The Human Rights Remedy Gap in ISDS – The Potential of the Hague Rules on Business and Human Rights Arbitration*

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Abstract

The tensions between the protection of human rights and States' obligations towards foreign investors has been the subject of extensive debates among States, civil society actors, business, and international organizations. The Hague Rules on Business and Human Rights Arbitration represent a recent effort to provide an avenue for resolving claims concerning human rights violations connected to business activities, including investment. These Rules may be linked to or incorporated in national investment laws, state contracts, or International Investment Agreements (IIAs). The Hague Rules aim to fill a currently existing gap in (access to) remedies for rightsholders and help both investors and States to fulfill their human rights obligations under the UNGPs, as well as States' duties to protect human rights. This paper provides an overview of the Hague Rules and suggests some options for incorporating them into IIAs, national investment laws and contracts.

A. Introduction

The tensions between the protection of human rights and States obligations towards foreign investors has been the subject of extensive debates among States, civil society actors, business, and

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international organizations.[7] Traditionally, IIAs impose obligations on host States but not on investors (whether human-rights-related or otherwise). Recent IIAs display a shift in this approach.[8] Moreover, experience has shown that human rights issues often play a role of some kind in investment disputes. Typically, however, individuals affected by human rights impacts by investments do not have access to investor-state arbitration, which is reserved to investors or, occasionally, to their host or home States. Although tribunals can in certain cases consider human rights concerns, e.g., when deciding treaty breaches, via counterclaims, few awards have explicitly done so.[9] Furthermore, the procedural rules in Investor-State Dispute Settlement arbitration (ISDS) are not adequately suited to human rights adjudication.

The Hague Rules on Business and Human Rights Arbitration (the "Hague Rules"), launched in December 2019, represent a new possible avenue to address this concern. The Hague Rules establish a concrete framework for arbitrating business and human rights disputes, providing claimants with a new, consensual, flexible, and multi-purpose remedial mechanisms to resolve those disputes. The Hague Rules aim to implement the objectives of the UN Guiding Principles on Business and Human Rights (UNGPs) and are based on the 2016 UNCITRAL Arbitration Rules. The Hague Rules aim to fill a currently existing gap in access to remedies for right holders and, additionally, can help States and businesses to fulfill their human rights obligations and responsibilities, respectively, under the UNGPs. They are designed for situations where national courts may be unavailable to right holders or others affected by human rights violations. They are not meant to displace those courts or international human rights courts for claims against States. Instead, they envisage a multi-lane approach to dispute management that contemplates the interplay between arbitration and other forms of collaborative settlement. They help avoid a gap in access to remedies with respect to the human rights impacts of business operations in host States. The human rights framework could be flexibly adapted to accommodate other sustainability disputes (e.g. environment).

This paper discusses the possibility of attaching and integrating the Hague Rules to legal instruments relevant to the regulation of foreign investment. After describing their rationale, background, as well as their main content and their interaction with other forms of collaborative settlement, such as mediation or conciliation (B.), the paper turns to the ways of integrating the Hague Rules into international

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[7] Luis Tomás Montilla Fernández, Large-Scale Land Investments in Least Developed Countries. Legal Conflicts Between Investment and Human Rights Protection (Springer. 2017); Tomer Broude and Caroline Henckels, *Not all rights are created equal: A loss–gain frame of investor rights and human rights*, 34 Leiden Journal of International Law 93 (2021); Eric De Brabandere and others, 'Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development: Liber Amicorum Nico Schrijver', *Chapter 3 Non-State Actors and Human Rights Obligations: Perspectives from International Investment Law and Arbitration* (Brill | Nijhoff 2021); Ursula Kriebaum, 'Human Rights and International Investment Arbitration' in Thomas Schultz and Federico Ortino (eds.), The Oxford Handbook of International Arbitration (2020); Anne van Aaken, *Investment Protection, Human Rights, and International Arbitration: Cross- Fertilization or Regime-Collision?* In: Julian Scheu, Rainer Hoffmann, Stephan Schill, Christian Tams, Investment Protection, Human Rights, and International Arbitration (Nomos 2022), 39.

[8] See, e.g., Martin Jarrett, Sergio Puig, and Steven Ratner, *Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals*, 12 Journal of International Dispute Settlement 259 (2021).

[9] Ibid. and Steven Ratner, *Fair and Equitable Treatment and Human Rights: A Moral and Legal Reconciliation*, 25 Journal of International Economic Law 568 (2022). Jurisdiction over a human rights based counterclaim has been upheld, in Urbaser S.A. v. Argentina, Award of 8 December 2016, ICSID Case No. ARB/07/26, at paras. 1193-1221, especially 1200, which considered a host State counterclaim based on the right to water in accordance with the ICSID Arbitration Rules. In contrast, the majority declined the counterclaim in ICSID, *Spyridon Roussalis v. Romania*, Award of 07 December 2011, ICSID Case No. ARB/06/1. For a discussion, see Jean E. Kalicki, Mallory B. Silberman, 'Spyridon Roussalis v. Romania', 27 *ICSID Review* 9 (2012).

investment law (C.) These include the direct claim model, attaching the Hague Rules to IIAs, integration into national investment laws; and integration into state contracts (complementary to required human rights assessments). Under these models, any dispute arising out of human rights concerns would be adjudicated under the Hague Rules. The paper then discusses some technical options of integrating the Hague Rules into IIA is drafted as well as contracts (D.). The last section (E.) concludes.

B. The Hague Rules on Business and Human Rights Arbitration: An Overview

From their inception, the Hague Rules were designed to respond to a remedy gap in cases of business involvement in human rights abuses.[10] Rather than displace domestic judicial remedies, international arbitration through the Hague Rules is another option available to rightsholders alongside domestic courts. This gap is especially relevant in cross-border cases where rightsholders often face both legal and practical challenges to access domestic courts.[11] Notwithstanding this challenge, access to justice is a fundamental component of the promotion and protection of human rights. The UNGPs also specify criteria for fair and effective remedial mechanisms, which the Hague Rules were specifically designed to meet. These include legitimacy, accessibility, predictability, transparency, and rights-compatibility.[12] The rationale of the Hague Rules is that if proper procedures take into account the particular interests involved in business-related human rights abuses, international arbitration can provide direct access in a neutral forum where national jurisdictions are unavailable or difficult to access.

In 2017, a drafting team of diverse practitioners and academics began to identify the procedural safeguards required in an arbitral process dealing with substantive claims arising out of a dispute concerning human rights. With the intention of including an even wider range of expertise and perspective, the drafting team assembled a sounding board consisting of representatives of government, inter-governmental organizations, non-governmental organizations, labor unions, law firms, and banks as well as academics, judges, public policy advisors, and general counsel of multinational enterprises. An iterative and transparent drafting process commenced in January 2018. After several rounds of open and public consultation with numerous stakeholders, the Hague Rules were launched on December 12, 2019 at the Peace Palace in The Hague.[13]

Although modeled on the UNCITRAL Arbitration rules, disputes covered by the Hague Rules have key differences from commercial disputes. Those concern the public interest in the resolution of business

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[10] For more information regarding the need to strengthen the implementation of the UNGP, *see* Office of the High Commissioner for Human Rights (OHCHR) Accountability and Remedy Project (ARP) (OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses | OHCHR).

[11] *See generally,* Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017); see also Gwynne Skinner, Robert McCorquodale, Olivier de Schutter, and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (*ICAR, CORE, ECCJ, 2013).

[12] UNGP Principles 27.

[13] The Hague Rules including a commentary on each norm and the annexes on code of conduct and model clauses can be found here: The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf. All other relevant information including Q&A are found here: The Hague Rules on Business and Human Rights Arbitration | CILC website.

and human rights disputes, which may require a higher degree of transparency[14] (as default rule) and greater participation by third parties;[15] evidence taking[16] and costs allocation[17] mindful of imbalances of power and resources between parties; witness protection measures;[18] possibilities for joinder or multi-party claims;[19] and specific expertise and qualifications for arbitrators appointed under the Hague Rules (including a Code of Conduct).[20] Applicable law, as stipulated by the parties, could range from domestic law, contract law, human rights treaties, and soft law standards.[21] Arbitral tribunals have the additional specific mandate to ensure that their awards are human rights-compatible[22] and can also issue non-monetary relief.[23] As a shield against costly and meritless suits, the Hague Rules also provide for an expedited procedure to dispose of claims and defenses manifestly without merit at a preliminary stage.[24]

The promotion and integration of other forms of collaborative settlement –mediation, conciliation, negotiation and facilitation – is another feature of the Hague Rules. Arbitration can be used as an escalation mechanism or as a backstop for the enforcement of a collaborative settlement agreement.[25] In this combination of remedies, arbitration can promote early settlement as well as compliance with non-binding resolutions. Collaborative settlement under the Hague Rules is encouraged at any stage of an arbitration proceeding.[26] If the parties agree to a settlement, the arbitral tribunal may record the settlement in the form of an arbitral award rendering the settlement with more potential universal enforcement.[27] The idea of integrating other forms of collaborative settlement acknowledges

[14] The Hague Rules on Business and Human Rights Arbitration (The Hague Rules) (December 2019) arts. 38-43. (provides that unless an exception applies, the following documents will be publicly available: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense; a list of all exhibits, expert reports and witness statements; the orders, decisions and awards of the arbitral tribunal.)

[15] The Hague Rules art. 28.

[16] The Hague Rules art. 32.

[17] The Hague Rules art. 53 (provides that the arbitral tribunal may apportion costs between the parties taking into consideration the circumstances of the case; including the financial burden on each party and the public interest).

[18] The Hague Rules art. 33 (provides that the arbitral tribunal may order a restriction to protect the identity of a witness, including an expert witness, based on a demonstrated genuine fear and may authorize that witnesses be examined through any means of telecommunication that do not require their physical presence at the hearing.)

[19] The Hague Rules art. 19.

[20] The Hague Rules art. 11 (provides that appointed arbitrators should not only be persons of high moral character but should also have demonstrated expertise in areas relevant to the dispute, which depending on the circumstances of the case, could include business and human rights law practice).

[21] The Hague Rules, art. 43 (provides that in all cases, the tribunal will take into account any applicable usage of trade, including any such business and human rights standards or instruments.)

[22] The Hague Rules art. 45(4).

