

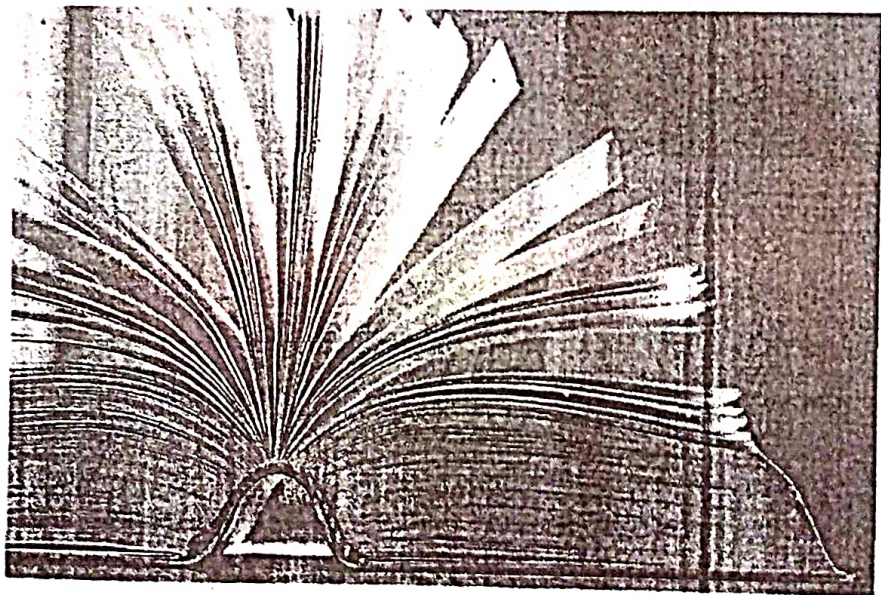
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Mapping the role of Human Rights Law within Bilateral Investment Treaties

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Abstract

Developing countries signs BIT's to attract FDI. Very few countries incorporates human rights in BIT for strong investor protection or associated fields like labour protection, environment protection etc. But most of the capital importing countries are tied by investment treaties with the worsening of human rights practice. Whether the developing countries address the human rights issues in the BITs is a major question and if they are incorporated implementation is the another part. This article provides a brief highlight with respect to incorporation of human rights obligation into BITs and also gives an idea about India's 2015 model which highlights human rights concepts.

Key Words: International Investment Agreement, Bilateral Investment Treaties, Human Rights, -

Introduction:

The significant development of international law is the augment of bilateral investment treaties¹. The regional or bilateral economic treaties that contain an Investment subdivision by means of Transatlantic Trade and Investment Partnership (TTIP), The Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP)². The great number of countries signs bilateral investment treaties in order to attract foreign direct investment and also because of the competitive pressure.

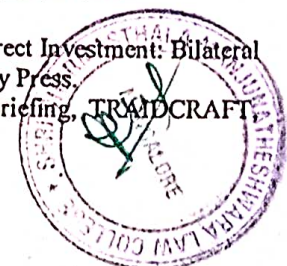
BIT differ from one treaty to another, depending on the provisions which the states are desire to include, they usually contains the some of the general provisions like standard of treatment, provide protection against direct and indirect expropriation, Fair and equitable treatment of the investor, provide for national treatment, full protection and security, free transfer of funds and typically contains most favoured nation clause. These investment

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¹ Refer, Karl P. Sauvant and Lisa E. Sachs (ed.) "The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows, Oxford University Press,

² Lorenzo Cotula, Rethinking investment treaties to advance human rights, IIED Briefing, TRADECRAFT Trade Justice Movement, September 2016.



treaties should be formulated in such a way that they must regulate the rights and obligations of both parties, rather than imposing duties or legal responsibilities on the parties these investment treaties be inclined to protect foreign investors and their assets³. Today's investment policies anticipate more than these general principles. The government of host state needs to introduce or reinforce harmonizing measures to investment, such as competition policies, environmental protection standards, taxation measures and regulation towards the human rights protection⁴. Whether BITs influence developing countries human rights practice this is the question which has to be addressed. It is accepted that developing countries signs the BITs to attract the FDI. But Human rights groups articulate that the hands of capital importing developing countries are tied by investment treaties, generating important grievances and worsening government's human rights practices. For example, the UK-Colombia BIT was signed in 2010 but was only ratified in 2014. Human rights and anti-poverty groups have argued that this BIT exposes the Colombian government to costly lawsuits and impacts land reform programs. Similarly, NGOs Recent work have reservations about the ongoing negotiations on a US-India BIT, including about how the investor-state dispute mechanism undermines the domestic policy space and justice system.

