

**Investment Arbitration and Human Rights: From the lens of a MFN Clause**

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**ABSTRACT**

*There has been a lot of discussion on the role of Human Rights in Investment Arbitration. The standard approach of investment tribunals is to rule that Human Rights claims are beyond their jurisdiction as they are only concerned with violations of the investment treaty between the parties. This article aims to address the overlap between Investor-State arbitration and Human Rights from the lens of the MFN clause. MFN clause allows the investors to rope in treatments accorded to other investors in third treaties. The defining scope of this article is to analyse the extent of the MFN clause of the investment treaties and whether they could be extended to Human Rights treaties. The article highlights several factors that may enable International Investment Tribunals to accomplish their responsibility of promoting an effective Human Rights framework by resorting to the MFN clauses in Investment treaties. The article is divided into four parts. **Firstly**, the article introduces the overlap between human right claims and investment arbitration. **Secondly**, the article deliberates upon the scope of the MFN clause and its restrictions. **Thirdly**, the article discusses the manner in which the MFN clause may be used to incorporate human rights claims in investment arbitration. **Lastly**, the article concludes the discussion by delving into the recent cases in which the tribunals have addressed human rights claims and opened the door for the same in investment arbitration.*

**Keywords:** MFN, Human Rights, Investment Arbitrations

**I. Introduction**

The recent spur in Investment Arbitration cases has given rise to discussions on various peculiar issues. One such issue is the scope of arbitral tribunals to determine the Human Rights claims of the parties. It is a general trend in Investment tribunals to limit their jurisdiction to investment treaty

claims.<sup>1</sup> The role of Human Rights in Investment Arbitration is much debated and various propositions have been put forward for the humanisation of Investor-State relations.<sup>2</sup> Investment Arbitration is a product of the lack of trust of foreign investors to settle their disputes in the national courts of the Host State. Investment treaties ensure certain rights of the investors that allow them to develop without the interference of the Host State. The Human Rights advocates see in investment arbitrations a great opportunity to protect and promote Human Rights.<sup>3</sup> However, most investment treaties make no reference to the Human Rights obligations of the Host State. Moreover, from a pragmatic point of view, the role of several investment arbitrations in the protection of human rights has been severely restricted.<sup>4</sup> The standard approach of investment tribunals is to rule that Human Rights claims are beyond their jurisdiction. For instance, the tribunal in *Biloune v. Ghana* ruled that its competence is limited to disputes “in respect of” the foreign investment and hence, the tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of Human Rights.<sup>5</sup> Investment tribunals only have the jurisdiction to determine the claims arising out of the investment treaty and cannot determine issues other than those of International Investment Law.

In this article, the author discusses the scope of a MFN clause with respect to the wordings of Article 8.7 of the Comprehensive Economic and Trade Agreement (CETA).<sup>6</sup> This article aims to highlight that there can be broader interpretations of the MFN clause based upon its text. Part II of this Article discusses the limitations and boundaries of the MFN clause as per the general understanding of the term. The limitations imposed by the historical understanding of the MFN clause have been reinforced by several investment tribunals. This narrow approach to the scope of the MFN clause restricts extending it to rope in Human Rights treaties. Part III provides the original analysis of this article, explaining that the application of MFN clauses may not be limited to disputes arising out of the investment of the investors. Using the text of MFN clause in CETA, the author highlights that the scope of a MFN clause may vary from treaty to treaty. Due to the similar nature of investor rights and

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<sup>1</sup> Clara Reiner and Christoph Schreuer, ‘Human Rights and International Investment Arbitration’, [https://www.univie.ac.at/intlaw/h\\_rights\\_int\\_invest\\_arbitr.pdf](https://www.univie.ac.at/intlaw/h_rights_int_invest_arbitr.pdf), accessed 4 June 2019; *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; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 of 26 June 2012, paras 39, 57.

<sup>2</sup> Yannick Radi, ‘Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox (2012) 37 North Carolina J. Int. L. & Com. Reg 1107, <http://scholarship.law.unc.edu/ncilj/vol37/iss4/3>, accessed 4 June 2019.