[23] The Hague Rules art. 45(2) (non-monetary relief can include restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition. An award may also contain recommendations to prevent future disputes or the repetition of harm).

[24] The Hague Rules art. 26.

[25] The Hague Rules provide model clauses for collaborative forms of settlement prior to arbitration. Mediation is also being discussed for ISDS, see Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, José Maria Reis, *Mediation in Future Investor–State Dispute Settlement*, 14 Journal of International Dispute Settlement 192 (2023).

[26] The Hague Rules, art. 1(6).

[27] The Hague Rules, art. 47(1).

the plurality of options available to rightsholders to ensure effective access to remedy. Depending on the circumstances and evolution of a dispute, one form of dispute settlement or a combination thereof may be more appropriate and effective.

The responsibility and duty to ensure effective access to remedy is one that the UNGPs ultimately relegates to States. The UNGPs reaffirm that States must ensure effective access to remedy for victims of business-related human rights abuses.[28] As part of a comprehensive system for remedy implementing States' international legal duties to respect, protect, and fulfil the rights of all persons to effective remedies, the UNGPs recommend that States take steps beyond domestic judicial mechanisms to address business-related human rights abuses, including facilitating access to both State-based and non-State-based non-judicial mechanisms.[29] States' consent to open non-judicial and non-State-based mechanisms, such as through business and human rights arbitration under the Hague Rules (whether through States' international investment agreements, contracts, or domestic investment laws), are thus, at the outset, central to realizing and implementing States' own international obligations to vindicate the rights to effective remedies for persons affected by human rights violations.[30]

International arbitration has been successfully used for the resolution of interstate claims (including treatment of foreign nationals) and commercial and investment disputes – though with controversies and critiques in the case of the latter. The proliferation of international arbitration is due in large part to certain elements advantageous in cross-border cases compared to the formalities of domestic judicial process, in particular, neutrality of the forum, party autonomy, procedural flexibility, and at least in principle, near universal enforceability of arbitral awards.[31]

Beyond the obligation of States reaffirmed under the UNGPs to ensure effective access to remedy for those whose rights have been abused, the framework also establishes the human rights responsibilities of businesses. The UNGPs affirm that business enterprises must prevent, mitigate and have in place processes to enable the remediation of any human rights impacts they cause or to which they contribute.[32] For businesses, a binding agreement to arbitrate under the Hague Rules – and thus to respect the outcome and pay any damages awarded – sends a strong signal of their commitment to respect human rights and provide a remedy for violations. This commitment can help foster a corporate culture of respect for human rights and have positive reputational ramifications for business.[33] The procedural flexibility of the Hague Rules for parties and the finality of an award may allow for a more rapid and effective resolution rendering arbitration more attractive to foreign investors than domestic courts.

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[28] United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (UNGP) (2011) A/HRC/17/31.

[29] UNGP Principles 26, 27.

[30] Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2(3); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Resolution 60/147, Articles 14 and 15.

[31] Katerina Yiannibas, *The Effectiveness of International Arbitration to Provide Remedy for Business-Related Human Rights Abuses* in Corporate Responsibility, Human Rights and the Law, eds. Enneking et al (Routledge 2020).

[32] UNGP Principles 13-15.

[33] The Hague Rules on Business and Human Rights Arbitration: Questions & Answers. *Available at:* https://www.cilc.nl/cms/wp-content/uploads/2021/05/QA-The-Hague-Rules.pdf

C. Integrating the Hague Rules in International Investment Law

States, tribunals, and civil society actors have recognized the many connections between international investment law and human rights law and are implementing them through creative strategies. Human rights concerns can be reflected in IIAs by clarifying that certain state action will be exempt from investor protection provisions, e.g., broad carve-outs for public health and labor, or narrower carve-outs in fair and equitable treatment or indirect expropriation provisions or even specific sectors (e.g. tobacco). However, such clauses do not give affirmative rights to individuals affected by business-related human rights violations; rather, they aim to protect the host State's regulatory space in human rights matters. Similarly, counterclaims by the state against the investor, whereby a state may claim human rights violations, do not confer any direct access to remedy for the alleged victims of such violations.

Human rights claimants routinely encounter difficulties in accessing effective remedies against foreign investors. These challenges include jurisdictional and related objections (e.g., *forum non conveniens*) if a multinational is sued in its home state, problems of inequality of arms, immunities and other defenses raised by State-owned and/or State-controlled investors, as well as the possible difficulty of enforcing domestic court judgments (e.g., against a state-owned company in its home state). Where the state lacks the resources for a strong judicial system, alleged human rights victims suing companies face the same capacity challenges (including possible lack of independence) as other litigants. These challenges of searching for and pursuing litigation remedies both undermine efforts toward effective access to justice for human rights claimants and create a costly delay in the just resolution of business-related human rights claims.

The four sections below address various options to provide direct access to arbitration for rightsholders. As noted, these options do not affect a state's obligations under human rights treaties and customary international law to protect all individuals within its jurisdiction against human rights violations by third parties, including by foreign investors. Nor do they displace existing remedies under domestic law in the case of violations.

C.I. The Direct Claims Model

Scholars have proposed different mechanisms for the initiation of or intervention by host States or their nationals in investment arbitration.[34] In the interest of clarity and brevity, we discuss only certain options for a host State or a host national[35] to bring proceedings for the alleged violation of human rights through the investment directly against the investor.

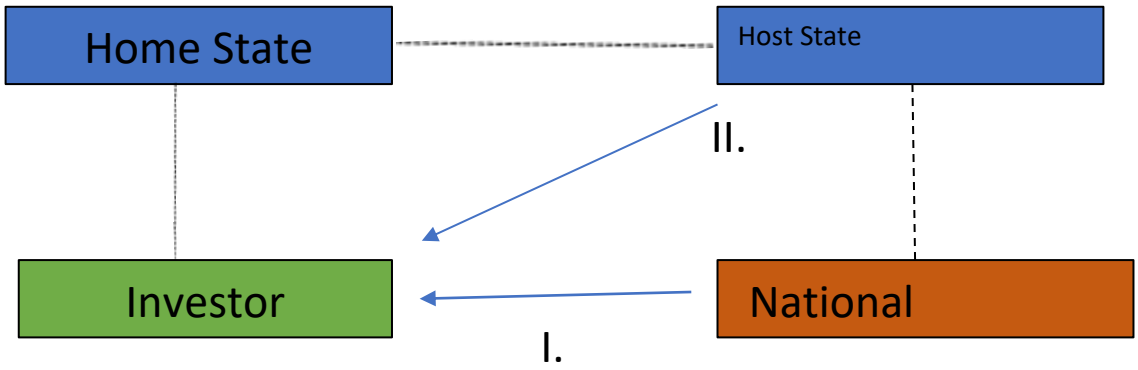

Figure 1: Direct Claims Model (based on Amado et al, at 20).

I: Direct prosecution of claims held by the host State national, opposable to the investor

II: Direct prosecution of claims held by the host State for its own interests or on behalf of its nationals and opposable to the investor

The direct claims model involves a claim in arbitration by the state or its national against a foreign investor. It can take a number of forms. In the first variant (I.), the host State national brings the case on its own behalf. A national of the host State is the direct claimant. This departs from the idea that the government espouses private claims and gives direct access to justice to rightsholders. The role of the state (apart from respective law-making) is thus removed and instead allows for a national of the host State national to bring a claim against the investor. The host State national is thus the party to the proceedings and holder of all relevant rights and controls access and proceedings.

In the other variant, the state acts either for its own interests or on behalf of its nationals (II.). Various proposals have linked these different options with the arbitral rules of different fora. In the following we will concentrate on the direct claims of nationals (I.).[36]

C.II Integrating the Hague Rules in IIAs

[34] Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodriguez, *Arbitrating the Conduct of International Investors* (Cambridge University Press 2018); Jarrett, Puig, and Ratner, supra note 8.

[35] Note that we use the term „national" but this could comprise also (permanent) residents or others on whom the host State has jurisdiction. See also infra D.iv.

[36] For other models, see Jarrett, Puig, Ratner, supra note 8, sec. III.

In principle, arbitration against investors for their alleged breach of human rights under an IIA presupposes two main conditions: i) the existence of human rights obligations on investors under the treaty; and ii) the provision of consent by investors and rightsholders to international arbitration for such violations.

C.II.a. Investors' obligations

Foreign investors are subject to the laws and regulations of the host State, including relating to human rights; and tribunals have interpreted IIAs to link investor protections to their compliance with local law (though IIAs are worded differently and tribunal interpretations vary). Illegal investor conduct can thus have negative consequences in terms of the admissibility of the claim or the merits of the case and compensation.

IIAs are increasingly open to the incorporation of direct international obligations on investors. For example, the Canadian 2021 Model IIA expands on the idea of 'responsible business conduct' (RBC) (article 16), which requires investors to comply with host States' laws and regulations on human rights, gender equality, environmental protection and labor. It also encourages investors to *voluntarily* incorporate into their business practices the OECD Guidelines, the UNGP as well as other internationally recognized standards, guidelines and principles concerning labor, environment, gender equality, human rights, community relations and anti-corruption (article 16 (2)).[37] Investors are likewise invited to engage in meaningful dialogue with local (including Indigenous) communities (article 16 (3)). However, there are no provisions enforceable against investors.[38]

The Dutch Model IIA of 2019 goes a bit further. Here, investors are liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions relating to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State.[39] Article 23 of the Model IIA States that a tribunal deciding on the amount of compensation should take into account non-compliance by the investor with its commitments under the UNGPs and OECD Guidelines.

Within Africa, the Sustainable Investment Facilitation & Cooperation Agreement (SIFCA) is a next-generation model IIA developed for The Gambia[40] that introduces investors' human rights obligations as a shield for host States. It introduces a requirement that the investor submit a declaration of compliance with both the SIFCA itself and the UNGPs as a condition to the submission of a dispute to arbitration and allows for the exclusion of the investor's claims as inadmissible if its declaration is untruthful. According to published information,[41] it also allows for the use of the Hague Rules on Business and Human Rights Arbitration.

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[37] See also Article 7(2)-(4) of the 2019 Dutch Model IIA.

[38] Except, at least to a certain extent, Article 23 of the 2019 Dutch Model IIA stating that a Tribunal, deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UNGPs and OECD Guidelines.

[39] See Article 7(2)-(4) of the 2019 Dutch Model IIA.