Early investment provided investor protection through state to state dispute resolution. Most recent BIT provides foreign investors the right to adjudicate violation of rights in international tribunal without exhaustion of local remedies. In case of non-compliance with arbitration decisions, broad rights to confiscate the host government's property from around the world. This provisions will led to the several repercussions: First is for the budgets of host states because monetary awards have been large⁵. Second, when investors allege violation of rights it leads to decrease in direct investment inflows. Third, a mere threat of arbitration from investors can be effective in extracting concessions because arbitration is a high-risk, high-cost option. Also, host states may be disadvantaged over investors because many developing and middle income states have limited legal capacity to counter the BIT driven investor-states claims.

In contrast a very few countries mentions human rights in BIT for strong investor protection or associated fields and developing countries would like to see BITs include more obligations

³ Yira Segrera Ayala, Restoring the Balance in Bilateral Investment Treaties: Incorporating Human Rights Clauses.

⁴ Ibid

⁵ The Republic of India shall pay to White Industries the amount of A\$ 4,085,180 (Payable under the award) in 2012, decision against Czech Republic \$350 million in 2001, Ecuador \$ 2.3 billion in 2012 (This is the largest ICSID award to an investor and a direct consequence of the US-Ecuador BIT)



for investors⁶. Related provisions like labour or environmental standards are increasingly mentioned in recent BITs or BIT templates.

BITs contribute to a worsening of human rights practices. BITs lock in legally enforceable conditions attractive to investors and constrain the states' development and welfare policies. With BITs in place, it is costly for states to reverse such policies in response to likely popular grievance and, in some countries, repression becomes relatively attractive. More specifically, the lock-in effect of BITs incentivizes governments to favour foreign investors even at the cost of violating the rights of their own citizenry⁷.

International Investment Agreements and Human Rights

The balancing of IIA and IHR law is depends upon the states how they are going to draft the substantive investment clauses in the IIA. Certain host state actions in furtherance of their human rights obligations such as right to health or right to work could be challenged by investors through and arbitral claim for violating the FET standards and MFN clause or as mounting to indirect expropriation. This can result in the host state having to pay large sums of money in compensation to investors and also chilling effect of future regulation by the host state.

IIA usually contains certain provisions which protects investors from the expropriation of their property, unless it is done for public purpose, by paying a compensation in a non-discriminatory manner, following due process and with the payment adequate compensation. Investors have argued that regulatory measures including measures to implement human rights obligations that impact the value of an investment amount to indirect expropriation⁸.

Some International investment treaties contain the meaningful human rights provisions. The cases relating to right to health, right to water and right to equality and freedom from discrimination describes how these tensions operate in practice.

⁶ Example: In the country model BIT of Germany, France, or United States no explicit provisions to human rights were included but an exception to this In Norwegian BIT model (2007) which mentions human rights in preambular language.

⁷ Cristina Bodea & Fangjin Ye, *Bilateral Investment Treaties: The Global Investment Regime and Human Rights* (October 17, 2017), *British Journal of Political Science*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054606, Visited on 17-06-2019.

⁸ Sanhita Ambast, *Human Rights Protections in India's Model BIT: a BIT left to go* *Indian Journal of International Law*, Volume 57 (1-2), 2017, Page No. 128



2010 In Phillip Morris International⁹ initiated an international law suit challenging two of Uruguay's tobacco control laws¹⁰. The two laws challenged by Philip Morris required 80% graphic health warnings on cigarette packs, and limited tobacco brands to a single brand. These laws were justified by The World Health Organisation. In 2008 and 2009 Uruguay adopted two new laws, the first to address the tobacco industry's use of brand variants that falsely imply some cigarettes are less harmful and tobacco industry tactic of replacing misleading terms with colors; and the second to introduce more effective health warnings, and to implement Uruguay's obligations under the WHO Framework Convention on Tobacco Control. The Tribunal concluded that the measures did not amount to expropriation and sovereign state can adopt any measures to protect public health¹¹.

