may result in the child having to find alternative, more dangerous forms of work (such as prostitution).
Right to participate in public life	• Citizens have the right to take part in the conduct of public affairs, including the rights to vote and be elected in free and fair elections, and the right of equal access to positions within the public service.	• Failing to give time off to workers for the purpose of voting. • Bribery of political figures or other improper uses of company influence may distort the electoral process or otherwise impede free and fair elections.
Right to equality before the law, equal protection of the law, and rights of non-discrimination	• Individuals have a right not to be discriminated against, directly or indirectly, on various grounds, including race, ethnicity, sex, language, religion, political or other opinion, national or social origin, property, and birth or other status (such as sexual orientation or health status, for example, having HIV/AIDS). • This right applies to the enjoyment of all other rights.	• Indirectly discriminating in the recruitment, remuneration or promotion of workers, for example, by offering a training programme that enhances an individual's chance of promotion at a time that is reserved for religious observance by a particular group. • A company offers compensation to men and women in a situation where its operations or products have had negative impacts on their health in a way that discriminates against women (such as by failing to recognize the

	• The State is allowed to make distinctions where they are in line with international human rights standards. • ILO standards provide further guidance on the content of the right.	particular harm to their reproductive health).
Rights of minorities	• Members of ethnic, religious or linguistic minorities are entitled to enjoy their own culture, practice their religion and speak their language.	• Failing to make reasonable adjustments for workers who wear a traditional form of headgear where that does not pose a legitimate safety or performance issue. • Using land in a manner that undermines the traditional way of life of a minority group, for example, by preventing them from ceremonial activities.
Right to work	• Individuals are entitled to the opportunity to make a living by work which they freely choose or accept. The work must be 'decent work', meaning that it respects their human rights. • The right includes the prohibition of arbitrary dismissal and the rights to just and favorable conditions of work and to form and join trade unions, discussed below.	• Arbitrarily or unfairly dismissing a worker, even if permissible under local law. • Hindering or failing to provide for the reasonable career advancement aspirations of workers. • (See also the examples under the rights to just and favorable conditions of work and to form and join trade unions.)
Right to enjoy just and favorable conditions of work	• Individuals have the right to fair remuneration and equal remuneration for work of equal value. Remuneration must enable them, and their families, to have a decent living. • The right includes safe and healthy conditions of work, equality of opportunity for promotion, and a right to rest, leisure and holidays. • ILO standards provide further guidance on the content of the right.	• Failing to address a pattern of accidents highlighting inadequate workplace health and safety. • A company's purchasing practices repeatedly allow changes to the terms of product orders without any changes to price or delivery time, creating pressure on its suppliers, who then demand excessive overtime from their workers. • Using cleaning staff that are employed by a third-party company and are paid extremely low wages with no or very limited entitlements to sick pay or leave.

Right to form and join trade unions and the right to strike	• Individuals have the right to form or join trade unions of their choice. • Trade unions must be permitted to function freely, subject only to limitations that are in line with international human rights standards. • Workers have the right to strike, in conformity with reasonable legal requirements. • ILO standards provide guidance on the content of the right, for example, that workers have the right to bargain collectively with their employers and that workers should not be discriminated against because of trade union membership.	• Creating barriers to the formation of trade unions among employees or contract workers. • Refusing or failing to recognize legitimate workers' associations with which the company can enter into dialogue in countries that prohibit trade unions.
Right to social security, including social insurance	• This right obliges the State to create and maintain a system of social security that provides adequate benefits for a range of issues (such as injury or unemployment).	• Denying workers their contractually agreed employment injury benefits. • Offering a private social security scheme that has discriminatory eligibility criteria.
Right to a family life	• Protection should be given to families during their establishment, and while they are responsible for the care and education of dependent children. • The right includes special protections for working mothers. • The right also includes special protections for children.	• Company practices hinder the ability of workers to adopt a healthy work–life balance that enables them to adequately support their families (such as requiring workers to live on site in dormitories for extended periods of time without providing adequate periods of leave to enable them to spend time with their families). • (See also the examples in relation to the rights of protection for the child above.)
Right to an adequate standard of living	• This right includes access to adequate housing, food, clothing, and water and sanitation. • Individuals have a right to live somewhere in security, dignity and peace and that fulfils certain criteria (such as availability of utilities and accessibility). • Food should be available and accessible to individuals, in sufficient quality and quantity, to meet their nutritional needs, free	• Poor-quality housing or dormitories provided to workers. • Failing to provide adequate sanitation facilities for workers in a company-owned factory. • The expansion of a company's operations significantly reduces the amount of arable land in an area, affecting local community members' access to food. • Business activities pollute or threaten existing water resources in a way that

	from harmful substances and acceptable to their culture. • The right to water and sanitation was recognized as a distinct right in 2010. Individuals are entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use and to sanitation services that fulfil certain criteria (such as being safe, physically accessible, and providing privacy and dignity).	significantly interferes with local communities' ability to access clean drinking water. In such situations, there may be particular negative impacts on women and girls, who are responsible for water collection in many communities.
Right to health	• Individuals have a right to the highest attainable standard of physical and mental health. • This includes the right to have control over one's health and body, and freedom from interference.	• Pollution from business operations can create negative impacts on the health of workers and/or surrounding communities. • The sale of products that are hazardous to the health of end users or customers. • Failure to implement appropriate health and safety standards leads to long-term negative impacts on workers' health.
Right to education	• All children have the right to free and compulsory primary education. • The right also includes equal access to education and equal enjoyment of educational facilities, among other aspects.	• The presence of child labour in a business or in its supply chain, where those children are unable to attend school. • Limiting access to, or damaging, educational facilities through construction, infrastructure or other projects.
Rights to take part in cultural life, to benefit from scientific progress, and to protection of the material and moral rights of authors and inventors	• Individuals have a right to take part in the cultural life of society and enjoy the benefits of scientific progress, especially disadvantaged groups. • This includes protection of an individual author's moral and material interests resulting from any scientific, literary or artistic production. • This protection extends to the rights of indigenous peoples to preserve, protect and develop indigenous and traditional knowledge systems and cultural expressions.	• Activities involving resource extraction or new construction (such as laying a pipeline or installing infrastructure networks) could impact this right by separating groups from areas of cultural importance and knowledge, or by damaging their cultural heritage.

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INTERPRETATION OF OPTIONAL ARBITRATION CLAUSES: AN INDIAN PERSPECTIVE

By Himanshu Shembekar*

ABSTRACT

Optional arbitration clauses are clauses wherein the parties decide that their disputes shall either be resolved through arbitration or litigation. There have been several debates over the validity of such clauses as they are not drafted properly and raise the question of law regarding their enforceability. Several judgements have been handed down by the courts in India with regard to this issue but no consistency is apparent. It is important that the Indian courts resolve this unsettled position to bring clarity to the enforceability of optional arbitration clauses and to make the interpretation of these clauses consistent with international arbitral jurisprudence. While India strives and aims to be a hub of international arbitration, uncertainty over the validity of optional arbitration clauses can be a big hindrance. This paper analyses the consequences of having an optional arbitration clause from Indian context and how the courts over the period of time have dealt with the issue. This paper also analyses the approach to these clauses by courts in other jurisdictions.

INTRODUCTION

In the recent years, a practice of drafting arbitration clauses has developed where the parties are given the option to litigate or arbitrate. These clauses are known as optional arbitration clauses.

The difference between a mandatory reference to arbitration on the

* Penultimate year law student at National Law University Odisha, Cuttack, India. Founder and Editor of LexDogma - a blog related to analysis of contemporary legal issues.

one hand and an optional reference to arbitration on the other is important. Mandatory arbitration clauses are clauses wherein the agreement provides that if any dispute arises between the parties, then the parties shall refer the dispute to arbitration. An optional/hybrid arbitration clause gives a party an advantage of initiating legal action either by invoking the arbitration clause before any judicial court.

The *Bombay High Court* judgement in *Quickheal Technologies v. NCS Computech,*[1] has re-ignited the debate whether optional arbitration clauses are valid. The court held that on its true construction the arbitration clause was optional and not mandatory. Therefore, the application filed by the petitioner for enforcing the arbitration clause was dismissed.

FACTS AND RATIO

In *Quickheal Technologies v. NCS Computech*,[2] the agreement provided that the respondent would distribute the products of the petitioner, who was into the business of development and manufacture of anti-virus software. Clause 17 provided:

> *"17. Dispute Resolution:*
>
> *a. All disputes under this Agreement shall be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same <u>may</u> be referred to arbitration as stated below.*
>
> *b. Disputes under this Agreement shall be referred to arbitration as per the Arbitration and Conciliation Act, 1996 as amended from time to time. The place of arbitration shall be at Pune and language shall be English. The arbitral tribunal shall comprise one arbitrator mutually appointed,*

[1] *Quickheal Technologies v. NCS Computech Private Limited and Another*, (2020) SCC OnLine Bom 687.
[2] *Ibid*.

failing which, three (3) arbitrators, one appointed by each of the Parties and the third appointed by the 2 so appointed arbitrators and designated as the presiding arbitrator and shall have a decisive vote.

c. Subject to the provisions of this Clause, the Courts in Pune, India, shall have exclusive jurisdiction and the parties may pursue any remedy available to them at law or equity."

A dispute arose between the parties regarding payment of money. The petitioner resorted to the 'Dispute Resolution' clause to resolve the issue through arbitration. The petitioner made several requests unsuccessfully to resolve the dispute within the 30 days time period. A petition was therefore filed for the appointment for arbitrator. The respondent challenged the relief sought in the petition on the ground that arbitration was not mandatory as clause 17(a) provides the word 'may' which makes it an optional method of arbitration. Thus, if the parties were to settle the dispute through arbitration a new agreement between the parties was required.

The questions put to the court were:

i) Whether the clause 17 was mandatory in nature?
ii) If the arbitration clause is optional or symmetrical, is it a valid clause or not?

The petitioner argued:

- That clause 17, properly construed, had to be read *in toto.*
- Further, on the true construction of the clause the petitioner argued that under Clause 17 (b) arbitration was mandatory and the word 'shall' in the context of the clause meant exactly that.
- Clause 17 (b), it was argued, allowed for disputes of all kinds. Thus, the words *'Disputes under this Agreement'* and not *'Disputes as referred in Sub Clause (a) above'*.

- Therefore, it was argued that clause 17 (a) and (b) provided for two distinct types of disputes.
- Finally, clause 17 (b) indicated that there was a clear *consensus* between the parties to refer to arbitration in case any dispute arose between the parties.

The respondent argued:

- That clause 17 provided that the parties may go to arbitration for settling disputes only if the parties failed to arrive at an amicable settlement.
- Therefore, it was argued that by ignoring the request of the respondent to settle the dispute in accordance to the procedure laid down in clause 17, arbitration was not permissible.

It was ruled by the hon'ble court that "use of the word 'shall' clearly indicates that the parties had agreed that they would initiate amicable settlement between themselves and thereafter use of the word 'may' indicate that the parties in the case of failure of an amicable settlement would consider the proposition of an arbitral process. There was no consensus ad idem between the parties that they would in fact initiate any arbitration process after the failure of the amicable settlement. A reading of the said clause in its entirety would show that there was no consensus between the parties with regard to arbitration and they only agreed to provide fresh consent (by use of the word 'may') in order to proceed with the arbitration. In the present case, no fresh consent to proceed with any arbitration has been provided by any of the respondents and as such there is no valid arbitration clause under which any Arbitrator can be appointed." It was pointed out by the hon'ble court that the use of words 'may' and 'shall' indicate that the arbitration clause was optional and not mandatory in its construct. Therefore, it can be inferred from the judgement that the court made a distinction as to what amounts to optional and mandatory arbitration clause when the arbitration clause includes words such as 'shall', 'may', 'will', etc. The use of such

words in clauses indicates the parties do not have the required *consensus ad idem* as to which method of adjudication shall be used to resolve the dispute. Therefore, optional arbitration clauses cannot be considered to be valid arbitration clauses.

