

THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION: SOME CHALLENGES AND RESPONSES

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INTRODUCTION.....	402
THE HAGUE RULES, WHAT THEY ARE AND HOW THEY CAME TO BE	404
(a) <i>Treaty developments since the launch: the UN Binding Treaty</i>	406
(b) <i>National legislation addressing business and human rights violations</i>	408
(c) <i>Case law of national courts</i>	411
MAIN CRITICISMS TO THE HAGUE RULES AND OUR RESPONSE.....	414
(a) <i>Criticism One: Arbitration is not suited to resolve business and human rights disputes</i>	414
(b) <i>Criticism Two: The Hague Rules divert litigation from national courts and hinder public participation in the development and administration of the rule of law</i>	417
(c) <i>Criticism Three: Business-to-business arbitration under the Hague Rules does not pay heed to the truth-seeking and reparative needs of victims</i>	419

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(d) <i>Criticism Four: The Hague Rules cannot remedy undemocratic, underequipped and politically driven legal systems that prevent access to remedy</i>	420
(e) <i>Criticism Five: Arbitration under the Hague Rules is likely to be regarded as “guilty by association” with investor-state arbitration</i>	421
(f) <i>Criticism Six: The Hague Rules cannot operate absent global and binding instruments imposing high human rights standards</i>	422
(g) <i>Criticism Seven: Lack of compulsory jurisdiction has been identified as a significant problem</i>	424
(h) <i>Criticism Eight: The Hague Rules don’t address fundamental issues of inequality of arms</i>	427
CONCLUSIONS	428

INTRODUCTION

The rise in power of multinational corporations over the past fifty years is well-documented.¹ Multinational enterprises have emerged as truly global actors, able to affect government policies in strategic, economic, and legal ways. Strategically, they often operate in sectors traditionally run by governments by providing infrastructures or other social services. Economically, they are powerful financial centres, wealthier than certain small countries.² Legally, multinational corporations tend to be independent of one specific state, except for the formal nexus of incorporation, and can restructure to quickly adapt to changing circumstances. From an international law standpoint, the large majority of international legal scholars argue that multinational corporations do not possess international legal personality, making it difficult to subject them to direct legal obligations applicable across borders.³

The comprehensive protection these entities have received, for instance, under international investment law, demonstrates how multinational corporations can often contribute to society’s economic and

1. John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 *REGUL. & GOVERNANCE* 317 (2017).

2. John Mikler, *Global Companies as Actors in Global Policy and Governance*, in *THE HANDBOOK OF GLOB. COMPANIES* 1, 4 (John Mikler ed., 2013).

3. For an overview of this body of scholarship, as well as of the dissenting voices, see Jan Wouters & Anna-Luise Chané, *Multinational Corporations in International Law* (KU Leuven—Leuven Ctr. for Global Governance Stud., Working Paper No. 129, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371216.

technical development. At the same time, these corporations can be responsible for breaches of human and environmental rights, spanning from the provision of unsafe or unhealthy working conditions, to discrimination against employees, to damage to people’s health through pollution, environmental accidents, and health and safety failures. However, they often walk away without being held accountable for those breaches due to the incapability or unwillingness of national and international authorities to regulate them effectively.

A range of initiatives has attempted to close this accountability gap. Reflecting the difficulty of creating binding obligations on non-state actors, the most widely used international law instruments deployed to date are international instruments of a “soft law” nature,⁴ such as the UN Guiding Principles on Business and Human Rights (UNGPs)⁵ and the OECD Guidelines.⁶ More recently, an increasing number of countries have begun to address this gap by setting out human rights due diligence obligations on multinational enterprises in their own national legislation, such as through the French *Loi relative au devoir de vigilance*.⁷ International treaties,⁸ and

4. Including the U.N. Global Compact (2019), available at <https://www.unglobalcompact.org>; the International Finance Corporation Performance Standards on Environmental and Social Sustainability, available at https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_pps; the updated ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Janelle M. Diller, *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 41 INT’L LEGAL MATERIALS 184, 184-201 (2002)); and the 2011 OECD Guidelines for Multinational Enterprises, available at www.oecd.org/daf/inv/mne/48004323.pdf.

5. Off. of the High Comm’r, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, HR/PUB/11/04 (2011). The UNGPs are structured in three “Pillars”—(i) protect (states have the duty to protect against human rights abuses by all actors in society, including businesses and must therefore prevent, investigate, punish and redress human rights abuses that take place in domestic business operations); (ii) respect (business enterprises must prevent, mitigate and, where appropriate, remedy human rights abuses that they cause or contribute to); and (iii) remedy (states must ensure access to an effective remedy for those affected when human rights are violated by companies within their jurisdiction). The UNGPs are not legally binding—they are part of a growing body of non-binding “soft law” regulating the conduct of multinational enterprises. Note that the Hague Rules declaredly want to contribute to the implementation of pillar three of the UNGP (remedy).

6. *OECD Guidelines for Multinational Enterprises*, *supra* note 4, at 8.

7. Loi 2017-399 du 27 mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d’ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of Parent Companies and Ordering Companies], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 27, 2017.

8. For instance, the 2019 Netherlands Model Bilateral Investment Treaty allows for reductions in investor compensation for noncompliance with the UNGPs. Netherlands Model Investment Agreement, Neth., Mar. 22, 2019, <https://investmentpolicy.unctad.org>.

judicial and quasi-judicial national⁹ and international courts and tribunals¹⁰ have also proven to be increasingly efficient instruments to fill the governance gap between the power and regulation of corporations.

The Hague Rules on Business and Human Rights Arbitration (the “Hague Rules”), which the authors of this article have contributed to developing, are another instrument that aims to effectively address harm to human rights, or the environment caused by corporations. Launched in December 2019, the Hague Rules are a set of arbitral rules specifically devised to settle disputes arising from the alleged breach of human and environmental rights by businesses and their supply-chain partners across borders.

We have previously discussed why this ad hoc instrument for resolving such human rights disputes, alongside other national and international instruments, might prove beneficial for preventing and resolving human rights violations on the part of businesses.¹¹ Indeed, the Hague Rules have received a broadly positive reception from stakeholders and it would appear that they have recently been integrated into the Sustainable Investment Facilitation & Cooperation Agreement (SIFCA), a next-generation model bilateral investment treaty (BIT) developed for The Gambia.¹² In the present contribution, we want to take stock of how the landscape of remedies for human rights violations by businesses has evolved since the launch of the Hague Rules in 2019 and attempt to respond to the main criticisms raised to date in relation to the Rules.

THE HAGUE RULES, WHAT THEY ARE AND HOW THEY CAME TO BE

The idea of the Hague Rules was conceived in 2017 when a group of international lawyers and academics, the Working Group, started developing the possibility of using international arbitration as a method of

9. See, e.g., the decisions of UK Courts in the cases of *Vedanta Res. PLC v. Lungowe and Okpabi v. Royal Dutch Shell PLC*. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20 (appeal taken from Zambia); *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3 (appeal taken from Nigeria).

10. See, e.g., *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, para. 155; *SERAP v. Fed. Republic of Nigeria* [2012] ECW/CCJ/APP/08/09 (ECOWAS, Dec. 14, 2012).

11. Bruno Simma & Giorgia Sangiuolo, *Advocating an Ad Hoc Forum for Business Human Rights Disputes*, in *THE STRUGGLE FOR HUMAN RIGHTS: ESSAYS IN HONOR OF PHILIP ALSTON* 122 (Nehal Bhuta et al. eds., 2021).