[40] See on a discussion 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 Arbitration Blog (26 November 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/.

[41] Ibid. mentions the Hague Rules of being included but the SIFCA is not publicly available.

The Draft of the Investment Protocol to the agreement establishing the AfCFTA[42] also incorporates investor obligations to an extraordinary extent in its chapter 4 and goes further in the bindingness of obligations, including civil liability for companies causing harm, whether regarding the environment or human rights. It allows victims to bring suits in the home state of the investor (article 47). The dispute settlement provisions of the Investment Protocol are to be still negotiated, and it remains to be seen whether and how substantive obligations of investors will be matched with effective procedural provisions.

The State parties to the IIA will have to specify exactly which human rights/labor rights obligations are incumbent on investors under the IIA. Furthermore, they will have to specify which human rights obligations will be the applicable law under Article 46(1) of the Hague Rules. Otherwise, such an inclusion of investor obligations would create legal uncertainty since the obligations have to be predictable and accessible for the investors and stakeholders alike.

C.II.b. Consent to arbitration by investors

The second requisite for direct access of rightsholders under international arbitration in IIAs is the provision of consent to arbitration by investors and right holders. Arbitration can be viewed favorably by the business community since it can avoid multiple court proceedings and expedite the solution of a conflict. Various possible legal techniques exist to obtain foreign investors' consent to allow rightsholders to access directly international arbitration under IIAs – including under the Hague Rules – in relation to the adverse human rights impacts created by those investors and their investments. The first one, is to place a condition precedent to the enjoyment by the investor of rights or benefits under the treaty (i.e., clarifying in the treaty that, if an investor is intending to rely on the protections and liberalizations agreed therein, then they accept the possibility to be sued for breach of their obligation by the host State and its nationals).

This condition could be expressed, for example, in an ad hoc clause or a denial of benefits clause. In this way, the investor would effectively extend a standing offer to arbitrate to individuals alleging a human rights abuse stemming from the investment of the investor on the territory of the host State or on a territory under the jurisdiction of the host State under the Hague Rules.[43] The technique of conditional consent can remove any role of the state (whether the home State of the investor or the host State of the investment) in these arbitrations, and establish a mechanism for claims by the host State national that may lie immediately against a foreign investor. This offer to arbitrate could be confined to certain mandatory investor commitments formulated in IIAs, for example labor or human rights.

The second option makes the enjoyment of IIA protection more generally contingent on the consent to arbitration (which many be confined to categories of claims)[44] and thus goes much further.

[42] Protocol on Investment to the Agreement Establishing the AfCTA Draft, Seventh Extraordinary Session of the Specialized Technical Committee on Justice and Legal Affairs (Experts Meeting) 16, 21 January 2023.

[43] "BITs may provide specifically that their benefits will extend only to investors that have consented to arbitration." Christoph Schreuer, Consent to Arbitration, in Peter T Muchlinski, Federico Ortino, Christoph Schreuer (eds.), The Oxford Handbook of International Investment Law (OUP 2008), at 837.

[44] Amado et al., supra note 20, at 87 et seq.

C.III Integrating the Hague Rules in National Investment Laws

National laws on foreign investment can also allow right holders to bring a case independently of an IIA and investor-state arbitration. There are two principled options, as in the IIAs.

First, given that the host State acts as gatekeeper of foreign investments, it can require the consent of an investor to arbitrate with host State nationals or with the host State under the direct claims model as a condition for entry.[45] Yet, some host States might regard such a condition as too strict.

Alternatively, the national law of the host State can introduce as precondition its consent to arbitrate in ISDS on the existence of the same investor's consent to arbitration with either the host State nationals raising human rights-related claims in investment activities in the host State or with the host State itself on behalf of its nationals. The investor would need to weigh the costs and benefits of bringing a claim against the host State whereby the potential costs of inviting a claim by host State nationals is included. Host State nationals would only be granted access to arbitration in the event a dispute between the investor and the host State. That leaves gaps of protection, namely in those cases where potential human rights violations have occurred but no investment claim is being brought. For the host State nationals, making their access to arbitration contingent on a dispute between the investor and the host State could subordinate their ability to pursue their human rights-related claims to the separate (albeit possibly parallel) transactions between foreign investors and host States.

A third option could be a requirement in national law for investors operating within their jurisdiction to incorporate international arbitration clauses under the Hague Rules in their supply-chain contracts as a remedy for the breach of human rights obligations set out in state legislation and/or in the contracts themselves. At least two sets of legislation could incorporate such obligations: national investment laws and national due diligence legislation. The effects and structure of the incorporation could differ depending on whether either one set of legislation is chosen. The advantage of investment laws is they specifically target all foreign investors within a state's jurisdiction. The disadvantage is that this legislation tends to not include human rights obligations. It follows from this, that States would need to amend their investment legislation to introduce such obligations, cross-refer to another body of legislation, or leave it to investors to decide on the scope of the obligations subject to arbitration in their supply chain contracts.

Due diligence legislation tends to specifically impose obligations on certain categories of companies to identify, act upon, and remedy certain human rights impacts of their activity. The obligation to include international arbitration clauses in companies' supply chain could fit well with the aims of this legislation and effectively become a further tool to prevent and remedy human rights impacts in supply chains. The advantage of providing for arbitration in due diligence legislation is that, unlike investment laws, this legislation typically specifies human rights obligations. However, due diligence legislation may not apply to all foreign investors operating in a country, but only those within the scope of the local due diligence legislation with regards to size, turnover criteria, etc. In either case, the scope of the arbitration clauses could vary, enabling a combination of companies in the supply chain of the investor and/or alleged victims of violations of the human rights obligations of investors to provide for international arbitration clauses in their supply-chain contracts within their jurisdiction.

[45] Amado et al., supra note 20, at 82 et seqq.

C.IV Integrating the Hague Rules in State Contracts

Finally, the Hague Rules can be integrated in State contracts, complementary to required human rights assessments that the investor must make, such that any dispute arising out of human rights concerns would be adjudicated under the Hague Rules. Just as a domestic investment law could condition admission on acceptance of Hague Rules arbitration, so could a contract as a condition of the licensing process.[46] A small number of States already include mandatory human rights due diligence obligations in their national laws,[47] which could be integrated into the contract as well. The host State thereby requires the investor's consent to arbitration under the Hague Rules as a condition for the bidding (in a license bidding process) or the signing of the contract itself.

The jurisdiction of any resulting tribunal derives from the *clause compromissoire* itself. Often tribunals are given jurisdiction only for the rights and obligations deriving from the contract alone. However, nothing bars a contractual arbitration agreement from vesting arbitral jurisdiction over the adjudication of rights and obligations from extra-contractual sources.[48] There are thus two possibilities: either the contract includes both investor obligations concerning human rights due diligence[49] and the possibility to arbitrate those obligations; or the *clause compromissoire* allows for extra-contractual inclusion of human rights due diligence obligations. In both cases, the contract can refer to the Hague Rules as procedural rules to be chosen for human rights related matters.

Third party rights could be granted to host State nationals by express language, allowing the host State nationals to arbitrate under the Hague Rules. This arbitration could not take place in ICSID (given its requirement of diversity of jurisdiction) but other fora. For examples, the Permanent Court of Arbitration (PCA), could be a venue for such a case under the Hague Rules, similar to the PCA Environmental Rules[50] which is available for private parties.

Even so, such third party beneficiary rights are highly contested, even in regular commercial (supply chain) contracts,[51] amongst others because of legal issues such as national laws not allowing such rights to be

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[46] Schreuer, supra note 30, at 837.

[47] For an overview, see IOE and KAs, Key developments in mandatory human rights due diligence and supply chain law Considerations for employers, 2001, available at: https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=156042&token=ee1bad43bfa8dbf9756245780a572ff4877a86d5.

[48] Ibid, at 864 et seq.

[49] States have to be careful about the contractual stipulation. Scholarship varies on whether international human rights treaty obligations are directly applicable to foreign corporations. While the Canadian Supreme Court in held that corporations are directly bound by customary human rights obligations of States (*Nevsun Resources Ltd. v. Araya*. Case No. 37919. Athttps://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do. Supreme Court of Canada, February 28, 2020), this is by no means the case everywhere. Yet, it is generally accepted that business can (and should) undertake human rights due diligence in the UNGPs, OECD Guidelines and several national laws as well as in the (third) draft of the UN Business and Human Rights treaty.

[50] 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

[51] See e.g. Louise Vytopil, Contractual control in the supply chain, Ph.D. Thesis Utrecht 2015, Eleven:Den Haag 2015, at 139. That said, proposals for such clauses have been drafted. See Towards Operationalizing Human Rights and Environmental Protection in Supply Chains: Worker-Enforceable Codes of Conduct, February 2021, https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/6026fd326aa9cd4f88697a20/1613167923256/Towards+%20Operationalizing+Human+Rights+and+Environmental+Protection+in+Supply+Chains.pdf. Cf. for a more limited version Article 7.2 of the American Bar Association, Balancing Buyer and Supplier Responsibilities,

granted to an indefinite group of whom the direct legal interest in such a clause cannot be assessed at the conclusion of the contract, and more practical issues such as legal uncertainty and unclarity regarding the ambit of the third party beneficiary group and the fear that it potentially is huge (floodgate argument). Therefore, it may be helpful to limit the ambit of such third party beneficiary rights in state contracts in order to address these issues and incentivize uptake. The way to implement this will be discussed in the next section (D.II.) on Legal Techniques and Model Clauses. However, the risk of a high number of claims in arbitration if third-beneficiary rights are implemented should not be exaggerated.[52] Due to the profound challenges right holders face in arbitration, which the Hague Rules aim to ameliorate, it is not likely that many of them will engage in arbitrations (unless in a mass claim).

Agreeing on a *clause compromissoire* including third party beneficiary rights may have appeal for States. Many international human rights instruments oblige States to provide effective procedures to address human rights abuse on their territories.[53] As has been elaborated hereinabove, access to national courts may pose fierce challenges for right holders to achieve access to remedy. Thus, it could be argued that these are in themselves not sufficient to address human rights abuse by investors, especially where judicial systems are weak or not accessible in practice to right holders. Additional instruments may be necessary and arbitration along the lines of the Hague Rules is a viable addition, which may bridge gaps the national court system leaves. Therefore, international human rights instruments may imply that contracting States should contemplate such additional mechanisms for right holders in their contracts. The advantage of including such a clause in a contract with the investor may be that the arbitration proceedings do not have to follow the (often costly and time consuming) path of international investment arbitrations, but can be more flexible, timely and less costly and do not necessarily have to include the host State. Furthermore, such proceedings are independent from a claim being brought by the investor (see above C.II.).

