TO CONSIDER OR NOT? THE COMPLICATED CASE OF BUSINESS AND HUMAN RIGHTS IN INDIAN ARBITRATION REGIME

*Aditya Mishra**

As human beings become increasingly aware of some inalienable human rights that everyone possesses regardless of their nationality, the voice for including these rights in all domains of life is becoming louder with each passing year. One such domain is the workplace, and human rights at work must be upheld at all costs due to increasing cases of work hazards, accidents, unsafe environments, unreasonable pay and negligible or low standards of minimum wage and working hours, among other atrocities that are afflicted upon low income and developing countries. There have been minimal remedies and recourse available to victims of human rights violations at the workplace. There was a need for a quick and effective forum apart from domestic courts which usually have limited jurisdiction and a conservative approach. Hence the demand for business and human rights arbitration has risen recently. Due to the contradicting nature of the subject matter of human rights and arbitration, such a concept faces backlash from states and other organs therein. This paper shall look into the contemporary and potential roadblocks in the intersectionality of Business, Human Rights and Arbitration to examine if it is viable and if there are any alternatives or solutions.

***Key Words**: Business & Human Rights, Indian Arbitration, Public Policy, ICSID Convention.*

TABLE OF CONTENTS

I. INTRODUCTION

A preliminary bar to arbitration consists in determining whether the subject-matter of the arbitration is itself arbitrable or not. If a disagreement can be brought to arbitration, it is arbitrable (i.e., if it is not a type of dispute that has been specifically reserved for resolution by domestic courts notwithstanding an arbitration agreement between the parties). Due to the

*Aditya Misra is a final year B.A. LL.B. student at Jindal Global Law School.

larger public interest engaged in the issue's examination or because the dispute involves the rights of certain individuals who need more state protection, national laws typically restrict access to arbitration for certain types of disputes. Both during and after an arbitration, the issue of arbitrability may be brought up. Under Section 34(2)(b)(i) of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), an arbitral award can be aside if the subject matter of the dispute is itself something that could not be settled by arbitration under the prevailing law of the time.[1] However, the issue of arbitrability is not dealt with under the Arbitration Act. This issue of arbitrability has been dealt with by the Supreme Court in various decisions.[2]

Some statutes do specifically exclude the applicability of the Arbitration Act. For example, under Section 42(8) of the Code on Industrial Relations, 2020, it is clearly stated that when a voluntary reference is made to arbitration by a worker and an employer because of an industrial dispute or a perceived industrial dispute, such arbitration would not be subject to the provisions of the Arbitration Act.[3]

The International Centre for Settlement of Investment Disputes[4] ("ICSID") is one international convention that was established for settling disputes involving international investments between the foreign investor and the host State. In the context of India and the Model Indian BIT,[5] the ICSID Convention is one of the authorities under which a tribunal can be constituted to settle disputes between a foreign investor and India. Thus, for settling disputes pertaining to human rights violations by the business, it must be seen whether such disputes are arbitrable as per Indian law in the first place and whether the ICSID Convention would allow for such disputes to be settled.

The 1958 New York Convention, to which India is a member, provides that an arbitral judgment may be refused enforcement on the grounds that it conflicts with the country's public policy.[6] Public policy is not defined in either the New York Convention or the Model Law, which many jurisdictions have used as the foundation for their own domestic arbitration legislation. The New York Convention's Article V(2)(b) refers to "the public policy of that country," which denotes a decision on what "public policy" means from the standpoint of the jurisdiction where recognition or enforcement is sought. Both Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law use the same language when referring to the public policy of the state where a set-aside application has been filed and where recognition or enforcement is

[1] Arbitration and Conciliation Act 1996 (A&C Act), s. 34.

[2] The Supreme Court's 2011 judgment in *Booz Allen* forms the foundation for any discussion on the question of arbitrability in India as it laid down a test for determining whether a subject-matter of a dispute is capable of arbitration in India or not (the "**Booz-Allen Test**"), *see* Booz Allen v. & Hamilton v. SBI Home Finance [2011] 5 SCC 532.The Booz-Allen Test of arbitrability was examined by the Supreme Court in the context of allegations of fraud in **Ayyasamy** where it held that, if the jurisdiction of the ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified/special court or tribunal then such a dispute would not be capable of resolution by arbitration as a matter of public policy, *see* A. Ayyasamy v. A. Paramasivam and Others A. Ayyasamy v. A. Paramasivam and Others, [2016] 10 SCC 386.In 2016, in **Vimal Kishor Shah** the Supreme Court added a seventh category to the list of disputes that could not be arbitrated – disputes arising out of a trust deed under the Indian Trust Act, 1882, *see* Shri Vimal Kishor Shahv. Jayesh Dinesh Shah & Others, [2016] 8 SCC 788.

[3] The CIRP (once commenced) is not arbitrable (at least during the pendency of the insolvency resolution process), *see* Code on Industrial Relations 2020, s. 42. The Supreme Court in *Ayyasamy* has observed that 'insolvency and winding-up matters' are not arbitrable. The order of moratorium is valid until completion of the CIRP. The Competition Act does not provide for arbitration in case of antitrust law disputes, *see Ayyasamy* (n 2)

[4] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

[5] Model Text for the Indian Bilateral Investment Treaty [2016].

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958] 330 UNTS 38.

sought. As a result, through law or jurisprudence, states have adopted and developed their own public policy formulations. Unsurprisingly, it appears that the underlying economic, religious, social, and political norms that each state uses to construct its legal system also influence how public policy is defined in that state. The fundamental principles of each country's legal system or its own unique domestic norms of morality, fairness, and the public interest are used by courts across the world to examine judgments. This inevitably makes public policy a somewhat fluid idea that must be evaluated based on the particular facts of each instance. Historically, India has struggled to harmonise its public policy definition and standard with existing international norms. Globally, governments have claimed that their international public policies are more constrained than their domestic ones. In India's bid to establish itself as an arbitration hub by granting finality to arbitration awards and limiting judicial intervention, there has been a trend toward adopting a more restrictive definition of public policy for refusing to enforce foreign awards in international commercial arbitrations. However, the path to this realisation has been lengthy and treacherous.

Unlike arbitrability, 'Public Policy' is unpredictable in nature with more scope of judicial intervention and interpretation. The bounds of arbitrability are either known by the parties before initiating an arbitration procedure or at least it is predictable, however public policy is infamously called an 'unruly horse' because of its unpredictability and the fact that it can overturn an entirely successful arbitration procedure post conclusion.[7] This paper shall discover the hurdles to the implementation of business and human rights arbitration in India. The paper shall first examine the arbitrability of such disputes in light of the Vidya Drolia judgment and the international treaties and conventions. Thereafter, the paper analyses how it stands against the 'public policy' of India and various tests birthed out of judicial activism. Lastly, the paper shall look into how the rights of investors could be secured and lastly, we shall conclude with a summary of the contentions and possible solutions that were discovered throughout the research.