12. Robert L. Houston et al., *Notes from Practice: Announcing the SIFCA Framework – Is the Confluence of Investment Protection with Business and Human Rights the Future of Investment Treaties?*, KLUWER ARB. BLOG (Nov. 26, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/11/26/notes-from-practice-announcing-the-sifca-framework-is-the-confluence-of-investment-protection-with-business-and-human-rights-the-future-of-investment-treaties>.

resolving disputes over obligations and commitments arising out of human rights violations by businesses.¹³ Initial consultations with stakeholders suggested that international arbitration could indeed help overcome some of the legal and practical barriers faced by individuals when bringing human rights claims through existing mechanisms of redress, particularly national courts, and provide an effective instrument to prevent and address the violation of human rights by businesses in line with Pillar III of the UNGPs.¹⁴

The Hague Rules were eventually launched on December 12, 2019 in a ceremony at the Peace Palace in The Hague. The final version of the Hague Rules is the product of a multi-stage process supported by the City of The Hague, which involved the creation of a “Sounding Board” comprising of stakeholders’ representatives, and two public consultations on an “Elements Paper”¹⁵ and on a first set of draft rules.¹⁶

Regarding their content and structure, the Hague Rules are based on the 2013 UNCITRAL Arbitration Rules,¹⁷ with amendments tailored to be applied in disputes raising environmental, social, and corporate governance issues, relating to human rights, environment, and climate change, rather than to purely commercial disputes. For instance, these amendments include requirements relating to the composition of the tribunal, which should be diverse, and the special expertise of the arbitrators (Article 11); a provision for multiparty claims (Article 19); rules on the taking of evidence that strike a balance among a number of factors, notably fairness, efficiency, cultural appropriateness and rights-compatibility (Article 32); support of third-party funding subject to certain guarantees of disclosure

13. The Working Group is the group of international lawyers and academics that first conceived the idea of the Hague Rules. The Working Group consists of Claes Cronstedt, Jan Eijbouts, Steven Ratner, Martijn Scheltema, Robert Thompson, and Katerina Yiannibas. Cronstedt, et al., *International Business and Human Rights Arbitration* (Feb. 13, 2017) (unpublished proposal). In 2017, the Working Group entrusted the task of elaborating a set of rules on the topic – The Hague Rules – to a “Drafting Team.” For an overview of the background to the Rules, see Bruno Simma et al., *International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process* (elements paper) (Nov. 2018).

14. Wouters & Chané, *supra* note 3, at 16.

15. Simma et al., *supra* note 13. The Elements Paper set out the background, aim, and scope of the Hague Rules. It then provided an overview of thirteen main “elements” that were being considered at the time by the Drafting Team for the purpose of developing the Hague Rules, accompanied by a set of questions that were considered by stakeholders in a first public consultation, the results of which have shaped the development of the Hague Rules.

16. For the draft Hague Rules published for consultation in June 2019, see Bruno Simma et al., *Draft Arbitration Rules on Business and Human Rights* (draft paper) (June 2019).

17. U.N. Comm. on Int’l Trade L., Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/68/462, *supp.* 17 (2013).

(Article 55); and the need that awards should be rights-compatible (Article 45).

The flexibility of the Hague Rules allows them to adapt to any dispute, regardless of the type of claimant(s), respondent(s), or subject matter of the dispute: they can be included in arbitration clauses in national or international commercial contracts, agreed on in arbitration agreements after a dispute has arisen, and even included as applicable rules in arbitration clauses of international treaties concluded by states and international organizations.¹⁸ Despite the reference to “human rights” in their name, the Hague Rules can be used for any dispute that deals with “collective action” problems relating to environmental, social, and corporate governance issues. In all cases, awards under the Hague Rules may be enforced through national laws or international treaties, including the New York Convention.¹⁹

Each article of the Hague Rules is also accompanied by a “commentary,” which aims to provide users with some background on the rationale and intent pursued by the Drafting Team with each provision, as well as by a set of “model clauses” for their easy incorporation in contracts and arbitration agreements. The Hague Rules further include a “Code of Conduct” for arbitrators, which reflects the highest ethical standards and best practices of international arbitration at the time of their drafting.

A brief overview of the changes in the legal landscape surrounding the resolution and enforcement of BHR disputes since the launch of the Hague Rules

(a) Treaty developments since the launch: the UN Binding Treaty

Since the launch of the Hague Rules, the attention of the international community continues to be focused on the most important international initiative in the field of human rights violations by businesses: the development of the first legally binding international instrument which will attempt the following: “a.) to clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfill and promote human rights in the context of business activities, particularly those of transnational character; b.) To clarify and ensure respect and fulfilment of the human rights obligations of business enterprises; c.) To prevent and mitigate the occurrence of human rights abuses in the context of business

18. Inter-Am. Ct. H.R., *supra* note 10; SERAP v. Federal Republic of Nigeria, at 9 [2012] ECOWAS 18/12.

19. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

activities by effective mechanisms of monitoring and enforceability; d.) To ensure access to justice and effective, adequate, and timely remedy for victims of human rights abuses in the context of business activities; e.) To facilitate and strengthen mutual legal assistance and international cooperation to prevent and mitigate human rights abuses in the context of business activities particularly those of transnational character, and provide access to justice and effective, adequate and timely remedy to victims of such abuses” (the so-called “Binding Treaty”).²⁰

The initiative for a Binding Treaty builds upon a 2014 resolution tabled by Ecuador and South Africa and is being led by an open-ended working group established in 2014 by the UN Human Rights Council (UNHRC). The instrument, in the form of an international treaty, would hold corporations directly responsible for violating human rights. In its current form, the Binding Treaty provides that states should set out a legal framework at the national level suitable to prevent and address human rights abuses by and protect victims of businesses’ activities of a transnational character.²¹ This includes ensuring that at minimum, victims should have effective access to courts and non-judicial grievance mechanisms of the state parties, including access to legal aid, the possibility to obtain restitution and compensation, and the right to have national and foreign judgments and awards promptly executed.

The Binding Treaty and the Hague Rules are thus complementary instruments: like the Hague Rules, the Binding Treaty is designed to implement the UNGPs. Like the Hague Rules, the Binding Treaty aims to shift the bulk of the responsibility for the violation of human rights from states to businesses. In terms of how the Binding Treaty will function, if agreed on the current terms, the Binding Treaty will establish a binding set of rules for multinational corporations that can be enforced across borders, including through the Hague Rules. Arbitration under the Hague Rules can further constitute a means through which states discharge their respective obligation under the Binding Treaty.²² The Binding Treaty will also oblige contracting States to enforce awards rendered by arbitral tribunals,

20. Open-Ended Intergovernmental Working Group, Rep. on the Work of Its Seventh Session, A/HRC/49/65/Add.1, art. 2 (2021).

21. The draft treaty is currently set to apply to “all business activities, including business activities of a transnational character,” although governments remain free to “differentiate” how business enterprises discharge these obligations “commensurate with their size, sector, operational context or the severity of impacts on human rights.” The obligations in question are all internationally recognized human rights and fundamental freedoms binding on the state parties and customary international law. *Id.* art. 3.3.

22. *Id.* art. 7.1.

including under the Hague Rules, in so far as they constitute an effective tool to implement the businesses' obligations.²³

At the time of writing, negotiations for the Binding Treaty are still ongoing,²⁴ and a third draft of the treaty was published in July 2021.

(b) *National legislation addressing business and human rights violations*

An important trend that has continued since the launch of the Hague Rules is the adoption of mandatory human rights due diligence legislation in several states and regional organisations. This legislation requires businesses to identify actual and potential human rights impacts on employees, individuals, or communities affected by a company and its supply-chain partners, integrate these findings into their operations, and remediate any of these impacts.²⁵

Since the launch of the Hague Rules, we note the adoption of three major pieces of legislation. Spearheaded by France and its “*Loi relative au devoir de vigilance*,”²⁶ Germany, the Netherlands, and Norway have passed, or are reinforcing, human rights due diligence legislation.²⁷ This legislation includes due diligence obligations to prevent and address not only human rights, but also social and environmental rights violations. Not all companies fall within the scope of the due diligence obligations contained in the legislation: German legislation covers, with few exceptions, only large companies established, domiciled, or having their principal place of business in Germany, and, to an extent, their direct and

23. *Id.* art. 7.6.