Corporations are expected to meaningfully engage with stakeholders regarding their human rights due diligence,[54] which also applies to foreign investors. A next step in a credible stakeholder engagement process is the implementation of means to solve disputes if a corporation and stakeholders are not able to find a solution for issues raised in this stakeholder engagement process. Such escalation mechanisms could develop into a best practice. An example of such a mechanism, including arbitration between corporations, which includes third party beneficiary rights, is the International Accord in the Textile and Garment sector.[55]

Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0, available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf.

[52] For example, the International Accord and the Dutch International Responsible Business Conduct Agreement in the Textile Sector, which will be elaborated hereunder, to date have dealt with one and two arbitrations (including third party beneficiaries) respectively.

[53] E.g. Article 13 of the European Convention on Human Rights.

[54] See e.g. section II.15 of the 2023 update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, accessible at https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm, and, especially in connection with the development of remediation plans, The OECD guidelines have been, as has been elaborated hereinabove, incorporated in some model IIAs (e.g. the Canadian one) as an instrument business can voluntarily comply with. Articles 7(2)(a) and 8(3)(b) of the EU proposal for Corporate Sustainability Due Diligence Directive accessible at https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[55] See https://internationalaccord.org/workers/complaints-mechanism/.

An even more striking example – because a government and corporations have agreed on this mechanism – is the Dutch International Responsible Business Agreements in the Textile and Natural Stone sectors to which civil society organizations, corporations and the Dutch government are signatories. It includes a third-party beneficiary clause that provides access to a binding dispute resolution mechanism (comparable to arbitration) for an indefinite group of third party beneficiaries claiming that a business signatories did not live after its commitments in the agreement.[56] Therefore, investors may have a reason to accept such a *clause compromissiore* as this field develops. It may also be in their own interest to have a dispute finally resolved through arbitration instead of being confronted with proceedings in national courts in multiple States.

Finally, a reason to implement arbitration in a contract between the investor and the government can be found in the Principles for Responsible Contracts,[57] which makes explicit in PRC 3 that any negative human rights impact should be remedied throughout the life cycle of the project. Where a weak judicial system does not allow for effective enforcement via litigation, and termination of the contract is not a viable option, contracts should include compensation avenues for victims.[58] The Hague Rules provide a mechanism for arbitration to enforce these provisions.

Enforcement would work under the New York Convention,[59] except for those States which have made the reservation this Convention applies to commercial matters only. Under the Hague Rules, the parties agree that any dispute that is submitted to arbitration shall be deemed to have arisen out of a commercial relationship or transaction for the purposes of the New York Convention.[60]

D. Legal Techniques and Model Clauses for the Integration of the Hague Rules

Inclusion of the Hague Rules in investment law can be achieved through different tools. In an IIA, they can be drafted as a separate article in the Annex on Dispute Settlement or integrated into various articles in the IIA. Furthermore, they can be integrated into national investment laws or state contracts. The Hague Rules contain an annex with several model clauses, including for contracts, and interested readers should consider those options in addition to the clauses below.[61] The following offers examples that are not exhaustive. Furthermore, the examples below are confined to direct claims by host State nationals only and do not encompass claims of the host State against the investor on behalf of its nationals.

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[56] These agreements are accessible at https://www.imvoconvenanten.nl/en/garments-textile/agreement/-/media/3670C016696D4456A9AB82DEAD9E88E4.ashx and https://www.imvoconvenanten.nl/en/trustone/initiatief/-/media/5EEE6797C4A846F39A6A7EC0818B8A31.ashx respectively. See also https://www.ser.nl/en/themes/irbc/complaints-disputes-committee for the decisions of the textile mechanism. The textile agreement has lapsed.

[57] Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiations (2011) UN Doc A/HRC/17/31/Add.3.

[58] Shavana Haythornwaite, PRC 3: Project Operating Standards, in: Barnali Choudhury (ed.), The UN Guiding Principles on Business Human Rights, A Commentary (Edward Elgar 2023), para. 34.20.

[59] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at https://www.newyorkconvention.org.

[60] The Hague Rules, art. 1(2).

[61] See supra note 13.

Integrating the Hague Rules in IIAs or contracts has both advantages and disadvantages. For contracts, the advantage is the foreseeability for investors which projects may be faced with arbitration, since there is an *ex ante* consent to arbitrate and a claim of right holders independent of any claim being brought against the host State. The disadvantage is that it covers only investments with underlying investment contracts. Were the Hague Rules integrated into an IIAs they would cover all investments, not only those with an underlying contract (although carve outs can be made). Furthermore, the Hague Rules can be integrated in a mandatory fashion or as a mere encouragement to use Hague Rules. We will deal with IIAs (I.) and contracts (II.) only.

D.I. Integration of the Hague Rules into IIAs

The Hague Rules can be integrated within the corpus of the treaty (e.g., in a section on investor obligations) or in an Annex on dispute settlement.

D.I.a. Investor obligations

As discussed, obligations on foreign investors can be found on the international level (e.g., IP of AfCFTA) or through the general duty that investments comply with domestic laws and regulations of the host State, including those relating to human rights, environmental protection and labor laws. States will see the advantage in their inclusion in IIAs in that they can perform an important role in rebalancing the real and perceived challenges of investment law as a threat to the achievement of their sustainability objectives. An important consideration for States when choosing to impose such obligations and rendering them arbitrable by an international tribunal is their level of precision. The less precise the obligation, the more discretion an international tribunal will have in implementing them in ways that the contracting States might not have anticipated. Furthermore, more precise obligations will augment legal certainty for investors, an important investment factor.

Once investors' obligations become part of the treaty, the Hague Rules could provide an added value in IIAs in two ways: (1) as a more flexible tool for tribunals to adjudicate direct claims or counterclaims from States against foreign investors; (2) where the treaty so provides, to allow certain individuals to arbitrate certain claims around the alleged violation of such obligations before an international tribunal. In this second model, any role of the state (whether the home State of the investor or the host State of the investment) is removed from the arbitration.

Adding the Hague Rules in a section on investor obligations:

> Option 1: Best efforts
>
> "Investors and their investments shall use their best efforts to comply with standards of business ethics, human rights and labour standards as formulated in Article [X], and in particular shall:
>
> 1. contribute to responsible dispute resolution mechanisms, such as mediation or consensual arbitration according to the Hague Rules
>
> 2. integrate the Hague Rules in their supply chain contracts"

"Home and Host States shall promote the use by investors of mediation, if necessary followed by arbitration under the Hague Rules, in relation to the investment where such acts, decisions or omissions in connection with the investment lead to significant damage, personal injuries or loss of life in the Host State."

Option 2: Mandatory

"Investors shall comply with standards of business ethics, human rights and labour standards as formulated in Article [X], and in particular shall:

1. rely on [comply with] the UN General Principles for effective dispute Resolution according to Pillar 3 by consenting to mediation, if necessary followed by arbitration under the Hague Rules, for all human rights related issues in connection with their investment, either occurring in their direct operations or in their supply chains, stipulated by their sourcing contracts."

D.I.b. Consent to arbitration

In principle, there are multiple venues to establish consent.

- As a condition precedent to the enjoyment by the investor of rights or benefits under the treaty is acceptance in writing that the Host State and its Host State Nationals shall be entitled to submit certain following claims to international arbitration (Contingent Consent Clause). Alternatively, such a provision may be drafted in the form of a denial-of-benefits clause, although this may have the effect of shifting the burden of proof to the host State as to compliance with this requirement.

-
- Through a presumption of consent. The home state submits its investor-nationals to the jurisdiction of an international tribunal (Jurisdiction without Privity)
- As an opt-in convention for all IIAs, so any offer of arbitration to the Investor shall be conditioned upon the Investor's consent to the possibility that host State / their nationals can submit certain claims to investment arbitration
-
- As an agreement between States to establish the exclusivity of an arbitral tribunal or a claims commission to adjudicate all claims arising out of a particular event or sequence of events (with or without limitations in terms of compensation or liability) getting the investor's consent (Mass Claims Settlement Agreement)

Option 1 as developed by Amado, Kern and Doe Rodriguez [62]

The Contracting Parties hereby agree that, as a condition precedent to the enjoyment by the Investor of any and all rights or benefits under this Treaty, including but not limited to the right to submit a claim to international arbitration against the Host State as set forth in [*investor-state arbitration provision(s) providing for the use of the Hague Rules*] of this Treaty, the Investor shall agree and accept in writing that the Host State and its Host State Nationals shall be entitled to submit the following

[62] Amado et al., supra note 20, at 180 et seqq. The text of the clause is reproduced verbatim, with the exception of the text in italic.

claims to international arbitration under said Article [*investor-state arbitration provision(s) providing for the use of the Hague Rules*]:

(i) those held by the Host State under [investors' obligations in the treaty or in national legislation] of this Treaty; and

(ii) those held by [any Host State Nationals] under [investors' obligations in the treaty or in national legislation] of this Treaty.

Option 2: Broad option – creates presumption of consent and opens up arbitration for the victims directly (Consent to Arbitration under the Hague Rules on Business and Human Rights Arbitration as a condition of investment for all investors)

"Investors that establish or expand their Investments after the entry into force of this [Treaty name] shall provide natural and juridical persons affected by the establishment, expansion, operation or conduct of their Investment with the opportunity to settle any dispute, controversy or claim [arising in connection with] [relating to] the alleged breach of the investor's obligations in Articles [investor obligations] by means of arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration."

"For greater certainty, for the purpose of this Article, Investors that establish or expand their Investments after the entry into force of this Protocol shall be deemed to have unilaterally consented to arbitration under the Hague Rules on Business and Human Rights Arbitration."

Option 3: Less broad option – arbitration clause in contracts concluded in connection with the investment (Consent to Arbitration under the Hague Rules on Business and Human Rights Arbitration in contracts)

"Investors shall provide in all contracts [concluded in connection with] [relating to] the establishment, expansion, operation or conduct of their Investment the opportunity to settle any dispute, controversy or claim relating to the alleged breach of the Investor's obligations in Articles [investor obligations], under the Hague Rules on Business and Human Rights Arbitration."