<sup>3</sup> Theodor Meron, ‘The Humanization of International Law’ (vol.7 Martinus Nijhoff Publishers, 2006).

<sup>4</sup> *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 of 26 June 2012, paras 39, 57.

<sup>5</sup> *Border Timbers Limited and others v. Republic of Zimbabwe*, (ICSID Case No. ARB/10/25); *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

<sup>6</sup> Comprehensive Economic and Trade Agreement [2017].

Human Rights, incorporating Human Rights terms does not disturb the ‘Ejusdem Generis’ principle, which provides that a MFN clause can only draw matters from the same subject matter or the same category of the subject as to which the clause relates. Moreover, MFN, as a general principle of International law, should apply to Human Rights violations if the particular violation deters the entire performance of the investment itself or renders the core contract in question incapable of being performed.

Tribunals have consistently rejected the argument that Human Rights law can be applied to investment arbitration under the garb of “principles of international law.” Though Article 42(1) of the International Centre for Settlement of Investment Disputes (ICSID) Convention allows the tribunal to apply rules of international law as may be applicable, tribunals have still not read Human Rights law into this phraseology. For instance, in the case of *Von Pezold v. Zimbabwe*, third parties applied to make *amicus curiae* submissions regarding the application of indigenous rights, which they argued were applicable by virtue of the Germany-Zimbabwe Bilateral International Treaty’s (BIT) reference to “international law.” However, the tribunal found that the rules of general international law as may be applicable does not incorporate the entire universe of international law such as International Human Rights law on indigenous peoples. It only includes the international law relevant to the BIT, such as international law standards for “fair and equitable treatment” shall be applicable.<sup>7</sup>

Similarly, in *Patrick Mitchell v DR Congo*’s Decision on Annulment, wherein though Human Rights claims were raised during the hearings, there was neither any indication of consideration of these claims nor mention of the same in the decision.<sup>8</sup> Since there are structural differences between Public International Law(PIL) and investment law, the generic principles of PIL are not granted precedence over contractual and consensual rules agreed upon by host states and investors.<sup>9</sup> Therefore, the broader spheres of Human Right law cannot take precedence over the specific treaty provision.

Primarily, Human Rights claims before an investment tribunal could involve Human Rights violations by the Host State in the treatment accorded to the investors and Human Rights violations by the

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<sup>7</sup> Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2 of 26 June 2012, paras 39, 57.

<sup>8</sup> Patrick Mitchell v DR Congo’s Decision on Annulment ICSID Case No. ARB/99/7, Decision on Annulment, 2006

<sup>9</sup> M Hirsch, ‘Interactions b/w Investment and Non-Investment’, (2008) Oxford Handbook of International Investment Law, DOI: 10.1093/oxfordhb/9780199231386.013.0005, accessed 5 June 2019.

investors during the operation of their investments.<sup>10</sup> Though investment treaties only place obligations on the Host State, Human Rights violations by the investors may render their claims inadmissible before the tribunal. More importantly, the question that arises is whether investors can claim before an investment tribunal, the violation of the Human Rights of investors or the failure of the Host State to ensure the protection of the Human Rights of the investors.

One tool at the disposal of the investors to broaden the jurisdiction of the tribunal is the Most Favoured Nation (MFN) Clause.<sup>11</sup> The MFN clause allows the investors to incorporate the terms of a third treaty.<sup>12</sup> The scope of a MFN poses an interesting question to the tribunals. International Law Commission in its working group report stated that the interpretation of a MFN clause is broad question involving both treaty interpretation and the nature and extent of obligations undertaken by States under the ambit of an MFN clause.<sup>13</sup> Despite being a common and fundamental feature of Investment treaties, the wording of MFN clauses varies in every treaty and such differences affect its operation.<sup>14</sup>

## **II. Restricting the power of the MFN clause: General Understanding**

Investment tribunals are constituted for the purpose of adjudicating disputes between investors and states. When examining the overlap between arbitration and Human Rights in the investor-state framework, the primary consideration is the jurisdiction of the tribunal.<sup>15</sup> Whether an investment tribunal is authorized to resolve Human Rights claims? Whether a Human Right claim can be submitted

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<sup>10</sup> Francesco Francioni, 'Alternative Perspectives on International Responsibility or Human Rights Violations by Multinational Corporations', (2007) *Eco Globalisation & Human Rights* 245, 297; doi:10.1017/CBO9780511493935.011, accessed 6 June 2019.

