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Master's Thesis

Human Rights and Arbitration
Žmogaus Teisės ir Arbitražas

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ABSTRACT AND KEY WORDS

This work analyses the theoretical and practical aspects of the relations arising in the process of implementing human rights issues in the International Investment Arbitration and of the International Commercial Arbitration; the theoretical and practical aspects of the relations arising in the process of implementing the rules governing the practical activities of the International Investment Arbitration and of the International Commercial Arbitration as a mechanism for resolving disputes related to the protection of human rights.

Keywords: Issues, adjudication, treaties, obligations, dispute resolution mechanism, business.

Šiame darbe analizuojami teoriniai ir praktiniai santykių, kylančių įgyvendinant žmogaus teisių klausimus Tarptautiniame Investiciniame Arbitraže ir Tarptautiniame Komerciniame Arbitraže, aspektai; teoriniai ir praktiniai santykių, kylančių įgyvendinant Tarptautinio Investicinio Arbitražo ir Tarptautinio Komercinio Arbitražo, kaip ginčų, susijusių su žmogaus teisių apsauga, sprendimo mechanizmo, praktinės veiklos taisykles, aspektai.

Reikšminiai žodžiai: Klausimai, sprendimas, sutartys, įsipareigojimai, ginčų sprendimo mechanizmas, verslas.

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INTRODUCTION

Businesses can have a profound impact on human rights. These impacts can be positive, such as improved access to employment or better public, or negative, such as pollution, underpayment of workers, or forced evictions of communities. For decades, local communities, national governments, and international institutions have debated the responsibilities of companies in managing these negative impacts and the role of governments in preventing them.

It can be observed that existing dispute resolution mechanisms are often ineffective, with the result that victims of human rights violations are denied access to justice.

No single dispute resolution mechanism for human rights disputes against transnational businesses is perfect. The effective resolution of disputes concerning the protection of human rights in business depends on the jurisdictional openness of domestic judicial systems to, for instance, transnational tort claims. Despite this, existing dispute resolution mechanisms may not be able to resolve contemporary human rights issues because of a corrupt government department, unqualified judges, or overburdened courts. It leaves victims of human rights violations without access to justice and therefore without the opportunity to defend their rights.

One of the advantages of arbitration is a high level of freedom for the parties to tailor the proceedings to their needs. Arbitration has arguably become the most popular dispute-resolution method in the business community. In such circumstances, arbitration may be another of the most appropriate ways to resolve disputes related to human rights violations by business entities.

However, why should it be so readily dismissed as a form of dispute settlement for the particular case of human rights victims claiming against transnational corporations whose reach and mobility transcend any single national jurisdiction? What is it about the particular nature and contours of human rights disputes against transnational corporate activities that somehow is automatically decisive for some against the suitability of international arbitration, excluding it from all the forms of dispute settlement currently open to human rights and business disputes?

The object of the research is practical and theoretical aspects of the relations arising in the process of implementing the rules governing the practical activities of arbitration as a mechanism for resolving disputes related to the protection of human rights.

The subject of the research is a set of rules governing the basic peculiarities of arbitration as a mechanism for resolving disputes related to the protection of human rights; practices of treaty interpretation contributing to the infusing of human rights in

international arbitration; case law concerning the resolution of disputes related to the protection of human rights by international arbitration.

The hypothesis is to prove that International Investment Arbitration and International Commercial Arbitration can be applied to resolve disputes related to human rights and provides an additional means of protecting human rights in conjunction with domestic law and international law.

The relevance of the topic of the research lies in the fact that, first, while the international system increasingly recognizes the rights and needs of individuals, violations and impunity still abound across the world. Secondly, there are regions where state courts are inaccessible or ineffective and victims of human rights violations have no access to justice. Therefore, the interest of the international community is growing in the development of procedures for the arbitration of disputes related to the impact of business activities. Third, arbitration is an important mechanism for the resolution of disputes, including those related to the protection of human rights in businesses.

In the research was used both qualitative and quantitative research methods: secondary analysis of legal, sociological and political data; content analysis of legal documents, claims, cases; situation analysis; event analysis; method of comparison.

The research was started from a review of the secondary data, which include an examination of various academic studies on the topic under research for a detailed definition of the purpose of the research and a research design; identification of patterns and trends for arbitration as a mechanism capable of resolving human rights issues. Secondary analysis of legal, sociological and political data has provided a cost-effective way of gaining a broad understanding of shortcomings of domestic and supranational mechanisms in resolving human rights issues on the one hand, and mechanisms and principles of functioning of the International Commercial Arbitration and International Investment Arbitration to determine a common ground of understanding of the ability of these bodies to resolve human rights issues; relations of the International Commercial Arbitration and International Investment Arbitration with domestic mechanisms of dispute resolution related to human rights issues.

Therefore, the secondary analysis of data has been used in compiling the Table of Contents for the research as well as introduction and summary parts. It also has been used in the 1 Chapter, where the main consistent patterns of relations of the International Commercial Arbitration and International Investment Arbitration with domestic mechanisms of dispute resolution related to human rights issues had been exploring. Content analysis of legal documents, claims, cases; situation analysis; event analysis; used

in the 2 Chapter to determine the crisis of legitimacy of International Investment Arbitration and the main ways of democratization of this dispute resolution mechanism. It used in Chapters 3, 4 as well to describe the experience of Bangladesh as an effective example of arbitral dispute resolution regarding the protection of human rights and analyze the progressive legal basic for arbitration as mechanism of resolving disputes related to human rights accordingly.