In Azurix Corp V/s Argentina

The Arbitral tribunals are also considering Human Rights obligations encompassing social and environmental considerations against the application of substantive treaty protections.

The recent bilateral investment treaty (BIT) arbitration case of Urbaser S.A V/s The Argentine Republic¹² is one of the example where a state advanced human rights based arguments in the context of an investment treaty claim.

The dispute in the *Urbaser* case arose as a result of the Argentina's financial crisis. Urbaser was a shareholder in a concessionaire that was in charge of the supply of water and sewerage services. Argentina's emergency measures led to financial losses of the concessionaire, resulting into its insolvency. Urbaser initiated arbitral proceedings against Argentina. For its parts, Argentina filed a counterclaim in which it alleged that the concessionaire's failure to provide the necessary level of investment in the supply services led to violations of the human right to water.

The tribunal in the *Urbaser* case accepted its jurisdiction over the Argentina's counterclaim based on human rights and confirmed that the "right to water" was a human right under international law. It is the first award to provide an in-depth discussion on a state's counterclaim against an investor for an alleged violation of human rights obligations. At the

⁹ Philip Morris v. Uruguay *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7

¹⁰ Also in Phillip Morris Asia Limited V/s Australia, UNCITRAL, PCA Case No. 2012-12(17 December 2015

¹¹ Global Legal Centre Litigation Spotlight, Philip Morris V/s Uruguay <https://www.tobaccofreekids.org/what-we-do/global/legal/trade-and-investment/philip-morris-v-uruguay#>

¹² ICSID Case No. ARB/07/26



same time, the award does not mark the breakthrough of human rights obligations directly applicable to foreign investors¹³.

On the other hand, in 2003 report by the United Nations High Commissioner for Human Rights suggested the way some arbitral tribunals interpret investment treaties could make it more difficult for states to honour their human rights obligations when doing so would adversely affect businesses. The concern is that the often-large compensation pay-outs that the tribunals awarded to investors, and the significant legal costs and uncertainty associated with arbitration might discourage cash-strapped-states from taking action to protect human rights.

The states should continue to raise human rights issues as a guard or defence to BIT claims by investors, invoking soft law human rights norms in jurisdictional defence and as a substantive defences to allegations that state conduct breaches BIT-guaranteed standards of protection such as "fair and equitable treatment". Following the Urbaser the respondent states to continue exercising human rights standards as a sword in the context of counterclaims against BIT claimants. The companies can help by anticipating, evaluating and taking steps to mitigate actual and potential environmental and social risks at the time an investment is made¹⁴.

Incorporation of Human Rights obligations into BITs

Incorporation of non-investment including human rights obligations in BITs is a major question. This problem can be solved by examining the following provisions

1. Where to include Non-investment and human in rights obligations BITs
2. The type of language used
3. The type of international instrument referred in BITs and why?
4. The type of enforcement mechanism used in the treaty obligations.

Where to include Non-investment and human in rights obligations in BITs

The inclusion of the corporate social responsibilities in the preamble of the bilateral treaties would provide the positive impact. As preamble is a part of treaty's context a reference of

¹³Investment Treaty Arbitration, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, <https://www.iisd.org/itn/2018/10/18/urbaser-v-argentina>, visited on 16-08-2019.

¹⁴ Ella Davies, Human rights issues in bilateral investment treaty arbitrations, <https://humanrights.freshfields.com/post/102e3g8/human-rights-issues-in-bilateral-investment-treaty-arbitrations>, Visited on 20-12-2019.



human rights is the preamble of the treaty may colour the treaty's object and purpose. It would lead the tribunals to adopt more balanced interpretation of treaty clauses.

Type of language used:

To ensure the effective corporation regulation, the provisions of the BIT must not only be clear and unambiguous, but they must create specific well define mandatory human rights obligations applicable to corporate activity. It is essential that a treaty provision creates mandatory legal obligations forcing corporations to adopt a certain behaviour. The treaty provision must also establish a mechanism whereby non-compliance is efficiently sanctioned by an arbitral tribunal¹⁵.