ANALYSIS ON THE LAW SETTLED BY INDIAN COURTS

A) Essential or integral elements for a valid arbitration agreement:

The Hon'ble Supreme Court in the case of *Jagdish Chander v. Ramesh Chander and Ors.,*[3] had laid down the guidelines and principles regarding what amounts to a valid arbitration agreement as per section 7[4] of the Indian Arbitration Act. They are as follows:

1) "that the intention of the parties to enter into an arbitration agreement would have to be gathered from the terms of the Agreement."

2) "that even if the words 'arbitration' and 'arbitrator' are not used in a clause relating to settlement of disputes with reference to the process of such agreement or with reference to the private tribunal which is to adjudicate upon the disputes, it does not detract from the clause being an arbitration agreement if it has the attributes and elements of an arbitration agreement."

3) "Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement."

4) "Mere use of the word 'arbitration' or 'arbitrator' in a clause will

[3] *Jagdish Chander v. Ramesh Chander and Ors.,* (2007) 5 SCC 719.
[4] The Arbitration and Concilliation Act 1996, s 7.

not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as 'parties can, if they so desire, refer their disputes to arbitration' or 'in the event of any dispute, the parties may also agree to refer the same to arbitration' or 'if any disputes arise between the parties, they shall consider settlement by arbitration' in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement."

5) "Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

There have been other cases too which have been dealt by Indian courts in which they have interpreted whether the use of certain words such as 'may', 'can' and 'shall' make an arbitration clause valid or not.

B) Cases where optional arbitration clause was not held to be valid

The hon'ble Supreme Court in the case of *Wellington Associates v. Kirit Mehta,*[5] the parties arbitration agreement stated the following –

Clause 4: "It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit

[5] *Wellington Associates Ltd. v. Kirit Mehta*, (2000) 4 SCC 272.

themselves to the exclusive jurisdiction of the courts in Bombay."

Clause 5: "It was also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1947."

After interpreting the above clauses, it was ruled by the hon'ble court that "Clause 5 follows with the words 'it is also agreed' that the dispute 'may' be referred to arbitration implying that parties need not necessarily go to the Civil Court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents." It was brought to notice by the hon'ble court that even if the parties drafted a mandatory provision for arbitration, the parties cannot have a clause which provides that the parties can file a suit in a civil court in case of a dispute. Thus, the arbitration clause was held not be valid in law.

In the case of *M/S Linde Heavy Truck Division Ltd V. Container Corporation of India Ltd & Anr.,*[6] the plaintiff had entered into an agreement with respondent for the purpose of manufacturing, supplying and commissioning 15 reach stakers for the period of 5 years. In the arbitration sub clause '15.5' it was provided that "If, after 30 (thirty) day from the commencement of such informal negotiation, CONCOR and the supplier have been unable to resolve amicably the contract dispute, either party may require that the dispute be referred for resolution by arbitration in accordance with the rules of Arbitration of the 'Standing Committee on Public Enterprises' of India (SCOPE) from the 'Conciliation and Arbitration' and award made in pursuance thereof shall be binding on the parties." It was ruled by the hon'ble court that "This clause, in my view, does not indicate a firm determination of the parties and binding obligation on their part to resolve their disputes through arbitration. It merely gives an option to either of them to seek arbitration and on such an option being exercised, it would be for the other party whether to accept it or not. The view taken by the Apex Court was that if the agreement between

[6] *M/s Linde Heavy Truck Division Ltd V. Container Corporation of India Ltd & Anr*., (2000) 4 SCC 272.

the parties provides that in the event of any dispute, they may refer the same to arbitration that would not constitute a binding arbitration agreement. In the case before this court, clause 15.5 of the agreement envisages a fresh consent for arbitration, in case the option for arbitration is sought to be exercised by one of the parties to the disputes. Therefore, it does not constitute a binding arbitration agreement." Hence, the arbitration clause was held not to be valid.

The Madras High Court dealt with the similar issue in the case of *M/s. Castrol India Ltd. v. M/s. Apex Tooling Solutions.*[7] The plaintiff in this case had entered into an agreement for the distribution of the defendant's product. Later, this agreement was terminated by the defendant. The plaintiff filed a suit for claiming compensation for breach of contract. But Clause 23 of the agreement provided that in case of any dispute or difference between the parties, the company alone can either approach a competent court or 'shall have the right' to refer the dispute to arbitration. Referring to the term 'shall have the right; the hon'ble court ruled: "that the said wordings is only optional in nature, either to go for competent civil Court or to refer the matter to the arbitration. Therefore, there is no definite intention to go for arbitration in case of any dispute or differences between the parties unless there is a definite intention in the clause found in the agreement to refer the matter only to arbitration, it cannot be said that there is a valid clause of arbitration in the agreement."

The Delhi High Court again dealt with this issue in the case of *Avant Garde Clean Room & Engg Solutions Pvt Ltd v. Ind Swift Limited,*[8] wherein the parties had entered into a purchase contract, wherein a dispute resolution clause was provided, which stated the following: "11. Arbitration - Dispute if any arising out of this Agreement shall be subject to the exclusive jurisdiction of the courts in city of Delhi." The question that arose in this case whether the arbitration clause is mandatory by nature or not? The hon'ble high court in this case stated that "mere use of the expression, 'arbitration' in the heading of

[7] *M/s. Castrol India Ltd. v. M/s. Apex Tooling Solutions,* (2015) SCC OnLine Mad 2095.
[8] *Avant Garde Clean Room & Engg Solutions Pvt Ltd v. Ind Swift Limited,* (2014) SCC OnLine Del 3219.

clause 11 would not militate against the substance of the said clause which, in unequivocal terms, states that disputes arising under the agreement shall be subject to the exclusive jurisdiction of the courts." The court after giving further reference to the judgement of *Jagdish Chander*[9] stated that the "The intention of the parties to enter into an arbitration agreement has to be gathered from the terms of the agreement. It cannot be said that the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication, and willingness to be bound by the decision of such tribunal. The words used in clause 11 in the present case do not disclose any obligation to go to arbitration. In fact, in the present case, the clause relating to settlement of disputes contains words which specifically excludes any of the attributes of an arbitration agreement and contains words which detract from an arbitration agreement-since the clause provides that disputes arising in the agreement, shall be subject to the exclusive jurisdiction of the courts in the city of Delhi." Therefore, it was held that the parties cannot be referred to arbitration to resolve their dispute.

C) Cases where optional arbitration clause was held to be valid

There have been decisions passed wherein the courts had come up with a different approach wherein the emphasis was placed on the 'intention of the parties' and whether the parties had the *consensus ad idem*, on having arbitration as mode for resolving disputes.

In the case of *Indtel Technical Services v. Atkins Rail Ltd.,*[10] the parties agreement provided for a clause of settlement of dispute, wherein it was stated that "If any dispute or difference under this Agreement touches or concerns any dispute or difference under either of the Sub Contract Agreements, then the Parties agree that such dispute or difference hereunder *will be referred to the adjudicator or the courts* as the case may be appointed to decide the

[9] *Supra note* 3.
[10] *Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd*., (2008) 10 SCC 308.

dispute or difference under the relevant Sub Contract Agreement and the Parties hereto agree to abide by such decision as if it were a decision under this Agreement." The hon'ble court in this case gave a lot of emphasis on the intention of the parties by referring to the guidelines laid down in the case of *Jagdish Chander.*[11]

In the case of *Visa International Ltd v. Continental Resources (USA) Ltd,*[12] the applicant was a company engaged in the business of providing services in international trading of minerals, metals and ship chartering, whereas the respondent was a US based company which aimed to invest in the integrated aluminium complex of Gandhamardan mines, operated by Odisha Mining Corporation. Parties had executed a Memorandum of Understanding (MOU) which contained the following clause: "Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996." The question that arose in the court of law was whether there exists a valid arbitration agreement between the parties. After taking a look at the facts, it was acknowledged by the hon'ble court that even though the arbitration clause had not been drafted properly, but it is not a prerequisite that in such conditions the arbitration clause shall be considered to be invalid. It has been stated by the court that "Be that as it may when the specific intention of the parties is clearly evident from the arbitration clause the same cannot be treated as vague on the ground that it does not satisfy the suggested checklist of all matters to be considered while drafting an arbitration agreement." Therefore, it was ruled by the hon'ble court that "What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties."

Similarly, in the case of *Powertech World Wide v. Delvin International*

[11] *Supra note* 3.
[12] *Visa International Ltd. v. Continental Resources (USA) Ltd.,* (2009) 2 SCC 55.

General Trading,[13] it was stated by the hon'ble Supreme Court that in case of ambiguity in the understanding of the arbitration clause, the clause must not be read alone but should be read together with the correspondence between the parties and the circumstances.

In 2018, the Hon'ble Supreme Court again dealt with same issue in the case of *Zhejiang Bonly Elevator v. Jade Elevator Components,*[14] wherein the parties had entered into a commission processing contract' for the supply of certain products. The contract had the following dispute resolution clause in the agreement: "Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court." In this case, the court emphasized that: "To appreciate the clause in question, it is necessary to appositely understand the anatomy of the clause. It stipulates the caption given to the clause dispute handling. It states that the disputes should be settled through consultation and if the consultation fails by treatment of to the arbitration body for arbitration or the court. On a query being made, learned counsel for the parties very fairly stated that though the translation is not happily worded, yet it postulates that the words 'arbitration or the court' are undisputable as far as the adjudication of the disputes is concerned. There is assertion that disputes have arisen between the parties. The intention of the parties, as it flows from the clause, is that efforts have to be made to settle the disputes in an amicable manner and, therefore, two options are available, either to go for arbitration or for litigation in a court of law." In the end it was ruled by the hon'ble court that intention of the parties indicated that the dispute shall be resolved through arbitration. Thus, the court in this case has given a lot of emphasis on the what was the intent and objective of the parties.

Thus, it can be observed that the Indian courts have started emphasising more on the intent of the parties rather than looking into

[13] *Powertech World Wide Ltd. v. Delvin International General Trading LLC*, (2012) 1 SCC 361.
[14] *Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components*, (2018) 9 SCC 774.

the construct of the arbitration clause while delivering the judgements. The same can be observed in the judgements of various foreign jurisdiction courts.

LAW SETTLED IN FOREIGN JURISDICTIONS

In the case of *Canadian National Railway and Others v Lovat Tunnel Equipment Inc.,*[15] the Canadian National Railway (CNR) had entered into a contract with Lovat Tunnel Equipment & Co. (Lovat) for delivery of certain equipment. The contract consisted of an arbitration clause which stated that "the parties may refer any dispute under this Agreement to arbitration, in accordance with the Arbitration Act of Ontario." Later, it was discovered by CNR that Lovat had delivered equipment which were not properly designed for which CNR sued Lovat. CNR wanted to invoke the arbitration clause for resolving this dispute, whereas the respondent wanted to have a motion on the same from the court. The hon'ble Supreme Court observed that the above clause allowed the appellant to either choose between arbitration or an alternative to litigate. The court observed that, the arbitration clause shall be deemed irrelevant, if due to the ambiguity in the clause, the parties are directed to go for litigation. Therefore, it was stated by the hon'ble court that this arbitration clause gives either of the party an option that they could refer the dispute to arbitration, rather than requiring the consent of both parties in order for the arbitration clause to operate. Thus, it was ruled that "The correct interpretation of the clause is that "parties" means "either party". Thus, either party may refer a dispute to binding arbitration and arbitration then becomes mandatory. Failing such an election by one of the parties, the matters in dispute can be resolved in the courts." The hon'ble court in this case directed both parties to resolve their dispute through arbitration.