II. ARBITRABILITY OF DISPUTES IN INDIA

Arbitrability indicates whether a dispute is "arbitrable", *i.e.*, capable of being settled by arbitration. Although arbitration is a private proceeding, the recognition and enforcement of a particular award may have an impact on any State involved. Certain matters may involve "public" rights and concerns, or interests of third parties, and in such circumstances, the resolution of disputes via a private proceeding may be contested. One problem, whether a specific disagreement can be brought to arbitration or if such conflict is solely reserved for court adjudication, was not addressed in the current round of revisions to the Arbitration & Conciliation Act, 1996. The Arbitration Act's lack of an explicit clause is most likely the cause of this. Certain conflicts "may not be referred to arbitration," according to Section 2(3) of the Arbitration Act. Additionally, if "the subject-matter of the dispute is not capable of resolution by arbitration under the Law," Sections 34(2)(b) and 48(2) provide for setting aside and refusal to enforce an arbitral ruling. As a result, it appears that the Indian judiciary's interpretive authority was left to handle this issue, which occasionally produced inconsistent decisions.

In *Booz Allen* v. *& Hamilton v. SBI Home Finance*, the Supreme Court held that generally, all disputes relating to rights in *personam* are arbitrable, while all disputes arising from rights in rem are required to be dealt with in the public fora by the courts and tribunals

[7] Mahajan P, "The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India" [2015] SSRN Electronic Journal.

since such disputes are not suited for private arbitration.[8] The Court proceeded to then discuss what is meant by rights in rem and what are rights in *personam*.[9]

The Court explained that rights in rem are those rights that are exercisable against the world at large.[10] In contrast, rights in *personam* are those rights that are protected solely against specific individuals. Subsequently, actions in *personam* refer to actions that determine the rights and interests of the parties themselves in the subject matter, while actions in rem refer to actions that would determine the rights and interests of all persons who may make claims in the property in question.[11]

Importantly, the Court in Booz Allen also held that disputes relating to subordinate rights in *personam* that are arising from rights in rem are arbitrable. While *Booz Allen* was followed by several judicial decisions pertaining to arbitrability,[12] these decisions usually dealt with the question of whether a particular subject-matter was arbitrable or not. Most recently, in *Vidya Drolia*v. *Durga Trading Corporation*, the Supreme Court authoritatively dealt with the issue of arbitrability of disputes in India.[13]

The Supreme Court in Vidya Drolia, after examining several decisions of the Supreme Court and other legal work, laid down the following test for determining whether some particular subject-matter is not arbitrable:

1. When the cause of action and the subject-matter relate to disputes arising out of rights in rem and which do not pertain to subordinate rights in *personam* that are arising from rights in rem.
2. When the cause of action affects the rights and interests of third parties; have *erga omnes* obligations; require centralised adjudication and mutual adjudication would not be suitable
3. When the cause of action and subject-matter of the dispute is related to the sovereign and public interest functions of the State and in such circumstances, mutual adjudication is undesirable
4. When the subject-matter is expressly stated to be non-arbitrable by a Statute.[14]

The Court clarified that these are not water-tight compartments and each category so enumerated can overlap with another.[15] But when these categories are applied and considered together then, the Court believed, the issue of whether the subject-matter is arbitrable can be answered to a great degree.[16]

Thus, through their decision in Vidya Drolia the Supreme Court has attempted to make the issue of arbitrability of disputes easier to understand and to streamline the process more. This is preferable over the previous regime, that was vaguer and in which the arbitrability of the subject-matter was decided on a case-to-case basis. The Court provided the much-needed clarity to the escalating discussion around the arbitrability of disputes based on their subject matter in the Indian context by establishing a clear checklist to evaluate whether a specific

[8] *Booz Allen* (n 2).
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] *Ayyasamy* (n 2); *Vimal Kishor Shah* (n 2).
[13] Vidya Drolia v. Durga Trading Corporation [2021] 2 SCC 1.
[14] Ibid.
[15] Ibid.
[16] Ibid.

dispute can be the topic of an arbitration. Although the decision addressed a number of problems, such as the arbitrability of tenancy disputes, it is significant for its findings about the peculiar context of the arbitrability of fraud in India. The Court reiterated the presumption in favour of arbitrability in Vidya Drolia, especially in cases involving fraud. The ruling has finally dispelled the long-held notion that a claim of fraud would provide a sufficient basis for refusing to send a matter to arbitration. The SCI set the ground for private adjudication of statutory claims in India by explicitly recognising the arbitrability of subordinate rights in personam deriving from proceedings in rem. By using this standard, the SCI overturned *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia (2017)* and determined that conflicts between landlords and tenants covered by the Transfer of Property Act are arbitrable in India.

With this test laid down in Vidya Drolia, it becomes easier to determine address the issue of arbitrability of human rights concerns in Bilateral Investment Treaties ("BITs").

III. JURISDICTION UNDER THE ICSID CONVENTION

Under Article 25 of the ICSID Convention, the tribunal constituted under the ICSID Convention would have jurisdiction on the basis of whether the dispute involves an investment and whether the dispute relates directly to said investment.[17] For the purposes of this paper, it would be pertinent to determine whether or not the dispute in question is directly related to the investment in the first place.

As such, in the context of human rights violations and abuse, it must be seen whether it can be claimed that such disputes are arising directly out of the investment in question.[18] For interpreting this provision, the articles of the Vienna Convention on the Law of Treaties, 1969 ("VCLT") can be resorted to.

Article 31 provides for the primary modes of interpretation of BITs.[19] According to Article 31(1), a treaty must be interpreted in good faith and in accordance with the ordinary meaning of the words used in the treaty in the context of its object and purpose. For identifying the context of the purpose of the international treaty, Article 31(2) states that this would include the preamble of the treaty.[20] Article 31(3) also refers to other instruments entered into to which the provisions of the treaty in question apply, subsequent state practice or other relevant rules of international law applicable to the relations between the parties.[21]

Ordinarily, according to the Cambridge Dictionary, the word "directly" means "without anything else being involved or in between".[22] This would mean that for something to be directly related to the investment, there would have to be nothing impeding the connection between the dispute and the investment. The Preamble of the ICSID uses the phrase "in connection with such investment" rather than the word "directly" that is used under Article

[17] International Centre for Settlement of Investment Disputes Convention (ICSID Convention) [1966] 575 UNTS 159, art 25.
[18] Guiding Principles on Business and Human Rights, art 13.
[19] Vienna Convention on the Law of Treaties (VCLT) [adopted 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331, art 31.
[20] Ibid.
[21] Ibid.
[22] University of Cambridge, Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/directly>accessed November 25, 2021.