<sup>11</sup> Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails,' (2010) 2(1), 113 *Journal of Int. Dispute Settlement*. <https://academic.oup.com/jids/article/2/1/97/843907>, accessed 6 June 2019.

<sup>12</sup> Julie Maupin, 'MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14(1), 157-190, *Journal of Int. Eco Law*, <https://academic.oup.com/jiel/article-abstract/14/1/157/856512?redirectedFrom=PDF>, accessed 7 June 2019.

<sup>13</sup> Report of the Working Group on the 'Most-Favoured-Nation Clause', (2015) UN Doc. A/CN.4/L.719,34, [http://legal.un.org/ilc/texts/instruments/english/reports/1\\_3\\_2015.pdf](http://legal.un.org/ilc/texts/instruments/english/reports/1_3_2015.pdf), accessed 7 June 2019.

<sup>14</sup> Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 *North Carolina J. Int. L. & Com. Reg* 1111, <http://scholarship.law.unc.edu/ncilj/vol37/iss4/3>, accessed 4 June 2019.

<sup>15</sup> Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration', [https://www.univie.ac.at/intlaw/h\\_rights\\_int\\_invest\\_arbitr.pdf](https://www.univie.ac.at/intlaw/h_rights_int_invest_arbitr.pdf), accessed 4 June 2019

under the provisions of an investment treaty? The investment tribunals have largely answered these questions in negative.<sup>16</sup> The intention of the tribunals is to prevent treaty shopping by investors.<sup>17</sup> The jurisdiction of an investment tribunal is limited to the breaches of the treaty provisions.<sup>18</sup>

With respect to the MFN clause, several investment tribunals have held that the MFN clause cannot be used to broaden the jurisdiction of the tribunal against the intention of the parties.<sup>19</sup> Though the question of roping in Human Rights treaties has not been addressed in particular, the issue of certain significance in this context is that of the 'ejusdem generis' principle.<sup>20</sup> In 1960 the Swiss–Italian Conciliation Commission endorsed the view that the MFN clause cannot ensure the enjoyment of advantages granted under a treaty of a different kind, namely a peace treaty.<sup>21</sup> The general understanding of the term is that extending MFN clause to treaties of other subject matter is against the genesis or the origin of the clause.<sup>22</sup>

MFN clause was created and governed by conventional rather than customary international law.<sup>23</sup> Historically, MFN clauses have been used within a limited sphere of trading relations between states in order to reduce discrimination. It arose in the context of international trade as can be seen in the MFN clause in the GATT, 1947.<sup>24</sup> The intention of a MFN standard is to establish, at least in principle, a level playing field between all foreign investors protected by an investment treaty. Therefore, extending MFN clauses to rope in substantive provisions of Human Rights treaties would be in contravention of the nature and origin of the clause itself.

Moreover, the Draft Articles on MFN Clauses, 1978 restrict an expanded interpretation of MFN clause. The Draft Articles on MFN Clauses, 1978 though not adopted, remain a useful source for

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<sup>16</sup> Vivian Kube and Ernst Petersmann, 'Human rights law in international investment arbitration', (2016), EUI Working Paper Law 2016/02, [http://cadmus.eui.eu/bitstream/handle/1814/38985/LAW\\_2016\\_02.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/38985/LAW_2016_02.pdf?sequence=1&isAllowed=y), accessed 8 June 2019.

<sup>17</sup> Makane Mbengue and Stefanie Schacherer, *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (15, 1st edn, Springer International Publishing, 2019)

<sup>18</sup> *Vivendi Universal v Republic of Argentina*, ICSID Case No. ARB 97/3. Decision on jurisdiction and on the Merits, 2000; Filip Balcerzak, 'Jurisdiction of Tribunal in Investor-State Arbitration and the issue of Human Rights,' (2014) 29(1), 216-230. *Foreign Investment Law Journal*, <https://doi.org/10.1093/icsidreview/sit039>, accessed 7 June 2019.