24. Open-Ended Intergovernmental Working Group, Rep. on the Work of Its Seventh Session, A/HRC/49/65/Add.1, art. 2 (2021).

25. *Mandatory Human Rights Due Diligence (mHRDD)*, OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd> (last visited Sept. 15, 2022).

26. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-399DC, Mar. 27, 2017, J.O. (Fr.).

27. For Germany, see Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten [Lieferkettensorgfaltspflichtengesetz—LkSG] [Supply Chain Due Diligence Act], July 16, 2021, BUNDESGESETZBLATT (BGBl.) I 2021, 2959 entering into force on Jan. 1, 2023; for the Netherlands, Wet verantwoord en duurzaam internationaal ondernemen [Human Rights and Environmental Due Diligence Law], available at <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761#wetgevingsproces>. This bill is set to replace the previous Child Labour Due Diligence Act (Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen [Wet zorgplicht kinderarbeid], Stb. 2019; for Norway, Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold [åpenhetsloven] [Transparency Act], Jan. 7, 2022, NORSK LOVTIDEND.

indirect suppliers,²⁸ whereas the Norwegian legislation addresses large companies and foreign companies which sell goods or provide services in the country.²⁹ The Dutch legislation, which builds upon the existing Child Labour Due Diligence Act, is the broadest in scope and extends the duty of care to all companies incorporated in the Netherlands and Caribbean Netherlands as well as “large” foreign companies which sell products on the Dutch market or carry out activities in the Netherlands. These companies have a duty to prevent, mitigate, reverse and remedy the negative impacts that it knows have, or reasonably suspects may have, adverse effects on human rights, labour rights or the environment in a country outside the Netherlands. All three sets of legislation establish certain economic thresholds for the application of due diligence obligations, with the aim of excluding smaller businesses that may not be able to sustain the added costs entailed in the due diligence requirements. They also set out certain transparency obligations, as well as limits to transparency to protect professional and business secrecy. Financial sanctions for breach of due diligence obligations are provided across all legislative initiatives, with the German legislation also foreseeing the possibility that a company may be excluded from public contracts.³⁰ In addition to financial sanctions, the Dutch legislation also provides for administrative or even criminal enforcement. At the time of writing, other EU Member States, such as Finland and Denmark, are also debating introducing similar legislation.³¹

We observe that the EU has taken note of this legislation and is preparing to act in the space of due diligence obligations for businesses at the time of this writing. The initiative for an EU Directive on “Mandatory Human Rights, Environmental and Good Governance Due Diligence”³²

28. Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, [BGBl I 2021, 2959] §1, entering into force on Jan. 1, 2023.

29. Åpenhetsloven [Transparency Act], Jan. 7, 2022, NORSK LOVTIDEND §2.

30. Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, [BGBl I 2021, 2959] §22, entering into force on Jan. 1, 2023.

31. *National & regional movements for mandatory human rights & environmental due diligence in Europe*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/> (last visited Sept. 21, 2022).

32. The Union has already adopted sectoral mandatory due diligence legislation in specific areas, including for operators that place timber and timber products on the internal market to due diligence requirements and requires traders in the supply chain to provide basic information on their suppliers and buyers to improve the traceability of timber and timber products. *See* Regulation 995/2010, of the European Parliament and of the Council of October 20, 2010 on the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23. The legislation also rules on supply chain due diligence in order to curtail opportunities for armed groups, terrorist groups and/or security forces to trade in tin, tantalum and tungsten, their ores, and gold. *See* Regulation 2017/821, of the European Parliament and of the Council of

builds on a February 2020 study that found that mandatory due diligence legislation would have significant social, human rights, and environmental impacts.³³ The EU Commission has since committed to introduce a legislative initiative in this space.³⁴ In March 2021, the European Parliament also passed a resolution recommending that the EU Commission take action on corporate due diligence and corporate accountability.³⁵ The recommendation is accompanied by a non-binding legislative proposal on mandatory supply chain due diligence and the outline of a draft Directive encapsulating the views of the European Parliament on this matter. While not binding, the draft Directive still provides some indication of what an EU due diligence legislation could look like: it sets out broad mandatory corporate due diligence obligations on a large number of businesses to identify, prevent, manage, remedy, and report on human rights, environmental and good governance risks and violations in their value chains, upstream and downstream.³⁶ Companies are required to develop an effective due diligence strategy that takes into account adverse impacts on human rights, the environment, and good governance in their operations and business relationships, even if only potentially. Businesses also have obligations to prevent and remedy risks to human rights, the environment and good governance in their operations and business relationships, to publicly disclose risks and harm that occurred, and to provide for grievance mechanisms and remediation processes both as an early warning mechanism for risk-awareness and as a mediation system, allowing any stakeholder to voice reasonable concerns about potential or actual adverse impacts.³⁷ In determining the effectiveness of these grievance mechanisms, the Directive makes reference to Principle 31 of the UNGPs (according to which non-judicial grievance mechanism should be legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable).

May 17, 2021 on the Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1.

33. British Institute of International and Comparative Law, Study on Due Diligence Requirements Through the Supply Chain, 2020, Eur. Comm'n (UK).

34. Didier Reynders, European Commissioner for Justice, Speech at RBC Working Group's Webinar on Due Diligence (Apr. 29, 2020).

35. European Parliament Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability No. 2020/2129 of 10 March 2021.

36. *Id.* art. 2. These are "large undertakings" governed by the law of an EU Member State or established in the territory of the European Union; all publicly listed small- and medium-sized undertakings; small- and medium-sized undertakings operating in high-risk sectors; and those governed by the law of a third country and not established in the territory of the European Union when they operate in the internal market selling goods or providing services.

37. *Id.* art. 9.

Sanctions for the violation of due diligence obligations include administrative sanctions,³⁸ a ban on the import of products linked to “serious human rights violations,” fines, and exclusion from public contracts.

Like the Binding Treaty, human rights due diligence is also complementary to the Hague Rules in various ways. First, like the Hague Rules, human rights due diligence is an element of the “smart mix of measures” that the UNGPs recommend that states should adopt to foster business respect for human rights.³⁹ Secondly, due diligence legislation articulates clear substantive environmental, social, and governance rules, the breach of which could be arbitrated under the Hague Rules. Finally, arbitration under the Hague Rules can arguably be regarded as one of the ways in which businesses can implement the obligations set out in due diligence legislation to prevent and remedy actual and potential human rights impacts on employees or individuals and communities negatively affected by its own and its supply-chain partners’ activity.

(c) *Case law of national courts*

The trend of national courts allowing action against parent companies for breach of human rights committed by their subsidiaries in a foreign territory—readers may recall the case of *Vedanta* before the UK Supreme Court⁴⁰—has continued strong since the launch of the Hague Rules. Deploying new, creative arguments to “pierce the corporate veil” among parent companies and their foreign subsidiaries, national courts fill the

38. *Id.* art. 13.

39. Off. of the High Comm’r, *supra* note 5; Wouters & Chané, *supra* note 3.

40. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20, *supra* note 9. In that case, the UK Supreme Court accepted jurisdiction over a claim brought by Zambian citizens allegedly affected by environmental damage and pollution resulting from the mining operations of the Zambian subsidiary of a UK-incorporated company, Vedanta Resources PLC. The Supreme Court found that, while Zambia would be the proper place for litigation, there was (in the case at issue) substantial risk that the defendants would not receive substantial justice in Zambia. The Supreme Court then went on to affirm that, based on the common law, it is well arguable that a holding company with a sufficient level of involvement in the operations of a subsidiary may have a legal duty towards individuals abroad who are injured as a result of the activities of that foreign subsidiary. The outcome of the merit of the case remains pending at the time of writing. This jurisprudence on the tort law duty of care was further confirmed by the UK Supreme Court in *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3, where some Nigerian communities brought claims in negligence in England against the UK-incorporated Royal Dutch Shell, PLC and its Nigerian subsidiary for alleged pollution and environmental damage caused by oil leaks from pipelines operated by the subsidiary company. *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3, *supra* note 9.

governance gap created by national company law rules and ensure the right to an effective remedy for victims of human rights violations.