25.[23] In this context, the word "directly" could be interpreted in a slightly wider manner than requiring a strict connection between the dispute and the investment.

Article 31(3)[24] is of great importance in the Indian context since the Model Indian BIT makes reference to the ICSID Convention and can be used to interpret the ICSID Convention[25] itself. This is compounded by the presence of other model BITs that also make reference to human rights. For example, the 2019 Model Netherlands BIT makes several references to the commitment of the Contracting Parties to various international instruments relating to human rights and the obligations imposed on investors by the UN Guiding Principles on Business and Human Rights.[26] In fact, the arbitrators to be appointed under Article 20 of the Model Netherlands BIT are expected to be well versed in the subject of human rights.[27]

The UN Human Rights Council established the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights in 2014 to elaborate an internationally mandated instrument that would regulate the activity and behaviour of transnational corporations with respect to human rights.[28] The fact that such an intergovernmental working group is attempting to devise an international instrument of this nature shows that there may be sufficient agreement among the members of the international community that corporations must also adhere to standards of human rights.

The ICJ In its advisory opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* held that when interpreting a treaty, the time when it is being interpreted and keeping in mind all the developments in law that may have taken place should be kept in mind while interpreting its provisions.[29] Additionally, the International Law Commission in its report on the fragmentation of international law, believes that Article 31(3)(c) of the VCLT encapsulates the principle of "systemic integration". This means that the various international institutions should not be treated as being completely independent of each other and that the legal regime should be interpreted harmoniously in order to give effect to the larger public interest.

The impact that business can have on human rights has also been officially recognised by UN in their Guiding Principles on Business and Human Rights, which was formally accepted by the UN Human Rights Council in Resolution No. A/HRC/17/31.[30] These have culminated in the Hague Rules on Business and Human Rights Arbitration, which is a modified version of the United Nations Commission on International Trade Law Rules on Arbitration that are to applicable in case of arbitrations involving violations of human rights by businesses.

Given these developments and the fact that all treaties must be interpreted in the context of modern developments, it would be difficult to continue to interpret the word "directly" under Article 25 of the ICSID Convention to exclude human rights violations.

---

[23] *ICSID Convention* (n 4).
[24] *VCLT* (n 19).
[25] *ICSID Convention* (n 4).
[26] Netherlands Model BIT 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>accessed November 25, 2021.
[27] Ibid.
[28] UNHCR, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights' [14 July 2014] A/HRC/RES/26/9.
[29] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory opinion) [1971] ICJ Rep 1.
[30] UNHRC, 'Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' [21 March 2011] A/HRC/17/31.

These developments and the tools of interpretation provided by the VCLT clearly show that any human rights abuse or violation by the foreign investor in the host state would be directly connected to the investment. If it was not for the investment, then such violation in that factual matrix would never have occurred. Thus, under the ICSID Convention, issues of human rights violations by businesses can be settled by arbitration and it would be within the jurisdiction of any tribunal constituted under the ICSID Convention to decide such matters.

IV. INTERPRETING THE BITS AND THE ICSID CONVENTION

While the BITs entered into between countries do provide protection to the investors by imposing obligations and duties upon the State, they also do impose reciprocal obligations upon the investors. For example, under the Model Indian BIT, 2016 Article 11 clearly lays down that a foreign investor must adhere and respect the laws of India, including the laws on tax.[31] Further, under Article 12 of the Model Indian BIT it has been recognised that issues pertaining to labour and human rights do form part of the Corporate Social Responsibility of any foreign investor.[32] As such, it has been implicitly recognised that Corporate Social Responsibility is linked to issues of labour and human rights concerns.

It must also be noted that these BITs, as international instruments, should not be interpreted in a manner that keeps them completely separate to issues of human rights violations. The BITs also clearly demarcate the limits on the jurisdiction of the tribunals constituted under it for the settlement of disputes. As such, if the BIT can be interpreted in a manner that supports the settlement of disputes pertaining to human rights violations, then the tribunal formed under it would also have jurisdiction.

This was noted in the case of *Urbaser* v. *Argentina,* wherein the counterclaim of the Respondent that the Claimant company had a responsibility to ensure clean water because the wording of the BIT allowed for such counterclaims to be made.[33] While the counterclaim was ultimately unsuccessful, it still shows that if the BIT is phrased in a particular manner, such claims can be made.

In the context of the Indian BIT we can apply the same interpretational tools to reach a similar conclusion as was reached with respect to the ICSID Convention. The Preamble of the Model Indian BIT clearly states that one of the goals of the BIT is "sustainable development". The phrase "sustainable development" is not simply an ordinary phrase that has been used by the Indian government in formulating the Model BIT and reference should also be made to the UN Sustainable Development Goals.

The UN Sustainable Developments Goals should be referred to because they are the culmination and the product of several rounds of negotiations and international declarations made by the international community over the years.[34] These are essential goals that must be accounted for by each member of the international community and their existence can be considered to be a part of customary international law given that the UN represents the interests of the international community as a whole and these goals have arisen out of international instruments such as the Rio Declaration of 1992, the World Summit on Sustainable

[31] *Model Indian BIT* (n 5).
[32] Ibid.
[33] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Award) (ICSID Case No. ARB/07/26).
[34] United Nations Department of Social and Economic Affairs, 'Sustainable Development Goals' <https://sdgs.un.org/goals>accessed November 25, 2021.

Development that was adopted in Johannesburg in 2002 and other works of the International Labour Organisation and other such international organisations.[35]

One of the crucial Sustainable Developments Goals is to 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'.[36] One of the targets within this goal is to provide better working conditions to all workers and ensure that the working environment is safe and secure for all.[37]

In fact, the Indian government itself has released its own National Guidelines on the Economic, Social and Environmental Responsibilities of Business.[38] Principle 3 of these National Guidelines relates to the welfare of employees throughout the supply chain.[39] Principle 4 refers to the responsibility of businesses to all stakeholders. Importantly, the word stakeholders is wider than the word shareholder and indicates that businesses in India have a responsibility to the society at large and any other groups or individuals who are affected by the business.[40]

In this context, the Preamble of the Model Indian BIT and the reference to "sustainable development" should necessarily involve an interpretation that involves the understanding of "sustainable development" with reference to the aforementioned.

One of the concerns with the Model Indian BIT is that the phrasing of Article 13 does not provide for arbitration for any dispute arising out of the investment.[41] It specifically states that an investor can only bring a claim in situations where an obligation of the State under Chapter II has been violated (except under Articles 9 and 10).[42] There is no mention of whether the State can raise a counter-claim if an investor is the one violating a law of India.

