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

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INTRODUCTION

The rise in power of multinational corporations over the past fifty years is well-documented.[1] Multinational enterprises have emerged as truly global actors, able to affect government policies in strategic, economic, and legal ways. Strategically, they often operate in sectors traditionally run by governments by providing infrastructures or other social services. Economically, they are powerful financial centres, wealthier than certain small countries.[2] Legally, multinational corporations tend to be independent of one specific state, except for the formal nexus of incorporation, and can restructure to quickly adapt to changing circumstances. From an

judicial and quasi-judicial national[9] and international courts and tribunals[10]

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

The flexibility of the Hague Rules allows them to adapt to any dispute, regardless of the type of claimant(s), respondent(s), or subject matter of the dispute: they can be included in arbitration clauses in national or international commercial contracts, agreed on in arbitration agreements after a dispute has arisen, and even included as applicable rules in arbitration clauses of international treaties concluded by states and international organizations.[18]

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

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

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

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

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

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

31. National & regional movements for mandatory human rights & environmental due diligence in Europe, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence/ (last visited Oct. 4, 2022).

builds on a February 2020 study that found that mandatory due diligence legislation would have significant social, human rights, and environmental impacts.[33] The EU Commission has since committed to introduce a legislative initiative in this space.[34] In March 2021, the European Parliament also passed a resolution recommending that the EU Commission take action on corporate due diligence and corporate accountability.[35] The recommendation is accompanied by a draft binding legislative proposal on mandatory supply chain due diligence and the outline of a draft Directive incapsulating the views of the European Parliament on this matter. While not binding, the draft Directive still provides some indication of what an EU due diligence legislation could look like: it sets out broad mandatory corporate due diligence obligations on a large number of businesses to identify, prevent, manage, remedy, and report on human rights,

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

Like the Binding Treaty, human rights due diligence is also complementary to the Hague Rules in various ways. First, like the Hague Rules, human rights due diligence is an element of the "smart mix of measures" that the UNGPs recommend that states should adopt to foster business respect for human rights.[39] Secondly, due diligence legislation articulates clear substantive environmental, social, and governance rules, the breach of wh(t)-4.6 (atd ( )]TJ96)2.3 (i)-4e9 (u)12p 9-10.8 D 14 >>BDC (w)4.6-anrat.8 D

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

For reasons of space, we limit ourselves to noting two main developments since the launch of the Hague Rules in December 2019. The first instance is the decision of the Canadian Supreme Court in Nevsun

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MAIN CRITICISMS TO THE HAGUE RULES AND OUR RESPONSE

Since their launch, the Hague Rules have received strong support from

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

In our view, this criticism overlooks that arbitration under the Hague Rules is not meant to displace or substitute the work of national courts, but rather provides those aggrieved by a situation of human rights breach an additional, effective mechanism to settle their dispute in the service of upholding rights that are quintessential to the functioning of society when other mechanisms at their disposal are unavailable or unsatisfactory for the parties. Looked at as a complementary, rather than alternative, route to national courts, arbitration under the Hague Rules so finds its "legitimacy" in the fact that it provides an

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

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

(d) Criticism Four: The Hague Rules cannot remedy undemocratic,

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

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

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

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

It is true that, as the inclusion of the Hague Rules in the model FIPA of The Gambia shows, the Hague Rules may, in the future, be deployed in investment arbitration proceedings. Yet, this does not seem to fundamentally change our conclusion that the Hague Rules will be regarded as "guilty by association" with investor-

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

These provisions have been designed to grant maximal autonomy and flexibility to the parties and to the tribunal to rely on provisions of different

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

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

One of the most widespread criticisms of the Hague Rules goes to the very heart of arbitration and regards the issue of parties' "consent." A business and human ri

ensure that sustainability rules and standards are respected throughout their supply chains and that stock market indices (such as the Dow Jones Sustainability Index and FTSE4Good) are also demanding more detail and transparency on human rights.[57] This makes access to capital for multinational enterprises depend on strong ESG programs, including human rights due diligence processes. Consent to arbitration under the Hague Rules would allow multinational enterprises to comply effectively and be regarded as complying with the regulations that requires them to exercise

and by operationalising and institutionalising a method of dispute resolution that is flexible enough to adapt to the complexity of cross-border disputes in the global supply chain. The Hague Rules encourage arbitral tribunals to proactively address issues of inequality of arms. For instance, Article 5(2) acknowledges that a party may face barriers to access to remedy due to a lack of awareness of the mechanism, lack of adequate representation, costs, physical location, or fear of reprisal and requires that the tribunal

that only "a smart mix of measures—national and international, mandatory and voluntary" may be able to "foster business respect for human rights,"[69] the Hague Rules position themselves as one procedural instrument that may be able to suppor