For reasons of space, we limit ourselves to noting two main developments since the launch of the Hague Rules in December 2019. The first instance is the decision of the Canadian Supreme Court in *Nevsun Resources Ltd. v Araya* in February 2020.⁴¹ In that decision, the Canadian Supreme Court confirmed that a claim against an Eritrean mining company for alleged breaches of domestic torts and customary international law rules having the nature of *jus cogens* could proceed against its Canadian parent company. Significantly, the majority of the Court, for the first time, opened the door to the possibility that customary international law rules of *jus cogens* may be relied upon against private companies for the acts of their subsidiaries abroad.

In short, the case was brought by three miners against a Canadian company, Nevsun Resources Ltd. (Nevsun), the ultimate owner of a mine in Eritrea. The three men alleged that they had been tortured and forced to work as slaves in the mine for years, until they managed to escape abroad, eventually obtaining the status of refugees. The workers brought proceedings against Nevsun for alleged breaches of domestic torts and customary international law, the latter in relation to slavery, forced labor, cruel, unusual, or degrading treatment, and crimes against humanity. Specifically, the plaintiffs argued that customary international law was part of Canadian law, which meant that Canadian courts should be able to hold Nevsun responsible for the harm they suffered. Nevsun disagreed, maintaining that the “act of state doctrine,” according to which national courts in one state do not have jurisdiction on the actions that another state has done within its own territory, meant that the company could not be sued for violating customary international law in Canada. Nevsun also disputed that customary international law may ground a claim for damages under Canadian law, as no statute creates such causes of action. A majority of the Canadian Supreme Court dismissed both of the arguments of Nevsun. First, the majority ruled that the act of state doctrine was not part of Canadian law and that Canadian courts are not barred from enquiring as to the lawfulness or validity of foreign laws, especially where this is necessary or incidental to the resolution of domestic legal controversies before the Canadian courts. The Court thus upheld the decision of the lower courts that the workers’ lawsuit could go forward. Second, the majority noted that common law may recognize a direct remedy for the miners’ claims as part of Canadian common law and that certain customary international law

41. *Nevsun Res. Ltd. v. Araya*, [2020] S.C.C. 5 (Can.).

norms may be relied on by individuals, despite their inter-state character. However, the majority of the Supreme Court left it to the trial judge to determine “whether the common law should evolve so as to extend the scope of those norms to bind corporations”⁴² and whether Nevsun breached customary international law and should therefore be held responsible. For better or worse, the case was eventually settled, leaving the questions returned to the trial judge without a final answer.

The second case we will refer to here is a case of the French *Cour de Cassation*, criminal section, of September 2021 in *Lafarge*.⁴³ Notably, in this case the *Cour de Cassation* upheld the indictment of the French multinational cement company Lafarge Holcim SA (Lafarge) for the complicity of its subsidiary Lafarge Cement Syria (LCS) in crimes against humanity and financing of terrorism committed by the Islamic State of Iraq and Syria and other armed groups in Syria. This is the first time a parent company faced a formal investigation for complicity in crimes against humanity abroad.

The facts of the case relate to the operation of the companies in Syria during the Syrian Civil War between 2011 and 2014. In order to continue its operations on the territory, LCS allegedly negotiated with armed groups and paid multimillion-dollar bribes to allow the movement of staff and goods inside the war zone. In 2016, eleven former Syrian employees and two NGOs filed a criminal complaint before French courts against Lafarge, and in 2017, the Paris Public Prosecutor opened an investigation for financing terrorism. In 2018, Lafarge, LCS, and some executives were indicted by French investigative judges for complicity in crimes against humanity. In November 2019, the Paris Court of Appeal confirmed the criminal indictments for the financing of terrorism but dismissed charges of complicity in crimes against humanity. The decision of the Court of Appeal was appealed to the *Cour de Cassation* which upheld the charges of financing terrorism and quashed the annulment of the charges of crimes against humanity. In particular, the *Cour de Cassation* found the existence of serious and corroborating evidence that not only the French mother company, Lafarge, had financed, via LCS, ISIS activities, but also had precise knowledge of the actions of the organisation, which were likely to constitute crimes against humanity. Interestingly, the Supreme Court added that Lafarge did not need to be willing to be associated with the crimes in order to be charged as an accomplice in the criminal proceedings in France.

42. *Id.* § 113.

43. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sept. 7, 2021, Bull. crim., No. 19-87.367 (Fr.).

MAIN CRITICISMS TO THE HAGUE RULES AND OUR RESPONSE

Since their launch, the Hague Rules have received strong support from the public and private sector. We have noted above how they have been incorporated in the model FIPA of The Gambia. Among other things, they have also featured in reports on the use of arbitration to address ESG issues,⁴⁴ and a number of organisations have taken them as a model to develop sectoral arbitration rules. However, the Hague Rules have also attracted some criticisms regarding their appropriateness and efficacy in addressing human rights violations on the part of businesses. Some of these criticisms are more “ideological” and harder to respond to, whereas we believe we have a good response for others. All of them give us a welcome chance to test our thinking and conclusions during the drafting process.

In the present article, we survey the main critical views on the Hague Rules and list below the ones that we have found most challenging and to the point. Each of them is accompanied by some reflections on the thinking that went into the drafting. For further reflections and clarifications on the scope and functioning of the Rules, readers should also refer to the “Q&A” document prepared by the Drafting Team.⁴⁵

*(a) Criticism One: Arbitration is not suited to resolve business and human rights disputes*⁴⁶

There appears to be two main parts to this criticism. For the first one, it is well known to those practicing in the field of international investment arbitration, that arbitration is a “private” mechanism for the settlement of disputes and that it is not suited to settle disputes dealing with fundamental interests of society, such as those relating to the protection of human and

44. Rep. of the U.N. Working Grp. on Bus. & Hum. Rights on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/47/39, at 22 (2021); Ulla Gläßer, et al., *Non-Judicial Grievance Mechanisms in Global Supply Chains: Recommendations for Institutionalisation, Implementation and Procedural Design* (2021); 999 I.C.C. Comm’n on Arb. & ADR, *Resolving Climate Change Related Disputes Through Arbitration and ADR 129* (2021). The authors were also made aware that the new International Labour Arbitration and Conciliation Rules (ILAC) are modelled around the Hague Rules. At the date of publication of this article, the text of these rules has not yet been published.

45. Ctr. Int’l Legal Coop., *The Hague Rules on Business and Human Rights Arbitration, Questions & Answers* (May 2021), <https://www.cilc.nl/cms/wp-content/uploads/2021/05/QA-The-Hague-Rules.pdf>.

46. Francois Holmey, *The Hague Rules on Business and Human Rights Arbitration*, THE L. SOC’Y GAZETTE (Jan. 17, 2020), <https://www.lawgazette.co.uk/legal-updates/the-hague-rules-on-business-and-human-rights-arbitration/5102761.article>; Iris Ng Li Shan, *On the Path to Justice: Exploring the Promise and Pitfalls of the Hague Rules on Business and Human Rights Arbitration*, 2 INST. TRANSNAT’L ARB. REV. 54, 66 (2020).

environmental rights. The argument essentially is that this type of dispute is best dealt with by national courts, the *bouche de la loi*,⁴⁷ whose embedment in the public law tissue of states gives them the necessary “legitimacy” to adjudicate on issues that go to the very core of society. The flexibility inherent to arbitration contributes to this criticism: unlike national courts, the argument goes that arbitration allows parties to “adapt” the dispute settlement proceedings to their needs. This includes the right of the parties to appoint decision-makers, limit the transparency of the proceedings, and select the law applicable to the dispute. According to critics, this flexibility would effectively allow parties to bypass certain procedural guarantees for the “good” decision-making traditionally featured by national courts.