For example, if a business established in India is engaging in contract labour or the workers are working in conditions of modern slavery and India decides to terminate the license, the business may choose to initiate dispute resolution under the Model Indian BIT (after satisfying the pre-conditions). Under Article 23.2, the investor has the burden for establishing that jurisdiction exists; however, under Article 13.4, an investor cannot initiate arbitration if the investment has been made through illegal mechanisms.[43]

Given that the investor has to essentially show that they are approaching the dispute resolution mechanism with clean hands, the Indian government would have the opportunity to show that they acted in the manner they did because of their commitment to protecting human rights. This could be done to dispute the jurisdiction of the tribunal since the investor has to show that the tribunal has jurisdiction and Article 13.4 bars dispute resolution when the investor has made the investment through illegal means.

[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ministry of Corporate Affairs, National Guidelines on the Economic, Social and Environmental Responsibilities of Business 2018, https://www.mca.gov.in/Ministry/pdf/DraftNationalGuidelines2018_20062018.pdf accessed November 25, 2021.
[39] Ibid.
[40] Ibid.
[41] *Model Indian BIT* (n 5).
[42] Ibid.
[43] Ibid.

Additionally, the absence of an explicit bar to the ability of India to raise counterclaims could imply that they have allowed the tribunal to decide whether counterclaims can be raised.

Along with these developments and the inclusion of systemic integration in light of the provisions of the VCLT, it can be argued that a counterclaim can possibly be raised by India if the foreign investor has violated domestic law. In the absence of a bar to raising of counterclaims and the ability of the State to raise a dispute against the investor, there would be no effect of Article 11 and 12 if India cannot act upon non-compliance with these articles. Therefore, human rights issues can potentially be decided as a counterclaim by the tribunal under the Model Indian BIT.

V. THE OBSTACLE OF VIDYA DROLIA AND ARBITRABILITY

Hypothetically, if an arbitration under the Model Indian BIT finds in favour of India due to some human rights violation by the foreign investor, they would be able to apply for setting aside this award under Section 48 of the Arbitration Act. This is because Article 27.5 specifies that any claim shall be considered to be one that has arisen out of a commercial relationship in accordance with the New York Convention.

Vidya Drolia explicitly excludes claims arising out of rights in rem. While human rights abuses can be considered to be ones that would affect society at large, under the Model Indian BIT the claim is only between the Indian state and the investor. Additionally, under Article 27.1 of the Model Indian BIT, it is explicitly stated that the award passed would only be binding as between the two parties and in respect to that particular case.

Essentially, by the operation of Article 27.1, any award arising out of dispute settlement under the Model Indian BIT has no value as precedent and is only binding between the parties in question and is limited to that specific factual matrix. With there being no value as a precedent, the award so passed cannot be said to be an award in rem i.e., an award that affects society at large. The award would also only affect India and the foreign investor and nobody else. As such, the award would be an award in *personam*.

An award in *personam* cannot be granted for claims arising out of rights in rem due to the nature of the claim and the procedural restrictions involved in such adjudication. Arguably, this would then satisfy the requirement under the first limb of the test laid down in Vidya Drolia i.e., that the dispute deals with subordinate rights in *personam* arising out of rights in rem. This is because the rights involved only affect and are enforceable against India and foreign investor rather than the whole world. The right to raise a claim under the Model Indian BIT is also limited to certain violations stipulated in the BIT.

With regards to the second limb i.e., the dispute affects the rights of third parties or have *erga omnes* obligations, it can be argued that this requirement would also be satisfied for similar reasons. In a potential human rights counterclaim, the Indian state has assumed responsibility for the violations caused to third parties and is not limiting the use of the fact of such violation as a dispute but is not raising such dispute in the name of the workers. It simply cannot raise such a dispute but can only challenge the initiation by the investor.

As such, the dispute in question is not one that is barred by virtue of the test laid down in Vidya Drolia and it is only the potential counterclaim that potentially relates to the rights of third parties. But even if such a dispute is disallowed because of the counter-claim it does not extinguish the right of third parties since the award is only binding on the investor and the Indian state.

However, this will be the most significant hurdle in allowing for arbitration on such matters and it will have to be seen how the Indian courts deal with such awards in light of Vidya Drolia.

VI. THE 'PUBLIC POLICY' CHALLENGE

India is among the handful of nations that, under the Arbitration and Conciliation (Amendment) Act, 2015, defines public policy statutorily. Even though some jurisdictions define public policy as international public policy,[44] Courts in India have determined that since there is no viable concept of international public policy, it should be regarded as the doctrine of public policy as interpreted by Indian courts.[45] India has statutorily incorporated fraud, corruption, fundamental policy of Indian law, and essential ideals of justice and morality in its definition of public policy. While public policy lacks a definition and its components are defined statutorily in Section 48(2)(b)(ii), additional components have been adequately hypothesised via judicial interpretation. In light of the above reasoning, the following practical conclusions concerning public policy are possible. These will be useful in evaluating an application seeking to evade the execution of a foreign judgment.

The Supreme Court held in *Vijay Karia & Ors.* v. *Prysmian Cavi E Sistemi SRL* ("Vijay Karia") that, while courts may exercise discretion on certain grounds for refusing to implement a foreign award, courts lack discretion on the grounds of fraud, corruption, the fundamental policy of Indian law, fundamental notions of justice and morality.[46]

The term 'fundamental policy of Indian law' implies a transgression that transcends basic statutory violations. In Renusagar it was concluded that Article V(2)(b) of the New York Convention, which replaced the Geneva Convention of 1927, excluded the reference to "principles of law of the nation on which it is sought to be relied upon". Due to the fact that the expression "public policy" encompasses the area not covered by the words "and the law of India" that pursue the interpretation, it was held that mere violation of the law does not constitute a violation of public policy and that something beyond the violation of the law is requisite.[47] Recalling its decision in Renusagar, the Apex Court stated in Vijay Karia that a violation of Indian law's fundamental policy must include "a transgression of certain principles of law or statute that is so essential to Indian law that it cannot be compromised." "Fundamental Policy" refers to the fundamental ideals guiding India's public policy as a country, which may be expressed not just via legislation but also through time-honoured, sacred principles upheld by the Courts."[48] In *Shri Lal Mahal Ltd* v. *Progetto Grano SpA* ("Shri Lal Mahal"), it was decided that execution of a foreign award would be denied under section 48(2)(b) only if it would be adverse to:(1) the fundamental policy of Indian law, (2) India's interests(inspired from Renusagar), or (3) justice or morality.[49]

And while the 2015 amendment explicitly excluded terms like "national interests of India" to curb an expansionist interpretation but even after the amendment, two judgments from 2018 namely, V*enture Global Engg LLC* v. *Tech Mahindra Ltd.*[50] and *Sutlej Construction*

[44] On this point Article 1514 of France's Civil Procedure Code only mandates compliance with international public policy, *see* Civil Procedure Code, France, art 1514.
[45] Renusagar Power Co. Ltd v. General Electric Co [1994] Supp (1) SCC 644.
[46] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL [2020] SCC OnLine SC 177.
[47] *Renusagar*(n 45).
[48] *Vijay Karia* (n 46).
[49] Shri Lal Mahal Ltd v. Progetto Grano SpA [2014] 2 SCC 433.
[50] Venture Global Engg LLC v. Tech Mahindra Ltd. [2018] 1 SCC 656.