<sup>19</sup> Filip Balcerzak, 'Jurisdiction of Tribunal in Investor-State Arbitration and the issue of Human Rights,' (2014) 29(1), 216-230. *Foreign Investment Law Journal*, <https://doi.org/10.1093/icsidreview/sit039>, accessed 7 June 2019.

<sup>20</sup> Stephen Fietta, 'Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A turning point' (2005) 4,132, *Int. AR*, [https://www.lw.com/upload/pubContent/pdf/pub1395\\_1.pdf](https://www.lw.com/upload/pubContent/pdf/pub1395_1.pdf), accessed 5 June 2019.

<sup>21</sup> Katia Small, *Arbitration under International Investment Agreements* (2nd Edn. Oxford University Press, 2018)

<sup>22</sup> Tony Cole, 'The Boundaries of Most Favoured Nation Treatment in International Investment Law,' (2012) 33(3), 543, *Michigan Journal of International Law*, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1021&context=mjil>, accessed 9 June 2019

<sup>23</sup> Katia Small, *Arbitration under International Investment Agreements* (2nd Edn. Oxford University Press, 2018) 598-601.

<sup>24</sup> Katia Small, *Arbitration under International Investment Agreements* (2nd Edn. Oxford University Press, 2018).

interpretation of MFN clauses. The Study group on the MFN clause, 2009, remained unchanged from the 1978 draft articles and they continue to remain the basis for the interpretation and application of the MFN clauses today. MFN is defined in Draft Article 4, whereby a state undertakes an obligation towards another state to accord MFN treatment in “*an agreed sphere of relations*”.<sup>25</sup> This agreed area of application may be defined in the MFN clause itself by reference to specific terms or matters that are defined or identified elsewhere in the treaty or by the specific nature of the treaty as a whole.<sup>26</sup>

Investment treaties constitute a limited sphere of state relations dealing with specifically defined types of investment and defined class of investors. The investments contemplated by the treaties constitute the outer bounds of the agreed sphere of MFN clause. The tribunal in *Telenor Mobile Communication v. Republic of Hungary* held that the MFN Clause should not be construed as extending the jurisdiction of the arbitral tribunal to categories of disputes beyond those set forth in the BIT.<sup>27</sup> A perusal of the investment treaties makes it evident that the nature of the treaty is related to protecting and fostering investments and doesn't include Human Rights consideration.

The principle of ‘*ejusdem generis*’, as discussed above, operates to define the scope of an MFN clauses subject matter. Article 9 and 10 of the Draft Articles deal with the subject matter of the MFN clause. The clause can only operate with regard to the subject matter which the two States had in mind when they inserted the clause in their treaty.<sup>28</sup> MFN treatment may be invoked as long as benefits in the same subject matter are extended to a third party whether those benefits are based upon a treaty, another agreement or a unilateral, legislative, or other act or mere practice.<sup>29</sup> The grant of MFN rights on one subject or order of subjects cannot confer a right to enjoy treatment granted to another country in respect of a different subject matter or category of the subject matter.<sup>30</sup> It was held by the *Salini* tribunal that the MFN clause should not be allowed to override treaty limitations concerning the types of claims arbitrable under the BIT.<sup>31</sup>

An extended interpretation of the MFN would disturb the *Jurisprudence Constante* and lead to a procedural imbalance in the future. Though there is no rule of precedence in Investment Arbitration,

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<sup>25</sup> Draft Articles on MFN Clauses Commentary [1978] 10(1) in II(2) Yearbook of the International Law Commission 27.

<sup>26</sup> Katia Small, *Arbitration under International Investment Agreements* (2nd Edn. Oxford University Press, 2018)

<sup>27</sup> *Telenor Mobile Communication v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 50, 13 September 2006

<sup>28</sup> Draft Articles on MFN Clauses Commentary [1978] 10(1) in II(2) Yearbook of the International Law Commission 27.