In our view, this criticism overlooks that arbitration under the Hague Rules is not meant to displace or substitute the work of national courts, but rather provides those aggrieved by a situation of human rights breach an additional, effective mechanism to settle their dispute in the service of upholding rights that are quintessential to the functioning of society when other mechanisms at their disposal are unavailable or unsatisfactory for the parties. Looked at as a complementary, rather than alternative, route to national courts, arbitration under the Hague Rules so finds its “legitimacy” in the fact that it provides an *additional* tool to implement universal values and pursue community interests, which could otherwise not be upheld, or be equally satisfactorily upheld. The procedural flexibilities of arbitration that allow parties to “tailor” the decision-making to the circumstances of their case represent an essential tool to enable arbitration to complement other existing remedies for human rights disputes: arguably, it is those flexibilities that make litigants in human rights-related disputes able or willing to adjudicate their disputes; disputes that may otherwise remain unresolved, perpetuating a situation of human rights breach.

The experience of the Bangladesh Accords arbitrations, the first example of business and human rights arbitration proceedings, supports our argument.⁴⁸ There were two commercial arbitration cases arising out of the Bangladesh Accords, which are agreements signed among a number of global fashion brands and labor organisations operating in the garment industry in Bangladesh. The two cases were eventually settled, with one fashion brand agreeing to remedy a breach, and the other agreeing to pay compensation to the claimants. The two proceedings were subject to

47. Charles Secondat de Montesquieu, *The Spirit of Laws* (Thomas Nugent, trans., 2010).

48. *IndustriALL Global Union v. Respondent*, 2016-36; 2016-37 PCA Case Repository (Perm. Ct. Arb. 2016). More information is available at *Bangladesh Accord Arbitrations*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/cases/152> (last visited Nov. 17, 2022).

confidentiality, so while the public knows about their existence, the identity of the respondent businesses remains undisclosed. One may certainly argue that the confidentiality of those proceedings runs against the need to make business and human rights arbitrations known to the public and to nurture a culture of protection of human rights by promoting awareness and legal certainty. Yet, those arbitration proceedings provided some needed reparation for the violation of human rights of workers in the garment industry in Bangladesh that probably would not have been otherwise available to them—and are indeed widely regarded as a victory for them—and it was the same confidentiality that arguably made it possible for the respondent brands to agree to arbitration in the first place.

Another side of this criticism that arbitration is not suited to resolve business and human rights disputes is more of a “procedural” nature. It revolves around the “arbitrability” of human rights violations by businesses, i.e., whether a dispute relating to the public interest, such as human and environmental rights, is capable in the first place of being settled by arbitration under national law. The argument is that arbitration is only available in so far as the domestic laws of the place of the arbitration (the “seat”) do not reserve the matter for domestic courts, and some countries indeed exclude disputes in the public interest that may be the subject of arbitration proceedings. Such exclusion has some relevant practical consequences, as it can hinder the enforceability of the arbitral awards rendered in the arbitration.⁴⁹ Therefore, arbitration of human rights disputes may, in certain cases, be barred by the law of the seat. Further, the enforcement and recognition of awards under the Hague Rules is governed by the 1958 New York Convention, and thus subject to the public policy defense in Article 5(2) of that Convention. Lack of state support for the Hague Rules may cause the awards rendered under it to be susceptible to enforceability issues. All of these may impact the legitimacy of the proceedings. For awards rendered under the Hague Rules to hold credibility, states must be readily willing to enforce them.

We note that, while the Hague Rules don’t expressly deal with the issue of the arbitrability of human rights disputes under the law of the seat, in practice they take it into consideration in two main ways. First, Article 1(2) states that, by using the Hague Rules, the parties to the dispute agree that they deem such dispute to have arisen out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention. As the commentary to Article 1 of the Hague Rules explains, this is a “deeming” provision intended to opt into the enforcement regime of the

49. U.N. Comm. on Int’l Trade L., *supra* note 17, at arts. II (1), V(2)(a).

New York Convention and to waive certain potential defenses to its application, even where the underlying relationship or transaction may not be considered ‘commercial’ under the applicable law. Obviously, the deeming provision cannot prevail over the applicable law. However, the idea is that this provision, albeit not binding on the national courts tasked with the enforcement of the arbitral awards, will be taken into account by them when using their discretion to decide on the enforceability of the award. The provision may also operate as an “estoppel” to preclude a party from objecting to the enforcement of an award rendered under the Hague Rules on the basis of a ‘commercial’ reservation made by the relevant Contracting state(s) to the New York Convention.

Secondly, the Hague Rules deal with arbitrability through the considerations for the choice of the seat of arbitration set out in the commentary to their Article 20. The commentary invites tribunals and parties to select a place of arbitration where business and human rights disputes are legally allowed to be settled by arbitration, so as not to frustrate the agreement of the parties to submit such disputes to arbitration.

We acknowledge that neither of these considerations *per se* resolve the issue of the arbitrability of human rights violations by businesses. However, Articles 1 and 20 of the Hague Rules, read together with their commentaries, offer guidance to potential users on how to prevent that issue from arising in the first place, and may even protect the enforcement of awards rendered in arbitrations under the Hague Rules from specious objections.

(b) Criticism Two: The Hague Rules divert litigation from national courts and hinder public participation in the development and administration of the rule of law

The criticism is that the very channelling of disputes through arbitral tribunals, away from the courts, is undemocratic, because courts “promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, as well as by allowing, or requiring, the citizenry to administer the law through jury service.”⁵⁰

Let us note again that the underlying intention of the Hague Rules is not to supplant judicial proceedings, but rather to provide a framework for an alternative means of resolution available to potential parties alongside access to the court. The Hague Rules are thus meant to constitute one

50. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 293 (2004).

element of a larger array of remedies contemplated by Pillar III, available to parties when national courts are unavailable due to inaccessibility, lack of independence, corruption, lack of capacity, and other factors; where courts in a business's home state may refuse to accept such cases based on jurisdictional, corporate-law, and other legal doctrines; or also where other barriers to access in the form of costs or excessive delays for the parties exist. It would thus be a mistake to assume that arbitration may automatically "divert" disputes from national courts; rather, arbitration offers a choice to parties to use a consensual mechanism that allows parties that freely consent to it to overcome deficits or other difficulties with the relevant national legal systems when it is in their best interest to do so. Of course, we agree that issues of access to court should be addressed through improvements of national and international law rules applicable to cross-border disputes involving multinational business enterprises. However, we believe that it is not the existence of multiple avenues for remedying human rights violations that may hinder this process.

Even in a world where all national courts function effectively, arbitration through the Hague Rules may still be beneficial for those envisaging to effectively prevent or address business human rights disputes. Arbitration may also offer certain advantages compared to national courts that may, in some instances, make it preferable for parties over court proceedings. Examples of these include: (i) the existence of a neutral forum for dispute resolution, independent of both the parties and their home states; (ii) a specialized dispute resolution process in which the parties can participate in the selection of competent and expert adjudicators for their dispute; (iii) the possibility to obtain binding awards enforceable across borders; (iv) means of dispute resolution potentially cheaper and quicker than litigation, which is also able to (v) accord parties broad autonomy to agree upon the substantive laws and procedures applicable to their arbitrations. Provided that the national courts' route should always be available to litigants, we believe that, especially when it comes to protecting fundamental interests of society such as human rights, litigants should have the broadest array of means of recourse at their disposal to ensure that an effective remedy exists.

*(c) Criticism Three: Business-to-business arbitration under the Hague Rules does not pay heed to the truth-seeking and reparative needs of victims*⁵¹

It has been argued that arbitration under the Hague Rules will mostly be employed between business partners in supply chains and this will hinder their efficacy in delivering satisfaction to the victims of human rights' abuses themselves.