Comparative analysis is used in Chapter 2, Subchapter 2.1.1, to identify differences and similarities in the principles of operation of International Commercial Arbitration and International Investment Arbitration and to identify one legal basis for arbitration as a method of resolving disputes related to human rights. As well it used in Chapter 4 to identify differences and similarities in the different legal documents, which regulate the functioning of arbitration, as well as identifying the benefits of creating a progressive legal framework for arbitration as a body resolving issues related to human rights.

The purpose of the research is to analyze international legal documents and practice in the field of human rights in business and determine the place of International Investment Arbitration and International Commercial Arbitration in the resolution of disputes related to the impact of business activities on human rights.

To achieve the goal, it is necessary to solve the following tasks:

- to identify the shortcomings of domestic and supranational mechanisms in addressing human rights issues;

- to determine the role and jurisdiction of International Investment Arbitration and International Commercial Arbitration in the resolution of disputes, concerning human rights;

- to consider different approaches to resolving human rights disputes between investors and states;

- to determine the usefulness of applying human rights standards in arbitration proceedings by identifying the link between the European Convention on Human Rights and International Commercial Arbitration;

- to examine and analyse the main international legal instruments, as well as case law, concerning arbitration, the issue of resolving human rights disputes by International Investment Arbitration and International Commercial Arbitration;

- to identify the most appropriate legal framework for resolving human rights disputes by International Investment Arbitration and International Commercial Arbitration.

The Master's thesis is completed by the author of the paper independently and references to the literature used are included.

The most important sources used in the thesis are European and International legal acts, regional legal acts, European and International and International case law, books, articles in scientific journals.

1. SHORTCOMINGS OF DOMESTIC AND SUPRANATIONAL MECHANISMS TO ADDRESS HUMAN RIGHTS ISSUES

1.1. Shortcomings of approaches to addressing Human Rights issues

1.1.1. Domestic means to addressing Human Rights issues

Transnational corporations (hereinafter - TNCs) are beginning to play an increasing role in the global economy in the twenty-first century. Their activities often could lead to violations of human rights. This is particularly true for companies in developing countries or countries with the totalitarian regime, where violations of employee's labour rights and other human rights are more systematic than in developed countries.[1]

Such disputes often arise in regions where national courts are ineffective, corrupt, politically influenced or simply unqualified. In such circumstances, victims of human rights violations, related to TNCs activity, may either refer to various international institutions or may have recourse to a private system that could operate in these regions.

International arbitration as a method of alternative dispute resolution holds great promise as a method that can be used to resolve disputes, concerning human rights.[2]

Arbitration has been used as a dispute resolution tool for thousands of years. Whether it has been as a means to resolve disputes between private parties, disputes involving states concerning boundaries, or disputes related to family law, property law or commercial transactions, arbitration has deep roots across a wide range of contexts. The allure of the arbitral mechanism is that it offers an alternative form of dispute resolution that can be used instead of the government-run court system.[2]

Much like litigation, the arbitral procedure is binding, adjudicative and subject to legal rules. However, by contrast, arbitration has also traditionally been perceived to be confidential, flexible, speedy and inexpensive. In addition to that, arbitration is a creature of contract. It permits the parties to the dispute considerable latitude to design the proceedings. Among other features, the parties have a say not only in the composition of the tribunal and where it has its seat, but also about how the proceedings are conducted and what the applicable rules are to resolve the dispute.[2]

In recent decades, the arbitral mechanism has witnessed unprecedented successes in international commercial and investment contracts. This can largely be attributed to the introduction of the 1958 Convention on the Recognition and Enforcement of Foreign

[1] Natapov, L. and Sciences. M. (2011). *Privlechenie k otvetstvennosti transnacional'nyh korporacij za narushenie norm mezhdunarodnogo prava v oblasti prav cheloveka.* p. 3; Arseniev I. A. (2019). Obespechenie prav cheloveka v deyatel'nosti korporacij v evropejskom prave, 7-8.

[2] Centner D. and Ford M. *A Brief Primer on the History of Arbitration*, p. 1.

Arbitral Awards (thereinafter - New York Convention)[3] and the advance of arbitration-friendly national legislative efforts in the 1980s, as the arbitral process had become more flexible and autonomous, and the awards could practically be enforced worldwide. In a fast-paced and market-oriented world order, the international arbitral mechanism, with its inherently suitable features, was subsequently developed into a highly sophisticated system that became the method of choice for international commercial disputes. However, this increased enthusiasm thereby also fundamentally altered the approach to the arbitral process. After all, arbitration progressively became a valuable tool to accelerate further the globalization process. Particularly, international investment arbitration, as an important instrument for protecting foreign investments, became known as 'a growth industry'. This is arguably evidenced by the exponential increase in the number of bilateral investment treaties (thereinafter -BITs).[4]

However, in order to identify arbitration as one of the relevant and effective mechanisms for resolving disputes, concerning human rights, it is important to identify the reasons for inefficiencies in the adjudication of human rights disputes by domestic state courts, as well as the assess challenges in the adjudication in such cases; and identify the challenges in resolving such disputes by different international institutions.