In England, the Privy Council dealt with the case of *Anzen Ltd & Ors. v Hermes One Ltd,*[16] wherein the appellants and the respondents are

[15] *Canadian National Railway v. Lovat Tunnel Equipment Inc.,* (1999), 122 O.A.C. 171 (CA).
[16] *Anzen Ltd & Ors. v Hermes One Ltd*, [2016] UKPC 1.

shareholder in a business company named, Everbread Holdings Ltd (Everbread). The parties had entered into a shareholder agreement on July 2012, in which the following arbitration clause was provided "19.5 This Agreement shall be construed in accordance with English law, without reference to its conflict of law principles. If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration.". In January 2014, the respondent filed a suit against appellant and Everbread on the grounds of unfair conduct in the management and sought to seek damages. The issue in this case was whether such arbitration clause shall be permissible and valid in the eyes of law. The hon'ble court in the case came up with certain approaches to resolve the issue:

"Analysis I: arbitrate or bust – if the parties wish to resolve their dispute, they may do so only via arbitration, regardless of whether they used 'may' or 'must' in their arbitration agreement;

Analysis II: a party may commence litigation, but the parties still must arbitrate if any party commences an arbitration; or

Analysis III: a party may commence litigation, but the parties must arbitrate if the defendant in the litigation applies for a stay of the litigation in favour of compelling arbitration."

In the end, the hon'ble court stated that the optional arbitration clause was permissive and valid in the eyes of law. The court approved the analysis III by stating the following: "Parties to an agreement to arbitrate are, it held, under mutual obligations to one another to cooperate in the pursuit of the arbitration. Section 40(1) of the current English Arbitration Act 1996 makes the duty express, by providing that: 'The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings'. Of course, this duty postulates that arbitral proceedings are already on foot. But it seems to the Board that a similar conception can and should influence the

construction of clause 19.5, which contemplates a consensual approach, first involving negotiation for at least 20 business days to see if any dispute which has arisen can be resolved amicably and then, if negotiations are unsuccessful, enables either party to submit the dispute to arbitration. An analysis whereby notice will trigger the mutual agreement to arbitrate a dispute appears to the Board to fit better into a consensual scheme than one which requires the artificial construction, and commencement of arbitration in respect of, a cross-claim." In this case, it can be interpretated that both the parties have the option to either initiate the arbitration by themselves or either of the party can apply for anti-suit injunction against litigation irrespective of fact whether the litigation started before the initiation of arbitration proceedings or not.

In Australia, the Hon'ble Supreme Court of Western Australia in the case of *Pipelines Services WA Pty Ltd v. ATCO Gas Australia Pty Ltd*,[17] dealt with the similar issue. Pipelines Services WA Pty Ltd (Pipelines) had entered into an agreement with ATCO Gas Australia Pty Ltd (ATCO) for the installation of gas pipelines in Western Australia. It was later alleged by Pipelines that ATCO had breached the agreement for which the arbitration clause was invoked. The arbitration clause stated the following: "If the dispute is still to be resolved within two weeks of having to be referred to the Chief Executive Officers then either party may by notice to the other party refer the dispute to arbitration in accordance with the provisions of the Commercial Arbitration Act 1985 (WA) (the 'Commercial Arbitration Act'), and for the purposes of the Commercial Arbitration Act, the parties agree that this Agreement is an arbitration agreement." The court in this case stated that it is a well-established principle that if there is no indication of any contrary intention between the parties, then the arbitration clause survives. Further, the court emphasized on the fact that while construction of the arbitration agreements, a broad and flexible approach must be taken. The court must be in favour of a construction wherein there is a "single forum

[17] *Pipelines Services WA Pty Ltd v. ATCO Gas Australia Pty Ltd,* [2014] WASC 10.

for adjudication of disputes arising from, or in connection with, that agreement." Thus, in the end the arbitration clause was allowed and was held to be valid.

In the German Federal Court of Justice,[18] the parties had entered into an agreement wherein the arbitration clause provided the following: "Any disputes arising out of this contract, its execution and interpretation shall be decided by an arbitral tribunal excluding the state courts. The parties will conclude a separate arbitration agreement in this regard." But the parties had never entered into any separate arbitration agreement in the future. The question which arose in the court was whether the arbitration clause can be said to be valid in law. The hon'ble court in this case looked into the 'intention 'of the parties. The court in this case ruled that by looking at the clause it can be ascertained that, the party intended to arbitrate, as the clause is unambiguous and clear in its construction. Therefore, it could not be said that the failure of the parties to enter into a separate arbitration agreement would invalidate the parties' intent to resolve the dispute through arbitration.

From the above judgements it can be observed that courts in foreign jurisdiction are also giving more importance to 'intent' rather than the construct of the optional arbitration clauses.

ANALYSIS

The approach of the courts to check the intention of the parties while interpreting the optional arbitration clauses might be questionable, yet it is felt that the existence of words such as 'may' or 'shall' must not be construed or interpreted as invalid clause by the hon'ble courts. Certain terms such as 'may' or 'shall' do indicate that the parties have kept their options open while choosing the method to adjudicate their dispute. It is believed that the validity of optional arbitration clauses must not be jeopardized only on the ground that

[18] BGH, 6.2.2020, I ZB 44/19.

such clauses are not prima facie clear in their construct.

The hon'ble Supreme Court in the *Zheijang*[19] case has emphasized on the intention of the parties while interpreting optional arbitration clauses, even though such clauses seem to have not been drafted properly. The parties have provided the option for adjudicating their disputes via arbitration for a reason. Therefore, the aspect of 'intention' of the parties cannot be completely neglected. To further support this stand, the hon'ble Supreme Court in the case of *Visa International*[20] has pointed out the very fact that there is no certain way or method of drafting an arbitration clause to be considered as valid in eyes of law. Rather, the court emphasized that the surrounding circumstances as well as the conduct of parties must be assigned due importance while interpreting the 'intention' of the parties.

Even in the foreign jurisdiction cases such as *Pipelines Services*[21] and *BGH*[22] the courts have given emphasis on intention of the parties even if there is lack of clarity in the optional arbitration clause or even in a situation where there is a mention of resolving the dispute through arbitration despite the absence of a proper arbitration clause. In *Canadian National Railway*[23] case, the court had ruled in favour of arbitration with the consent of one of the parties even though the other party wished to litigate. In fact, Privy Council in *Anzen*[24] case, has gone one step ahead by suggesting the parties to go ahead with arbitration, even after the litigation has commenced if optional arbitration clause is included in the agreement.

After analysing the above judgements, it can be inferred that the Indian courts have been adopting a flexible and broad-minded approach while interpreting the optional arbitration clauses similar to

[19] *Supra note* 14.
[20] *Supra note* 12.
[21] *Supra note* 17.
[22] *Supra note* 18.
[23] *Supra note* 15.
[24] *Supra note* 16.

that of foreign jurisdiction courts by giving importance to the 'intention' of the parties. The courts have been favouring arbitration where there were no obvious contradictions. Indian courts may also adopt the approach followed by Canadian and English Privy Council courts for considering arbitration as a favoured dispute resolution method in case there is an optional arbitration clause.

CONCLUSION

In India, lower courts still have reservations while deciding on the validity of optional arbitration clauses due to set precedents wherein they have given more weightage to the language and terms of the clause in the agreement. Courts have preferred arbitration clauses which are specific and direct in their construct. Therefore, most of the times courts tend to invalidate optional arbitration clauses by not giving due consideration to the intention behind such clause. It is felt that the courts must give leverage in such situations and may suggest to the parties to resolve their disputes through arbitration rather than litigation, as arbitration is considered faster and cost-effective method of resolving disputes.

Recent judgements of the hon'ble Supreme Court of India have given more emphasis on intent than the construct of the optional arbitration clauses, similar to verdicts passed by foreign jurisdiction courts. The hon'ble Supreme Court had also set up certain guidelines which need to be followed by the courts while validating optional arbitration clauses. By removing the uncertainties over the validity of optional arbitration clauses, India can promote itself as a hub of international arbitration.

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INDIA INVESTMENT AGREEMENTS VIS-À-VIS TAX CARVE OUTS –AN ANALYSIS

By Dr.R.J.R.Kasibhatla* and Anjana Kameswari**

ABSTRACT

Taxation is the principal means to finance the public provision of goods. It is open to everyone to so arrange his affairs as to reduce the brunt of taxation to the minimum and such a process does not constitute tax evasion. Despite the clear and unequivocal provisions for excluding tax measures in investment treaties, the rise of arbitral disputes of tax-related measures is a reality. States' tax measures have come under increasing scrutiny by international arbitral tribunals. Private investors have challenged them through the Investor-State Dispute Settlement (ISDS) mechanism. Claims arising from tax related issues are effectively being adjudicated by international arbitral tribunals as a matter of State obligations toward foreign investors, even in cases where the Investment Agreements (IAs) contain unambiguous tax carve-out provisions. This brief will analyse the language included in taxation carve-out provisions in IIAs.

INTRODUCTION

The power to control taxes is a cornerstone in the exercise of full sovereignty of States[1]. Taxation is the principal means to finance the public provision of goods[2]. For many societies, taxation seeks to

* Presently working as Dy. Legal Adviser, in the Ministry of Law & Justice, Department of Legal Affairs, Government of India and the views expressed by the author are purely personal and no way reflects either the views of the Government or the Department.
** 5th Year 5yrs BA LLB (Hons) student at G.D.Goenka University
[1] See: Claire Provost, Taxes on Trial: How Trade Deals Threaten Tax Justice (Transnational Institute and Global Justice Now, 2016) Annex. Available from https://www.tni.org/en/ publication/taxes-on-trial.
[2](a)see Allison Christians, "Sovereignty, Taxation, and Social Contract", Minnesota Journal of International

distribute the burden of achieving public objectives fairly. For societies that choose to do so, it is also a tool to redistribute wealth, and a key feature in the economic system of a State. It is open to everyone to so arrange his affairs as to reduce the brunt of taxation to the minimum and such a process does not constitute tax evasion; nor does it carry any ignominy"[3].

It is true that tax avoidance in an underdeveloped or developing economy should not be encouraged on practical as well as ideological grounds. Taxes are the price of civilisation and one would like to pay that price to buy civilisation. But the question which many ordinary taxpayers very often in a country of shortages with ostentatious consumption and deprivation for the large masses ask is does the taxpayer buys civilisation with taxes or does he facilitate the wastes and ostentatiousness of the few[4].

Despite the clear and unequivocal provisions for excluding tax measures in investment treaties, the rise of arbitral disputes of tax-related measures is a reality[5]. States' tax measures have come under increasing scrutiny by International Arbitral Tribunals. Private investors have challenged them through the Investor State Dispute Settlement (ISDS)[6] based on the rights granted to them by

Law, Vol.18(2009).
(b)https://www.researchgate.net/profile/Allison_Christians/publication/228135833_Sovereignty_Taxation_and_Social_Contract/links/Sovereignty-Taxation-and Social Contract.pdf?
(c) also refere 'Building a Mirage: The Effectiveness of Tax Carve-out Provisions in International Investment Agreements' By Daniel Uribe and Manuel F. Monte as published in INVESTMENT POLICY BRIEF No. 14 March 2019

[3]"THE MCDOWELL DICTUM — VANISHING LINE BETWEEN TAX AVOIDANCE AND TAX EVASION" *by* S.P. Gupta (2003) 5 SCC J-15 (SCC pp. 252-53, para 41).