Ltd v. *State (UT of Chandigarh)*[51] adopted an expansionist interpretation of 'public policy'. However, the 2019 case of *Ssangyong Engg & Construction Co Ltd* v. *National Highways Authority of India*[52] ("Ssangyong") again upheld the limited approach while interpreting the 2015 amendment. But then again in the recent 2020 decisions of *National Agricultural Co-operative Marketing Federation of India (NAFED)* v. *Alimenta S.A.* ("NAFED"),the SCI ruled that contravention of export policy contravenes the public policy of India thereby using an expansive approach to interpret 'public policy'.[53] In *Government of India* v. *Vedanta Limited*, the Court used the Renusagar case's definition of public policy, holding that 'public policy' included fundamental policy, India's interests, fairness, and morality.[54]

Additionally, the Court determined that the tribunal's inaccurate reading of a contractual clause cannot be used to reverse the decision on the merits. The Indian jurisprudence established by a plethora of judgments by the apex court of India clear points towards the assertion that interpretation of 'public policy' can be expansive or limited based on the court's discretion and there is no precedent that is being followed.

VII. ARE HUMAN RIGHTS IN BUSINESS AGAINST INDIA'S 'NATIONAL INTEREST'?

India is one of the fastest developing countries in the world and nearly 7.1% of the population is unemployed.[55] It is within this context that India's receptivity and resistance to global human rights norms must be comprehended. In monetary terms, the majority of these least developed nations lack money, a technical foundation, manufacturing capability, and access to foreign markets. Additionally, these economies face various structural impediments, including stratification (caste systems), tribalism, the widespread disparity in wealth/income division, demographic constraints, tribalism, and patriarchal socio-political institutions. These impediments limit the range and boundaries of policy options accessible to local policymakers.[56] Globalisation does not imply uniformity or democratic control over multinational companies (MNCs), the International Monetary Fund (IMF), and the World Bank, which have seldom if ever, been subjected to democratic accountability norms. Democracy and economic development are inextricably linked, as is the relationship between economic globalisation and the preservation of social and economic rights. It's understandable why. Globalization of the economy has exacerbated inequality both inside and across nation-states.

Distributional issues, unequal access, and disparate access to information have exacerbated tensions within emerging nations. Privatization and deregulation of markets in Latin America have resulted in increased poverty, exacerbated inequality, more crime, and decreased safety, according to a growing body of research.[57]

Effective execution of "productive" development strategies, growth-oriented fiscal policies, and public-private collaboration have shown the benefits of a pragmatic welfare state.

---

[51] Sutlej Construction Ltd v. State [2018] 1 SCC 718.
[52] Ssangyong Engg & Construction Co Ltd v. National Highways Authority of India [2019] 15 SCC 131.
[53] National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A. [2020] SCC Online SC 381.
[54] Government of India v. Vedanta Limited [2020] SCC Online SC 749.
[55] Centre for Monitoring Indian Economy, "Unemployment Rate in India" 2021.
[56] Mahmood Monshipouri, 'Human Rights Conditions in the Third World: Historical Realities and Prospects in the 1990s' [1992] 9 J. THIRD WORLD STUD 80.
[57] Malley R, 'The Third Worldist Moment' [1999] 98 CURRENT HIST 359,369.

In this state, policies are carried out to the greatest degree feasible "by private initiative rather than governmental ownership, and via market mechanisms rather than administrative restrictions."[58] To this purpose, the government has a critical role in both promoting the private sector and harnessing its "aggressive pursuit of profits" for the greater good of the country. This, in turn, needs an expansion of state capabilities, not a reduction in state capacity.[59] Transnational companies' (TNCs) and multinational firms' growing economic and political weight has hindered governments' attempts to pursue policies independent of commercial interests. Given that governments are increasingly competing to lure MNCs, the balance of power has undoubtedly shifted in favour of MNCs and away from governmental bodies. States, for example, have been driven to reduce labour and environmental requirements, as well as the taxes demanded by foreign corporations. As a result, a downward, standard-lowering bidding cycle dubbed the "race to the bottom" has developed.[60] Fears that growing pressures in industry are dragging standards into a race to the bottom are naturally common in both the developing and industrialised worlds. International competition is a danger to job security, reduces wages, and erodes environmental and labour norms. Economic liberalisation may encourage nations to loosen labour and human rights rules in order to attract corporations by lowering their cost of doing business. In what amounts to a "race to the bottom," TNCs across a variety of sectors often located near or in low-income neighbourhoods. TNCs in extractive industries locate where the resources are, and may be forced to do so in certain sectors due to infrastructure and technical requirements. With little or no oversight over their actions and no motivation to comply with labour and environmental policies, TNC operations have wreaked havoc on rural areas and subsistence patterns.[61]

The IMF suggests countries to bring in reforms which usually includes deregulation, privatization and export-oriented production and compel states to ease the labour standards, among other regulations, to attract foreign direct investment.[62] The world bank releases the “ease of doing business” rankings each year[63] which, as the name suggests, calls for labour market deregulation[64] and indirectly promotes long working hours, the minimum wage level, social protection not to be granted to women workers working at inferior wages, elimination of protection against contract termination or unfair dismissal and absence of unemployment benefits.[65] India has thus understood that FDI will improve the prospects of employment[66] and accordingly deregulated its labour market. This indicates that a ‘lack of human rights in business’ might be in the ‘national interests’ of India. And in a court of law, this increase in

[58] Ibid.
[59] Gore C, ‘The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries’ [2000] 28 WORLD DEV. 789, 797.
[60] J. Millen &T. Holtz (ed), *Dying for Growth, Part I: Transnational Corporations and the Health of the Poor* (Common Courage Press 2002).
[61] Ibid
[62] Pritam Singh, ‘IMF's Autocritique of Neo-Liberalism?’ [2016] 51 Economic and Political Weekly <https://www.epw.in/journal/2016/32/commentary/imfs-autocritique-neo-liberalism.html> accessed November 25, 2021.
[63] The World Bank, ‘Business Enabling Environment (BEE)*’ <https://www.doingbusiness.org/en/rankings>accessed November 25, 2021.
[64] Bakvis P, ‘How the World Bank and IMF Use the Doing Business Report to Promote Labour Market Deregulation in Developing Countries’ [2006] ICFTU <https://library.fes.de/pdf-files/gurn/00171.pdf> accessed November 25, 2021.
[65] McCormack G, ‘Why ‘Doing Business’ with the World Bank May Be Bad for You’ [2018] 19 European Business Organization Law Review 649.
[66] Mishra R and Palit S, ‘Role of FDI on Employment Scenario in India’ [2020] 8 International Journal of Recent Technology and Engineering 1481.

employment that FDI brings can also be argued as a step towards the provision of human rights. The core argument being that unemployment reduction, poverty alleviation, basic needs provision, and disease prevention and treatment must all be seen as integral parts of an integrated process of safeguarding and advancing human rights.