One possible source of binding obligations lies in domestic law. Domestic law "operates both in a regulatory capacity, providing the background effect against which corporations must act, as well as in an accountability capacity, by providing for effective redress of any harm a priori, caused by corporate activity."[5] Reliance on extraterritorial application of domestic law can be especially useful to regulate TNCs working in host states with weak regulatory and legal systems.[6]

However, jurisdictional problems limit the effectiveness of this mechanism. An example of the usefulness and problems of this approach is the United States Alien Tort Statute (thereinafter - ATS).[7] The ATS grants federal district courts original jurisdiction over any civil action where an alien sues for a tort "committed in violation of the law of

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf [Accessed 1 November 2022].

[4] Choudhury, B. Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights. *International Law and Democratic Considerations*, 46(4), 983–985.

[5] Hepburn, J. (2017). Identify Domestic Law Issues in Investment Arbitration. Domestic Law and Remedies, 69–100 [interactive]. Available online: https://doi.org/10.1093/acprof:oso/9780198785736.003.0004 [accessed 12 November 2022].

[6] Arbitration of human and labor rights: the Bangladesh experience. [interactive]. Available online: https://nyujilp.org/wp-content/uploads/2020/01/NYI104.pdf.

[7] Grande, D. (2022). The Alien Tort Statute in the United States: U.S. Compliance with International Law Norms following Nestlé v. Doe. In: Chowdhury, A. and Editor, S. Available at: https://www.nyujilp.org/wp-content/uploads/2022/04/Chowdhury_online_Formatted-139-153.pdf.

nations or of a treaty of the United States. Broadly speaking, it serves as a statutory instrument for gaining universal jurisdiction over violations of international law.

In Kiobel v. Royal Dutch Petroleum case,[8] the United States Supreme Court held that the ATS only grants jurisdiction for violations of international law occurring within the United States. Moreover, in Sosa v. Alvarez-Machain,[9] the Supreme Court held that ATS claims can proceed against both natural persons and legal persons, but claims against state governments are precluded by sovereign immunity.[9]

Importantly, the United States Supreme Court ruled that "the presumption against extraterritoriality constrains courts exercising their power under the ATS,"[8] thereby diminishing the extent to which it can be used enforce human rights obligations on business entity (especially TNCs) acting on foreign territory.[8]

Thus, the ATS is an example of some of the jurisdictional problems that can arise when domestic law is used extraterritorially as a mechanism to enforce human rights obligations.

Some states have not only shortcomings in the judicial system, but also gross irregularities, which, in particular, are evidence of the inefficiency of the judicial system as a whole.

For instance, in Belarus, trials concerning human rights are adjudicated by not only administrative and criminal courts but also civil courts of general jurisdiction. The chief issue of the Belarusian courts system is that it is almost dependent on the president and the bodies that report to him (president Alexander Lukashenko and the government accountable to him are currently illegitimate). Moreover, the dependence of the courts is manifested "vertically" in the judicial hierarchy. The precondition for this is financial, material-technical and organisational dependence of the lower courts. Since there is a dependence of judges on presidential power, judicial administrative and criminal trials are dependent on internal political processes. Therefore, opponents of the current government, human rights defenders and social activists are being prosecuted.[10]

Among other issues, the main challenges in resolving human rights disputes in Belarus are the following: there is a post-soviet inefficient court system and ineffective legislation generally; there is a lack of autonomy and independence of the courts as the

[8] *Kiobel v. Royal Dutch Petroleum* [SCOTUS] Nr. 10–1491, [2013-04-17]. ECLI:569 U.S. 108,133 S.Ct. 1659,185 L.Ed.2d 671.
[9] *Sosa v. Alvarez-Machain* [SCOTUS] Nr. 03–339, [2004-06-30]. Available at: https://www.law.cornell.edu/supct/pdf/03-339P.ZS [Accessed 5 November 2022].
[10] Pastukhov, M. Sudebnaya Sistema Respubliki Belarus: sostoyanie, problemy, perspektivy. *Studia I Analizy*, 39, p. 120.

main organs of justice; corrupt judicial apparatus; unequal numbers of judges in courts and unequal workload distribution.

It is also worth noting that Belarus has no independent trade unions and public organisations capable of providing an alternative for the protection of civil rights: On July 18, the Supreme Court ruled on the liquidation and dissolution of the Belarusian Congress of Democratic Trade Unions and its four affiliates - the Belarusian Independent Trade Union, the Belarusian Trade Union of Radio-Electronic Industry Workers, the Belarusian Free Trade Union and the Free Trade Union of Metalworkers. Three of these unions are Industrial affiliates.

It is worth noting that the important changes that took place in the late 1980s and 1990s the economic and political life of the countries of Central and Eastern Europe, the countries formerly part of the Union of Soviet Socialist Republics became the basis for the development of a new, in comparison with the soviet period, system of foreign economic relations. Thus, all business entities have obtained the right to participate independently in international trade relations. As a consequence, the number of disputes related to foreign economic relations has increased.[11]

These problems show that arbitration can be a method of alternative dispute resolution for the protection of civil rights as there is no any other effective measures to protect human rights.