D.I.c. Possibility of Mass Claims

Amado, Kern and Doe Rodriguez also suggest another avenue to open the route of international arbitration to individuals directly for breach of their human rights by foreign investors that sits slightly outside of IIAs: the possibility of Mass Claims Settlement Agreements. Agreement between States to establish the exclusivity of an arbitral tribunal or a claims commission to adjudicate all claims arising out of a particular event or sequence of events. The mandate of the tribunal of commission could be tailored to the specific circumstances of the case. The incentive for investors to agree to conditionality clauses in IIAs or opt-in convention is clear (access to the protection of the IIAs and their ISDS). Less so might appear their incentive to agree to arbitration under Mass Claims Settlement Agreements. Arguably, the terms of the settlement agreement, such as the imposition of limitations in terms of compensation or liability on the investor, could shield them from unlimited proceedings across multiple jurisdictions and fora. Amado, Kern and Doe Rodriguez provide an example of what a Mass Claims Settlement Agreement could look like:[63]

[63] Amado et al., supra note 20, at 184 et seqq. The text of the clause is reproduced verbatim, with the exception of the text in italic.

1. This Settlement Agreement by and between [INSERT HOME STATE] and [INSERT HOST STATE] addresses the compensation of any and all Host State Nationals who have suffered a loss or injury as a consequence of those events defined in Annex [X], caused by [INSERT INVESTOR] as an investor in the territory of [INSERT HOST STATE].

2. [INSERT INVESTOR] and [INSERT HOST STATE] have agreed to establish a compensation fund in accordance with Annex [Y].

3. Applications for compensation under this Agreement shall be made within one year of the effective date of this Settlement Agreement and shall be administered by the [International Bureau of the Permanent Court of Arbitration], in accordance with the [*Hague Rules on Business and Human Rights Arbitration*], as well as such other supplementary rules as may be established by the [International Bureau of the Permanent Court of Arbitration].

4. [Where the amount of the damage assessed exceeds the balance of the compensation fund, the compensation to be granted shall be reduced in proportion to the funds available.]

5. The right to compensation cannot be assigned or pledged. If the person entitled to compensation has died as of the date of this Settlement Agreement, the surviving spouse and the surviving children shall be

entitled to equal compensation. Benefits under this Settlement Agreement may be applied equally by the grandchildren, or if they are no longer living, by the siblings, if the entitled person has left neither spouses nor children. If no application is made by these persons, the heirs who are appointed in a will are entitled to apply.

6. Host State Nationals who are juridical persons shall not be entitled to compensation. [This paragraph shall not apply to indigenous or religious communities or organizations, or their legal successors.]

7. In the application, any and all persons entitled to compensation shall submit a declaration that, upon receipt of compensation under this Settlement Agreement, they shall not be entitled to any further assertion of claims in connection with those events defined in Annex [X].

Such declaration shall have the force of a waiver of claims for compensation from [INSERT INVESTOR] or any affiliate thereof, before any forum other than the [arbitral tribunal] [claims commission] established in this Settlement Agreement, including without limitation the courts of [INSERT HOME STATE] and [INSERT HOST STATE]. [INSERT HOME STATE] and [INSERT HOST STATE] declare their mutual desire and expectation that the exclusivity of the [arbitral tribunal] [claims commission] established under this Settlement Agreement be respected by the Courts of other States.

D.I.d. For special consideration

In all scenarios described C.II., the Hague Rules could provide an alternative effective route available to rightsholders against investors for breach of specific investors' human rights obligations. States considering pursuing this route should however carefully consider a number of policy and legal questions, some of which are discussed below.

General considerations. First of all, States will also want to think about legal and policy implications of allowing direct access of rightsholder to investment arbitration in their case. From a policy perspective, an additional remedial route for victims of human rights violations by foreign investors sends a positive signal to society and to foreign investors that that state will uphold strict standards of protection when it comes to foreign investments in their territories, providing those affected with as many effective avenues of redress as possible. However, that might come at the expense of investment flows, with foreign investors actively choosing to establish in other jurisdictions that do not allow such claims. International arbitration may also be regarded as a sign of distrust in the justice system. Legally, international arbitration, with its characteristic flexibility and neutrality, has proven to be one effective tool to remedy human rights

violations.[64] At the same time, there might be legal impediments, e.g. constitutional impediments, to the use of arbitration to the settling of these human rights disputes by an international tribunal.

Scope of protected rights and rightsholders. The scope of the arbitration mechanism, both in terms of the identification of the rightsholders able to access it and for the breach of which obligations. Firstly, States will want to consider and carefully define the level of 'interest' for individuals or companies to be able to qualify as claimants in an arbitration proceeding against an investor and its investments under an IIA. There exist various tests under international law that a state could look at – the 'victim' status under the European Convention on Human Rights being one that immediately comes to mind. The test should be crafted to allow meaningful access to genuine victims of human rights violations but not be so broad to open itself up to abuses against foreign investors and their investments. Secondly, there is also the question of nationality. States' obligations to protect human rights are normally linked to the violation taking place within their jurisdiction, rather than to the nationality of the victim. For example, if an investor's activity in the territory of state x violates human rights of a national of state y within the territory of state x, then state x would still be under a duty to protect them. Therefore, the normal definitions of 'national', and even 'territory', commonly found in IIAs may not be suited to cater to these considerations and would require careful thinking. Thus, the definition of 'host State *national*' can be more or less broad. For example, the UK normally covers citizens and permanent residents. Yet, possibly there are persons covered by the jurisdiction of a state which are not covered by this definition. Depending on how investors' obligations are drafted, these could potentially be brought by nationals who are however not directly the victims of the violation. Should those be included?

Precision of investor obligations. The offer to arbitrate should preferably be limited to proceedings relating to certain well-defined investor commitments formulated in IIAs or national laws. Lack of well-defined obligations may otherwise create rule of law issues, due to a lack of predictability for investors, and generally provide a level of discretion in their application to tribunals that States party to an IIA themselves may not find desirable. Furthermore, a lack of specification of the investor obligations could also create disincentives for foreign investors to invest in the host State's territory.

Consent. Fourth, there is the question as to when and how consent should be regarded to have been provided by an investor. For example, would any foreign investor of a particular nationality that has invested in a country that has included the conditional consent clause be deemed to have provided their consent by the sole fact of their establishment? There are at least two ways to go about this question. The first one is to let all investors know that, as of the entry into force of the IIA, they will be presumed to have provided their consent to arbitration under the treaty. This seems quite a draconian approach, which could be open to challenges as to the actual validity of that presumed consent. The second one is to wait for an investor to start ISDS and condition the filing of their notice to consent being expressly provided to international arbitration by right holders for the breaches of human rights provisions specified in the treaty itself. This model looks more balanced compared to the previous one. It however means waiting for an investor to start ISDS before arbitration proceedings can be brought against the investor and leaves gaps of protection for right holders in case no claim is brought by the investor.

Ratione temporis: Another consideration, particularly for the 'opt-in' convention option for existing treaty is one of time applications. Conditional consent appears best required for investments made *after* entry

[64] See the experience of the Bangladesh Accords Arbitrations, PCA Cases 2016-36; 2016-37, more information available at < https://pca-cpa.org/en/cases/152/ > accessed 9 January 2022.

into force of the IIA (or the opt-in convention) to avoid rule of law issues relating to potential retroactive amendments to the terms of the agreement.

Restriction of direct claims against the investor to States (Option II. in Figure 1.). Option for host States to take over claims held by individuals provided that the host State assumes "any and all obligations" of the transferor or assignor including with respect to any and all jurisdictional defenses or counterclaims.

D.I.e. How to amend existing IIAs?

States have in place many IIAs already but mostly without investor obligation and without recourse to dispute settlement for right holders. Amending all of them to include a condition precedent could be a burdensome process. For existing IIAs that States may not want to reopen and amend one-by-one, Amado, Kern and Doe Rodriguez suggest the idea of an 'opt-in' convention, along the lines of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (commonly known as "the Mauritius Convention") to extend the condition precedent to all investment treaties concluded amongst two or more States without having to formally amend them. This model requires the specification of the enforceable obligations on the investor found in national legislation, likely in an annex to the convention. The proposed wording of this provision by Amado, Kern and Doe Rodriguez is as follows:[65]

> 1. The Contracting Parties agree, with respect to all investment treaties as concluded amongst them, that any offer of arbitration to the Investor shall be conditioned upon the Investor's consent in writing that the Host State and its Host State Nationals be entitled to submit the following claims to international arbitration under [*investor-state arbitration provision(s) providing for the use of the Hague Rules*] of this Treaty:
>
> (i) those held by the Host State as set forth in [Annex specifying investor's obligations]; and
>
> (ii) those held by any Host State Nationals as set forth in [Annex specifying investor's obligations].
>
> 2. The Contracting Parties further agree that, where an Investor accepts an offer of arbitration extended in a Contracting Party's investment treaty but the Investor's Home State is not party to this Convention, such Contracting Party shall request that the Investor consent in writing that the [Host State Nationals] be entitled to submit claims as set forth in [Annex specifying investor's obligations].
>
> 3. For purposes of this Convention, the term 'investment treaty' means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

D.II. Integration of the Hague Rules into Contracts

Another option is to implement an obligation for investors in a contract between the investor and the host State to accept arbitration to settle disputes with affected stakeholders. This again can take different forms. Furthermore, dispute settlement with right holders can also be made a requirement in an IIA in that investors should accept a remediation clause as set forth hereunder regarding contracts concluded

[65] Amado et al., supra note 20, at 182 et seqq. The text of the clause is reproduced verbatim, with the exception of the text in italic.

between the host State and an investor. However, as discussed above, such obligatory third beneficiary rights in an IIA would need to meet the requirements of legal certainty in order not to disincentivize investment. That said, this may be more generally true regarding *clauses compromissoires*, except for the parties involved in the arbitration. This issue may be addressed by agreeing in the contract between the host State and the investor that if affected right holders claim a (severe) human rights issue has emerged, which is not solved to their satisfaction by the investor on short notice, a remediation plan should be developed by the investor in meaningful consultation with these stakeholders.[66]

The Hague Rules contain in its Annex several model clauses for contracts, including for preceding mediation, [67] we will provide here only the option of a remediation plan.