In the case of *Harris Adacom Corporation* v. *PercomSdnBhd*,[67] the high court of Malaysia held that while considering enforcement of an arbitral award, the Malaysian law, moral values and governmental policy must be looked at. In this case, enforcement of an award involving an Israeli company was deemed to be against public policy because trade with Israel is prohibited according to Malaysian public policy.[68] *United World* v. *Krasny Yakor*[69] is the most vivid case involving a breach of Russian public policy. United World was rewarded US$37,600 against Krasny Yakor in this case, and the Russian court of the first instance allowed enforcement. However, the Federal Arbitrazh Court of the Volgo-Vyatsky Region reversed the enforcement order. The cassation court determined that enforcing the arbitral award would result in the bankruptcy of Krasny Yakor (a state-owned enterprise), which would have a detrimental effect on the social and economic stability of Nizhi Novgorod, and thus on the Russian Federation as a whole, because Krasny Yakor manufactured products critical to the state's security and national security. As a result, such damages were ruled to be against public policy. German courts have determined that bankruptcy cases are governed by obligatory German law and have consequently invalidated arbitral decisions that violate those norms.[70] Similarly, substantial breaches of German foreign exchange laws, competition law, and human rights were determined 'part of mandatory German rules'.[71] In a 1997 case, *USA Productions and Tom Hulett & Associates* v. *China Women Travel Service*, the Chinese Supreme People's Court refused to enforce an arbitral award on the grounds that heavy metal music was "incompatible with China's actual conditions and thus incompatible with China's socio-public interests."[72] In Indonesia, the courts construed public policy widely as a barrier to enforcement. Frans Winarta said in a 2015 report to the International Bar Association's Subcommittee on Recognition and Enforcement of Awards that the Indonesian courts' definition of a breach of public policy is as follows: -

"i. a breach of Indonesia's applicable laws and regulations;

ii. jeopardising Indonesia's national interest, which includes the local economy; and

iii. a breach of Indonesia's sovereignty."[73]

Thus, it can be seen that courts have construed national interests in their own way and there is no same definition, but national interests have been, at times, favoured above enforcement of an arbitral award. Thus, if an expansive and activist role is adopted by an Indian court, they could deny the enforcement of a business and human rights award on grounds of it violating Indian public policy.

---

[67] Harris Adacom Corporation v PercomSdnBhd [1994] 3 MLJ 504 HC.
[68] Equitas limited v Allianz General Insurance Company (Malaysia) Berhad [2009] MLJU 1334.
[69] Fed. Com. Ct. of Volga-Vyatka Cir. [2003] Case No. A43-10716/02-27-10isp.
[70] UNCITRAL Guide p. 246, citing Oberlandesgericht [OLG] Karlsruhe [2012] 9 Sch 02/09.
[71] Ibid., citing judgment Oberlandesgericht [OLG] [2005] 11 Sch 01/05.
[72] Chen H, Bao H and Zhang T, 'Piercing the Veil of Public Policy in the Recognition and Enforcement of Foreign-Related Awards in China' [2016] 07 Beijing Law Review 23.
[73] Frans H. Winarta, 'Indonesia Country Report on Public Policy for IBA APAG' [IBA, 2015] <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx>accessed November 25, 2021.

However, it must be noted that although Indian courts have frequently adopted expansive and merit-based interpretations to 'public policy' exceptions, they have rarely delved into the aspect of 'national interests'. While judicial activism in legal and policy spaces is comprehensible, the stepping of courts in the economic interests of nation might constitute a case of judicial overreach. There is the government and other public bodies like Reserve Bank of India conferred with the authority to assess and analyse India's economic interests. The Indian courts must understand that if the Government of India brought in the 2015 amendment to explicitly omit the standard of 'national interest' laid down in Renusagar,[74] then it must have considered the economic aspects of such a decision as well. It must also be understood that an approach of over-expansive interpretation of 'national interest' might act opposite to the desired effect and also hurt India economically. If such an approach is adopted, then foreign multinational corporations might be sceptical of arbitrating or even investing in India because any dispute or award might not be enforced if interpreted to be against 'national interest'.

VIII. ARE HUMAN RIGHTS IN BUSINESS AGAINST THE 'FUNDAMENTAL POLICY OF INDIAN LAW'?

The U.N. Human Rights Council ("UNHRC") launched the treaty procedure in response to a request from Ecuador and other governments frustrated with what they saw to be sluggish and restricted progress on business and human rights on the global stage. However, currently there is no binding treaty related to business and human rights.[75] Every country has their own human rights law and there is little or no uniformity at the global arena in human rights legislation and the countries' commitment to the same. The only major framework on Business and Human Rights are United Nations Guiding Principles on Business and Human Rights ("UNGP") but they are non-binding in nature.[76] Multiple challenges have already slowed down the process of such a binding international treaty:-

1. Direct implementation of Human Rights standards against corporate entities, rather than against states, represents a significant theoretical shift from the conventional human rights practise.
2. The lack of consensus on standards to be adopted and clear treaty objective
3. The absence of solely national enterprises casts severe doubt on the treaty's purpose. The proposed pact would apply primarily to multinational enterprises, excluding domestic firms.[77] If the treaty's main purpose is to make companies accountable for human rights abuses, such a difference is superfluous.
4. The exclusion of corporate stakeholders from treaty discussions will almost certainly backfire.[78]

Another issue is that such a treaty would have to be ratified by all member states and even if a single major state backs out, it would be counterproductive for other states. As noted

[74] *Renusagar* (n 45).
[75] Business & Human Rights Resource Centre, 'Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council' [Sept. 2013] <http://business-humanrights.org/sites/default/files/media/documents/ statement-unhrc-legally-binding.pdf>accessed November 25, 2021.
[76] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'[Mar. 21, 2011] U.N. Doc. A/HRC/17/31.
[77] Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.
[78] McBrearty S, 'The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity' [2016] 57 Harvard International Law Journal <https://harvardilj.org/wpcontent/uploads/sites/15/McBrearty_0615.pdf> accessed November 25, 2021.

earlier, corporations work on capitalist interests and they often move to states where compliance and regulatory standards are extremely low. This would only lead to a migration of corporations from country which has ratified such a treaty to those which have not. Hence, we can assume that introduction, ratification and universal implementation of such a treaty will take time.