The International instruments that should be referred in BIT

The Only few areas of the international law defines the obligations existing in a treaty they are human rights, labour rights, the protection of the environment and anti-corruption. The United Nations Global Compact, a non-binding initiative adopted this approach under which large number of companies have committed to respect in their business activities abroad a set of ten core principles and values¹⁶. These ten principles are drawn from the four above mentioned areas of international law. The BIT should also refer these instruments:

- Universal Declaration of Human Rights (UDHR) (1948)¹⁷
- United Nations International Covenant on Civil and Political Rights (ICCPR) (1966)¹⁸
- International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work (1998)¹⁹
- United Nations Convention Against Corruption (UNCAC) (2003)²⁰

¹⁵ Patrick Dumberry, Suggestions for Incorporating Human Rights Obligations into BITs, Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, Ed., Kavaljit Singh and Burghard Ilge, Page No. 213-215

¹⁶ United Nations, Global Compact, UN GA Res. 64/223, 25 March 2010. The Ten Principles are: Human rights: Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses. Labour: Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation.

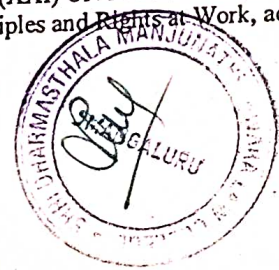
Environment: Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption: Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery. <https://www.unglobalcompact.org/what-is-gc/mission/principles> Visited on 20-12-2019

¹⁷ United Nations, Universal Declaration of Human Rights, adopted on 10 December 1948 by the UN General Assembly: GA Res. 271 A (III) UN Doc A/810.

¹⁸ United Nations, United Nations International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976, GA Res. 2200 A (XXI) UN Doc A/6316 (1966).

¹⁹ International Labour Organization, Declaration on Fundamental Principles and Rights at Work, adopted on 18 June 1998 by the International Labour Conference.



Different Enforcement Mechanism

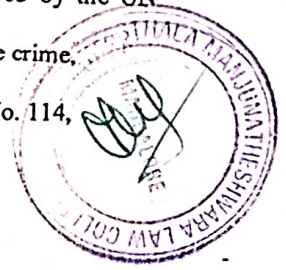
Giving references of international treaties in BIT is first step of improvement along with this investor state dispute resolution must also contain a provision indicating how human rights obligations imposed upon corporations must make it clear that an arbitral tribunal has jurisdiction over allegations of human rights violations committed by corporations. There are three different enforcement possibilities that can be envisaged in a BIT's investor-state resolution clause.

1. The clean hands doctrine: In 57th Report of International Law Commission it was observed that clean hands doctrine was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands. It was to be distinguished from the tu quoque²¹ argument, which allowed a respondent State to assert that the applicant State had also violated a rule of international law, and was instead to be confined to cases in which the applicant State had acted improperly in bringing a case to court²². The doctrine of clean hands is a source of law that can be applied by international tribunals in accordance with article 38(1) (c) of the ICJ Statute. Arbitral tribunals may refer to the doctrine in the context of investor-state arbitration.
2. Offsetting of damages: A second available option would be to permit an investor's claim even in the face of human rights violations, but to allow the respondent state to raise any such allegations during the arbitral proceedings. This is the 'offsetting of damages' (or mitigation) option. A tribunal would thus take into account such allegations when making its determination on the merits of the dispute. These allegations should also have some impact on the tribunal's assessment of compensation for damages claimed by the investor. Thus compensation should be reduced proportionally to the investor's violation of human rights obligations.
3. Counterclaims: A third available option is a variant of the 'mitigation option' discussed above. Under this counterclaim option a claimant investor would be permitted to file a claim even in the face of human rights violations, but the host country would be allowed to raise human rights allegations in counterclaim.

²⁰ United Nations, United Nations Convention Against Corruption, adopted on 31 October 2003 by the UN General Assembly: GA Res. 58/4. (2012 -10-21).