<sup>29</sup> Katia Small, *Arbitration under International Investment Agreements* (2nd Edn. Oxford University Press, 2018) 600.

<sup>30</sup> Suzy Nikiema, ‘IISD Best Practices Series: The Most-Favoured-Nation Clause in Investment Treaties’ (2017) 2, <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>, accessed 7 June 2019.

<sup>31</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Award, 2001

the tribunal must attempt to establish a constant pattern and establish a '*Jurisprudence Constante*'.<sup>32</sup> In practice, the MFN clause has not been interpreted to extend to Human Rights conventions. Moreover, the *Telenor Mobile* tribunal pointed out that the effect of the wider interpretation of an MFN clause would be to encourage unwarranted treaty shopping and raise questions as to whether the investor could broaden the jurisdiction of the tribunal to suit their purpose.<sup>33</sup> It would also lead to uncertainty and irregular application of the MFN clause.

### **III. Realising the power of MFN clause: Expanding the scope**

In the previous part, we discussed the general trend in Investment Arbitration towards Human Right issues. We also discussed the limitations and boundaries of a MFN clause in light of roping in Human Rights treaties. However, the general understating takes a very narrow approach which is inconsistent with the responsibility of Investment tribunals to promote Human Rights. In this part, we analyse the broad scope of MFN clause and discuss how it can be extended to incorporate Human Rights treaties. Firstly, it is highlighted that the interpretation of a MFN clause may vary from treaty to treaty. Secondly, it is argued that Human Rights claims must not be seen in isolation and must trigger the jurisdiction of the tribunal if the violation directly concerns the investment of the investor. Lastly, the overlapping nature of investor rights and Human Rights has been examined in light of the 'Ejusdem Principle'.

#### **A. Purposive Interpretation of the MFN Clause: Through the text of CETA**

The 2015 International Law Commission(ILC) reports on MFN observed that there cannot be a single interpretation of an MFN provision applicable across all investment agreements.<sup>34</sup> The scope of a MFN clause shall be dependent on the text of the treaty and the context under which the MFN clause is triggered. In this section of the paper, we shall discuss the expansion of MFN clause to include Human Rights violations by States. We refer to Article 8.7 of CETA to understand the purposive interpretation that can be given to the MFN clause. Article 8.7 of CETA states that "*Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favorable than the treatment it accords in like situations, to investors of a third country and to their investments*".<sup>35</sup>

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<sup>32</sup> Andrea Bjorklund, 'Investment Treaty Arbitration Decisions as Jurisprudence Constante' (2010) 1 TDM, <https://www.transnational-dispute-management.com/article.asp?key=1518>, accessed 9 June 2019.

<sup>33</sup> *Telenor Mobile Communication v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 50, 13 September 2006.

<sup>34</sup> Report of the International Law Commission, [2015] Supplement No. 10 (A/70/10)

<sup>35</sup> Comprehensive Economic and Trade Agreement [2017].

A close perusal of Article 8.7 shows that the wordings of MFN clause do not exhibit the intention of the drafters to constitute ‘treatment’ only in reference to covered investments. The clause makes a distinction between the treatment meted out by host state, investor or any other party to an ‘*investor of the other party*’ and to ‘*covered investment*’ which means that certain guidelines and obligations for both the host state and investor have been set up. Therefore, the applicability of the MFN clause is not solely related to treatment with respect to the investment of an investor and independent discriminatory actions by the host state against the investors would also trigger the MFN clause.

The aforementioned textual interpretation of the MFN clause finds support in the Fair and Equitable Treatment (FET) clause of CETA. Article 8.10 states that each Party shall accord in its territory to covered investments of the other Party and “*to investors with respect to their covered investments*” fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7. It can be seen in the FET clause that where the drafters wanted to limit the scope of the clause only to violations in respect of the covered investment, they have explicitly provided for the same. If it was the intention of the drafters to limit the ambit of MFN to only other investment treaties, the same would be explicit in the clause itself. Similar MFN clauses are found in various investment treaties, such as Article 14.4 of the Australia-Japan BIT and Article 88 of the Japan-Switzerland Economic Partnership Agreement. As the normal effect of an MFN clause in a BIT is to widen the rights of the investor,<sup>36</sup> there is a need to interpret the scope of each MFN clause based upon its wordings by giving it a purposive interpretation.