Such remediation plan should involve subsidiaries, suppliers or buyers of the investor if they have caused or contributed to the human rights issue at stake. The host State and the investor should also agree that part of this obligatory remediation plan is a dispute resolution mechanism with affected right holders commencing with dialogue but making use of arbitration implementing the Hague Rules as an escalation mechanism.[68] The dialogue phase is more common to date, as investors often establish, either or not prompted to do so by their financiers, such dialogue-based mechanisms (operational level grievance mechanisms). That said, the host State has to see to it that the investor also agrees to make this dialogue-based mechanism UNGP 31 compliant or participates in an existing dialogue-based mechanism which meets this standard. At the time such human rights impact has occurred it will be clear(er) which stakeholders are involved and which human rights issue is concerned. Thus, the first step of the dispute resolution mechanism which is part of the remediation plan should be a dialogue aiming to solve the issue and including access for relevant stakeholders. If the dialogue does not bring about a solution, the issue is escalated to arbitration implementing the Hague Rules involving the stakeholders involved in the dialogue. This also clearly delineates the third party beneficiaries that are involved in the arbitration. Obviously, the question who could be considered to be an affected individual, community or entity is shifted to the dialogue phase (see also above D.I.d.). Although these may be lengthy processes, facilitators in such dialogues between business and affected individuals or communities have by and large been able to delineate the relevant group. Furthermore, one may draw on experience gathered through administrative law in which individuals or entities which are not further delineated in the law are allowed to litigate against governments in for example environmental cases. Jurisprudence has been developed in which these undefined groups are delineated. In assessing whether they have an interest or are affected by an environmental impact, the administrative courts, for example, investigate the distance between these individuals and the environmental impact. Similarly, that could be done for human rights issues.

A further question would be whether the host State should also be part of this dispute resolution process, including dialogue and arbitration. It may be argued it should as the host State may also be part of the solution for the human rights impact. That said, sometimes the host State is also part of the problem and affected stakeholders may feel the participation of the host State in the dispute resolution process may be counterproductive. In such instances state participation may not be helpful. Therefore, the meaningful

[66] For some investors this may also be required by their home state law. See e.g. Articles 7(2)(a) and 8(3)(b) of the EU proposal for Corporate Sustainability Due Diligence Directive.

[67] See supra note 13.

[68] An example of this, however in a commercial contract, can be found in version Article 8 of the American Bar Association, Balancing Buyer and Supplier Responsibilities, Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0.

consultation between the investor and the affected stakeholders in the drafting of the remediation plan should include the question whether or not the host State should be involved in the process. If affected stakeholders feel this would not be helpful, the investor should consider or may even be obliged to leave the host State out of the process. Whether the host State is involved in the process is, thus, case dependent.

Alternatively, the host State and the investor could agree on a *clause compromissoire* which involves arbitration between the host State and the investor, but in which third party beneficiaries may file claims (and engage in the arbitration) on behalf of the host State.[69] However, this may still generate the unclarity regarding the type of issue that will emerge and the beneficiaries acting on behalf of the host State at the time this clause is agreed upon. Furthermore, if the host State is part of the problem, this may not be helpful. Thus, the solution provided hereinabove may be preferable. That said, the host State may want to pursue its own claim vis-à-vis the investor because of a human rights issue (see Option II in Figure 1). Obviously, this may be part of an investment arbitration if the investor has filed an investment claim and counterclaims are allowed, but these conditions are not always met. Therefore, host States may have an interest to arbitrate against investors on human rights related matters and may agree on this in a contract with the investor.

An example of a clause in a State contract implementing the foregoing could read as follows:[70]

> Remediation and dispute resolution in case of Adverse Human Rights Impact
>
> X.1 If Investor becomes aware of an Adverse Human Rights Impact in connection with the Investment on the territories of the State that has not been effectively remediated and cannot be addressed and solved within a reasonable period of time given the circumstances of the impact, Investor shall, if applicable in collaboration with other entities involved in the impact, where legally appropriate and in a manner that is compatible with applicable law, prepare a Remediation Plan. The Remediation Plan shall be proportionate to the significance and scale of the Adverse Human Rights Impact. The State shall support, to the extent it is achievable, proportionate and reasonable and allowed by law, Investor with the preparation of the Remediation Plan, if Investor asks for support.
>
> X.2 The purpose of the Remediation Plan shall be to restore, to the extent achievable, proportionate and reasonable, the affected persons, entities, goods or the environment to the situation they would have been in had the Adverse Human Rights Impact not occurred. The Remediation Plan shall enable remediation that is proportionate to the adverse impact and may include apologies, restitution, reparation, rehabilitation, financial and non-financial compensation, as well as prevention of additional Adverse Human Rights Impacts.
>
> X.3 The Remediation Plan shall include a timeline and objective milestones for remediation, including objective standards and quantitative and qualitative indicators for determining when such remediation is completed. Investor shall demonstrate to the State that the affected individuals and/or entities by the Adverse Human Rights Impact and/or their representatives, have participated in the development of the Remediation Plan.
>
> X.4 Investor shall provide [reasonably satisfactory] evidence in writing to the State of the implementation of the Remediation Plan and shall demonstrate that affected individuals and/or entities and/or their representatives, are being regularly consulted. Before the Remediation Plan can be deemed fully implemented, evidence shall be provided to show that affected individuals and/or entities and/or their representatives, have participated in determining that the Remediation Plan has met the standards developed under this Article.
>
> X.5 The Remediation Plan includes the establishment, and if necessary usage, of a dialogue based dispute resolution mechanism, which is compliant with UNGP 31 and deploys a facilitator, who is independent from Investor and the State,

[69] Cf. on this Martin Jarrett, Sergio Puig and Steven Ratner, Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States and Direct Actions by Individuals, Journal of International Dispute Settlement, 2023, 14, 276 and 277.

[70] We would like to thanks Martin Scheltema, one author of this paper to drafting this clause.

and allows those individuals, (indigenous) communities or entities affected by the Adverse Human Rights Impact to file grievances. The mechanism allows for representation by civil society or other organizations of the individuals, communities or entities affected by the Adverse Human Rights Impact. The State may join the dialogue if [the Investor in meaningful consultation with the affected individuals and/or communities and/or entities and/or their representatives] [the affected individuals and/or entities and/or their representatives] invite the State to do so. The Investor may either establish this dialogue based dispute resolution mechanism at the time the Remediation Plan is drafted or make use of an existing operational level grievance mechanism of Investor or a dialogue based mechanism maintained by third parties provided that this operational level grievance mechanism or third party operated mechanism is amenable to all complaints regarding the Adverse Human Rights Impact in connection with the Investment on the territories of the State, is UNGP 31 compliant and deploys an independent facilitator.

X.6 As part of the Remediation Plan and/or if grievances are filed in the mechanism referred to in Section X.5 above, the directly affected individuals and/or entities and the Investor or the parties involved in the ensuing dialogue, may agree to engage experts for expert determination or assessment of fact. If these parties have agreed to engage (an) expert(s) they will negotiate in good faith regarding the appointment of one or more experts. The [Investor shall bear the cost][parties involved in the dialogue shall share the cost] of the determinations and/or assessments by such experts and will, upon request by the expert(s), provide information to the expert(s) which the expert(s) reasonably need to undertake the determination and/or assessment in connection with the Remediation Plan and/or to which parties to the dialogue have agreed upon. Expert(s) shall enable the affected individuals and/or entities and/or their representative and/or parties to the dialogue to review and comment on their draft findings and will respond to the comments of these parties regarding the draft findings.

X.7 [If national law of host State allows arbitration on human rights issues:] If a grievance is not resolved between the parties in the dialogue based process referred to in Section X.5 above [within a reasonable period of time proportionate to the nature and the salience of the Adverse Human Rights Impact][within … months], then the grievance shall be settled by arbitration in accordance with the Hague Rules on Business Human Rights Arbitration (the "Arbitration Rules") in effect on the date of this Agreement. The arbitration shall be administered by the Permanent Court of Arbitration and the number of arbitrators shall be [one][three]. The seat of arbitration shall be The Hague, the Netherlands, and the place shall be [place]. The language of the proceedings shall be [language]. The award shall include compliance with the Remediation Plan as contemplated by Section X.1 above.

[If national law of host State does not allows arbitration on (certain) human rights issues, then for these issues:] If a grievance is not resolved between the parties in the dialogue based process referred to in Section X.5 above [within a reasonable period of time proportionate to the nature and the salience of the Adverse Human Rights Impact][within … months], then the grievance shall be settled by [competent national court of host State].

X.8 Investor shall not take any adverse action against any person on account of such person having spoken to Investor's representatives, supplied information to the State and/or experts referred to in Section X.6 above or otherwise having cooperated in any fashion with Investor or its representatives and/or the State and/or the experts mentioned in Section X.6 above in connection with efforts to ascertain the extent of the Investor's compliance with the terms of Remediation Plan or in connection with the dialogue referred to in Section X.5 above or with arbitration referred to in Section X.7 above.

X.9 Investor shall establish a third party administered remedy fund which is independent from Investor at the Effective Date of this Agreement and to which Investor on a yearly basis donates […]% of its annual profit earned through the investment. The remedy fund will bear the cost of the establishment and maintenance of the grievance mechanism referred to in Section X.5. If arbitration as referred to in Section X.7 [as far as certain human rights issues are not amenable to arbitration under host State national law: litigation in [competent court of host State] is initiated the remedy fund will deploy the available funds to pay the cost of the arbitral tribunal and the reasonable expenses of the affected individuals and/or entities participating in this arbitration [as far as certain human rights issues are not amenable to arbitration under host State national law: in the proceedings at the [competent national court of host State]].

E. Outlook

The obligations of States and business under the UNGP are without doubt. Pillar III of the UNGP envisages effective remedies for human rights violations and this applies also to foreign investors. The Hague Rules have the potential to close the missing remedy gap for rightsholders in international investment law. This paper discusses some of the options on how to connect the Hague Rules to international investment law, discussing IIAs, investment laws and contracts. The examples given are not exhaustive, for example, the home state venue for liability claims, whereby IIAs or contracts allow for direct claims by foreign nationals in investor's home state courts has not been discussed. Yet, this is the way many of the new due diligence laws operate.