1.2. Supranational adjudication

1.2.1. The European Court of Human Rights in resolving Human Rights disputes

It can be assumed also that human rights cases have their specific issues, such as the length of judicial proceedings and the lack of necessary remedies. Although the European Court of Human Rights (hereinafter - ECtHR) serves as an institution that summarises practice and provides recommendations to improve the judicial system, it still cannot guarantee the effectiveness of judicial proceedings in every case.[12]

Many of the cases, pending before ECtHR, are so-called “repetitive cases”, which stem from general dysfunction at the domestic level. Under the Rules of ECtHR the Pilot-judgment procedure has therefore been developed as a method for identifying the structural problems underlying recurrent cases against many countries and establishes an obligation for the state to take action to address these problems (rule 61 «Pilot-judgment procedure»).

[11] Hlevin, C. (2019). Reformirovanie instituta mezhdunarodnogo arbitrazha v zakonodatel'stve Rossijskoj Federacii, Respubliki Kazahstan I Latvijskoj Respubliki. *European Humanities University*. Vilnius: the European Humanities University library.

[12] Rules of Court (2022). Available at: https://www.echr.coe.int/documents/rules_court_eng.pdf [Accessed 12 September 2022].

If the Court receives complaints that have common roots, it may select one or more such complaints for priority examination under the pilot decision procedure. The Court's task in issuing a pilot judgment is not only to determine whether a particular case has been violated of the European Convention on Human Rights, but also to identify a systemic problems and to give clear guidance to the government on the measures to be taken[13].

The judicial system has its own characteristics and consequently shortcomings in the functioning of the judiciary in different states. These disadvantages may include, for instance, the excessive length of judicial proceedings and the lack of domestic remedies, as in Rumpf v. Germany case[14], which was considered before the ECtHR in 2010. Since 2006, the Court has repeatedly observed that Germany does not provide a reasonable time limit for the handling of cases before the administrative tribunals.[14]

The measures ordered by the Court are: to introduce, within a period of not more than one year from the date on which the decision becomes final, an effective remedy allowing for the obtaining of redress for the excessive length of proceedings before the administrative courts.[14]

Following this pilot decision, in December 2011, the German Act on protracted proceedings and criminal investigations came into force. It combined tools for speeding up proceedings and provisions against delays, allowing for bring an action for redress before the court of appeal.[14]

It is noteworthy that in two inadmissibility decisions of 29 May 2012 (Taron v. Germany, Garcia Cancio v. Germany and Garcia Cancio v. Switzerland),[15] the Court did not find at that stage no reason to believe that the new remedy did not allow the applicants to obtain adequate and sufficient redress for the violation of their rights, or that it did not provided a reasonable chance of success. In these cases, it may be noted that the Court did not take into account the fact that the German courts could not establish any legal practice within months following the entry into force of the enactment of the new law.[15]

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13 Pilotnye postanovleniya. (2015). [interactive]. Available online: https://www.echr.coe.int/Documents/FS_Pilot_judgments_RUS.pdf lt [Accessed 12 November 2022]. p. 2

14 Rumpf v. Germany [ECHR], Nr. 46344/06, [02-09-2010]. Available at: https://hudoc.echr.coe.int/eng-press?i=003-3245235-3615893. lt [Accessed 15 November 2022].

15 Complaints concerning length of proceedings before German courts: applicants must use new national remedy. Press Release issued by the Registrar of the Court.(2012) Available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3966255-4602367&filename=003-3966255-4602367.pdf [Accessed 15 November 2022].

By 1 September 2011, 13 pilot-judgments had been issued by the ECtHR. All of them, with a few exceptions, concerned either the right to a reasonable time trial or the enforcement of a court decision, or property rights.[13]

Therefore, the ECtHR is not always able to deal effectively with human rights issues. For instance, the overload of the court lead to the length of adjudication. Also, the procedure for bringing a case before the ECtHR is rather complicated, as the rule of exhaustion of all domestic remedies exists. Arbitration can provide an additional remedy for protection of human rights in these circumstances; especially, when parties wish to have the dispute resolved in the shortest period of time. It may also be noted that an increase in the submission of human rights disputes to arbitration can provide an additional mechanism to offload the ECtHR. This creates a balance in the assignment of legal disputes and allows the ECtHR to operate more effectively.

1.2.2. The evolutionary interpretation practice of the International Court of Justice as an entry point for Human Rights norms in Investment Treaties

It is necessary to point out the interpretations of the norms of investment treaties developed with regard to human rights considerations, since such interpretations have an impact on the creation of norms in the field of investment.

There are different means of intermediating human rights norms within the investment treaty framework, as by including human rights treaties within the investment treaty's general provisions on governing or applicable law (eg, 'any relevant rules of international law applicable');[16]through the incorporation of specific human rights-based provisions into the investment agreement itself;[17] and through the interpretation of investment terms or concepts using human rights jurisprudence or treaty standards, on the basis of article 31(3)(c) of the Vienna Convention on the Law of Treaties.[18] In the following, I will focus on the interpretation of investment law terms or concepts with reference to human rights treaty norms and jurisprudence.