Our first thought about this criticism is that the Hague Rules were designed to address three main sets of disputes: (i) between victims and corporations, based on the latter's alleged human rights violations; (ii) between a corporation and one of its business partners, arising from the latter's breaches of its contractual obligations to respect human rights (e.g., suppliers in a supply chain); and (iii) between victims of human rights violations and a corporation, where victims may rely on an intra-businesses arbitration clause granting them the third-party beneficiary right to litigate against one of the stipulating business parties autonomously. In the absence of empirical data, it seems difficult to predict in which of these situations arbitration under the Hague Rules will be more frequently used in practice.

Secondly, the criticism fails to acknowledge that business-to-business arbitration may still deliver satisfaction to the victims, both directly and indirectly. Directly, Article 45(2) (Awards) of the Hague Rules provides to tribunals adjudicating a business-to-business dispute with an array of instruments, monetary and non-monetary, to ensure that the losing party makes good of the harm caused, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition. When agreed to by the parties, the award can also contain recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm. So, one may well envisage that a tribunal may require a company found in breach of health and safety measures in an intra-business dispute to remedy those faults, with direct benefit for the workers involved.

Indirectly, two examples come to mind as to how victims of human rights breaches subject to business-to-business arbitration under the Hague Rules may also indirectly benefit from the arbitration proceedings: on the one hand, arbitration clauses in supply chain contracts may arguably well have the effect of preventing breaches of human rights-related obligations

51. Shavana Haythornthwaite, *The Hague Rules on Business and Human Rights Arbitration: Noteworthy or Not Worthy for Victims of Human Rights Violations?*, KLUWER ARB. BLOG (May 5, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/05/05/the-hague-rules-on-business-and-human-rights-arbitration-noteworthy-or-not-worthy-for-victims-of-human-rights-violations>.

of business partners, making the perspective of the enforceability of this type of dispute more concrete for all signatories. On the other hand, one may envisage the case that victims of human rights breaches found by tribunals in business-to-business disputes may “piggyback” on the awards rendered in an arbitration under the Hague Rules when bringing a case for reparation against the business partner found in breach of the human rights obligations in the supply-chain contract in other fora, such as national courts.

*(d) Criticism Four: The Hague Rules cannot remedy undemocratic, underequipped and politically driven legal systems that prevent access to remedy.*⁵²

The criticism that the Hague Rules, *per se*, cannot remedy undemocratic, underequipped and politically driven legal systems that prevent access to remedy is well-founded. The authors of the Hague Rules have always been well aware that, by themselves, the Hague Rules cannot change the legal culture of a state, as no procedural dispute settlement mechanism can.

However, arbitration under the Hague Rules can certainly be a supporting factor for a cultural shift in legal systems around the world. First, the Hague Rules can offer victims of human rights breaches an additional dispute-settlement mechanism that may allow them to obtain reparation for those breaches where other dispute settlement mechanisms would not easily be available. Secondly, the awareness itself that remedies for business human rights violations beyond state-remedies exist and can be effective, can contribute to mobilizing actors within those legal systems. Further, the delivery of awards by tribunals adjudicating under the Hague Rules can support the creation of a body of case-law that can be looked at and taken into account by national courts and other national institutions operating in this space. Finally, these arbitration proceedings can bring human rights violations in national legal systems around the world under the spotlight for the international community, and, with it, mobilize resources to build capacity for national institutions.

52. *Id.*

(e) *Criticism Five: Arbitration under the Hague Rules is likely to be regarded as “guilty by association” with investor-state arbitration.*⁵³

Investor-state arbitration has in recent years come under increasing fire from states, civil society, and certain parts of academia. Among other things, critics often regard investor-state arbitration as a tool at the service of multinational corporations, which is, at best, unable to take into account environmental and social rights, and, at worse, directly undermines them.

Without entering the merits of this debate, we will limit ourselves noting that arbitration under the Hague Rules is fundamentally different from investor-state arbitration in two main respects. First, as for its parties and subject matter, investor-state arbitration is designed to protect a specific category of individuals, foreign investors, from allegedly discriminatory or unfair state action. Arbitration under the Hague Rules is instead agnostic in relation to the nationality and nature of the parties, which in any case will primarily be private parties (corporations or claimants) as opposed to state actors.

Secondly, because they will not normally challenge states’ regulatory measures, awards of tribunals deciding on the basis of the Hague Rules are unlikely to have far-reaching implications for states and be regarded as impairing their right to regulate in the public interest, which is one of the main criticisms against investor-state arbitration. For this reason alone, arbitration under the Hague Rules will likely face a different reception from investor-state arbitration.

It is true that, as the inclusion of the Hague Rules in the model FIPA of The Gambia shows, the Hague Rules may, in the future, be deployed in investment arbitration proceedings. Yet, this does not seem to fundamentally change our conclusion that the Hague Rules will be regarded as “guilty by association” with investor-state dispute settlement. The Hague Rules could instead become part of the solution sought by the critics of investor-state arbitration. First, the Hague Rules lend themselves to being incorporated into investment agreements that provide obligations, in addition to rights, to investors to take responsibility for their actions that may negatively affect local communities and the environment. These agreements arguably already address many of the concerns traditionally put forward against international investment agreements that do not consider environmental, social and governance issues. That is, for instance, the case for the Gambia SIFCA model, which constitutes one example of the “new generation” of investment treaties attempting to counterbalance rights and obligations of investors and their impact on the host state. Secondly, even

53. Ng Li Shan, *supra* note 46; Nevsun Res. Ltd., *supra* note 41.

if used in the context of the “old generation” investment treaties that do not impose obligations on investors, the inclusion of the Hague Rules in an investment treaty is likely to incorporate the reasoning of investment tribunals sustainability considerations through procedure. For instance, an investment tribunal deciding a dispute on the basis of the Hague Rules will have to be constituted based on the diversity and specialization considerations set out in Article 11 of the Hague Rules and satisfy itself with the “rights compatibility” of its award, regardless of whether the relevant treaty makes any reference at all to human rights, based on Article 45 of the Hague Rules.

Finally, we note that arbitration under the Hague Rules, in investor-state arbitration and beyond, could arguably become a tool for states to expand the reach of their human rights and environmental regulations beyond their geographical borders: on the one hand, encouragement, facilitation, or even directives for businesses to use arbitration in their activities that may result in human rights or environmental harm allows states to ensure an effective remedy to all those affected by the activities of certain categories of businesses subject to their jurisdiction wherever in the world the harm may occur. On the other hand, the flexibility of arbitration, which allows parties to select the law applicable to the dispute, also enables the application of states’ environmental and human rights laws and regulations *outside* of their territories, across global supply-chains. So, for instance, arbitration under the Hague Rules may apply certain obligations like the ones set out in the French *Loi devoir de vigilance* in disputes arising in any part of the world.

*(f) Criticism Six: The Hague Rules cannot operate absent global and binding instruments imposing high human rights standards.*⁵⁴

This criticism builds on the issue of the absence of uniform binding rules regulating businesses’ conduct in the field of environmental, social, or human rights. The essence of this criticism is that the Hague Rules are merely a set of procedural rules, which will not be of use in the absence of substantive rules binding the activity of businesses impacting on environmental, social, or human rights.

The criticism is well founded in the sense that the Hague Rules are a set of procedural rules that will require substantive norms to operate.

54. Bo Ra Hoebeke & Thomasina van Roosmalen, *The Hague Rules on Business and Human Rights Arbitration*, LINKLATERS (Jan. 6, 2020), <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/january/the-hague-rules-on-business-and-human-rights-arbitration>; Ng Li Shan, *supra* note 46.