²¹ a retort made by a person accused of a crime implying that the accuser is also guilty of the same crime, <https://www.collinsdictionary.com/dictionary/english/tu-quoque>, visited on 21-12-2019

²² Report of the International Law Commission, 57th Session UN DOC A/60/10, Para 236, Page No. 114, https://legal.un.org/ilc/documentation/english/reports/a_60_10.pdf, visited on 21-12-2019



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Sometime tribunal may reject the counterclaim on the ground that it is disconnected with the claim submitted by the investor and thus outside the scope of arbitration. For this reason the counterclaim by the host state should be expressly provided for in the BIT's investor-state-dispute resolution clause²³.

Human Rights protection in India's Model BIT 2015

The BIT Model 2015 it clearly states that model BIT text will provide appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of relevant international precedents and practices, while maintaining a balance between the investor's rights and the Government obligations.

A BIT increases the comfort level and boosts the confidence of investors by assuring a level playing field and non-discrimination in all matters while providing for an independent forum for dispute settlement by arbitration. In turn, BITs help project India as a preferred foreign direct investment (FDI) destination as well as protect outbound Indian FDI²⁴.

Principle 9 of the UN Guiding Principles on Business and Human Rights says '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'²⁵. India's BIT 2015 model appears to have taken several steps towards creating such a domestic policy space.

The 2015 model BIT has specific exemptions to investor protections. It is an attempt to appropriately limit the scope of such protections and allow for necessary regulatory space. Article 5.5 provides non-discriminatory regulatory measures²⁶ but 2003 model does not contain an equivalent specific exemption.

Another provision of 2015 model BIT prescribes the factors to be taken into consideration when assessing whether a measure is expropriatory. Article 5.3(b) States that whether a measure is expropriatory requires a case by case analysis of the economic impact of the

²³ Supra Note no. 51, Page no.216-229

²⁴ Press Information Bureau Government of India, Cabinet 16th December, 2015, <https://pib.gov.in/newsite/mbErel.aspx?relid=133411>, visited on 01-12-2019

²⁵ Guiding Principles on Business and Human Rights, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, visited on 22-12-2019

²⁶ 2015 Model Text for BIT Article 5.5 Provides non-discriminatory regulatory measures by a party or measures or awards by judicial bodies of a party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and environment shall not constitute expropriation under this Article.



measure, the duration of the measure, the character of the measure and whether a measure breaches a party's prior binding written commitments. Such a provisions sets out key factors be taken into account when a tribunal studies regulatory actions.

One of the most important aspect of many BITs is that inclusion of "general exceptions", General exception stipulate what regulatory measures would not amount to breaches of the BIT, and therefore will not require the state to pay compensation to investors. General exceptions are a comparatively recent development in BIT practice²⁷.

Article 32 of the 2015 Model BIT, titled "General Exceptions", prevents the adoption or enforcement of discriminatory measures by the party which are necessary to protect the public morals or maintaining public order, protect human, animal or plant life or health²⁸.

Like Article 32, Article 5.5 also protects the Indian state's regulatory capacity. Article 5.5 does not make express reference to human rights commitment but says that any measures can be designed and applied to protect legitimate public interest or public purpose objectives such as public health safety and environment.

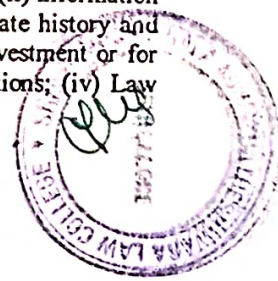
Investor obligation

Today international human rights jurisprudence has acknowledged that corporations and business entities also have certain obligations with respect to human rights. The 2015 model BIT provides some provision for investor obligations with respect to protection of human rights. Article 12 of the model BIT deals with corporate social responsibility which provides the opportunity to investor to voluntarily incorporate internationally recognized standard of corporate social responsibility in their practice and internal policies. The human rights obligations which contained in the model BIT 2015 is appear to be weaker than the provisions mentioned in the draft model BIT 2015²⁹.

²⁷ Supra Note No 47, Page no. 131.

²⁸ Article 32 of the 2015 BIT model provides General Exceptions : Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non-discriminatory basis that are necessary to: (i) protect public morals or maintaining public order; (ii) protect human, animal or plant life or health; (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement; (iv) protect and conserve the environment, including all living and nonliving natural resources; (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value. https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf, visited on 22-12-2019.