The treaty interpretation by investment tribunals as an entry point is preferable to the belated (and possibly destabilizing) resort to 'human rights' as a 'public policy' ground for national courts to refuse recognition or enforcement of awards under the New York

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16 ICSID Convention, Regulations and Rules (2006).Available at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf [Accessed 20 November 2022].

17 Canada Model BIT (2004).Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download. p. 15.

18 Simma, B. and Kill, T. (2009). Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology in Binder, C. and Kriebaum, U. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer:* OUP, Oxford, 678–707.

Convention or UNCITRAL Model Law. It remains a lingering threat from jurisdictions bent on resisting pro-investor arbitral awards.

Human rights law can only be taken into account if, and as far as, an investment tribunal is allowed to consider rules of international law whose source is not found in the treaty in question. In order for such 'external' rules to be admitted to the scene at all, they must be placed in a particular relationship with the investment treaty concerned.

In the practice of international courts and tribunals, particularly of the International Court of Justice (hereinafter – ICJ) and its predecessor, such relationship has been established.

It finds expression in the principle of evolutionary, or dynamic, interpretation: where treaties use known legal terms whose content the parties expected would change through time [19]the meaning of these terms will be determined by reference to international law as it has evolved and stands at present, rather than to the state of the law at the time of the conclusion of the treaty. For the ECtHR, application of this principle is a matter of routine. However, to consider the issue of the relationship between Investment Treaties and Human Rights it is important to consider how ICJ apply this practice.[20]

Most of the ICJ cases on evolutive interpretation focus on developments in international law that may impact on the meaning of the treaty. The Court comes closest to the ECtHR's conception of evolutive interpretation in the Costa Rica v. Nicaragua case,[21] where ICJ stated: "There are situations in which the parties intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law".

The Court adopting a modern meaning of the terms used. The Court indicated also that such an approach was presumptively appropriate when interpreting treaties establishing international organisations and, potentially, also human rights treaties.[22]

Thus, 'navigational rights', in this case, are significant because the bilateral treaty being interpreted was very different in nature from the human rights treaty. It offered little

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19 Crawforda, J. and Keene, A. (2017). The International Journal of Human Rights. Interpretation of the human rights treaties by the International Court of Justice, 24, 935-956 [interactive].Available online: https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1600509 [Accessed December 1 2022].

20 *Ibid.*, p. 947.

21 *Costa Rica v. Nicaragua. Dispute regarding Navigational and Related Rights, Judgment* [ICJ], Nr. 959, [2009-07-13] p. 242–4, para. 64. Available at: https://www.icj-cij.org/public/files/case-related/133/133-20090713-JUD-01-00-EN.pdf [Accessed 15 October 2022].

22 Reports: Advisory Opinion, I.C.J. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) 53, p. 16, paras. 21–22.

in terms of its object and purpose to justify an evolutive approach. Nonetheless, the Court was willing to adopt this approach based on the text of the treaty alone. That the case may be seen as an indication of the 'willingness of the Court to test the application of progressive traits originally developed in specialised human rights jurisprudence to other branches of international law'.[23] The ICJ approach continues to be justified in terms of the presumed intention of the parties. Such a presumption is all the more difficult in the context of a multilateral treaty. By contrast, the ECtHR has been prepared to depart from what the drafters intended, in order to reflect modern societal norms and practice.[24] The ECtHR's approach may be considered as 'it cannot be the task of the interpreter to change the content of a norm; but if the content of a norm has undergone a change in social reality, the interpreter must take account of this'.[25]

The second relationship is expressed in the interpretative presumption that treaties are intended to produce effects which accord with existing rules of international law.26 This presumption is used to resolve issues of interpretation relating to the broader normative content of a treaty rather than to the meaning of a specific term. This presumption of coherence with existing international law is to be handled with care and on a case-by-case basis, because States might have concluded a treaty for the precise purpose of producing effects not in accordance with the law that was previously binding upon them; and States are free to do so, their liberty finding its limits in the presence of jus cogens or of certain multilateral obligations owed to third parties.

Generally, it is important to note that ICJ as is arbitration, one of the bodies through which disputes between countries can be resolved amicably. The established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions the Statute of the International Court of Justice of 26 June 1945. One of the six principal organs of the United Nations (hereinafter – UN) replaced the Permanent Court of International Justice to settles disputes between states in accordance with international law and gives advisory opinions on international legal issues.[27]

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[23] Simma, B. (2012). *Mainstreaming Human Rights: The Contribution of the International Court of Justice*, *JIDS* 3, 1, 20.
[24] Marckx v. Belgium. Dynamic (Evolutive) Interpretation of Treaties, part I. *The Hague Yearbook of International Law*, 101, 153.
[25] Sereni, P. (2008). *Diritto internazionale I*, p. 182.
[26] Simma, B. (2011). *Foreign investment arbitration: a place for human rights? International and comparative law quarterly*, 60(3), 573-596.
[27] Statute of the International Court of Justice (1945). Available at: https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf [Accessed 30 November 2019].