[4] CIT v. Vadilal Lallubhai) (1973) 3 SCC 17

[5] William W Park, "Arbitrability and Tax", in Arbitrability: International and Comparative Perspectives, Loukas A. Mistelis and Stavros L. Brekoulakis, eds. (The Netherlands, Kluwer Law International, 2009).

[6] (a)Dispute settlement is arguably the most important provision in any Bilateral Investment Protection and Promotion Agreement ("BIPA"). It provides recourse to foreign investors for ensuring that the obligations of the contracting parties under the BIPA investment treaty are effectively implemented and enforced. Article 9 of the India Model BIPA provides for a mechanism for Investor-State Dispute Settlement ("ISDS"). Traditionally, under customary international law dispute settlement has always involved disputes between States. However, the growing importance of foreign investment in the international economic arena has inevitably led to ISDS provisions in most BIPA's. As the United Nations Conference on Trade and Development ("UNCTAD") notes: -
"[Having ISDS provisions] increases the level of certainty regarding the business environment in which

Investment Agreements (IAs)[7]. Claims arising from tax related issues are being adjudicated effectively by international arbitral tribunals as a matter of State obligations toward foreign investors, even in cases where IAs contain unambiguous tax carve-out provisions. This brief will analyse the language included in taxation carve-out provisions in India's Investment Agreements IIAs[8], and its effectiveness in restricting the dispute settlement provisions of IIAs only to non-tax-related claims.

LEGITIMATE TAX PLANNING WITHIN THE FRAMEWORK OF LAW IS PERMISSIBLE:

Tax planning may be legitimate, provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or to entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges[9]. In the absence of any suggestion of bad faith or fraud, the true principle is that the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is embodied in a document, the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction[10].

investors operate in the host country. In addition, this mechanism ensures that the dispute is decided on legal grounds, thus separating legal from political considerations."
(b) UNCTAD, Bilateral Investment Treaties 1995-2206: Trends in Investment Rulemaking, New York and Geneva 2007.

[7] (a) IIAS/BIPAs/BITS are the agreements within the frame work of our domestic laws and inter alia provide for dispute resolution between foreign investors and the Government of India. BIPAs/BITs are distinguishable from other comprehensive agreements like FTA/CECA/CEPA. The object of IIAS/BIPAs/BITs is to protect investments and economic development of the Contracting Parties and to provide confidence in the minds of investors.

[8] Government of India has signed Bilateral Investment Promotion Agreements (hereinafter BIPAs) with more than 80 countries since 1994. These agreements are within the frame work of our domestic laws and inter alia provide for dispute resolution between foreign investors and the Government of India. India also signed Comprehensive Economic Cooperation Agreements with countries like Japan, Singapore, Australia and Korea etc.

[9] M/s MC. Dowell & Company Ltd V C.T.O. AIR 1986 SC 649

[10] CIT v. Motors & General Stores (P) Ltd. (1967) 66 ITR 692 (SC)

WHAT DOES TAXATION MEAN?:

Under Article 366(28) of the Constitution of India, "Taxation" has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy. The well-known and well-settled characteristic of "tax" in its wider sense includes all imposts. Imposts in the context have following characteristics:

(*i*) The power to tax is an incident of sovereignty.

(*ii*) "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.

(*iii*) The term "tax" under Article 265 read with Article 366(28) includes imposts of every kind viz. tax, duty, cess or fees[11].

(v) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special[12].

TAX CAN BE LEVIED ONLY THROUGH LEGISLATIVE ACTION:

"Tax", "duty", "cess" or "fee" constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only the expression that no "tax" shall be levied and collected except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot

[11] For further details refere Article 366 (28) of the Indian Constitution
[12] CIT v. MCdowell and Co. Ltd., (2009 (10) SCC 755 at page 763).

be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State[13].

TAXATION AND JUDICIAL REVIEW:

Judicial review is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself[14].

INDIA INTERNATIONAL INVESTMENT AGREEMENTS AT A GLANCE:

The Indian International Investment Agreements (IIAs) /Bilateral Investment Treaties (BITs)/Bilateral Investment Promotion and Protection Agreement (BIPAs) were initiated as part of Economic Reforms Programme commenced in the year 1991, with a view to increase the integration of Indian economy with the global economy by fostering inward and outward flow of investments. The main objective of Indian BIT/BIPA is to promote and protect the interest of investors of either country in the territory of the other country and such agreements increase the comfort level and boost the confidence of investors by assuring a minimum standard of treatment on a non-discriminatory basis in all matters while providing for justifiability of disputes with the host country. The Government of

[13] Ibid.
[14] H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312 at page 317

India has signed more than 80 BIPA's with different countries after having negotiations on the basis of a negotiating text approved by the Steering Committee on Economic Reforms.

EXCEPTIONS / RESERVATIONS UNDER INVESEMTN TREATIEES:

Many Investment Treaties contain exceptions or reservations for certain types of measures or subject matters. The most common are exceptions and reservations for tax measures, grants, and subsidies, Most Favoured Nation (MFN) and National Treatment (NT)[15]. India carved out an exception by excluding any matter pertaining taxation. There is no explicit commitment or undertaking under the India's BIPA or BIT. Indian BIPA/BIT clarifies that all taxation matters would be dealt with under the Avoidance of Double Taxation Treaties[16]. It also clearly provides that In the event of any inconsistency between the provisions of the BIPA and any Tax Convention, the provisions of the latter shall prevail.

INTERNATIONAL PRACTICE:

There are no restrictions under International law to a legislative jurisdiction to impose and collect taxes[17]. In most countries, the jurisdiction to tax is based on the domestic legislative process, which is an expression of national sovereignty. Taxation is an essential prerogative of State Sovereignty and by virtue of this sovereign prerogative, States may tax not only their own national but also aliens, including foreign investors, if they effectuate investments in those States. Paragraphs 'd' and 'e' of Article XIV of General Agreement on Trade in Services (GATS), a Double Taxation

[15] Most Favoured Nation (MFN) and National Treatment (NT) are aimed at creating a level playing field between all foreign investors and national investors. MFN ensures that a foreign investor is not treated less favorably in comparison to any other similarly placed foreign investor, whereas NT ensures that a foreign investor is not treated less favorably in comparison to any other similarly placed domestic investor.
[16] Ref: India-China, India-Argentina, India-Ghana, India-Austria, India-Govt. of Kingdom of Bahrain, India-Ice-land, India -Belarus, India-Bulgaria, India-Croatia, India-France, India-Egypt, India-Congo, India-Hellenic republic, India-Australia, India-Columbia, India-Armenia
[17] UNCTAD

Avoidance Agreement is excluded from the general principle of National and Most Favored Nation Treatment in respect of services or service suppliers[18].

INVESTMENT AGREEMENTS AND EXPRESS CARVE OUTS:

International Investment Agreements (IIA) provide broad express exceptions for all taxation measures[19]. An alternative approach is the 'qualified exclusion model' under which taxation matters are generally excluded but subject to a small number of specific exceptions[20] International Investment Agreements (IIA) provide broad express exceptions for all taxation measures[21].The 2004 US Model BIT and the 2003 Canadian Model BIT follow the model of a general exception

TAXATION IS PERMISSIBLE REGULATORY POWER OF THE STATE:

Taxation is the result of a State's permissible exercise of regulatory powers, it is not expropriation[22]. In Occidental v. Ecuador[23] the claim was brought under the United States – Ecuador BIT. The respondents argued that the claim concerned the non-refund of the VAT, and it was under the scope of the taxation carve-out included in the treaty. The State also argued that the rules that were invoked by the claimants in connection with (no less favourable treatment, national treatment and fair and equal treatment) were also within the scope of the carve-out. The tribunal considered that the first paragraph of the carve-out clause providing that "With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other

[18] For further details refere Article XIV of GATS.
[19] For example Article 5(2) of Argentina -New Zealand (1999)
[20] FOR EXAMPLE: Article 19 of Japan-Vietnam (2003); Article 2103 (10), NAFTA 'Except as set out in this Article Nothing in this agreement shall apply to taxation measures).
[21] For example Article 5(2) of Argentina -New Zealand (1999)
[22] Burlington Resources V Ecuador
[23] EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award (3 February 2006).

Party", implied the same obligation as FET[24] and, therefore, the fair and equal treatment was outside the scope of the taxation carve-out. In addition, the Tribunal concluded that the exclusion of a tax measure relating to "the observance and enforcement of terms of an investment agreement" from the scope of the carve-out clause was meant to clarify that every "tax matter associated with an investment agreement" was within their jurisdiction.

In Encana Vs Ecuador[25] rejecting the claim of the investors to claim VAT refunds it has been noted by the Tribunal that in the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of investment. However, it added that *'only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would an issue of indirect expropriation be raised'*. The Tribunal considered that a "tax measure" should be analysed from "its legal operation, not its economic effect", therefore "a taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes". Following this definition, the Tribunal concluded that its jurisdiction is limited under the BIT with respect to taxation measures (Article XII), subject to the exception for expropriation[26]. Then, the Tribunal turned to the question of expropriation, as the only exception within the carve-out provision. First it recognised that a foreign investor "has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment". Further, it reasoned that a tax measure itself should not be considered a taking of property; the opposite would deny a universal State prerogative by a guarantee against expropriation, particularly in the absence of a specific commitment from the host State. The Tribunal concluded that the tax measure adopted by the State did not amount to expropriation, and therefore it was not within the exception included in the carve-out clause as

[24] Fair and Equitable Treatment.
[25] LC/A Case No. UN 3481 (February 3, 2006)
[26] Ibid. para. 147 and para. 149.

provided by the BIT.

INDIA'S REVISED IIA/BIT/BIPA[27] CARVE OUT:

India's revised model draft IIA clearly provides carve out and states that taxation measures are excluded from the scope. The relevant portion of the IIA/BIT reads as under:

> "2.6 This Treaty shall not apply to:
>
> ……
>
> (iv) any taxation Measure. Where a Host State asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation which is excluded by this Article from the scope under this Treaty, any decision of the Host State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review any such decision[28].

DOCTRINE OF LEGITIMATE EXPECTATION:

In arbitral jurisprudence, 'legitimate expectations' has emerged as one of the important ingredients for testing presence of Fair and

[27] India with the approval of the Cabinet revised its BIPA text in the year 2015 and come up with a new model BIT by bringing a paradigm shift from 'asset based investment' definition to 'Enterprise based Investment definition' with closed list of assets.
[28] For further details refer India's revised BIT refer dea.gov.in.

Equitable Treatment (FET)[29]. In Tecmed V Mexico[30] explained as follows:

> "…in the light of the good faith principles established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investors to make the investment. The foreign investor expects the host State to act in a consistent manner, free form ambiguity and totally transparently in its relations with the foreign investor, so that it may know before-hand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."

The doctrine of legitimate expectation in substantive sense has been admitted in Indian Jurisprudence as well, unless there is overriding public interest[31]. This Doctrine has been developed in the context of reasonableness and natural justice[32].