However, the flexibility built into the Hague Rules and the recent legal developments in national and international law allow us to be optimistic that the current widespread absence of such standards will not be a showstopper for the use of the Hague Rules. Article 46(1) of the Hague Rules provides tribunals with wide flexibility in determining the rules applicable to the dispute: a tribunal may apply “the law, rules of law or standards” designated by the parties as applicable to the substance of the dispute. In the absence of this selection, they can apply the “law or rules of law” determined to be appropriate, including international human rights obligations (Article 46(2)).

These provisions have been designed to grant maximal autonomy and flexibility to the parties and to the tribunal to rely on provisions of different nature (including soft law; public/private) and origin (international/national). So, under Article 46(1), businesses could even decide to rely on industry codes to settle their disputes under the Hague Rules. The reference to “rules of law” in the first two paragraphs of Article 46 of the Hague Rules also allows tribunals and parties to rely on provisions agreed contractually to decide a dispute. This dispenses them of the need to find provisions of national or international law to which to “hook” arbitration under the Hague Rule.

The Hague Rules further allow parties and tribunals to decide to apply human rights standards included in international “soft law” instruments, such as the UNGPs or the OECD Guidelines for Multinational Enterprises. This has been done in practice, albeit outside the arbitration context, by FIFA in deciding to make the UNGPs compulsory for its contractual partners and suppliers.⁵⁵

Tribunals and parties involved in a dispute under the Hague Rules may also rely on national or international human rights obligations of any states involved in the dispute, such as UN instruments, or regional human rights conventions. It is true that rules found in international instruments often contain open-ended provisions, drafted in broad terms, which may be difficult to apply in practice. However, it was seen above that a global sustainability trend within globally acting corporates and states is leading to the development of an increasing number of national rules on the corporate social responsibility of companies that can potentially be relied upon in arbitration proceedings by choice of the parties, states, or arbitral tribunals.

55. Fédération Internationale de Football Association (FIFA), *FIFA Sustainable Sourcing Code* (2021). The Code builds on FIFA’s commitments to sustainability endorsed in its *Statutes and Human Rights Policy*, respectively. See Fédération Internationale de Football Association (FIFA), *FIFA Statutes* (2019) and Fédération Internationale de Football Association (FIFA), *FIFA’s Human Rights Policy* (2017).

In most states' constitutions, human rights entitlements such as the right to life and liberty, the prohibition of torture, and the right to a fair trial are often already guaranteed. In addition, it was seen above that states are increasingly adopting national legislation imposing human rights due diligence obligations on businesses specifically which may provide the legal framework for the application of the Hague Rules.

(g) Criticism Seven: Lack of compulsory jurisdiction has been identified as a significant problem

One of the most widespread criticisms of the Hague Rules goes to the very heart of arbitration and regards the issue of parties' "consent." A business and human rights dispute can only be resolved by arbitration if all the parties involved in the dispute agree to that. As companies do not want to be sued, it is "difficult to answer the question of why companies will agree to arbitrate here and set aside [...] notions, such as *forum non conveniens*."⁵⁶

We are well aware of this practical issue, but we think that companies will have at least three good reasons to provide consent to arbitration under the Hague Rules. First, the increasing regulatory pressure is a key driver for companies to address human rights issues effectively. It was seen above how an increasing number of states are moving to adopt legislation that sets out broad duties for multinational companies, particularly relating to due diligence in the supply chain. Pressure also comes from the international level, where negotiations for the Binding Treaty are underway. International bodies continue to develop international guidelines and standards delineating the contours of companies' corporate social responsibility and thus the reputational risks connected to being associated with breaches of sustainability standards and rules. Companies also do not want to be perceived as falling below national and international standards, even when they are not under a legal requirement to comply. A KPMG report evidences how customers' expectations, employees' relationship, scrutiny from NGOs and media, labor unions and labor rights, suppliers, investors and lenders' scrutiny, is increasingly driving companies' choice to

56. Siobhan Abraham, *Hague Rules on Business and Human Rights Arbitration and the Challenges Facing the Rules*, THOMSON REUTERS ARB. BLOG (Feb. 10, 2020), <http://arbitrationblog.practicallaw.com/hague-rules-on-business-and-human-rights-arbitration-and-the-challenges-facing-the-rules>; Haythornthwaite, *supra* note 51; Rachel Nicolson & Emily Turnbull, *The New Hague Rules on Business and Human Rights Arbitration – Effective Remedy or Strange Chimera?*, ALLENS (Feb. 10, 2020), <https://www.allens.com.au/insights-news/insights/2020/02/the-new-hague-rules-on-business-and-human-rights-arbitration-effective-remedy-or-strange-chimera>; Ng Li Shan, *supra* note 46.

ensure that sustainability rules and standards are respected throughout their supply chains and that stock market indices (such as the Dow Jones Sustainability Index and FTSE4Good) are also demanding more detail and transparency on human rights.⁵⁷ This makes access to capital for multinational enterprises depend on strong ESG programs, including human rights due diligence processes. Consent to arbitration under the Hague Rules would allow multinational enterprises to comply effectively and be regarded as complying with the regulations that requires them to exercise due diligence and control over increasingly long and complex global supply chains, thus preventing and addressing breaches of sustainability rules and guidelines. Unilateral offers to arbitrate to victims of human rights abuses through third-party beneficiary clauses might also tackle the image problems facing certain types of businesses in the public sphere.

Secondly, let us turn to the legal risks of not effectively preventing or addressing such risks with their supply chain partners or subsidiaries. Indeed, it was seen above that, even where mandatory legislation does not exist, the absence of an international dispute settlement mechanism to solve these disputes does not mean impunity. Cases like *Vedanta*⁵⁸ or *Nevsun Resources*⁵⁹ prove that national courts are increasingly willing to consider claims against parent companies for human rights violations of their subsidiaries abroad. In this context, arbitration under the Hague Rules allows corporations to take control of the parameters of the dispute as a risk management strategy: arbitration is a dispute settlement instrument that is likely to be more familiar to companies compared to litigation in foreign jurisdictions and offers flexibility to companies to adjust the dispute settlement mechanism around the specific circumstances of the case, for instance, by ensuring that the arbitrator has specific expertise in human or environmental rights, or selecting a language for the procedure that is accessible to all parties.

Thirdly, even beyond this, arbitration under the Hague Rules may align with corporations' expectations of clear sustainability rules able to create a level playing field across borders by improving or facilitating leverage with third parties to adopt non-negotiable standards without reducing competitiveness or innovation. We note, for instance, that this argument was factored into the letter in which a large number of UK multinational enterprises recently called on the government to "introduce a new legal requirement for companies and investors to carry out human rights and

57. KPMG INT'L, ADDRESSING HUMAN RIGHTS IN BUSINESS: EXECUTIVE PERSPECTIVES (2016).

58. *Vedanta Res. PLC*, *supra* note 9.

59. *Nevsun Res. Ltd.*, *supra* note 41, at 87.

environmental due diligence,” and so to align to the trend of implementation of human rights due diligence and prevent abuse of human rights and environmental harm in global operations and value chains.⁶⁰ Similarly, the large majority of firms that participated in the European Commission’s study on due diligence requirements⁶¹ indicated that a due diligence requirement at the EU level would benefit businesses by providing a “single harmonized EU-level standard (as opposed to a mosaic of different measures at domestic and industry level).” Another recent study indicated that businesses experienced similar benefits as a result of the introduction of the UK Bribery Act 2010 ten years ago.⁶²

Whatever their reason may be, companies’ willingness to self-regulate and internalize costs in areas where collective action is needed should not be underestimated. We have mentioned above the Bangladesh Accords, where the tragic collapse of a garment factory that left 1,134 dead and many injured led to a voluntary agreement between over 200 leading international garment companies and two international trade union federations to ensure a fire and building safety program in Bangladesh. The agreement is complete with an administrating body, and disputes arising under it are subject to arbitration. Yet, that is not the first case of companies accepting to voluntarily self-regulate in order to address collective problems. Long before the Bangladesh Accords, multinational companies agreed to initiatives of self-regulation in the field of the environment, specifically oil spills, in the form of the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) schemes.⁶³ Like the Bangladesh Accord, these were two voluntary schemes set up in the aftermath of ecological disasters. Through these schemes, tanker owners agreed to provide compensation in respect of oil spills through their Protection & Indemnity clubs (in the case of TOVALOP) and oil companies (in the case of CRISTAL). Administrating bodies were set up in the context of both initiatives to ensure the effective implementation of the compensation obligations adopted by the participating companies,⁶⁴

60. AMT FRESH ET AL., CALLING FOR A NEW UK LAW MANDATING HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR COMPANIES AND INVESTORS (2021).