The Hague Rules On Business and Human Rights Arbitration

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Overview

- Why arbitration for business and human rights?
- What are The Hague Rules?
- How can they be integrated in international investment law?
- Value added of The Hague Rules
- Q&A

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Why arbitration for business and human rights?

State duty to provide options for remedy

The question is not whether arbitration should supplant judicial remedy, but rather whether arbitration can provide **an additional option** for rights holders to seek and obtain a rights-compatible remedy.

- States must protect against human rights abuses.
- This includes providing redress for such abuse through effective policies, legislation, regulations and adjudication.
- States should also consider ways to facilitate access to effective non-State-based grievance mechanisms.

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Why arbitration for business and human rights?

United Nations Guiding Principles on Business and Human Rights (UNGPs) Principle 25

As part of their **duty to protect** against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have **access to effective remedy.**

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Why arbitration for business and human rights?

Remedies: An illustrative list of some options

- Investigations or inquiries
- Dialogue (community-based, facilitated, etc.)
- Operational-level grievance mechanisms
- Negotiation
- Mediation
- Conciliation
- Other forms of collaborative settlement
- **Arbitration**
- Litigation
- Other forms of judicial-based remedies

Note: The right to remedy is critical to the realization of substantive human rights (cf. Pillar 3 UNGPs)

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Why arbitration for business and human rights?

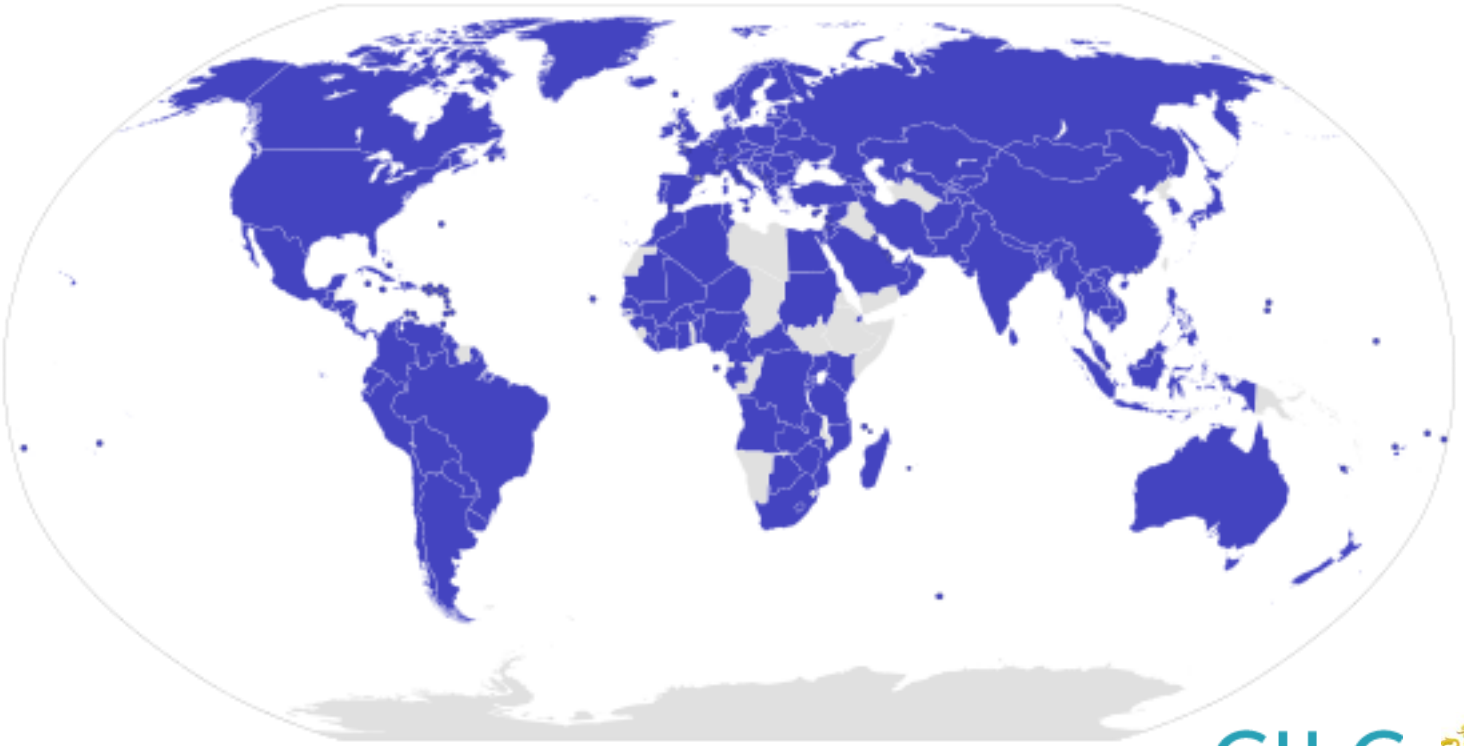
Legal and practical barriers to access national courts

Challenge → Can arbitration overcome some of the legal and practical barriers faced when bringing human rights claims through existing mechanisms of redress, particularly (home or host state) national courts?

Why arbitration for business and human rights?

A neutral forum with international enforcement

*172 contracting states to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention')



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What are The Hague Rules?

The Hague Rules Timeline

Independent experts with open, global consultation

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What are The Hague Rules?

At a Glance

- **More than human rights → sustainability and responsible business conduct**
- **Structure:** Rules of procedure, Commentary, Model Clauses, Code of Conduct, Annex on Model Clauses
- **2013 UNCITRAL Rules with modifications**, including:
  - Default transparency
  - Protection of parties, counsel and witnesses
  - Specific qualifications for arbitrators
  - Joinder or multi-party claims
  - Emergency/Expedited arbitration
  - Remedies and non-monetary relief
  - Human-rights compatibility of the award
  - Claims or defences manifestly without merit
  - Promotion of mediation, conciliation and other forms of collaborative settlement
  - Specific cost allocation provisions

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What are The Hague Rules?

Issue: Transparency

→ Scope of application of transparency provisions (Articles 38-43)

Article 40(1). Subject to Article 42, the following **documents shall be made available to the public:** the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table was produced in the proceedings; the orders, decisions and awards of the arbitral tribunal.

Article 41(1). Subject to paragraphs 2 and 3, hearings for the presentation of evidence or for **oral argument shall be public.**

Article 43. The repository of published information under these Rules shall be the PCA. The repository shall regularly publish general information about arbitration under these Rules as a source of continuous learning, including industry sector, names of arbitrators, outcome of cases and costs.

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What are The Hague Rules?

Issue: Protection of parties, counsel and witnesses

→ Conduct of hearings; exceptions to transparency (Articles 18(5), 33(3), and 42(5))

Article 33(3) Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal. **If the legitimate interest of a witness based on a genuine demonstrated fear requires restriction of the representatives of the parties who are informed of the identity of the witness, the arbitral tribunal may order such restriction.**

Article 42(5). The arbitral tribunal may, on its own initiative or upon the application of a party, after consultation with the parties where practicable, take appropriate measures to restrain or delay the publication of information pursuant to Articles 39 to 41 **where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for parties or members of the arbitral tribunal**, or in comparably exceptional circumstances.

What are The Hague Rules?

Issue: Qualified, impartial arbitrators

→ **Disclosure of conflicts; expertise in subject matter of dispute; nationality of arbitrator; Code of Conduct (Article 11, Code of Conduct)**

Article 11(1)(b) The presiding or sole arbitrator shall **have demonstrated expertise in international dispute resolution and in areas relevant to the dispute**, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field or industry.

Article 11(2) The arbitrators shall comply with the Code of Conduct

Article 11(3) The Parties, arbitrators and the appointing authority shall take into account the advisability of forming a diverse tribunal.

What are The Hague Rules?

Issue: Multiparty claims and joinder

→ Collective redress/mass claims and third party beneficiaries (Article 19)

Article 19(1) In so far as possible, claims with significant common legal and factual issues shall be heard together. The arbitral tribunal may adopt special procedures appropriate to the number, character, amount and subject-matter of the particular claims under consideration.

Article 19(2) The arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument […]

What are The Hague Rules?

Issue: Emergency arbitration

Article 31(1) A party that needs urgent interim measures that cannot await the constitution of an arbitral tribunal may submit a request for such measures to the appointing authority […]

Article 31(5) The appointing authority shall appoint an emergency arbitrator within as short a time as possible, **normally within two days from receipt of the request.**

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What are The Hague Rules?

Issue: Expedited arbitration

Article 57 Unless the parties have agreed otherwise, where **only monetary compensation is sought** and the appointing authority determines that, in view of the circumstances of the case, it is appropriate to appoint a sole arbitrator pursuant to Article 7, paragraph 2, the following expedited procedures shall apply:

(a) All time limits under the Rules shall in principle be halved;

(b) The case shall be referred to a **sole arbitrator**;

(c) The proceeding shall be decided on the basis of written statements and documents **without an oral hearing**; and

(d) The final **award shall be made within six months** from the date of the constitution of the sole arbitrator.

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What are The Hague Rules?

Issue: Applicability of human rights standards

→ Article 46 Applicable law, amiable compositeur

1. The arbitral tribunal shall apply **the law, rules of law or standards** designated by the parties as applicable to the substance of the dispute.

2. Failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate.

3. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the applicable agreement(s), if any, and shall take into account any usage of trade applicable to the transaction, including any business and human rights standards or instruments that may have become usages of trade.

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What are The Hague Rules?

Issue: Types of remedies

Article 45(2) An award may order monetary compensation and non-monetary relief**, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition**. An award may also contain recommendations for **other measures** that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm, which shall be binding only if agreed by the parties.

Article 45(3) […] the arbitral tribunal may, at the request of a party, stipulate any **penalty, monetary or otherwise, it deems appropriate for non-compliance** with any non-monetary relief contained in its award.

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What are The Hague Rules?

Issue: Claims or defences manifestly without merit

Article 26 (1). The **arbitral tribunal shall have the power** to rule on an objection that a claim or defence, including a counterclaim, a claim for the purpose of a set-off or any point of law or fact supporting such claims or defences, is manifestly without merit. The objection may relate to the jurisdiction of the arbitral tribunal or the substance of the dispute, including any relief or remedy sought.

What are The Hague Rules?