[29] The obligation to accord fair and equitable treatment (FET) to foreign investments appears in the great majority of international investment agreements (IIAs). Among the IIA protection elements, the FET standard has gained particular prominence, as it has been regularly invoked by claimants in Investor-State Dispute Settlement (ISDS) proceedings, with a considerable rate of success. The wide application of the FET obligation has revealed its protective value for foreign investors but has also exposed a number of uncertainties and risks. First, with regard to the capacious wording of most FET provisions, many tribunals have interpreted them broadly to include a variety of specific requirements including a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations. The second issue concerns the appropriate threshold of liability, that is, how grave or manifest a State's conduct must be to become FET-inconsistent. Thirdly, the application of FET provisions has brought to light the need to balance investment protection with competing policy objectives of the host State, and in particular, with its right to regulate in the public interest. For further details refer UNCTAD FET Series on Issues in International Investment Agreements II

[30] (a) Tecnicas Mdioambientales Tecmed, S.A. V The United Mexican States, Award, ICSID Case No. ARB (AF)/00/2, Para.89 (29 May 2003).
(b) Also refere Anirudha Rajput, 'Protection of Foreign Investment in India and Investment Treaty Arbitration' Wolters Kluwer 110-113

[31] Punjab Communications Ltd v Union of India, (4) SCC 727, Para 37 (1999).

[32] National Buildings Construction Corporation v S.Raghunathan, (7) SCC 66, Para 19 (1998)

DOCTRINE IMPOSES A DUTY ON PUBLIC AUTHORITY:

The Doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in case of 'legitimate expectation' the reasonable opportunities to take representations by the parties likely to be affected by any change of consistent past policy come in[33].

LEGITIMATE EXPECTATION DOES NOT IMPLY DISREGARD OF REGULATORY FLEXIBILITY:

The existence of the Doctrine of legitimate expectations is *dehors* any legal right. Hence any unbridled and expansive interpretation could hugely impair legitimate regulations by Governments. The doctrine is thus to be applied with circumspection, and it loses its force in situations of supervening public interest. A legitimate expectation arising from the practice of the government certainly limits the right of the Executive, but it cannot impair right in entirety while acting in a bona fide manner in public interest[34].

The protection of legitimate expectations does not imply disregard of regulator flexibility of the host state. In Saluka v Czech Republic[35] it was observed that no investor may reasonably expect that the circumstances prevailing at the time of investment shall remain unchanged. In order to determine whether frustration of the foreign investors; expectation was justified and reasonable, the host State's legitimate right to regulate domestic matters in the public interest must be taken in to consideration as well[36].

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[33] Navjyoti Co-operative Group housing Society v Union of India (4) SCC 477, Para. 16 (1992).
[34] Refer (i) Council of Civil Service Unions v. Minister for the Civil Service, 3 All ER 935 (1984), cited with approval in Navjyoit Co-operative Group Housing Society v. Union of India (supra n.4) and Union of India v. Hindustan Development Corporation, (3) SCC 499, Para 7 (1993).
(ii) Also refer Anirudha Rajput, 'Protection of Foreign Investment in India and Investment Treaty Arbitration' Wolters Kluwer P. 112.
[35] Saluka Investment BV (The Netherlands) v. The Czech Republic, PCA, Partial Award, Mar.Paras 256-61(17 Mar.2006).
[36] Ibid.,

The person claiming legitimate expectations has to satisfy that there is foundation and thus has *locus standi* to make such a claim. Such a situation will arise only if the following conditions are met[37]:

(a) the decision taken by the authority shall be arbitrary, unreasonable and not taken in public interest;

(b) If it is a matter of policy, including change of policy, the courts cannot interfere with the decision;

(c) Whether a legitimate expectation was crated is essentially a question of fact;

(d) If all these tests are satisfied then the question to be asked is whether there was failure to give a hearing which has resulted into failure of justice[38].

TREATIES ARE TO BE PERFORMED IN GOOD FAITH:

As per Article 26 of the Vienna Convention on the Law of Treaties (VCLT)[39] and also as per the settled principle of International Law every treaty in force is binding upon the parties to it and must be performed by them in good faith. As per Article 31(1) of VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

NO EXPLICIT PROVISION UNDER IIAs TO COVER TAX MEASURES:

It is a settled position under Public International law that treaties should be interpreted so as to give reasonable and consistent meaning of the phrases and words. The words and phrases are to be considered according to their plain and natural

[37] Union of India v. Hindustan Development Corporation, (3) SCC 499, para 33
[38] Ibid.
[39] For further details refere Vienna Convention on the Law of Treaties concluded at Vienna on 23rd May 1969.

meaning. In case the words and phrases are ambiguous, they are considered keeping in view the general object of the treaty and its content. All of IIAs (pre-revised or revised) clearly reveals that there is a no explicit clear provisions covering tax measures. Per contra, it provides that all taxation matters would be dealt under the Avoidance of Double Taxation Treaties[40]. It also clearly provides that in the event of any inconsistency between the provisions of the BIPA and any Tax Convention, the provisions of the latter shall prevail.

DOUBLE TAXATION AVOIDANCE AGREEMENTS (DTAA):

DTAA is an agreement between two countries that the income of non-residents should not be taxed both in their country of origin and in the country in which they live. It aims to avoid the burden of double taxation on taxpayers in the two countries in order to promote and thereby stimulate flow of investment, technology and services[41]. These DTAAs have an inbuilt provision to address various concerns relating to cross border taxation. Therefore, the correct course of action to resolve the cross-border tax issues would to invoke the provisions of the DTAAs and not IIAs.

IN BUILT PROVISIONS UNDER THE TAX LAWS:

In India, no tax shall be levied or collected except by authority

[40] Supra 13

[41] For Example Section 90 of the Income Tax Act, 1961 empowers the Central Government to enter into agreements with Foreign Countries for avoidance of double taxation. Section 90 (1) (c) of the Income Tax Act, 1961 empowers the Central Government to enter into Agreements with foreign countries for exchange of information for prevention of evasion or avoidance of Income Tax chargeable under the Income Tax Act or under the corresponding law in force in that country or specified territory as is may be, or investigation of cases of such evasion or avoidance India entered into several DTAAs with different jurisdictions.

of law[42].The power to tax is an incident of sovereignty[43] and no one can be taxed by implication. A charging section has to be construed strictly so as to bring a person within its ambit. Whenever a challenge is made to levy of tax, its validity may have to be mainly determined with reference to the legislative competence or power to levy the same and in adjudging this issue the nature and character of the tax has to be inevitably determined at the threshold[44].

TAX LAWS CONTAIN A PROCEDURE FOR DISPUTE RESOLUTION:

In addition to the above, the tax laws in India are self-contained code, which provides a procedure for dispute resolution, including appeals to Appellate Authority, Tribunal as well as reference to the High Court[45]. Without paying attention to the those mechanism or procedures laid down under the domestic law raising an international investment arbitration dispute by invoking the provisions of IIAs may not be prudent and correct legal practices.

TAXATION CARVE-OUTS IS AS PER THE GLOBAL PRACTICE AND SETTLED PRINVIPLES OF INTERNATIONAL LAW:

The taxation carve outs under IIAs is not a new practice and is as per the global practice. Such carve outs are permissible both

[42] (a) Further details refer Article 265 of the Constitution of India.
(b) Article 265 provides that not only levy but also the collection of tax must be under the authority of some law. Where an executive authority has been empowered to collect tax by an invalid law or rules made thereunder, the Court is entitled to interfere (Chhotabhai Jethabhai Patel V Union of India AIR 1952 Nag. 139 at 144)

[43] New Delhi Municipal Committee V State of Punjab, AIR 1997 SC 2847

[44] Municipal Council, Kota V Delhi Cloth & General Mills Co Ltd (2001) 3 SCC 654 (para 16 at 668).

[45] For example Section 245B of the Act confers power on Central Government to constitute Income Tax Settlement Commission for settlement of cases pertaining to Income Tax. Under Section 245C of the Act, an assessee may at any stage of a case relating to him make an application in such form to the Settlement Commission to have the case settled.

under the public international law[46] as well as under customary international law[47]. Therefore, having taxation carves out under IIAs is as per the best global practice and not a deviation from the settled international law practice.

TAX LAWS CANNOT REMAIN STATIC:

Extraordinary economic circumstances merit extraordinary measures, hence tax laws cannot remain static. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. New principles have to be evolved and new norms need to be laid to adequately deal with the new problems, which may arise, in a highly industrialized economy.[48] No sovereign State including India can afford to assure any commitment of not altering their tax laws for the sake of foreign investment. Therefore, non-discriminatory taxation in a fair and reasonable manners is no violation of any commitments made under the IIAs.

According to a report published by the United Nations Economic Commission for Africa (UNECA), the State's ability to mobilize resources to support the growth and diversification of their economy is fundamental for achieving inclusive and sustainable development[49]. In order to achieve such objective, there is an outstanding need to include provisions guaranteeing the right of the State to regulate as an expression of countries' sovereignty[50] and recognise that this right also includes the State's possibility to implement economic or financial policies[51], including the design and

[46] International Law is defined as a body of principles & rules commonly observed by States in their mutual relationship with each other. International law includes the law relating to States & International organisations and also International Organisations inter se. It also includes the rules of law relating to international institutions and individuals, and non-State entities and individuals.

[47] Customary International the law that results from a general and consistent practice of States that they follow for a sense of legal obligation. It is an evolving branch of law and its terms are not settled fully.

[48] M.C. Mehta v. Union of India (Shriram - Oleum Gas), (1987) 1 SCC 395, at page 420

[49] 4 United Nations Economic Commission for Africa, Strategies for mobilizing domestic resources and investments for structural transformation (2017).Available from https://repository.uneca.org/bitstream/handle/10855/23647 /b11832575.pdf? Sequence=5.

[50] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development (2015).

[51] UNCTAD, World Investment Report 2011: Non-Equity Modes of International Production and

implementation of tax measures towards the achievement of their development objectives

As issues of taxation are not covered under investment treaties but are dealt at length separately under Agreement for Avoidance Double Taxation and Fiscal Evasion, raising an investment dispute on the issues of tax may not be in accordance with the spirit and intent of investment treaties. Therefore, foreign investor neither accrues a right nor any legitimate expectation to raise a dispute by invoking the provisions of IIAs/BIPAs/BITs.

CONCLUSION

Though there is no specific explicit commitment to cover issues of taxation under the BIPA/BIT, there are incidents of raising of tax disputes under them. Genuine strategic tax planning has not been abandoned by any decision of the English courts till date[52]. Taxation is an entirely different subject and are covered by a separate legislation. BIPAs/BITs/IIAs protects only investments and not the investors. Investor cannot claim a right to tax exemption or relief by colorable means. Issues pertaining to Taxation have to be strictly discussed under the Double Taxation Avoidance Agreements and not under the Investment Treaties or Agreements. It is the task of the Department of Revenue or domestic Courts of Law to ascertain the legal nature of the transaction and while doing so it has to peruse the entire transaction as a whole and not to adopt a dissecting approach[53]. It can therefore be concluded that International Arbitral Tribunals ought not entertain disputes surrounding taxations under IIAs on the basis of implied arguments unless there is a specific stipulation under the IIAs in this regard. The Arbitral Tribunals further ought to restrain from entertaining such disputes by invoking the provisions of IIAs or otherwise, as this this may lead to treaty shopping and shall lead to the dilution of the purpose and the object

Development.

[52] Vodafone international holdings BV v. union of India, (2012) 6 SCC 613 at page 670.

[53] look at" principle enunciated in Ramsay [1982 AC 300 : (1981) 2 WLR 449 : (1981) 1 All ER 865 (HL)]

of both IIAs and DTAAs.

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THE LEGAL CONUNDRUM ON THE ISSUE OF ANTI ARBITRATION INJUNCTION: DOES IT HINDER THE ARBITRATION PROCESS?

