LABOUR LAWS & INVESTMENT ARBITRATION: A COMPARATIVE ANALYSIS

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ABSTRACT

The article examines the intersection between labor laws and investment arbitration. It discusses the potential for labor laws to be challenged in investment arbitration and the implications of this for the protection of labor rights. The article concludes by considering the challenges and opportunities for balancing labor rights and investment protection. The article draws on a comparative analysis of case law from different jurisdictions and the work of international organizations and academics. It argues that there is a need to develop a more nuanced understanding of the relationship between labor laws and investment arbitration to ensure that both sets of rights are protected.

Keywords: Labor Laws, Labor Rights, Investment Arbitration, Investment Protection.

OVERVIEW

The legislative enactments and the court's decisions mainly embed labour law in India. It keeps on changing due to social, economic and political needs. The legislative enactments, the judicial decision, and the recommendation of boards and commissions set up by the government have contributed to the growth of labour law in the past year. The national Emergency must have influenced some decisions of the legislature and judiciary in the realm of labour law. In the case of Pfizer (P) Ltd. Bombay v. The, Workmen, it was held that when a country is in times of need/emergency, then, in that case, everyone should work together to produce the goods and services that are needed to support the war effort. Employees should cooperate with their employers' efforts to increase production, even if it means working longer hours or doing different jobs. In this case, the Supreme Court held that the employer, a pharmaceutical company, had the right to increase the working hours to support the country's needs during an emergency, but it was not made compulsory. In Hindustan Times Ltd vs their workmen, the court referred to the cost of living as constantly rising, while workers' productivity is not continuously increasing at the same rate. This means it is becoming

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increasingly difficult for industries to pay their workers a living wage, even if they are willing to do so.[1]

During the Emergency, the Parliament enacted the Personal Injuries Act of 1963, which imposed liability on employers to compensate workers sustaining personal injuries and provide insurance against such liability.[2]This act applies to the persons working in the section of mines, significant ports, and plantations. However, if an employer has appointed an employee for a wage less than Rs 1500, the government has to pay for the insurance in such cases. The amount of compensation is generally the same as under the Workmen's Compensation Act of 1923. This act differs as it makes the compensation more specific in this act, and it imposes a greater responsibility on the employers who will be liable to be penalized if they fail to pay the compensation. The government will also be liable to pay for the compensation. Thus, the act is a step towards those favouring social security legislation.[3]

The University of Delhi v. Ram Nath case is the most significant verdict in labour law. In this case, the most crucial question imposed in front of the court was whether a university would be considered an industry. The widening of the purview of the Industrial Disputes Act would allow disputes between them and their employees to be referred for adjudication.[4]But these cases, Bombay v. Hospital Mazdoor Sabha; Lalit Hari Ayurvedic Pharmacy v. L.H. A.P. Worker's Union; the corporation of the city of Nagpur v. its employees, gave the word industry a far-reaching import. In these cases, the authorities classified a hospital, a pharmacy, the education department of a municipal corporation, and a research association as industries.

However, in the case of the University of Delhi v. Ram Nath, the University of Delhi terminated the services of two bus drivers because running buses for girls had led to a loss, which the drivers claimed under the Industrial Disputes Act 1947. The university rejected the petition because the university is an educational institution, not an industry. However, the tribunal rejected this claim and directed the university to pay the retrenchment compensation.

Talking about worker wages, during the past year, the central wage board has shown much more dynamism than the judiciary and legislature. The central wage board for the jute

[1] Pfizer Bombay ltd v. The Workmen (1962) AIR 1103, 1963 SCR Supl. (2) 627
[2] Personal Injuries Act 1963, 37 Of 1963
[3] The Workmen's Compensation Act, 1923
[4] University of Delhi v. Ram Nath (1963) AIR 1873, 1964 SCR (2) 703

industry submitted its report on September 4, 1963. The central govt accepted it and requested the workers, employers and the state government to implement it expeditiously. The main points were that no contract labour should be employed in manual work. However, if so, the employed principal employer would be liable for its wages and enforcement of all labour laws, i.e., the basic wages should be raised when the clearance allowance is raised. It should be according to the consumer price index, and it should be revised every month. The retirement age for men should be fixed at 58, and the retirement age for women should be fixed at 55.