Although there is no specific business and human rights law as of yet, the Government of India has taken multiple steps to make its intentions clear for the world and the courts to interpret the 'fundamental policy of Indian Human Rights Law' into 'public policy'. The Ministry of Corporate Affairs, Government of India issued a statement in 2018 that it will be releasing a National Action Plan on Business and Human Rights and the zero drafts for the same was released recently.[79] The National Action Plan is meant to address a variety of problems that are prominent in India, including community dispossession and rehabilitation, child labour, bonded labour, employee health and safety, favourable conditions of employment, and social welfare.[80] Notably, the most challenging aspect of regulating economic activity in India is that approximately 90% of the workforce is employed in the informal economy.[81] Employers employing informal labourers are often oblivious to voluntary corporate social responsibilities and related compliances. Thus, for initiatives to be successful, they must be designed in such a way that they include unorganized labourers. Unless this is accomplished, the State's actions will effectively safeguard barely 10% of India's labour.[82]

In addition, the Ministry of Corporate Affairs amended the 2011 National Voluntary Guidelines on Business's Social, Environmental, and Economic Responsibilities (NVGs) and established the National Guidelines on Responsible Business Conduct (NGRBC) in 2019. The revised standards were created to encourage enterprises to adhere to the UNGPs in text and spirit.[83] However, all of these recommendations are optional, and until they are replaced with strict compliance requirements, they will continue to serve just as token gestures, bringing about no meaningful change. A framework for business and human rights that is successful will need accountability and enforcement of the UNGPs' objectives.

The absence of governmental intention on the side of States to regulate businesses' human rights adherence may be attributed to the fact that investment treaties have historically neglected to enforce any responsibility on investors with regard to environmental conservation, labour standards, or human rights. Additionally, although several recent treaties have clauses pertaining to investor compliances/obligations, they just require a bona fide commitment to corporate social responsibility norms without ensuring for their enforcement. The Indian Model BIT expresses a voluntary commitment to protect human rights but makes no obligatory commitment in that respect. To contextualise, a reference to the more effective investor liabilities outlined in the Southern African Development Community (SADC) Model BIT, 2012, may be made. In descriptive and clear words, the SADC Model BIT mandatorily requires

[79] National Action Plan <https://www.mca.gov.in/Ministry/pdf/NationalPlanBusinessHumanRight_13022019.pdf>accessed November 25, 2021.
[80] Ibid.
[81] Employment in Informal Sector and Conditions of Informal Employment [2013] <https:// labour.gov.in/ sites/default/files/Report%20vol%204%20final.pdf>accessed November 25, 202.1
[82] Ibid.
[83] National Guidelines on Responsible Business Conduct [2019] <https://www.mca.gov.in/ Ministry/pdf/NationalGuildeline_15032019.pdf>accessed November 25, 2021.

investors and/or investments to adhere to the host State's international environmental, labour, and human rights commitments.[84]

In Indian context, the government's efforts towards promoting Business and Human Rights are clearly visible through actions. The NAP when formally introduced, will act as sufficient evidence for the court to determine the 'fundamental policy' behind Indian Human Rights jurisprudence.[85] The NAP will also be in congruence with the UNGP-BHR and there would be no contradiction in the domestic and international; frameworks for the courts to discover a difference in 'fundamental policy' if a Business and Human Right arbitral award is rendered in accordance with UNGP-BHR.[86] Moreover, the term 'fundamental policy of Indian law' calls for a very specific contravention of a policy and mere lack of legislation on a subject matter must not be considered as a violation of any 'fundamental policy'. It is the nature of law to evolve and include novel legal concepts in the process and any resistance from the judiciary towards this process might be counterproductive to society at large. Hence, such a decision in congruence with UNGP-BHR would not be contravening the 'public policy' and 'fundamental principles of Indian Law' therein even by the expansive and limited interpretations adopted in Ssangyong,[87] Renusagar,[88] and Vijay Karia.[89]

IX. EXPLORING PROVISIONS TO SAFEGUARD THE INVESTORS

It is imperative to understand relevant concepts in international law that could be invoked to help the cause of business and human rights arbitration for investors as well. While most of the jurisprudence and discussions revolve around the human rights violations committed by investors, it must be realised that a state could also be discriminatory or exproriatory against an investor and their rights must be safeguarded as well. An investor will partake and cooperate in the evolution of domestic and international business and human rights development by compromising their own interests only if their own rights are protected and they are provided an incentive to support the furtherance of this legal discussion.

One such provision is Most-favoured Nation ("MFN") clauses applied along with Fair and Equitable Treatment ("FET) standards.[90] Most Favoured Nation clause is typically interpreted to indicate that an investor from a party to an agreement, or its investment, would be regarded "no less favourably" by the other party regarding a specific subject-matter than an investor from a third country, or its investment. Most international investment treaties have Most Favoured Nation treatment provisions. While the wording of the MFN provision, its context, and the intent and purpose of the treaty in which it is included must all be considered when interpreting the clause, it is the "multilateralization" device par excellence for the advantages provided to foreign investors and their investments.[91]

The majority of investment treaties include no mention to the Host State's human rights commitments. Investment tribunals' normal course of action when a claim is brought in

[84] Southern African Development Community (SADC) Model BIT [2012].
[85] *National Action Plan* (n 79).
[86] Ibid.
[87] *Ssangyong* (n 52).
[88] *Renusagar* (n 45).
[89] *Vijay Karia* (n 46).
[90] Dupuy P-M, Francioni F and Petersmann E-U, *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009).
[91] OECD, 'Most-Favoured-Nation Treatment in International Investment Law' [2004] OECD Working Papers on International Investment 2004/02, OECD Publishing.

is to determine that human rights issues fall beyond their jurisdiction. For example, in *Biloune* v. *Ghana*, the tribunal determined that its jurisdiction is confined to issues "in respect of" foreign investment and hence that the tribunal lacks jurisdiction to examine, as a separate cause of action, a claim of human rights violation.[92] Due to the similarity between investor rights and human rights, including human rights terminology does not violate the 'Ejusdem Generis' principle, which states that an MFN clause may only refer to the same subject matter or category of subject matter as the clause. The issue that emerges is whether investors may bring a lawsuit against an investment tribunal for a breach of their human rights or for the host state's failure to safeguard their human rights.[93]