By Divyanshu Gupta*

INTRODUCTION

Anti-arbitration injunctions are granted by the courts to restrain the party from initiating or continuing arbitration proceedings when the party goes beyond the agreed terms of the agreement or wrongfully appeals to the jurisdiction of the arbitrator.[1] The use of anti-arbitration injunctions by the courts has tremendously increased and this has become a contentious issue in domestic arbitration and international arbitration because its legality is itself in dispute. The anti-arbitration injunction is treated as a threat to the principle of Kompetenz-Kompetenz, which is considered to be the keystone in the arbitration system.[2] Primarily, it is argued that the arbitration agreement does not expel the jurisdiction of the court rather it grants the adjudication of disputes to the arbitral tribunal.[3] However, there arises a certain situation where the issue of an ant-arbitration injunction is considered to be necessary.

In this article, the author will critically examine whether the grant of an anti-arbitration hinders the arbitration process or not. To argue this proposition, the author will *firstly* analyze the position of the anti-

* 4th Year BBA. LLB (Hons.) student at Symbiosis Law School, Pune, BBA.

[1] Julian DM Lew, *'Does National Court Involvement Undermine the International Arbitration Process?*' (2009) 24 Am U Int'l L Rev 489; Thomas E Carbonneau, *'"Arbitracide": The Story of Anti-Arbitration Sentiment in the US Congress'* (2007) 18 Am Rev Int'l Arb 233.

[2] Emmanuel Gaillard, 'Reflections on the Use of Anti-Suit Injunction in International Arbitration' in Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 203–15.

[3] Van Houtte, *Parallel Proceedings Before State Courts and Arbitral Tribunals*, in *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* 35, 42 (ASA Spec. Series No. 15 2001).

arbitration injunction in the context of international law. *Secondly,* the author will evaluate the scope of the *Kompetenz-Kompetenz* principle and the issuance of an anti-arbitration injunction. *Thirdly*, the author has considered the approach of the common law countries i.e., US, UK, India, and Australia and that of a civil law country i.e., France by analyzing the position of anti-arbitration injunction and the position adopted in these legal systems. The author has also critically evaluated the situations when the injunction can be granted. *Finally*, the article will end with the conclusion and suggestions and outline the position of the anti-arbitration injunction whether it hinders the arbitral process or not.

ANTI-ARBITRATION INJUNCTIONS AND INTERNATIONAL LAW

Stephen Schwebel once noted that anti-arbitration injunctions violate the principle of conventional and customary international law, international public policy, and the accepted principles of international arbitration.[4] Doak Bishop has termed such injunctions as 'arbitral terrorism'.[5] There is no specific concept of anti-arbitration injunction in International Law however, the UNCITRAL Model Law on international arbitration grants certain provisions on interim measures. According to Article 8, if the subject matter of the agreement is governed by arbitration, the court will refer the parties for arbitration but it is subject to three conditions; agreement should not be null & void, the agreement should be operative and it shall be capable of being performed.[6]

In New York Convention, contracting state parties usually undertake to recognize arbitration agreements and enforcement of arbitral awards.[7] The parties to the New York Convention that adhere strictly to the principle of Kompetenz-Kompetenz consider anti-arbitration

[4] STEPHEN SCHWEBEL, 'ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION—AN OVERVIEW' IN GAILLARD (ED), ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Juris Publishing, 2005) 5.
[5] Doak Bishop, *Combating Arbitral Terrorism: Anti-Arbitration Injunctions increasingly threaten to frustrate the International Arbitral System.*
[6] UNCITRAL Model Law on International Commercial Arbitration, Art. 8.
[7] New York Convention, arts. II and V.

injunctions to be hostile and unfriendly to the Convention's structure.[8] However, the crucial legal provision for anti-arbitration injunctions can be analyzed under Article II (3) of the New York Convention on enforcement of arbitral awards. It states that the contracting state shall refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[9] Thus it secures valid and enforceable arbitration agreements, but offers no protection to non-existent or unenforceable arbitration agreements.[10] In the context of the anti-arbitration injunction, it means that there are certain cases where the court will not refer the matter to arbitration.

Gary Born has argued that the New York Convention provides for each party of the contracting state, the right to review the arbitrator's decision on jurisdiction under Article 5 of the convention[11] and the injunction issued by one domestic court preventing an arbitration from going forward would directly interfere with this right.[12] Hence, the issuance of the anti-arbitration injunctions prohibits the purpose of the New York Convention which mandates that the agreement to arbitrate and the arbitral award to be enforced. It prevents or immobilizes the arbitration process that seeks to implement the arbitration agreement between the parties.

Therefore, according to UNCITRAL model law and New York Convention, the arbitration agreement may not be operative only in these circumstances if it is found that the agreement was null & void, inoperative or incapable of being performed. Otherwise, as a general rule, all the disputes which forms the subject matter of arbitration agreement shall be referred to arbitration.

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[8] EMANUEL GALLIARD AND YAS BANIFATEMI, NEGATIVE EFFECT OF COMPETENCE-COMPETENCE: THE RULE OF PRIORITY IN FAVOUR OF THE ARBITRATORS, IN ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 261 (Galliard and DiPietro, eds. 2008).

[9] New York Convention, arts. II (3).

[10] Julian Lew, *Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings*, in Anti-Suit Injunctions in International Arbitration 34 (Gaillard ed. 2005).

[11] New York Convention, arts. V.

[12] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 2009) 1053.

ANTI-ARBITRATION INJUNCIONS AND KOMPETENZ-KOMPETENZ PRINCIPLE

It has been widely argued that the grant of anti-arbitration injunction is inconsistent with the Kompetenz-Kompetenz principle. Article 16 of the UNCITRAL Model law incorporates that the arbitral tribunal can rule on its own jurisdiction and includes the objections on the existence of the validity or invalidity of the arbitration agreement.[13] The intervention of the court for not referring the matter to the arbitral tribunal in case the arbitration agreement is invalid shall violate this principle, the very bedrock of international arbitration[14], which requires that the jurisdiction to determine the validity of the arbitration agreement be left to the tribunal. Therefore, an anti-arbitration injunction granted by the court would directly interfere with this principle.[15] Some countries have ruled in their legal system that the issue of an arbitration injunction is contrary to the principle of Kompetenz-Kompetenz. For example, the Swiss Court of First Instance has held that the anti-arbitration injunction contradicts the Swiss legal system.[16] Similarly, the France Code of Civil Procedure excludes the court's jurisdiction for determining the validity of the arbitration agreement.[17]

The examples mentioned above represents the stand taken by the civil law countries. However, the common law countries have taken a different approach in interpreting this principle. There is a misunderstanding that the principle of Kompetenz-Kompetenz precludes the process of judicial review.[18] However, the UK courts

[13] UNCITRAL Model Law on International Commercial Arbitration, Art. 16.

[14] Emmanuel Gaillard*, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in Pervasive Problems in International Arbitration*" (Loukas Mistelis & Julian Lew eds) (Kluwer, 2006) at para 10-21.

[15] *Supra Note* 21.

[16] Air (PTY) Ltd v International Air Transport Association (IATA) and C SA in Liquidation, Case No C/1043/2005-15SP, Republic and Canton of Geneva Judiciary, Court of First Instance, 2 May 2005.

[17] JOHN SAVAGE, EMMANUEL GAILLARD, FOUCHARD GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 1999) 407.

[18] China Minmetals Materials Import and Export Co Ltd v Chi Mei Corp (2003) 334 F 3d 274 at 228, ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer, 1990) at p 74.

have well established this point that the judicial review of an arbitral tribunal's decision on jurisdiction is not precluded in setting aside and enforcement of arbitral award proceedings.[19] Neither, the judicial review is precluded before the arbitral award is passed.[20] The view taken by the Indian Supreme Court in *SBP & Co v. Patel Engineering Limited*[21] has asserted that the arbitral tribunal has the competence to rule on its own jurisdiction only if jurisdiction issues are raised before the tribunal. If the parties object to the validity of the arbitration agreement and that it is null & void, it would be wrong to say civil courts would not have jurisdiction. Supreme Court in *Chatterjee Petrochem Company & Ors v Haldia Petrochemicals Ltd & Ors*[22] has affirmed that civil courts will have jurisdiction to entertain suits seeking grant of anti-arbitration injunctions. Similarly, the US Court of Appeals for the Third Circuit held that arbitral tribunal cannot determine its own jurisdiction if the parties have never intended to contract for an arbitration agreement in the first place.[23] An arbitral tribunal cannot cloak itself with jurisdiction when it has none.[24]

Therefore, the views mentioned above affirms that the Kompetenz-Kompetenz principle is not absolute. The parties don't need to seek arbitration or challenge the jurisdiction of a tribunal that it never consented to.[25] Hence, while granting anti-arbitration injunctions, the court needs to balance the claim of the sanctitude of arbitration and the costs suffered by the party in being unnecessarily forced to go to

[19] Law Debenture Trust Corp plc v Elektrim Finance BV [2005] 2 All ER (Comm) 476; Anglia Oils Ltd v The Owners/Demise Charterers of the Vessel Marine Champion [2002] EWHC 2407 at [16]; Azov Shipping Co v Baltic Shipping Co [1999] 1 All ER 476.

[20]Nicholas Poon, *the use and abuse of anti-arbitration injunctions: a way forward for Singapore*, Singapore Academy of Law Journal, (2013) 25 SAcLJ.

[21] (2005) 8 S.C.C. 618.

[22] (2014) 14 S.C.C .574.

[23]China Minmetals Materials Import and Export Co Ltd v Chi Mei Corp (2003) 334 F 3d 274 at [55].

[24] Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472 at [24]; Nicholas Poon, "Striking a Balance between Public Policy and Arbitration Policy in International Commercial Arbitration: AJU v AJT" [2012] Sing JLS 1 at 9.

[25] Sharad Bansal and Divyanshu Agrawal, '*Are anti-arbitration injunctions a malaise? An analysis in the context of Indian law'*, in William W. Park (ed), Arbitration International, Oxford University Press 2015, (Volume 31 Issue 4) pp. 613 – 629.

arbitration.[26]

APPROACH OF VARIOUS COUNTRIES ON ANTI-ARBITRATION INJUNCTIONS

Anti-Arbitration Injunction in UK

UK courts have tried to maintain the balance between the arbitration process and the legal abuse of the arbitral proceedings. If the court finds that the conduct of arbitral proceedings would be oppressive, then it shall grant an anti-arbitration injunction. In *Kitts v Moore*[27], the appellate court ruled that the courts have jurisdiction to interfere by passing an anti-arbitration injunction where an action is brought to impeach the arbitration clause or agreement. However, this was 1895 judgment and the laws have undergone a radical change since English Arbitration Act of 1996 is premised on the general principle that courts shall not intervene in matters governed by Part 1, except as provided in that part.[28] In the landmark judgment of *Elektrim SA v Vivendi Universal SA*[29], a significant judgment in the UK arbitration regime, where the two arbitration proceedings were initiated on different subject matter, the court was of the view that pursuit of two different arbitration with different subject matter would not constitute oppressive or vexatious proceedings. Further, if parties are not amenable to the arbitration agreement, then any arbitration proceedings initiated would be oppressive or unfair and unconscionable and would result in gross injustice.[30]

In *Sana Hassib Sabbagh v Wael Said Khoury*[31], the court has held that in case of a foreign-seated arbitration where the dispute does not fall within the scope of the arbitration agreement and the proceedings are, or would therefore be, vexatious and oppressive. This court clarified the grant of an anti-arbitration injunction in case

[26] *Ibid.*
[27] [1895] 1 Q.B. 253.
[28] Section 1(c), English Arbitration Act, 1996.
[29] [2007] EWHC 571 (Comm.).
[30] Excalibur Ventures LLC v Texas Keystone Inc, [2011] EWHC 1624 (Comm).
[31] [2019] EWCA Civ 1219.

of a foreign seated arbitration and the English courts can grant anti-arbitration injunctions only in exceptional circumstances. The rationale that anti-suit injunctions cannot restrain foreign proceedings does not apply in the case of arbitration.[32] Anti-arbitration injunction does not fell within the jurisdiction of foreign courts.