²⁹ Article 12: Compliance with Law of Host State 12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following: (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees; (ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes; (iii) environmental Law applicable to the Investment and its business operations; (iv) Law



The 2015 model BIT envisages investor obligation as voluntary commitments, whereas the draft model BIT 2015 required investors to comply with host state's human rights laws as a mandatory investor obligation. The reason for the Indian government to depart from the ten of Article 12 of the draft model BIT 2015 are not clear. The law commission of India had suggested that the formulation of Article 12 was vague and that it could lead to an interpretation where even minor non-compliance with any law could lead to the investor being denied the benefit of the treaty³⁰.

The 2015 model BIT makes clear that tribunals under the BIT only have the jurisdiction to arbitrate disputes with respect to its investment arising out of an alleged breach of an obligation of a party under Chapter II which provides provisions regarding "Obligations of Parties", and deals with substantive investor protection clauses. Claims of human rights violations by investor are not strictly covered unless they can also be framed as violations of investor protection guarantees³¹.

US model BIT 2012³² and ICSID convention³³ provides the power to the tribunal to decide the issues in dispute in accordance with the treaty and applicable rules of international law. The 2015 model BIT does not contain an applicable law clause. It is unclear about the extent to which India's international human rights law commitments are relevant to the adjudication of disputes under the BIT³⁴.

Arbitrations under the 2015 model BIT can take place under the ICSID or UNCITRAL rules depending on the circumstances.

relating to conservation of natural resources; (v) Law relating to human rights; (vi) Law of consumer protection and fair competition; and (vii) relevant national and internationally accepted standards of corporate governance and accounting practices.

³⁰ Supra Note no. 47, page no. 134

³¹ Ibid

³² Article 30: Governing Law 1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.
<https://ustr.gov/sites/default/files/BIT%20text%20for%20AOE%20Meeting.pdf> Visited on 23-12-2019

³³ Article 42 (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree. ICSID CONVENTION, REGULATIONS AND RULES, <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>, Visited on 23-12-2019.

³⁴ Supra Note no. 47, Page no. 138



Article 22 of the 2015 model BIT contains Transparency in Arbitral Proceeding- States that defending parties shall make available to the public certain documents³⁵ that oral arguments shall be made public including by organizing attendance through video links³⁶ that awards should be publicly available and that non-disputing parties can make oral and written submissions to the Tribunal regarding the interpretation of the BIT³⁷

Conclusion:

Human Rights and BITs is important concept. Bringing human right law within investor-state arbitration provides the protection to the foreign investment. Series of cases have arisen between foreign investors and their host-state –where state compliance with investment treaty obligations in question and where human rights issues have arisen as a result of investment projects.

The states must satisfy three things to overcome the problems associated with the realization of human rights issues in BITs:

1. Inclusion of human rights approach when negotiating the BITs
2. BITs clauses should be designed with giving importance to human rights concerns.
3. Creating proper dispute resolution mechanisms within national and international system when such precautions fail.

India is renegotiating its several BITs with other countries. So India’s future negotiations are crucial. The 2015 model contains few provisions which reflects human rights and also contains other provisions that do not adequately reflect India’s human rights commitment.

So future negotiation should provide a prominence space for human rights.

³⁵ 22.1 Subject to applicable law regarding protection of confidential information, the Defending Party shall make available to the public the following documents relating to a dispute under this Chapter: a. the notice of dispute and the notice of arbitration; b. pleadings and other written submissions on jurisdiction and the merits submitted to the Tribunal, including submissions by a Non- disputing Party; c. Transcripts of hearings, where available; and d. decisions, orders and awards issued by the Tribunal. [https://www.finmin.nic.in/sites/default/files/ModelTextIndia BIT%20%281%29.pdf?download=1](https://www.finmin.nic.in/sites/default/files/ModelTextIndia%20BIT%20%281%29.pdf?download=1), Visited on 23-12-2019

³⁶ 22.2 Hearings for the presentation of evidence or for oral argument (“hearings”) shall be made public in accordance with the following provisions: a. Where there is a need to protect confidential information or protect the safety of participants in the proceedings, the Tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. b. The Tribunal shall make logistical arrangements to facilitate public access to hearings, including by organizing attendance through video links or such other means as it deems appropriate. However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

³⁷ Supra Note no 47, Page no. 141.

