

Addressing the Remedy Gap

Business and Human Rights Arbitration

By Alyssa Hussein



This article addresses how the newly launched Hague Rules on Business and Human Rights Arbitration¹ provide a dispute resolution mechanism for business and human rights arbitrations, and specifically, how the rules can be used by businesses to resolve disputes with suppliers.

Imagine, as a manufacturer, you advertised a product that was environmentally friendly. You find out that the supplier with whom you contracted did not, in fact, sustainably source the materials. Or as an automotive company during a global pandemic, international suppliers shut down their factories, had mass layoffs, and dodged union disputes.² Consumers and investors are outraged that a company they believed in could be involved in such actions. Uncertainty among individuals, families, businesses, and governments continues amid the COVID-19 global pandemic and its aftermath. Factory closures, impacting both supply-chain workers and business stakeholders, continue in this trying time.³

Inevitably, there will be disputes, including those that implicate the rights of workers. Access to effective and meaningful remedies is a way that enterprises, especially businesses with multijurisdictional supply chains, can mitigate the effect of those disputes. The recently launched Hague Rules set out a mechanism for businesses that not only provides an opportunity to resolve disputes outside of courts but also complies with businesses' international obligations to provide for nonjudicial grievance mechanisms, as set out in the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.⁴

The Business and Human Rights Arbitration Working Group, comprised of international lawyers and academics, developed the Hague Rules, which address the impact of business activities on human rights, including the remedy gap.⁵ On December 12, 2019, the working group launched the Hague Rules at the Peace Palace in the Netherlands. Spearheaded by Bruno Simma, a former judge at the International Court of Justice, the

group developed the rules over five years in a multistage process, which included ongoing consultations and input from businesses, arbitrators, human rights advocates, and relevant stakeholders.⁶ The purpose of the Hague Rules is to create an international, private, nonjudicial dispute resolution mechanism. Businesses, especially those conducting business transnationally, can use the new rules to keep their suppliers accountable and resolve disputes in a manner that is efficient and fair and respects international human rights.

It is not too late to use the Hague Rules for resolving an existing or future dispute. For a dispute that is not already subject to an arbitration, the parties need to agree to submit the dispute to arbitration under the Hague Rules. If there is an existing agreement to arbitrate, the agreement could be modified to incorporate the Hague Rules, providing an opportunity for businesses to keep their suppliers accountable and satisfy consumers by using a fair and effective means of dispute resolution.⁷

The Guiding Principles: Implementing the United Nations “Protect, Respect and Remedy” Framework

The Guiding Principles provide a comprehensive and consolidated framework of international law obligations in a single global platform for “the effective prevention of, and remedy for, business-related human rights harm.”⁸ Human-rights-related abuses in business have been an issue of concern; therefore, the United Nations has implemented initiatives to address such abuses.⁹ However, without a consistent and straightforward framework, there has been a deep divide between stakeholders regarding their roles and responsibilities in aiming to address human rights abuses in the business context.¹⁰

These concerns have been on the United Nations global policy agenda since the 1990s.¹¹ With a rise in transnational economic activity resulting in increased social awareness and advocacy related to businesses’ impact on human rights, the

United Nations initiated an early proposal that sought to directly impose on companies human rights duties under international law.¹² The response to this initiative was controversial, as the initiative exacerbated the divide between the business community and human rights advocacy groups.¹³ Therefore, the initiative was dropped because of divergent views of the various stakeholders.¹⁴

To address the divide and controversies related to these issues, a framework of consolidated guiding principles was needed to help business communities and human rights advocates agree on their understanding of existing standards and practices of international law obligations.¹⁵ Thus, in 2005, the United Nations established a mandate for a special representative of the secretary-general to conduct systematic research and provide a report addressing the implications of existing human rights standards and practices for both governments and businesses in a consolidated and comprehensive manner.¹⁶

John Ruggie, the special representative appointed to this task, conducted research and held discussions across different stakeholders’ groups in the business and human rights domain to create a coherent report of knowledge held by all parties. He found that although there were initiatives incorporating business and human rights, existing efforts did not reach sufficient scale to move markets because of lack of an authoritative focal point where expectations and actions within these communities could converge.¹⁷

The Guiding Principles aim to do just that. They rest on three “pillars”: (1) the state duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which means acting with due diligence to avoid infringing on the rights of others and addressing those adverse impacts that do occur; and (3) greater access for victims to effective remedies, both judicial and nonjudicial.¹⁸ Each pillar is interrelated and provides for the protection, respect, and remedial measures for human rights abuses.

The remainder of this article focuses on the third pillar of the Guiding Principles, which centers on access to remedies and emphasizes governments’ duties to protect against human rights abuses through non-judicial and judicial means so victims have access to effective remedies. Although the report focuses on governments’ duties, it also addresses the role of business enterprises in facilitating access to non-state-based grievance mechanisms. The report states: “To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level

At a Glance

The uncertainty ahead, especially during a global pandemic, regarding disputes within multijurisdictional supply chains can put businesses at public exposure for potential human rights claims. Businesses and parties within the supply chain can agree to submit disputes to arbitrate under the recently launched Hague Rules on Business and Human Rights Arbitration, which provide for a fair, effective, and transparent means of international dispute resolution. This solution aims to address existing gaps in access to remedy by providing an international nonjudicial grievance mechanism.