61. Off. of the High Comm’r, *supra* note 5.

62. IRENE PIETROPAOLI, ET AL., A UK FAILURE TO PREVENT MECHANISM FOR CORPORATE HUMAN RIGHTS HARMS 15-16 (2020).

63. For an overview of these schemes and the similarities with the Bangladesh Accords, see Graham Dunning, Expert on International Arbitration, Keynote Address at the Environmental Pollution and Small States Conference (Sept. 7, 2018).

64. In TOVALOP, the administrating body monitored participating owners’ financial capacity, ensured by a mandatory requirement to be insured against liability under the scheme; in

albeit no mandatory arbitration was provided. To our mind, these three examples show that companies may be less averse to subjecting themselves to voluntary binding obligations to address collective problems.

(h) Criticism Eight: The Hague Rules don't address fundamental issues of inequality of arms

Another frequent criticism of arbitration under the Hague Rules is that they do not address the issue of imbalance of arms between the potential parties, particularly when those parties are large corporations, on the one hand, and victims of human rights abuses, on the other.⁶⁵ These disparities between the potential parties of arbitration proceedings under the Hague Rules include, for instance, litigation funding and the loser pays principle,⁶⁶ burden of proof, or the lack of anti-retaliation protections in the Hague Rules.⁶⁷ Critics argue, in particular, that even if companies consent to arbitrate, there is a presupposition that they will ensure that any human rights dispute be adjudicated in their favour, twisting the procedure in their favour. For instance, there is a clash between the need for transparency, essential in disputes involving human rights' violations, and confidentiality, one of the main features of arbitration. This issue is regarded as particularly relevant due to the possibility for disputing parties to "opt out" of certain provisions of the Hague Rules.⁶⁸

We acknowledge the essence of this criticism and note that business and human rights arbitration, particularly between businesses and victims, is almost by definition characterized by fundamental issues of inequality of arms and power imbalances between the parties that are very difficult to address. The Hague Rules have been designed to attempt to tackle such inequality of arms through procedure by offering an additional route to prevent and address the violation of corporate social responsibility duties

CRISTAL, the administrative body held the fund, and was the counterparty to the members' contractual obligations. *Id.*

65. LISA SACHS ET AL., THE BUSINESS AND HUMAN RIGHTS ARBITRATION RULE PROJECT: FALLING SHORT OF ITS ACCESS TO JUSTICE OBJECTIVES (2019).

66. Haythornthwaite, *supra* note 51; Abhisar Vidyarthi, *Hague Rules on Business and Human Rights Arbitration: What Lies Ahead?*, AM. REV. INT'L ARB. (Sept. 28, 2020), <http://aria.law.columbia.edu/hague-rules-on-business-and-human-rights-arbitration-what-lies-ahead>; Ng Li Shan, *supra* note 46, at 58-59; Nevsun Res. Ltd., *supra* note 41.

67. Haythornthwaite, *supra* note 51.

68. *Id.*; Vidyarthi, *supra* note 66; Abraham, *supra* note 56; Maria Laura Izzo, *A Further Step Towards Business and Human Rights Arbitration – The Hague Rules*, KLUWER ARB. BLOG (Sept. 13, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules>; Ng Li Shan, *supra* note 46; Nevsun Res. Ltd., *supra* note 41.

and by operationalising and institutionalising a method of dispute resolution that is flexible enough to adapt to the complexity of cross-border disputes in the global supply chain. The Hague Rules encourage arbitral tribunals to proactively address issues of inequality of arms. For instance, Article 5(2) acknowledges that a party may face barriers to access to remedy—e.g., due to a lack of awareness of the mechanism, lack of adequate representation, costs, physical location, or fear of reprisal—and requires that the tribunal shall ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings. Article 18(5) allows arbitral tribunals to keep a person’s identity confidential where this information may be sensitive or cause prejudice to reduce the risks of retaliation. Article 55 attempts to balance the interest of corporations to avoid frivolous claims and victims to obtain justice by allowing third-party funding but subjecting it in principle to the disclosure of the names and contact details of the funder. The Hague Rules also provide mechanisms to address urgent situations that arise before a final decision can be rendered, or even before arbitration commences, on an emergency basis. Finally, the commentary on the Hague Rules sets out clear guidance on how the authors envisaged arbitration proceedings to be carried out, clarifying, for instance, that the parties should, in principle, avoid diverging from certain mechanisms set out in view of the public interest concerns entailed in the arbitration proceedings, such as the transparency of the proceedings.

Yet, the reality is that, while the Hague Rules attempt to lower barriers to access to remedy as much as possible, they are not—and cannot be, in and for themselves—a panacea to resolve the structural inequalities that too often characterize disputes relating to the conduct of big businesses and their environmental, sustainability and governance duties. Much of their success will depend on factors that are outside of the control of their authors, including the implementation of “access to justice” measures such as funding options under national law, whether users will choose to follow the authors’ guidance when adapting the Hague Rules to their disputes, and the approach taken by arbitral tribunals and national courts in their decisions.

CONCLUSIONS

The Hague Rules come at a time of increasingly shifting attitudes towards accountability for the human rights record of businesses, where states and companies are called upon to step up their efforts to find creative solutions to the complex problem of the transnational regulation of the impact of businesses activities on the fundamental rights of individuals and communities around the world. Responding to the UNGPs’ observation

that only “a smart mix of measures—national and international, mandatory and voluntary” may be able to “foster business respect for human rights,”⁶⁹ the Hague Rules position themselves as one procedural instrument that may be able to support companies, states, and individuals in the challenging task of preventing and addressing breaches of sustainability rules on the part of businesses.

Since the launch of the Hague Rules, a number of additional developments and initiatives have occurred that further contribute to strengthening regulation and accountability of the transnational activity of multinational enterprises. For instance, through the development of new national and international rules governing the operation and liabilities of multinational enterprises, and by means of decisions of national courts that pierce the corporate veil, allowing parent companies to be called to respond to the actions of their subsidiaries abroad. All these initiatives make us optimistic that times are changing and that the accountability gap that has for too long characterized the relationship between the power and the responsibilities of multinational enterprises is finally being bridged. Yet, more work remains to be done.

Having looked at the criticisms moved to this instrument, we remain convinced that arbitration under the Hague Rules will become an important element of a wider system of remedies that, taken together, can prevent and address businesses’ violations of human and environmental rights, operationalising and institutionalising a method of dispute resolution that is flexible enough to adapt to the complexity of cross-border disputes in the global supply chain. At the same time, we are fully aware that its voluntary and procedural nature means that, in itself, it is not a panacea able to address in full the economic, legal, and structural issues that have given rise to this accountability gap or address the inherent power imbalance that often characterises relationships in this field.

Much of the success of the Hague Rules will ultimately depend on a number of factors that are outside of the control of their authors, including the implementation of “access to justice” measures, such as funding options under national law; whether users will choose to follow the authors’ guidance when adapting the Hague Rules to their disputes; and on the approach taken by arbitral tribunals and national courts in their decisions. Our view (and wish) is that if businesses, individuals, and governments constructively engage with the Hague Rules, this procedural mechanism will become an effective tool to hold corporations to account for human rights abuses or effectively deter human rights breaches.

69. Off. of the High Comm’r, *supra* note 5, at 5; Wouters & Chané, *supra* note 3, at 10.