The ICJ is not a human rights court to which individuals can bring claims against states, and it has no specific mandate in the field of human rights. The ICJ rules as a general court for inter-state disputes and its judgments and opinions serve as the one of the main sources of international law.[28]

At the same time, the ICJ influences jurisprudence concerning the protection of human rights through the interpretation of human rights conventions and the juridical mainstreaming of human rights. It now has a significant track record of involvement in human rights issues, acting as a body that makes pronouncements on the meaning of the law in this field and applying the law to particular situations, supplementing the more long-standing and wide-ranging activities of specialist human rights courts and tribunals. [28]

This issue has been explored in academic commentaries primarily as part of general reviews of the treatment of the full range of human rights issues in the Court's jurisprudence. The issues under consideration cover a number of different areas of law, including, inter alia, human rights treaty law, such as the customary international law of self-determination, the law of immunity, treaty law, United Nations law, international criminal law, international humanitarian law and the law of occupation. Such a broad scope helps to reflect the scope and extent of the Court's involvement in human rights issues.[28]

The ICJ has no specific human rights mandate. As a court of general jurisdiction for inter-state disputes, it has occasionally had to interpret human rights conventions. But there are surprisingly few cases in which the Court has had to deal in depth with the interpretation of these conventions. Jurisdictional limitations restricting the number of human rights cases determined by the International Court of Justice is one reason for the small number of such cases.[28]

For the Court to find itself in a position to interpret rights and obligations in international human rights treaties, a delicate constellation of legal and political preconditions must align. These include questions of jurisdiction and standing but also, on occasion, the willingness of States to act outside the sphere of immediate self-interest to develop and enforce community standards.

Under the Article 36(1) of the Statute of the International Court of Justice (thereafter – Statute), the jurisdiction of the Court comprises all cases which the parties refer to it and

[28] Wilde, R. (2013) Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties, *Chinese Journal of International Law*, 12(4), 639–677 [interactive]. Available online: https://doi.org/10.1093/chinesejil/jmt039 [accessed 2019 December 12].

all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Under the article 36(2) of the Statute, the states may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation.

For a matter of human rights, the most obvious way in which jurisdiction can be established is where both States party to the dispute have filed optional clause declarations recognising the compulsory and general jurisdiction of the Court under Article 36(2) of the Statute.

Article 36(2) was the basis for the Court's jurisdiction in the Republic of Guinea v Democratic Republic of the Congo case between Guinea and Democratic Republic of the Congo (thereafter – DRC), in which the international responsibility of the DRC was engaged for violations of the International Covenant on Civil and Political Rights (thereafter – ICCPR) and the African Charter on Human and People's Rights (thereafter – African Charter).[29]

To found the jurisdiction of the Court, Guinea invoked in the application the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under article 36, paragraph 2, of the Statute of the Court.[29]

Even where the optional clauses exist, there may be other reasons that require the Court to decline jurisdiction, such as not exhaustion of local remedies, reservations that exclude its jurisdiction, preconditions for jurisdiction that have not been satisfied, or because there was no justiciable dispute at the date the application was filed.

Thus, the ICJ, on the one hand, is an example of the fact that even bodies which main competence does not include resolving disputes related to human rights, anyway, face these issues. This confirms the universal nature of human rights on the one hand and the rule of law and human rights on the other hand. Therefore, the introduction of human rights in arbitration is an important milestone in the development of law, making arbitration more effective and meeting the needs of current society.[30]

[29] *Republic of Guinea v Democratic Republic of the Congo, Preliminary Objections* [ICJ], Nr. 924, [2007-05-27], reports 2007, p. 596, para. 32. Available at: https://www.icj-cij.org/public/files/case-related/103/103-20070524-JUD-01-00-EN.pdf [Accessed 30 November 2022].

[30] *Marshall Islands v. United Kingdom* [ICJ], Nr. 1106, [2016-10-05], p. 1, 23, para. 58. Available at: https://www.icj-cij.org/public/files/case-related/159/159-20161005-JUD-01-00-EN.pdf [Accessed 30 November 2022].

2. SUITABILITY OF INVESTMENT ARBITRATION FOR RESOLVING HUMAN RIGHTS DISPUTES

2.1. Human Rights in the International Investment Regime

2.1.1. International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences

The concept of protection for investments is most prominent in the dispute resolution mechanism provided in investment treaties. Introduced in bilateral investment treaties the process of investment arbitration allows foreign investors to directly submit a claim against a foreign government. Investment arbitration is both a departure from the traditional methods of resolving foreign investment disputes, which relied predominantly on diplomatic channels, and from international adjudication in any other branch of public international law.[31]

Investment arbitration provides a forum, similar to the mechanism found in international commercial arbitration, for the resolution of foreign investment disputes. The process begins with the aggrieved foreign investor filing notice of its claim, typically to the International Centre for the Settlement of Investment Disputes (thereinafter - ICSID) or under the rules of the United Nations Commission on International Trade Law (UNCITRAL).[32] Following a period of negotiations and consultation between the investor and state, if the dispute still remains unsettled, the parties will select arbitrators to adjudicate their dispute.[33] After both written submissions and an oral hearing, the arbitrators issue an award.[34] If the arbitrators find in favour of the investor, it will order damages against the state, which can exceed hundreds of millions of dollars.[35] The arbitral award may then be subject to limited review, mainly on procedural grounds, either in another arbitral forum or in a national court.[36]

For the most part, the investment arbitration process parallels the international commercial arbitration, which mediates disputes between private contracting parties. Both the investment arbitration procedure and the limited review of final arbitral awards are

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[31] Ray, J. (2002). *Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?* 527-529; Susan, F. (2005). *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 1521-1537.