grievance mechanisms for individuals and communities who may be adversely impacted.”¹⁹ Furthermore, “[i]ndustry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.”²⁰ The pillar on access to remedies focuses on stakeholders’ roles in addressing human-rights-related abuses. This section of the report emphasizes that it is crucial for all stakeholders—governments, business enterprises, industry and collaborative initiatives—to work simultaneously to provide nonjudicial grievance mechanisms.²¹

In addition to providing victims of human rights abuses an avenue for recourse, access to nonjudicial grievance mechanisms provides business enterprises an opportunity to avoid the impact of potential human rights violations before they escalate. The Guiding Principles propose the following criteria for nonjudicial grievance mechanisms: legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; and based on engagement and dialogue.²²

These criteria maximize the opportunity for, and perception of, protection and trust needed from the potential victims, as “[a] grievance mechanism can only serve its purpose if the people it is intended to serve, know about it, trust it and are able to use it.”²³ In addition, effective grievance mechanisms assist business enterprises in identifying adverse human rights impacts and provide them with an opportunity to analyze trends and systemic problems, which, once identified, can create an avenue to address adverse impacts early and directly.²⁴

Procedures provided in the Hague Rules

The Hague Rules provide a set of procedures for the arbitration of disputes based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules),²⁵ but take these rules a step further and account for gaps in access to remedies related to human rights impacts of business activities.²⁶ Business enterprises that incorporate the use of arbitration according to the Hague Rules within their supply chain provide the opportunity for access to a remedy through a non-state-based grievance mechanism. This is consistent with the third pillar of the Guiding Principles—specifically, the criteria listed for effective nonjudicial grievance mechanisms.

During the development of the Hague Rules, the working group published reports that addressed the remedy gap and proposed methods and solutions.²⁷ Some of the considerations included party autonomy, rights compatibility, transparency, election criteria and nomination process of arbitrators, participation of nondisputing parties, evidence, protection of parties and nonparties, time sensitivities, types of relief, recognition and enforcement, claims without merit, costs, and financing.²⁸ These considerations, ultimately incorporated into the Hague

Rules, are consistent with the effective criteria listed in the Guiding Principles.²⁹

The Hague Rules provide a mechanism for reparations and assist businesses in managing risk. At the Launch Symposium of the Hague Rules, the working group stated that it had taken the commercial norms with which businesses are familiar at an international level, and by using the UNCITRAL Rules as their framework, made amendments relating specifically to human rights concerns while addressing potential imbalances of power in business and human rights abuses.³⁰ The following provisions address business and human-rights-related elements in the Hague Rules:

- Appointment of arbitrators
 - Article 11 addresses the selection of arbitrators and requires high moral character and demonstrated expertise by the presiding or sole arbitrator in areas relevant to the arbitration, and encourages the constitution of a diverse tribunal.
- The arbitration
 - Article 5(2) focuses on representation and assistance. It instructs the tribunal to make efforts to ensure that unrepresented parties can present their cases in a fair and efficient manner, and directs the tribunal to consider specific barriers to access to a remedy, including, for example, lack of awareness of the process by the parties, lack of adequate representation, costs, or fear.
 - Articles 18 and 32 require that the proceedings be “fair, efficient, culturally appropriate and rights-compatible” and that due regard be given to “the urgency of addressing the alleged human rights impacts.”³¹ The commentary in the rules defines rights-compatible as “outcomes and remedies [that are in] accord with internationally recognized human rights.”³²
 - Article 18(1) provides the tribunal procedural power to implement a fair and efficient process specific to the circumstances of the case. This power is limited by agreement of the parties and any mandatory law applicable to the arbitration.
 - Article 18(5) allows the tribunal to keep the identity of a person or people confidential where it may be sensitive or cause prejudice. The tribunal has the power to determine the need for nondisclosure based on the specific circumstances of the case.
 - Article 32 provides that the tribunal has discretion in the manner in which evidence is taken. Members of the tribunal should take into account best practices in international dispute resolution and for the specific circumstances of the case, including fairness, efficiency, cultural appropriateness, and rights compatibility. This includes considering “the possible inequality of arms and of access to evidence among the parties.”³³ Inequality of arms include cases

between rights-holders and businesses and claims by large multinational companies against small local suppliers.³⁴

- o Human rights obligations are, by nature, matters of public concern, and Articles 38–43 address which submissions, decisions, oral hearings, details of the parties, and arbitrators shall be made public. Yet, in keeping with the confidential nature of arbitration, the tribunal has broad discretion in weighing such public interest in transparency against other legitimate concerns, including safety of the participants, privacy, and confidentiality of business information. Again, this is where the expertise of the tribunal is significant, as arbitrators with business and human rights backgrounds can weigh these factors in light of global standards specific to the subject matter.³⁵

The general and broad power in the hands of the arbitral tribunal is indicative of the need to have a tribunal of arbitrators who are experts in business and human rights, as well as in the specific subject matter of the dispute.

The Business and Human Rights Arbitration Working Group has consulted and engaged in ongoing dialogue with stakeholders to develop rules that align with the international standards provided for in the Guiding Principles for non-state grievance mechanisms. The Hague Rules do just that, and business enterprises can use these rules in existing and future agreements to create accountability within their supply chains while appropriately providing dispute resolution mechanisms that address existing gaps in access to remedies in a manner that is transparent, fair, and effective and holds suppliers accountable. ■



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ENDNOTES

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