Article 8.7 of the Comprehensive Economic and Trade agreement ("CETA") states that "Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments". A careful reading of Article 8.7 reveals that the phrasing of the MFN provision does not reflect the drafters' aim to define 'treatment' exclusively in terms of covered investments. The section distinguishes between the treatment accorded by a host state, an investor, or any other party to an 'investor of the other party' and a 'covered investment,' implying that specific standards and duties have been established for both the host state and the investor. This interpretation attracts support from Article 8.10 of CET, which talks about Fair and Equitable treatment of Investors.[94] Article 31 of the Vienna Convention on the Law of Treaties specifies that while interpreting treaties, the relevant norms of international law applicable to the parties must be respected. Therefore, if the parties to the BIT have an existing Human Rights Convention, the tribunal must take it into account while interpreting the investors' rights. Hence, by applying a broader interpretation, tribunals can invoke MFN clause to attract human rights obligations towards host states and investors.[95]

MFN Clause must not be interpreted as extending the tribunal's jurisdiction to matters outside of the BIT, according to the tribunal in *Telenor Mobile Communication* v. *Hungary*.[96] Such an expansive interpretation is like opening a pandora's box and enabling treaty shopping which is one of the biggest hurdles in the adoption of the MFN clause for incorporating Business and Human Rights.

Due to the discretionary nature and vast interpretation in these cases, the tribunal has the option of adopting any stance. The Jurisprudence Constante would be disrupted if the MFN was interpreted in a more expansive manner. A 'Jurisprudence Constante' (constant pattern) is expected to be established in Investment Arbitration, even while there is no doctrine of precedent.[97] We must analyse some approaches that have been adopted by the tribunal:

1. Sole Effect Doctrine– The purpose of regulation is irrelevant; the state must compensate if the investment is impacted.[98]

---

[92] Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability of 27 October 1989, 95 ILR 184, 202.
[93] Douglas Z, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails' [2010] 2 Journal of International Dispute Settlement 97.
[94] Misra A and Vidyarthi A, 'Investment Arbitration and Human Rights: From the Lens of a MFN Clause' [2019] International Review of Human Rights Law.
[95] Ibid.
[96] Telenor Mobile Communication v. Republic of Hungary (Award) (ICSID Case No. ARB/04/15).
[97] A.K. Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' [2010] TDM 1 <www.transnational-dispute-management.com>accessed November 25, 2021.
[98] Methanex Corporation v United States, Final Award on Jurisdiction and Merits [2005] 44 ILM 1345.

2. Police Power Doctrine– A rule that is not exclusionary and is applied in accordance with due process is not judged expropriatory.[99]
3. Proportionality/Balancing - When determining if a rule is expropriatory, the arbitrator must assess whether the actions are proportionate to the ostensibly protected public interest and the legal protection conferred to investments.[100]

While the first two approaches are extremely severe in nature, the proportionality approach balances both the considerations and does not give unfettered privileges to the investor or limitless power to the state.

X. CONCLUSION

Tribunals have had the choice to either evade the question of human rights or harmonise them with international concepts. *Glammis Gold* v. *United States,* for example, the tribunal simply said that the "most contentious" human rights questions presented throughout the hearings did not need to be resolved in order for the tribunal to grant its decision and therefore avoided them totally.[101] Similarly, in *Border Timbers* v. *Zimbabwe*, the tribunal determined that the human rights of indigenous people impacted by the contested investment were irrelevant to the issue.[102] The vast list of incidents demonstrates a pervasive unwillingness to deal with these problems in a meaningful way. The reasons range from a lack of clarity in the Respondent State's arguments[103] to the notion that international human rights are beyond the competence of an International Arbitration Tribunal,[104] given its restricted mission and function in interpreting applicable investment treaty clauses. However, such evasion eventually results in disparities for the Respondent States and effectively subordinates human rights legislation to investment treaty law. This result is especially devastating for developing countries like India, where a slew of possible negative consequences are expected to occur for tribal/indigenous groups, rural communities who rely on the ecosystem for their survival, and the nation as a whole.

One option to such evasiveness has been to construe the two domains of international norms in a harmonious manner. As a result of this style of interpretation, IATs are compelled to read governments' human rights commitments as an exception or caveat to investor rights. In essence, rather than the other way around, this just interprets the underlying legal framework, the investment treaty, in light of human rights standards.[105] Most Respondent States claim that the latter, understanding investor rights as human rights, should be done, and IATs consistently refuse to deal with it. This is arguably unavoidable and reasonable, given the tribunal's competence in investment treaty law rather than human rights law. Furthermore, its mission and scope are to interpret the former rather than to attempt to align it with the latter.

This makes it even more imperative to have a uniform International Human Rights treaty, the provisions of which will be reflected in domestic laws and bilateral treaties, thereby

[99] Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica [2000] Case No. ARB/96/1.
[100] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States [2003] ICSID Case No. ARB (AF)/00/2.
[101] Glamis Gold, Ltd v. United States, UNCITRAL, Award, (8 June 2009).
[102] Bernhard von Pezold and Others v. Zimbabwe (ICSID Case No. ARB/10/15); Border Timbers Ltd and Others v. Zimbabwe (ICSID Case No. ARB/10/25).
[103] Siemens AG v. Argentina (Award)(ICSID Case No. ARB/02/8).
[104] *Biloune* (n 92).
[105] SAUR International SA v. Argentina (ICSID Case No. ARB/04/4).

bringing the same set of norms to everyone because it would be ironical if human rights standards were applied to different parties and stakeholders unequally.

Developing and upcoming countries like India will have a huge role in establishing standard for corporations and businesses while at the same time safeguarding their assets and interests. Not just the policymakers but the courts will also have a massive role in establishing such standards. Interpretation of rights in rem and *personam* in light of Vidya Drolia will play a huge role. Furthermore, the potential draft of BITs will have a huge role in establishing business and human rights. It is also imperative that the 2015 amendment is given due consideration and courts do not exercise judicial overreach while interpreting 'public policy'. As we move towards globalisation and uniform human rights law, standards like 'national interests' must be dropped altogether and while 'fundamental policy of India law' must continue to exist as a standard, it should not be construed broadly and only cases that entirely 'shake the conscience' of the Indian legal jurisprudence must be subjected to the test. The policymakers must not delay the formation of a set of regulation or action plan which will govern the businesses in India however such an attempt would be of no use if the informal sector which forms the majority of the workforce, is organised and brought into such a bracket. Geopolitics and diplomacy will play a huge role and if a country does not partake in the international treaty governing business and human rights deliberately with an intent to exploit such an opportunity, then such a diplomatic structure should have the option of exerting economic sanctions. It must be made sure that all stakeholders are involved in discussions about such a treaty and that everyone's interests are incorporated. States must not exploit this opportunity to create uneven playing field for investors and their interests must be incorporated via better BITs. For contemporary relief, the arbitral tribunals must discover the use of the MFN clause and FET standards. However, in doing so they make sure that they are not opening the pandora's box of treaty shopping.