[32] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) [1976] 575 UNTS 159, art. 35; UNCITRAL Arbitration Rules (1976). UN Doc. A/31/17, art. 3.

[33] UNCITRAL Arbitration Rules (1976). UN Doc. A/31/17, arts. 5-8.

34Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) [1976] 575 UNTS 159, art. 48-49; UNCITRAL Arbitration Rules (1976). UN Doc. A/31/17, arts. 31-41.

35 *CMS Gas Transmission v. Argentine Republic* [ICSID], Nr. ARB/01/8, [2005-05-12] Available at: https://www.biicl.org/files/3913_2005_cms_v_argentina.pdf [Accessed 10 October 2022].

36 Pranas, M. (2019). International Commercial Arbitration – Enforcement of arbitral awards revisited arbitral award. *International Comparative Jurisprudence*, 5(2), 155-166.

found in international commercial arbitration. Similarly, because the private nature of international commercial arbitration emphasizes confidentiality and secrecy, investment arbitration also tends to embody these characteristics. As a result, investment arbitration generally does not provide public access to pleadings, oral hearings, or final awards.[37] Public participation in investment arbitration is also limited, as most hearings are private, and amicus participation is permitted only rarely.[38]

Investment arbitration also borrows from the judiciary model found in international commercial arbitration. Because international commercial arbitration is designed to resolve disputes arising from a contractual relationship in which either party can initiate a claim against the other, arbitrators to these disputes are appointed on a case by case basis. Therefore, arbitrators in international commercial arbitration, and consequently also in investment arbitration, do not have tenure or financial security. Instead, they must rely on arbitral institutions and the parties themselves for reappointment. They are also not prohibited from acting as both arbitrator and advocate in different cases.[39] Arbitrators thus have a strong interest in ensuring the continued viability of investment arbitration, which is supported by their often-broad interpretations of investment treaty obligations.

Interestingly, the parallels between International Commercial Arbitration and International Investment Arbitration end when it comes to consenting to the process. International Commercial Arbitration requires both parties' consent prior to its use, while the investment arbitration process can be initiated solely at the investor's request. This is because investment treaties contain states' general consent for the use of arbitration to all future investment disputes. As the consent is provided ex ante, the opportunity to arbitrate is extended to a wide variety of potential claimants whose identity is unknown at the time consent is given, and for a broad range of potential disputes, the nature of which is also unknown at the time of consent. Thus, whereas a state party to an International Commercial Arbitration contractually consents with a known individual or business to submit their dispute to arbitration, state parties to investment arbitration are notified with whom they will be resolving their dispute only after the investor has initiated his or her claim.[39]

[37] Eric, P. and Kevin, R. Gray. (2005) International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration. Winnipeg: International Institute for Sustainable Development.
[38] *Aguas del Tunari, S.A. v. Republic of Bolivia* [ICSID], Nr. ARB/02/3, [2005-10-21]. Available at: https://www.italaw.com/cases/57 [Accessed 1 December 2022].
[39] Andreas, F. (1995). The Party-Appointed Arbitrator in International Controversies: Some Reflections, p. 59, 65 [interactive]. Available online: https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj30&div=9&id=&page [accessed 10 November 2022].

2.1.2. Jurisdiction of Investment Arbitration Tribunal to analyze Human Rights claims

May be the idea of control over the admission and activity of foreign investment arose from developing countries' distrust of the influence of the developed world over the former's economic affairs. Other scholars argue the converse: that investment rules were introduced to address the distrust by developed countries that developing and less developed countries would nationalise investments.[40] In addition, investors in developing countries often face perceived, and in some cases real, political risk that may affect their investments. There is also a perception that national courts in these countries are incapable of resolving investment disputes in a way that investors can rely on. Fears that judicial decisions in host countries may not be enforceable in other jurisdictions, possible bias in favor of host governments, and unpredictability of decision-making have increased support for investment rules with a neutral arbitration mechanism instead of local litigation.

Investment arbitration is a procedure to resolve disputes between foreign investors and host States. It is also called Investor-State Dispute Settlement (thereinafter - ISDS)[41]. Typically, it is ISDS mechanism to provide the possibility for a foreign investor to sue a host State. It is a guarantee for the foreign investor that, in the case of a dispute, it will have access to independent and qualified arbitrators who will solve the dispute and render an enforceable award. This allows the foreign investor to bypass national jurisdictions that might be perceived to be biased or to lack independence, and to resolve the dispute in accordance to different protections afforded under international treaties. However, for a foreign investor to be able to initiate an investment arbitration, a host State must have given consent to this.[42]

Human rights considerations are central to the debate about the future of investment arbitration. On the one hand, investment lawyers assume that foreign investment contributes to sustainable development, which ultimately leads to better living conditions for those concerned.[43] Human rights scholars and civil society, on the other hand, argue that foreign investors and governments do not prioritize the obligation to respect and protect fundamental human rights, thereby systematically undermining human rights standards.[44]

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[40] Meyer, G. and Coleman, M. (2009). Arbitration in Africa. *Without Prejudice*, p. 46 [interactive]. Available online: https://www.withoutprejudice.co.za/pdf/WP-June2009.pdf [accessed 2022 November 2022].