Issue: Promoting collaborative settlement

→ **Facilitating settlement and mediation, and emphasizing the complementarity of arbitration to such procedures as the OECD NCP system (Articles 1(6), 18(3), 47, and 56)**

Article 56(1) At any time during the course of the arbitral proceedings, parties may agree in writing **to resort to negotiation, mediation, conciliation or other facilitation methods** to resolve their dispute. In that case, upon joint request of the parties, the arbitral tribunal shall stay the arbitral proceedings.

Article 56(2) No mediator or other facilitator may subsequently participate in the arbitral proceedings in any capacity, including as arbitrator, expert, representative, adviser or otherwise.

Article 56(3) All offers, admissions, or other statements by the parties, or recommendations by the mediator, made during the course of the settlement proceedings shall be inadmissible as evidence in the arbitral proceedings, unless otherwise agreed by the parties.

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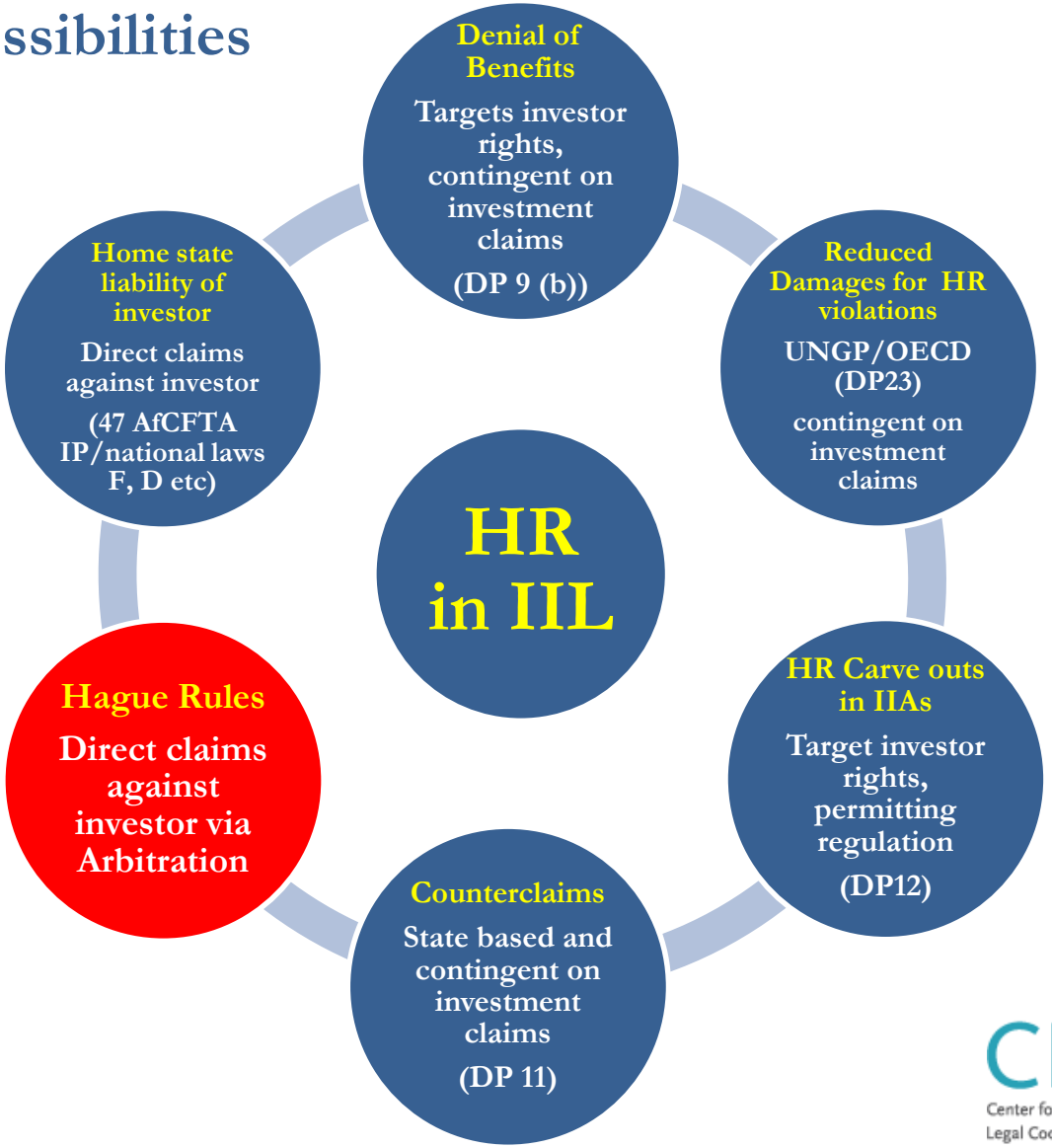
Integration of Human Rights (HR) concerns in International Investment Law (IIL)

The many possibilities



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Integration of the Hague Rules in IIL

Possibilities for integrating The Hague Rules

- Integration in IIAs
- Integration in national investment laws
- Integration in state contracts
- A combination thereof
- *See also Amado, Kern, Doe, Arbitrating the Conduct of International Investors (CUP 2018) for model clauses*

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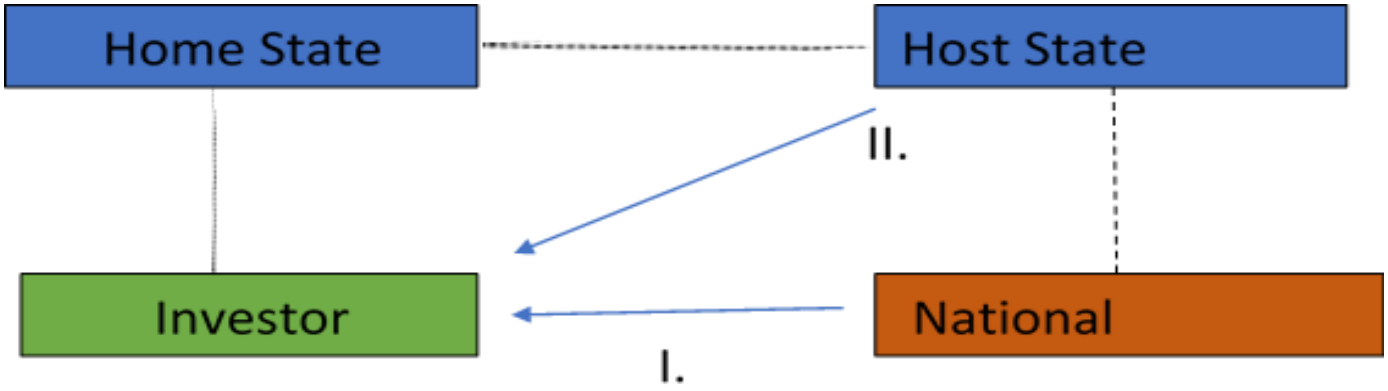
Integration of the Hague Rules in IIL

Possibilities for The Hague Rules – Focus on Direct Claims Model



I: Direct prosecution of claims held by the host State national, opposable to the investor

II: Direct prosecution of claims held by the host State for its own interests or on behalf of its nationals and opposable to the investor

Direct Claims Model (based on Amado et al, at 20)

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Integration of the Hague Rules in IIL

Issues to be considered

- General policy considerations
  - Sending positive signals to investors for adhering to HR standards
  - May impact non-SDG compatible investment
- Scope of protected rights and rightsholders
  - Labor rights, other rights; national and/or international law; precision of investor obligations important
  - Rightsholders: nationals and/or residence and/or jurisdiction
- Consent
  - As condition for entry/contract
  - Once investor files a claim (but leaves protection gaps)
- Claim by state (Model II) or claims by rightsholders (Model I)
- Issues *ratione temporis*
- For technical options of drafting, please refer to AF paper.

Integration of the Hague Rules in IIL

Integration in IIAs

Investors' obligations

- Laws and regulations of the host State, including relating to human rights
- Direct obligations via IIA
  - OECD or UNGPs obligations or others
  - Specified HR obligations as in AfCFTA IP (chapter 5), including internationally recognised human rights (Art. 33 a)
- (Canadian Model BIT, NL Model BIT)

Integration of the Hague Rules in IIL

Integration in IIAs

Consent to arbitration by investors

- Enjoyment of IIA protection generally contingent on consent to arbitration (strict version)
- Condition precedent to the enjoyment by the investor of rights or benefits under the treaty (via ad hoc clause or denial of benefit clause); can be restricted to certain mandatory investor obligations

Integration of the Hague Rules in IIL

Integration in national investment laws

Investors' obligations: as in IIAs

Consent to arbitration by investors

- Condition for entry (strict version)
- Host State can precondition its consent to arbitrate on the existence of the investor's consent to arbitration with either the host State nationals raising human rights-related claims in investment activities (Model I) or with the host State itself on behalf of its nationals (Model II)
- Requirement in national investment laws or in national due diligence legislation for investors operating within their jurisdiction to incorporate international arbitration clauses under the Hague Rules in their supply-chain contracts as a remedy for the breach of obligations set out in state legislation and/or in the contracts themselves

Integration of the Hague Rules in IIL

Integration in state contracts

- Investors' obligations
  - Contracts can integrate investor obligations from IIA or national investment law /national due diligence laws or be formulated free-standing
  - *Clause compromissoire* allows for inclusion of extra-contractual human rights (due diligence) obligations
- Consent to arbitration by investors
  - Condition for the bidding (in a license bidding process)
  - Signing of the contract itself
- See also UN Principles for Responsible Contracts

Value Added of The Hague Rules

- **Filling a HR remedy gap:** independence of investor claims, direct access to remedy, not contingent on investor claim
- Flexible, neutral and HR compatible
- **For investors:** fulfillment of responsibilities under Pillars (2 and) 3 of the UNGPs; avoid multiple (lengthy) court proceedings, consensual solution of a conflict
- **For HR claimants:** direct remedy, quick, HR-adjusted (e.g. witness protection), enforceable via the New York Convention
- **For States:** fulfillment of duties of UNGPs, no involvement, avoidance of direct conflict (unless Model II)

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For a copy of The Hague Rules and more information please visit:

https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/

For draft clauses and technical details of integration, please see Academic Forum paper (print-out) or write us an email

For any remaining questions, comments and suggestions:

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Thank you for your attention!

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