According to labour law, defined by Piron, it is a positive law whose job is to maintain labour relationships in the private sector between the employer and his workers and the state.

Kahn Freud emphasizes the argument of Piron that the principal purpose of labour law is to regulate, restrain, and support the power of organized labour. According to Kahn, labour law counters the inequality existing in the relationship between employer-employee. This inequality exists because the employer carries with him the accumulation of human resource and material resources. But the exception to this inequality exists, for example, a world-renowned scientist, a highly skilled tradesman, etc. [5]

Due to this inequality in the labour workforce, there have been two developments in the world regarding labour politics. The law, both in the continent and in England, has shrugged off its favouring private companies without government interference policy and started protecting the employee. This protective legislation has also been implemented in safeguarding women's representation and equal pay legislation. However, the most effective form of safeguarding the interest of the employees has been trade unions much more than legislation. In support of trade unions, Kahn Freud describes that legal norms can only be successful once and if they are backed by social sanctions, which are the countervailing power of trade unions and workers' unions to withhold their labour. Because of the countervailing management, trade unions are much more helpful than ordinary legislation.[6]

The question which arose here is why the law provides so much protection for trade unions to operate and why it protects the workers by enacting the legislative provisions.

[5] Vide Gazette of India, Part I, Section 1 dated the 2 nd March, 1963, at p.134
[6] Vide Gazette of India, Part I, Section 1 dated the 11 th May, 1963, at p.216

Kahn Freud answered this question by stating that the primary provision of labour relations is how control is exercised over work relations, focusing on how work organizations control workers. There is a divergence of interest according to labour relations. The employer is concerned with maximizing profits, whereas the employee is concerned with maintaining or improving the standard of living.[7]

There are two ways in which the workers express their disaffection. i.e. one is through strike action, and the other is through industrial sabotage, high labour turnover, and low productivity, manifesting the same fundamental discontent.

For the above condition, the role of law is to establish control and regulation and preserve society's socio-economic structure. The state also cannot be said to be the neutral third party in the context of industrial legislation. The state's primary role is to preserve the interest of those who essentially rule the society. This is because the state has been formed due to the coalition of classes with an employer hegemony at the front.

SOUTH AFRICAN CONCEPT OF LABOUR LAW

The basic framework of labour law is to provide a framework in which the conflict between employers and employees can be directed, and as such, the economic system is preserved.

However, the South African legislative framework provides an opposite framework of the above. In early South African labour history, a conflict of interest existed between capital who wished to market profit in which only whites would be involved, mainly in the supervisory section.

Many conflicts were organized in 1907 and 1913 and, finally and most importantly, in 1922 with the rand revolt. Moreover, in every period, it was followed by legislation culminating in the Industrial Conciliation Act of 1924. This act provided that before the statute is formed, it goes through several processes to make it lawful. It also created a provision for forming industrial councils, where the representatives from trade unions and representatives from employees organization and where binding agreements between these two groups would be concluded.[8]

[7] Kahn Freud, Labour and The Law, Third Edition
[8] R Davies op cit 11 ff

INDIA AND THE REFORMS OF LABOUR LAW

The Parliament of India passed legislation on labour law that will change how businesses operate in India. The main aim of these legislations was to protect the interests of the workers and ensure that they are treated fairly by the employees. The first change was that the threshold for retrenchment, layoff, and closure had been increased from 100 workers to 300 workers. The second change was that the industrial code 2020 set up a national commission for industrial relations. The fourth change is that the social security code 2020 provides social security benefits to gig and platform workers. The fifth change is that the Parliament has passed the wage code. This code sets out the minimum wage for all workers in the country.[9]

The first change helps in protecting workers by law.

The second change helps employers comply with more stringent regulations.

The third implication helps give the gig and platform workers social security benefits.

The fourth implication is to help all workers receive the minimum wage.

THE FOUR CODES OF LABOUR LAW:

The Code on Wages; According to this code, which the Indian Parliament passed, it was a path-breaking initiative that seeks to ensure minimum wages for all workers across the country. In addition, the code will also protect workers in hazardous industries.