### **B. Human rights violations against Investors: Not an isolated Act**

The previous section elaborated upon the different interpretations that can be accorded to a MFN clause by an arbitral tribunal. However, even if a restricted interpretation of the MFN clause is to prevail, the interpretation of the MFN treatment must evolve to include the practical consequences of Human Rights violations. In situations wherein the Human Right violation against the investor is correlated with the existence and performance of the investment itself, the same shall trigger the jurisdiction of the investment tribunal and the MFN clause because it might not be possible to overlook human rights considerations if they cause a disturbance in the investment itself.

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<sup>36</sup> Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Award, 106, 2011.



In order to better understand this proposition, it is imperative to refer to one of the most widely cited cases in investment arbitration i.e., the *Ambatielos* case decided by an Adhoc Arbitration Commission in 1956.<sup>37</sup> Greece had brought a claim in arbitration against the UK on behalf of its national, arguing that Mr. *Ambatielos* had suffered a denial of justice in respect of a dispute before the English Courts. Greece invoked a right to bring such a claim by relying on the MFN clause in an 1886 Angle Greek treaty of commerce and navigation and earlier treaties between the UK and third states that Greece claimed had obligated the UK to accord its national treatment in accordance with international standards in the administration of justice.

In response, the UK argued that Greece had not brought a valid claim because the MFN clause at issue only related to commerce and navigation, not to the administration of justice. However, the arbitration commission rejected this interpretation and held that the effects of MFN clause could be extended to the systems of the administration of justice in so far as it concerns the protection by the courts of the rights of persons engaged in trade and navigation. The commission found that the subject matter of the 1886 Anglo Greek treaty encompassed the administration of justice, at least in respect of the intended beneficiaries under the treaty. Similarly, drawing from the rationale of the Adhoc Arbitration Commission, Human Rights violations to the extent that they concern the performance of the investment by the investors shall trigger the jurisdiction of the investment tribunal.

The *Ambatielos* Arbitration Commission explained that it is true that the administration of justice when viewed in isolation, is a subject matter other than commerce and navigation, but this is not necessarily so when it is viewed in connection with the protection of rights of traders.<sup>38</sup> Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation.

For instance, the officials of the Host State have illegally detained the investors, or the Host State advocates racial hatred against the investors or the Host State fails to provide freedom of movement to the investors owing to which the investment collapses. Similarly, limiting access to justice and violating due process also amount to Human Rights violations. These actions of the Host State violate the basic Human Rights of the investors and, in turn, violate the treaty provisions due to its impact

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<sup>37</sup> The *Ambatielos* Claim (Gr. v. UK), XII RIAA 91, 1956.

<sup>38</sup> *Id.*

on the investment of the investor or in a case of expropriation. In such cases, a purposive interpretation of the investment treaties shall allow Human Rights violations to fall within the scope of the investment tribunals.

### **C. The overlap between the nature of Human Rights and Investor Rights**

In Part I of this Article, we saw that the general understanding is based upon the ‘Ejusdem Generis’ principle. Though it is argued that rights of an investor and Humans Rights do not conform to the same subject test of a MFN clause,<sup>39</sup> the same might not be the case. The nature of Investor Rights and Human Rights are similar and overlapping in nature and both intend to protect individuals from exploitation. Human rights are the basic rights and freedoms that are inherent to all human beings.<sup>40</sup> While, Human Rights are embedded in the very existence of human beings, it came into prominence post the devastations of World War II. The calls for Human Rights came from across the world for the protection of the citizens from abuses by their governments and fellow beings. Human Rights become prevalent due to the power imbalance wherein the dominant parties abuse the weaker parties. Interestingly, Right against exploitation is the basis of investor rights as well. Bilateral Investment treaties between two sovereign states guarantee to the investors several rights (concerning business aspect of investment) such as Right to Fair and Equitable Treatment, Right against discrimination (MNF and National Treatment clauses) and Right against Indirect expropriation .<sup>41</sup> This is done to bridge the power imbalance between foreign investors and Host States and in turn protect foreign investors from exploitation.