Many arbitrators considered that this important Court of Appeal case had laid down principles upon which an English court can grant an anti-arbitration injunction in respect of foreign arbitration proceedings. Herbert Smith Freehills summarized the following criteria for arbitrator's attention.[33]

1. *"English Courts have powers to grant an anti-arbitration injunction where it is just and convenient to do so."*
2. *"Where it is clear that the dispute is within the scope of the arbitration agreement, no injunction should be granted."*
3. *"Where it is clear that the dispute is outside the scope of the arbitration agreement, either because there is a common ground between the parties or because of a previous determination, the court may grant an anti-arbitration injunction but only if the circumstances of the case require it (e.g., when the proceedings are considered oppressive and vexatious)."*
4. *Save in the case of exclusive jurisdiction agreements, the grant of an anti-arbitration injunction remains an exceptional step.*"

Based on author's limited research and views of the English laws, an anti-arbitration injunction may be granted if the dispute fell outside the scope of an arbitration agreement or the proceedings if initiated stands oppressive. Other than in exceptional circumstances, it appears that the English Courts

[32] *Ibid.*

[33] https://hsfnotes.com/litigation/2019/07/23/court-of-appeal-confirms-jurisdiction-to-restrain-foreign-arbitration-even-where-england-is-not-the-natural-forum-for-the-dispute/.

leave the determination of the scope of an arbitration agreement to the arbitral tribunal itself. Before ending the discussion in this sub-section on Anti-Arbitration Injunctions in UK, the author wishes to highlight an interesting decision in the Federal Court of Australia with persuasive influence in common law. The additional considerations that had been considered by the Federal Court and held by Justice O'Callaghan worth further attention.

Anti-Arbitration Injunction in Australia

In *Kraft Foods Group Brands LLC v Bega Cheese Limited* [2018] FCA 549[34], the Federal Court of Australia held that the Court has jurisdiction to grant an injunction restraining a foreign arbitral proceeding. Justice O'Callaghan granted an injunction to restrain the US arbitration from further proceeding on the grounds that it could affect the proceedings between the two parties already underway in the Federal Court.

In the background of the case, Kraft initiated proceedings in the Federal Court of Australia and alleged that Bega's advertisements were false, misleading or deceptive that would be in contravention to s. 18 of Schedule 2 of the *Competition and Consumer Act 2020* (Cth) (The "Australian Consumer Law")[35]. Kraft had commenced an arbitration in the United States that sought mediation and arbitration. Thus, Bega filed an application to the Federal Court seeking to restrain the proceedings in the United States. The United States arbitration proceeding was on hold pending the determination of the Federal Court. The Counsel representing Bega relied on two grounds for the application. Firstly, Bega submitted that if the arbitration was allowed to proceed at the same time as the proceeding in the Federal Court, it would interfere with, or would have a tendency to interfere with the proceeding and the Federal Court's processes because of a a possibility or probability of inconsistent findings. Secondly, Bega

[34] [2018] FCA 549.
[35] S. 18, Schedule 2, Competition and Consumer Act 2020 (Cth).

submitted that such an injunction should go in the exercise of the Court's equitable jurisdiction, because to permit the arbitral proceeding to continue together with the proceeding in the Federal Court would, according to the principles of equity, be vexatious or oppressive.[36]

In the decision to grant an injunction, Justice O'Callaghan held that the court had jurisdiction to grant an anti-arbitration injunction because Kraft commenced this action in the Federal Court seeking permanent relief and damages. It was thus amenable to this Court's personal jurisdiction.[37] An important consideration in his judgment was that the two proceedings in the US and the Federal Court overlapped.[38] Justice O'Callaghan determined the two proceedings overlapped and held that "*in assessing whether, and if so, to what extent, the issues in the two proceedings overlap, the scope of the relevant issues necessarily includes all the issues raised by the parties, including by Bega in his defence and counterclaim, and by Kraft in its statement of claim, reply and defence for counterclaim. This is so because when a foreign party brings a proceeding in an Australian court, it submits not only to its jurisdiction in respect of its own action, but also in respect of any cross-claim that a respondent brings."* Upon deciding that the two proceedings overlapped, Justice O'Callaghan then decided that an anti-arbitration injunction was necessary for the administration of justice. It was held that the risk of inconsistent findings was a question central to both proceedings and there was a possibility of duplicated litigation and inconsistent findings that weighed significantly in favor of restraining the arbitration at least until the proceeding in the Federal Court was determined.[39]

Anti-Arbitration Injunction in France

The New Code of Civil Procedure of France deals with both

[36] Para. 8, [2018] FCA 549.
[37] Para. 25, [2018] FCA 549.
[38] Para. 69 and 79, [2018] FCA 549.
[39] Para. 103, 104 and 109, [2018] FCA 549.

international and domestic arbitration.[40] Generally, the power to issue an injunction is given under Article 809 of the French Civil Procedure Code where the court can order injunction either to avoid imminent damage or to abate a manifestly illegal nuisance.[41] However, Article 1448 of the New Code of Civil Procedure stipulates that the dispute subject to an arbitration agreement is brought before the national court in case of international arbitration, the court shall decline jurisdiction, except if the arbitration agreement is manifestly void or not applicable.[42] Otherwise, it is a general practice in France that the court will not issue any order or anti-arbitration injunction[43], and issuing such an injunction in France is considered to be an assault on the cohesion of the arbitral process.[44]

The two major judgments decided by the French Court relating to the issue of anti-arbitration injunction are *S.A. Elf Aquitaine and Total v Mattei, Lai, Kamara and Reiner*[45], and *Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea, de Ly, Owen and Leboulanger*.[46] In the former, the court ruled that the question of the establishment of the tribunal or its constitution shall be decided by the arbitral tribunal. In the latter, the court ruled on similar reasoning and stated that the arbitral tribunal will have the priority to decide issues relating to its jurisdiction. Moreover, it also ruled that the French courts are deprived of any jurisdiction to interfere with the arbitral proceedings even if such arbitration is seated in France. Therefore, in the author's point of view, the French Courts are very stricter in issuing an anti-

[40] Sairam Subramanian, '*Antiarbitration injunctions and their compatibility with the New York convention and the Indian law of arbitration: future directions for Indian law and policy*', in William W. Park (ed), Arbitration International, (Oxford University Press 2018, Volume 34 Issue 2) pp. 185 – 217.
[41] www.legifrance.gouv.fr/content/download/1962/13735/. . ./Code_39.pdf
[42] Article 1448, France New Code of Civil Procedure, https://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/1448.html.
[43]EMMANUEL GAILLARD, 'INTRODUCTION' IN EMMANUEL GAILLARD (ED), ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION (Juris Publishing 2005); Alexis Mourre, *'French Courts Firmly Reject Anti-Arbitration Injunctions'* Kluwer Arb Blog, (6 May 2010).
[44] Michael Reisman and Heide Iravani, '*The Changing Relation of National Courts and International Commercial Arbitration*', (2010) 21 Am Rev Intl Arb 33.
[45] SA Elf Aquitaine and Total v Mattei, Lai, Kamara and Reiner (6 January 2010) (Tribunal de Grande Instance, Paris)
[46] Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea (29 March 2010) (Tribunal de Grande Instance, Paris) [2010] Revue de l'arbitrage 390.

arbitration injunction.

Anti-Arbitration Injunction in USA

In the USA, the Federal Arbitration Act 1925 mainly governs the legal regime of arbitration. It deals with both international arbitration and inter-state arbitration. Intrastate arbitrations are governed by state arbitration statutes.[47] Since Chapter 2 (International Arbitration) of the Arbitration Act, 1925 implements the New York Convention, there is no express provision given in the act for anti-arbitration injunction. There is no definitive judicial precedents on the authority of the Federal Court to issue an anti-arbitration injunctions in an international context.[48] US Courts have considered this idea that in absence of any legal authority on an injunction, FAA's explicit authority to compel arbitration must incorporate the 'concomitant' authority to enjoin arbitration.[49] Because compelling arbitration in case there is no valid arbitration agreement may cause irreparable loss to the parties. Decisions of court of the second circuit in *American Express*[50] and first circuit in *SGS*[51] have acknowledged that the injunctive power of the court need not necessarily lie within the FAA. The issue of an anti-arbitration injunction must not conflict with the provisions of the FAA and the federal court has the authority to grant an anti-arbitration injunction. Further, most of the states in the USA have enacted their state arbitration laws that provide for injunctive reliefs and even cases involving international arbitration.[52]

Therefore, the granting of anti-arbitration injunctions in the USA can be exercised through (a) the inherent equitable powers of the court

[47] *Supra Note* 42.
[48] Jennifer L. Gorskie, "*US Courts and the Anti-Arbitration Injunction*," Arbitration International, Vol. 28 No. 2, pp. 295-323 (2012).
[49] *Ibid.*
[50] In re American Express Financial Advisors Securities Litigation, 672 F.3d 113, 140 (2d Cir. 2011).
[51] Société Géneralé de Surveillance, S.A. v. Raytheon European Management and Systems Co, 643 F.2d 863 (1st Cir. 1981).
[52] DAVID M. LINDSEY AND YASMINE LAHLOU, THE LAW APPLICABLE TO INTERNATIONAL ARBITRATION IN NEW YORK, (Pre ed. 1st, pub. 16th June, 2016).

& (b) state arbitration laws.[53]

Anti-Arbitration Injunction in India

There is a constant dilemma in the Indian legal system over the autonomy of the arbitral tribunal and the interference of the court in the jurisdiction of the arbitral tribunal. There are several conflicting decisions of the Supreme Court decisions and High Court decisions in granting anti-arbitration injunctions in India.

According to Section 5 of the Arbitration Act, 1996, the court shall not interfere in the matters relating to arbitration.[54] Thus, the power of the court is limited and it can only interfere when as provided in the arbitration act.[55] In *Bhushan Steels Ltd v. Singapore International Arbitration Centre & Ors.*[56], the Delhi High Court has held that the object of the Arbitration Act is to minimize the role of courts in the arbitration act and the court should not be obliged to bypass the provisions of this act. In *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Ors.*[57], the Supreme Court has held that the arbitral tribunal has the power to decide the question relating to its own jurisdiction under section 5 and section 16 of the arbitration act which allows the arbitral tribunal to rule on its own jurisdiction and the court in this case held that injunction cannot be granted. Similarly, Supreme Court in *National Aluminum Company Ltd. v Subhash Infra Engineering Pvt Ltd*[58] relied on the Kvaerner Cementation case and held that the court does not have the power to grant an anti-arbitration injunction arbitral tribunal is competent to rule on its own jurisdiction under section 16 of the arbitration act.