Social Security Code provides workers benefits like maternity leave, health and safety standards, and social security benefits.

The Labour Code on Industrial Relations makes it easier for small companies to retrench workers or close operations. This code will bring about changes in the trade union movement.

Code on Occupational Safety, Health and Working Conditions Code 2020 states and amends the laws regarding workers' health, working conditions, and occupational safety.

[9] VakilSearch 'All You Need To Know About The Labour Law Reforms In India' (VakilSearch.com, 5 Dec 2022)& lt;https://vakilsearch.com/blog/all-you-need-to-know-about-the-labour-law-reforms-in-india/> Accessed 5 Dec 2022.

INVESTMENT ARBITRATION

As global trade and investment continue to expand exponentially, there has been a regular question regarding how to address the cross-border dispute. Although there are various ways in which cross-border dispute happens, that is why international arbitration is becoming much more popular. Further, under international arbitration, it is international investment arbitration that is becoming more popular. In the recent year, the case of Yukos came to light in which the government of Russia was held to be liable for expropriating 50 billion dollars of assets of Yuko, which is one of the largest oil companies in Russia. However, there are many examples where the state has violated the investment treaties, which has led to the growing popularity of investment arbitration.[10]

Investment arbitration can be described as claims brought against a sovereign nation by a foreign firm under the purview of an investment treaty. An investment treaty is an agreement between nations to establish an arrangement to encourage or protect foreign investment.

There is an extensive growing network of international investment treaties. These treaties protect foreign investors' rights and promote investment between countries. Two types of international investment treaties are standalone between two countries. The other is comprehensive trade agreements, which include investment provisions and other interests such as trade in goods, services, and intellectual property.[11]

IMPORTANCE OF INVESTMENT TREATIES FOR FOREIGN INVESTORS

Investment treaties typically include a provision that grants investors certain substantive rights, such as the right to establish and operate a business in the host country, the right to receive fair and equitable treatment, and the right to be protected from expropriation without compensation. [12]

In addition to granting investors substantive rights, investment treaties typically include provisions that create an enforcement mechanism for investors who believe the host country has violated their rights. This enforcement mechanism typically allows investors to sue the

[10] VikramAditya Khanna And Aditya Singh, 'International Investment Arbitration'(2005) Vol. 41, No.3, <https://www.jstor.org/stable/44677775> Accessed Spring 2015
[11] Gaukrodger, D. "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice" (2014), 2014/03 <https://doi.org/10.1787/5jxvk6shpvs4-en> Accessed 2014
[12] Catherine Yannaca Small, "Fair and Equitable Treatment Standard in International Investment Law" (2014), 2004/03 < https://doi.org/10.1787/675702255435> Accessed 2014

host country in international arbitration, which is a process that is independent of the host country's local courts. This is important because it allows investors to resolve their disputes with a neutral third party, which can help protect their rights. When foreign investors sue the host state, the case will be referred to the International Centre for Settlement of investment dispute (I.C.S.I.D.) if the host country is a signatory to the I.C.S.I.D. convention. Or else, it will be referred to as ad hoc arbitration, which is governed by the rules of arbitration rules of the United Nation Commission on international trade law; ad hoc arbitration is based on the arbitration agreement between parties.[13]

ARBITRAL AWARD

Arbitral Award is not much of an issue now because 154 nation has signed the New York Convention on the recognition and enforcement of foreign arbitral awards, making it easier to enforce a foreign tribunal award than a foreign court judgement. Also, arbitration should be done by those with expertise in that subject. [14]

ISSUES DURING FOREIGN INVESTMENT

There are many differences when someone invests abroad rather than in his home state. Therefore one should be fully versed in the legal and regulatory environment of the host state.

For example, foreign investors face the risk of arbitrary and misleading conduct of the host state. The Arab Spring put foreign investment at risk, particularly in Libya and Egypt. Incoming regimes took various steps that can hurt foreign investors and take further steps, such as cancelling licenses. A host state can also interfere and discriminate against foreign investors to protect its domestic industry. Therefore, legal recourse in that country will not be the most effective remedy when this happens.[15]

Foreign investors, therefore, mention minimum standards that must be followed during international investment agreements. Not obligating to the minimum standards can lead to initiating actions under the treaty.