Rights created by an investment treaty and Human Rights are overlapping as both of them intend to prohibit State exploitation. Investment treaties and Human Rights treaties create similar substantive and procedural obligations for the States, creating an implicit overlap in the treaty rights and Human Rights of the investor. Therefore, as mentioned above, in cases of illegal arrest, limiting access to justice, restricting freedom of movement, etc., the violation of the investment treaty would also con-

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<sup>39</sup> Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights,’ (2011) 60(3), 573-596, *The International and Comparative Law Quarterly*, [https://www.jstor.org/stable/23017021?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/23017021?seq=1#page_scan_tab_contents), accessed 5 June 2019.

<sup>40</sup> Diana Ludrovcová, ‘Decay of Human Rights in the 21st century’ (2017) 3, 162-177, [https://www.fos-unm.si/media/pdf/IP/Ludrovcov\\_Pinteric\\_22.pdf](https://www.fos-unm.si/media/pdf/IP/Ludrovcov_Pinteric_22.pdf), accessed 6 June 2019.

<sup>41</sup> Yannick Radi, ‘Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox’ (2012) 37 *North Carolina J. Int. L. & Com. Reg.* 1107, <http://scholarship.law.unc.edu/ncilj/vol37/iss4/3>, accessed 4 June 2019.

stitute Human Rights violations and would fall under the scope of investment tribunals. Though investment tribunals have not made explicit reference to Human Rights, they remain important considerations for the general interests of the State and the investor.

This obligation to respect Human Rights within the framework of the investment arbitration is further heightened in cases where there are existing Human Right obligations between the parties.<sup>42</sup> For instance, Article 31 of the Vienna Convention on Law of Treaties states that the relevant rules of International law between the parties must be considered to interpret the treaties. Therefore, if the parties to the BIT have a pre-existing Human Rights treaty, the same must be considered by the tribunal to interpret the rights of the investors. This understanding stems from the fact that the Investment treaty cannot allow the Host State to evade its responsibilities in other existing International obligations. It is also the legitimate expectation of the investor that the laws in protection of Human Rights will be followed by the host state which in turn might be breached by actions of the Host State under the garb of a BIT. Therefore, as Human Rights are interwoven with the rights of the investor, MFN clause can be extended to include them.

#### **D. Other measures to bridge the gap between Human Rights and Investor Rights**

Having discussed the coverage of human rights concerns in the investment arbitration case, it is also imperative to regulate the use of MFN clause to avoid treaty shopping. Unregulated use of the MFN clause could defeat the purpose of investment treaties by rendering it open to infinite interpretations. These concerns can be accommodated by adopting the following measures-

- 1) Provision like Article 23 of the Model BIT of Netherlands<sup>43</sup> which states that, “Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises” could be adopted and endorsed wherein decision on the quantum of compensation to an investor could be based on his non-compliance with its commitments related to human rights.
- 2) BITs may explicitly make reference to the UN Guiding Principles on Business and Human Rights<sup>44</sup> allowing the tribunals to confine its interpretation to the wordings of the BIT.

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<sup>42</sup> Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, 621, 2016.

<sup>43</sup> [https://globalarbitrationreview.com/digital\\_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf](https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf)

<sup>44</sup> [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)

- 3) Draft BITs should be made open to public scrutiny and the negotiation process should be transparent and open to greater consultation and participation. Representatives of multiple NGOs that are major stakeholders in claims relating to human rights must be invited and consulted. This practice was undertaken in India in 2015<sup>45</sup> wherein the draft BIT was published on public domain for open interaction.

#### **IV. Conclusion**

Whether it is the lack of expertise or the lack of willingness to move away from the status quo, the Investment tribunals and Human Rights have been largely aloof. Despite the reluctance of the investment tribunals to extend their jurisdiction to Human Rights claims of the investors, Human Rights claims have found a way into investment arbitration. Some scholars advocate that Human Rights finds space in Investment Arbitration in the disguise of public and general interests. It is argued that reference to general International Law allows the arbitrators to incorporate Human Rights laws. This line of argument stems from the fact that International tribunals have a duty to promote Human Rights and ensure its compliance in the Host States.