In *Chatterjee Petrochem Company & Ors. v. Haldia Petrochemicals ltd & Ors.*[59] the Supreme Court relying on the Patel Engineering case

[53] *Supra Note* 50.
[54] Section 5, Arbitration Act, 1996.
[55] *Ibid.*
[56] 2010 SCC OnLine Del 2236.
[57] (2012) 5 S.C.C. 214.
[58] 2016 S.C.C. Online P&H 19317.
[59] (2014) 14 S.C.C. 574.

held that when the plea is raised that before the court that the arbitration agreement is valid and enforceable, the parties are bound to refer the matter to arbitration. Thus, the court in this case rejected the suit to injunct the arbitration proceedings. However, the court has also observed that the civil court shall have the jurisdiction to engage the suit relating to the anti-arbitration injunction. In *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd*[60], the Supreme Court in this case overturned the ruling of the High Court and observed that injunction cannot be granted under section 45 of the Arbitration Act which deals with foreign arbitration. The court stated that the wordings of Section 45 states that the court shall refer the parties to arbitration unless the court finds the agreement as null & void, inoperative or incapable of being performed.[61] Therefore, the issues of fraud can be dealt with under arbitration. Further, the Supreme Court held that the civil court has an inherent jurisdiction under section 9 of the Civil Procedure Code and If any of the party has gone to the court on the ground that the agreement is null and void, the court is bound to hear the matter.[62]

In the case of *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors*[63], the Calcutta High Court has granted an anti-arbitration injunction. The court ruled three conditions (1) if an issue involves the validity of the arbitration agreement and the court is of the view that there exists no arbitration agreement between the parties. (2) If the arbitration agreement is null and void, inoperative or incapable of being performed. (3) if the foreign arbitration proceedings might be oppressive or vexatious or unconscionable.[64] These conditions apply to domestic arbitrations as well. This judgment has also clarified that power under Section 5 of the Act cannot be restrained under section 45 of the Arbitration Act and the civil courts shall have the power to grant anti-arbitration

[60] (2014) 11 S.C.C. 639.
[61] *Ibid.*
[62] *Ibid.*
[63] 2014 S.C.C. OnLine Cal 17695.
[64] *Ibid.*

injunctions to foreign arbitrations. Furthermore, in *McDonald's India Pvt Ltd. v Vikram Bakshi & Ors*[65], though the court had not issued an anti-arbitration injunction, however, the court had observed that the injunction can be granted in exceptional circumstances such as if the arbitration agreement is null & void, inoperative or incapable of being performed, invalid right from the beginning due to lack of consent between the parties for agreeing the disputes to arbitration or where the res-judicata is applied. Lastly, the recent Delhi High Court judgment of *Bina Modi v. Lalit Modi*[66] had refused to grant an anti-arbitration injunction because section 5 empowers the non-interference of the court and section 16 allows the arbitral tribunal to rule on its own jurisdiction. The judgment had cast doubt in the Indian jurisprudence because the previous rulings of the High Court and the Supreme Court as mentioned above had allowed the civil court to grant injunction in exceptional circumstances. The Delhi High Court had further observed that Section 41(h) of the Specific Relief Act "*bars the injunction order when equally efficacious alternative remedy*"[67] is available. However, this argument has created a confusion because if the arbitral remedy is rendered procedurally inefficient because of the jurisdictional issue, such a matter is bound to come into the court.

Thus, as argued above, it is perceived that in the Indian scenario, the granting of an arbitration injunction is a complex issue because, on one hand, it has been argued that civil courts can issue an anti-arbitration injunction in domestic and foreign arbitration where on the other hand, it has also been argued that the civil court cannot grant an injunction because the arbitral tribunal has the competency to rule on its own jurisdiction. Thus, the law on this point is unclear and the Supreme Court must pragmatically determine this aspect so that the object and scope of the Arbitration Act is upheld and the parties do not unnecessarily go to the court for the issuance of an injunction

[65] *2016 (4) ARBLR 250 (Delhi).*
[66] 2020 S.C.C. OnLine Del 901.
[67] Section 41(h), Specific Relief Act, 1963.

order.

CRITICAL ANALYSIS

The author has focused on three critical areas where anti-arbitration injunction becomes the major issue. *First*, the arbitrability of the subject matter. *Second*, the *Kompetenz-Kompetenz Principle*, and *Third*, cost-analysis of the anti-arbitration injunction.

The party to arbitration proceedings apply for an anti-arbitration injunction due to main reasons: a) the subject matter of the dispute is non-arbitrable, b) the absence of an obligation to arbitrate the dispute. The party may object that no arbitration agreement was ever formed between the parties, the disputed arbitration agreement had been discharged by frustration or breach, the applicant is only bound to arbitrate some disputes, etc.

Further, if the jurisdiction of the arbitral tribunal is challenged, the principle of Kompetenz-Kompetenz mandates that it is the arbitral tribunal that has jurisdiction to determine whether it has jurisdiction to decide on the substantive merits of the dispute. The author has explained below that how this principle is not an absolute rule and even anti-arbitration injunction can be granted at the very first stage if the objection to jurisdiction is raised and if the situation so permits.

Also, the author has critically analyzed the cost-efficient approach of anti-arbitration injunction if the arbitration is restrained while the court rules on the jurisdiction issue.[68]

- ***Analysis of Kompetenz-Kompetenz principle***

Furthermore, the argument that arbitration can rule on its own jurisdiction based on the *Kompetenz-Kompetenz* principle is not universal. The Supreme Court of India in *Chloro Controls India Pvt*

[68] *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 678.

Ltd v Severn Trent Water Purification Inc[69] outlined that there may be situations where the court may enquire into the very existence of the arbitration agreement. This principle has also been held in the famous English case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan.*[70] This principle has been interpreted differently for e.g., France and Switzerland does not impede the arbitral process where the common law countries such as India, USA, UK and even Singapore are of the view that in case of invalidity and inexistence of the arbitration agreement, an injunction can be granted if the situation so permits. However, if the jurisdictional issue is raised by the parties, the court may determine if the prima facie the arbitration agreement is valid, and if the answer is affirmative, the matter must be referred to arbitration by the courts because of the underlying principle of Kompetenz-Kompetenz.

- ***Arbitrability of the subject matter***

Another area where the parties usually ask for an injunction is the non-arbitrability of the subject matter.[71] Generally, arbitration is a private proceeding but where the public matter is involved and the dispute may have huge public ramifications[72], States prefer to hear disputes in the public domain.[73] The Indian Supreme Court in *Booz Allen* case has held that the matters relating to the *right in rem* are not arbitrable and such matters are not suited for private arbitration.[74] Those matters are *criminal offences, insolvency matters, tenancy matters governed by special statutes, matrimonial matters*[75], consumer disputes.[76] Further, if a contract is *void ab initio,* the

[69] (2013) 1 SCC 641.
[70] [2010] 3 WLR 1472 at [84].
[71] *Supra Note* 29.
[72] Stavros Brekoulakis Margaret Devaney, *Public-private arbitration and the public interest under English law*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 248/2016, SSRN-id2868024.
[73] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 4th edn, [London: Sweet & Maxwell, 2004] at p. 164.
[74] Booz Allen & Hamilton v. SBI Home Finance Ltd., (2011) (5) S.C.C .532.
[75] *Ibid.*
[76] *Ayyasamy v. A. Paramasivam & ors*, (Civil Appeal Nos. 8245-8246 of 2016, decided on 04.10.2016)

arbitration agreement cannot be sustained because its existence depends upon the validity of the contract.[77] Thus, every part of the void ab initio contract makes the arbitration clause invalid.[78]

- ***Cost-Analysis approach***

If we analyze the law on an anti-arbitration injunction, it is not correct to say that the anti-arbitration injunction inhibits the efficacy of arbitration. The granting of an anti-arbitration injunction is sometimes justifiable where the jurisdiction of the arbitral tribunal is in dispute and the issue is already raised in the court[79] because it would be cost-efficient for both the parties if the arbitration is restrained while the court rules on the issue of jurisdiction matter.[80] As observed by Justice Mann, "*it is cost-effective for the parties to determine the jurisdictional issue*"[81] because the party's objection to jurisdiction will come before the court sooner or later.[82] If the court finds that the jurisdiction is unavailable, the award passed by the arbitral tribunal will be set aside. Thus, if there is no voluntary consent between the parties to go into arbitration, the award anyway would be set aside by the court in the subsequent proceedings. Therefore, the early determination of the jurisdiction issue before the court shall be in the interest of the parties only.[83] Even New York Convention does not hold that national courts shall be forbidden from enjoining the parties to arbitration in case of absence of a valid arbitration agreement.[84]

[77] ARSS Bus Terminal Pvt. Ltd. v. Odisha State Road Transport Corporation, 2020 (I) ILR-CUT 38.
[78] Jaikishan Dass Mull v. Luchhiminarain Kanoria and Co., A.I.R. 1974 S.C. 1579; Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd., (1963) 3 S.C.R. 209; Khardah Company Ltd v. Raymon & Co. (India) Private Ltd, 1962 A.I.R. 1810.
[79] Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; as adopted on 21 June 1985) read with s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed).
[80] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds) (Kluwer, 1999) at para 678.
[81] Law Debenture Trust Corp plc v Elektrim Finance BV, [2005] 2 All ER (Comm) 476 at [36].
[82] AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2012] 1 WLR 920 at [81].
[83] Frédéric Bachand, *"Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction*?" (2006) 22 Arb Int'l 463 at 464.
[84] GARY B. BORN, CHAPTER 8: EFFECTS AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AGREEMENTS, INTERNATIONAL COMMERCIAL ARBITRATION, 2nd edition (© Kluwer Law International; Kluwer Law International 2014) pp. 1253 – 1316.

Therefore, an anti-arbitration injunction promotes arbitration as it gives both parties the proper sense of security in the arbitration system in the long run. Arbitration as a process is not undermined by the anti-arbitration injunction.

CONCLUSION & SUGGESTIONS

Anti-arbitration injunction has been treated as an appropriate remedy in common law countries such as India, the USA & UK where the situation so demands that the party will suffer irreparable loss and injustice if the injunction is not granted. However, the author does not agree with the view taken by the civil law nations such as France which limits the interference of the courts. The approach taken by the civil law countries and the common law countries contrasts with each other. It means that if one of the parties belong to civil law jurisdiction and the other party belongs to the common law jurisdiction and the seat of the arbitration is in civil law jurisdiction, the parties will not be able to enforce the injunction because the supervisory jurisdiction is the civil law nation which will enforce the arbitral award. The best way to resolve this issue would be to add the provision of an anti-arbitration injunction in the New York Convention and the Model Law Convention on International Commercial Arbitration. This would ease the arbitral process in the international arbitration and it will eliminate the confusion between the approach taken by both the civil law and common law countries. This will imply that the state parties to the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration will have to adopt the provision of anti-arbitration injunction in good faith in their domestic arbitration and parties can object to the arbitral process only on those grounds provided in the international convention. This will encourage the scope of international arbitration.

Further the author suggests that the anti-arbitration injunction should be issued only if *the subject matter falls outside the scope of arbitration, the arbitration agreement is null & void, inoperative or incapable of being performed*, *the foreign arbitral proceedings would*

be oppressive or vexatious, no valid consent for arbitration agreement, the seat of the arbitration is wrong or there is revocation of arbitration clause by the parties. This will apply to domestic arbitration as well. Unless the parties show these grounds, the court should restrict themselves from issuing an anti-arbitration injunction.

Thus, the author is of the opinion that an anti-arbitration injunction will not hinder the arbitration process rather it will make the arbitration process more sufficient, cost-effective and autonomous. It will enhance the enforcement of the arbitral award between the parties and parties at the later stage cannot refuse to enforce the arbitral award on the ground that there is no jurisdiction or arbitration agreement between the parties. As observed above, "*it is cost-effective for the parties to determine the jurisdictional issue*"[85], thus, anti-arbitration injunction is a useful tool in the judicial arsenal of remedies.

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[85] *Supra Note* 80.

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The Secretariat
Asian Institute of Alternative Dispute Resolution
No.28-1, Medan Setia 2, Bukit Damansara
50490, Kuala Lumpur, Malaysia
T: (+60) 3 2300 6032
Email: thesecretariat@aiadr.world
URL: https://aiadr.world