[13] 14 Prof. N. Jansen Calamita, "Handbook On Obligations in International Investment Treaties" (2020), 219-CT-03.5 <https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/apec_handbook_on_obligations_in_iit&gt Accessed 2020

[14] Convention Related to Arbitral Award (Adopted 1958, entered into force 7 June 1959) (New York Convention) Article XII

[15] Marcelo Ribeiro Goraieb, Mauricio Reinert, Fabiane Cortez, 'Cultural Influences on Foreign Direct Investment' (2018) Vol. 14, NO.2, pp. 128-144.

Some of the commonly used standards to protect by different investment agreements are:

"Fair and equitable treatment" is the most frequent and invoked standard, which provides the basis for most successful claims. The standard protects foreign investment against arbitrary and unfair treatment by the host country.

Investment agreements also provide for compensation in the event of expropriation or nationalization. Expropriation in investment agreements is allowed for public purposes, should be non-discriminatory, and should be accompanied by adequate compensation. By non-discriminatory, we mean that the expropriation should be used for adequate purposes, such as building roads, schools, or homes. When the Qadaffi regime in the 1970s nationalized foreign oil concessions, Texaco, British Petroleum, and L.I.A.M.C.O. recovered substantial damages in arbitrations. Most Investment treaties also include the Most favoured nation clause, which means that a country provides a trade concession to one trading partner to extend the same treatment to all the parties. It means that there should be no discrimination against a particular country, and no country should be given special treatment to goods or services from one trading partner. [16]

INDIA: A CASE STUDY

India is a leading destination for foreign investment due to its competitive labour costs, skilled workforce, a large and expanding domestic consumer market. According to Ernst and Young Attractiveness survey, more than half of international business leaders planned to set up new business operations in India over the next year.

PROBLEMS REGARDING INVESTMENT IN INDIA

Many global companies, when they try to invest in India, face the problems of regulatory, tax, and other disputes. Moreover, when any disputes arise, they are well-versed in the delaying function of courts in India. In the World Bank's 2015 Doing Business Work Report, India ranks third from the bottom 186 of 189 on the ease of enforcing contracts. In light of all these problems, foreign investors are considering the option under-investment regimes.

[16] KHANNA, VIKRAMADITYA, and ADITYA SINGH. "Current Trends in International Investment Arbitration." Litigation, vol. 41, no. 3, 2015, pp. 41–44. JSTOR, http://www.jstor.org/stable/44677775. Accessed 13 July 2023.

WHITE INDUSTRIES

White Industries is an Australian Company that won an ICC Arbitration for 4 million dollars from a Paris seated tribunal in 2002 in a contractual dispute with Coal India, a state-owned entity. From 2002 to 2010, White Industries unsuccessfully sought to enforce an award, and in July 2010, it filed a treaty claim against the government of India under the Australian India BIT in London. London Tribunal Held that India's delay in enforcing the award violated the obligation to provide effective means of asserting claims and enforcing rights. White Industries awakened foreign investors to the possibility of actively using investment arbitration against the Indian government. Moreover, recent Supreme Court judgments have made international investment more attractive. [17]

CONCLUSION

The Indian government has passed a series of labour law reforms that aim to protect workers' interests and ensure that employers treat them fairly. The reforms include increasing the threshold for retrenchment, lay off and closure, setting up a national commission for industrial relations, providing social security benefits to gig and platform workers, and setting out the minimum wage for all workers in the country. These reforms will help improve the working conditions of workers in India and ensure they are treated with respect. Investment arbitration is a growing field as more and more foreign investors are looking to protect their investments in other countries. India is a leading destination for foreign investment, but investors need some help, such as the slow and complex legal system. The White Industries case showed that foreign investors can use investment arbitration to protect their rights, and recent Supreme Court judgements have made international investment more attractive.

[17] International Investment Claims (India v. Australia) IIC 529 (2011) (OUP reference)