The Hague Rules on Business and Human Rights Arbitration has been enacted as a tool to provide remedy to those affected by Human Rights violations of business activities. The Hague Rules become particularly relevant in the context of international investment law wherein the role of Human Rights in investment arbitration is much debated and various propositions have been put forward for the “humanization” of investor-State relations. Moreover, in 2016, the Urbaser tribunal<sup>46</sup> dealt extensively with the discourse surrounding Human Rights and investment arbitration. Dealing with the question on right to water, the tribunal noted that a BIT cannot be interpreted in a vacuum and partially opened the door for Human Rights in investment arbitration.

Therefore, the recent decisions of investment tribunals coupled with the Hague rules may lead to an interesting change in the trend in investment arbitration. It is undisputed that there is a considerable amount of power imbalance between the investors and the Host States. The lack of confidence of the investors in the administration of the Host States has led to an increase in Investment treaties providing for an international tribunal to resolve disputes. Therefore, it is imperative, that the investment

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<sup>45</sup> [https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)

<sup>46</sup> Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v The Argentine Republic, ICSID Case No ARB/07/26, Award, 8 December 2016.

tribunals do not shy away from delving into the Human Rights claims of the investors. Investment disputes provide a great opportunity to further the principles of Human Rights and ensure that the States have robust compliance with Human Rights. International tribunals are essential components of the International system and their contribution ensuring peace and Human Rights compliance is indisputable.

Several Investment treaties provide for the Right to Regulate to the Host States for the promotion of Human Rights. For instance, Article 1114(1) of NAFTA and Article 10(1) of the Canadian Model BIT states that the provisions of the investment treaty do not limit the regulatory powers of the Host State regarding the protection of Human Rights. The investment treaties acknowledge the Human Rights obligations of the States towards their own citizens, there is no reason why they shouldn't have similar obligations in the treatment they accord to foreign investors. This obligation is further strengthened in cases wherein the parties to the investment treaty have existing Human Rights arrangements such as the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or any other convention relating to human rights between them like in the case of Occidental Petroleum Corporation<sup>47</sup> where the tribunal conceded that the principle of proportionality as held by the European Court of Human Rights in its decision and found a breach of FET standards.

In this Article, we have analysed the overlap between Investment Arbitration and Human Rights from the lens of the MFN clause. MFN clause may provide the Investment tribunals a convenient tool to realise their obligation to promote Human Rights compliance. As highlighted in this Article, the scope of a MFN clause is determined by its text and should not be limited to other investment treaties. Based upon the similar nature of rights created by Human Rights treaties and Investment treaties, it is argued that MFN clause provides a valid channel for incorporating Human Rights obligations from third treaties. Moreover, when the Human Rights violation has a direct impact on the substantive rights of the investor, the MFN clause should enable the investors to rope in treaties of other subject matters.

Even if Investment Arbitration is seen in isolation, Human Rights principles are given effect by various safeguards guaranteed by the investment treaties. The rights created by the MFN, FET, Full Protection and Security and indirect expropriation clauses are based upon Human Rights principles. While, the rights are overlapping, to prove Human Rights violation, the claimants must satisfy a

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<sup>47</sup> Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11

higher threshold. The same shall ensure expediency and justice for the investor, as a higher compensation shall be awarded in case the higher threshold of Human Rights violations is triggered. Using the MFN clause is one way to enable the jurisdiction of Investment tribunals to determine Human Rights issues. Other tools may include purposive interpretation of the substantive rights of the investor through the use of Article 31 of the Vienna Convention on the Law of Treaties. Incorporating Human Rights Clauses into the treaty provisions is another way of bridging the gap between the two. As against the argument of fragmentation, harmony between Investment tribunals and Human Rights Framework shall provide an efficient model for ensuring Human Rights compliance by the Host States.