[41] Convention on the Settlement of Investment Disputes between States and Nationals of Other (1965), 575 UNTS 159; 4 ILM (1965) 532.

[42] Reinisch, A., Binder, C. (eds.) (2009). The future of Investment Arbitration [interactive]. Available online: https://doi.org/10.1093/acprof:oso/9780199571345.003.0046 [accessed 17 October 2022], 894 – 895.

[43] Muchlinski, P., A., Faundez, J., Tan, C. (eds.) (2010). Holistic Approaches to Development and International Investment Law: The Role of International Investment Agreements. [interactive]. Available online: https://ideas.repec.org/s/elg/eechap.html [accessed 17 October 2022].

[44] Statement by Alfred-Maurice de Zayas, Independent Expert on the Promotion of a Democratic and Equitable International Order at the Human Rights Council, [interactive] (modified 18-09-2015), Available

However, it is important to note that respect for human rights is now a priority on the public policy agenda of any decent host democratic state, and thus cannot affect the host democratic state's legal and regulatory space vis-à-vis foreign investors and other states. The current paucity of jurisprudence related to direct contradictions between treaty norms on human rights and investment should not mislead somebody into believing that this is merely a polemic on the periphery of international investment law.

The inherently long-term nature of foreign investment contracts can entail international obligations for the host state arising from economic and social rights. Such contracts last for decades, last longer than the administrations that entered into them, and often cover a wide range of state economic activities, from the provision of basic services to the privatization of state enterprises and utilities; physical and telecommunications infrastructure; public procurement; and natural resource exploration and extraction activities, among others. At the same time, most host states are the parties of the International Covenant on Economic, Social, and Cultural Rights[45] and must fulfill their obligations under the Covenant to progressively fulfill their obligations "to respect, protect, and fulfill those rights within their jurisdictions.[46]

Indeed, in economic terms, foreign investment and human rights have connection. One of the more comprehensive empirical studies on the 'bite' of BITs has shown that their success in actually attracting foreign investment depends to a considerable degree upon the political environment in a potential host State; rule of law and respect for human rights in conjunction with investor protection.[47]

It could be noted, that BITs are agreements signed between two states, which establish a number of rights and protections for investors, and impose certain obligations on the investment-receiving states.[48] The standard protections offered are usually: protection from discrimination; protection from direct or indirect expropriation (provided that where such expropriation takes place, it shall be for a public purpose with prompt, adequate and effective compensation); to ensure fair and equitable treatment; and the resolution of disputes in a selected international arbitration forum should any of the BIT

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at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16461&LangID=E [Accessed 18 October 2022].

[45] International Covenant on Economic, Social, and Cultural Rights (1966). [1976]. [interactive]. Available at: https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf.

[46] Simma, B. (2011) Foreign Investment Arbitration: A place for human rights? International and Comparative Law Quarterly. *Cambridge University Press*, 60(3), 573–596.

[47] Tobin, J and Rose-Ackerman, S. (2006). When BITs have some bite: The political-economic environment for bilateral investment treaties. *The Review of International Organizations*, 6(3), p.5

[48] Coleman, M. and Williams, *K.* (2008). South Africa's Bilateral Investment Treaties: Black Economic Empowerment and Mining; a Fragmented Meeting? *Business Law International*, 9, 56-59.

protections be breached.[49] BITs are binding on states, usually after the parties have notified each other in writing that they have complied with their respective constitutional requirements for the entry into force of the agreement in their respective countries.

Generally, the tension between investment protection and human rights becomes a problem of achieving two "moving targets": for the foreign investor, how to accurately assess the political risks of the investment before or during its creation in the host state, so that the investor can properly "value" the contract according to the projected return on investment. How to determine the optimal degree of police and regulatory powers that should be maintained during the life of the investment is for the host state.

The opposing goals of states and investors with respect to investment liberalization are most evident in investment disputes involving non-commercial issues. Thus, Investment treaties are premised on a reciprocal relationship: foreign investors establish investments that create more favourable economic conditions in the host state in exchange for the host state's protection of the investment. However, in liberalizing investments states have gradually begun to realize that state objectives might be at odds with the objectives of investors. Whereas states use investment to improve national development, investors are primarily interested in enhancing their own competitiveness and market share. The absence of an alternative mechanism for resolving the non-commercial aspects of investment disputes has led to a gradual expansion of the scope of investment arbitration to matters unrelated to investment.[50]

While international investment treaties traditionally do not include human rights, investment tribunals acknowledge the pressing need to address this criticism. Despite this alleged inherent antagonism, human rights law and investment law also share several important characteristics. Their similarity becomes visible in the paramount status of the individual and their highly developed dispute settlement bodies.[51]

For example, some investment arbitrations have involved human rights issues, that do not fall within the traditional scope of investment treaties or investment treaties or investment arbitrations.

[49] UNCTAD International Investment Instruments: A Compendium (1996). p. 3. Available online:https://unctad.org/system/files/official-document/dite4volxii_en.pdf [Accessed 2022 November 13].
[50] Montreal, Q. (2009) *Democratic implications arising from the intersection of Investment Arbitration and human rights*, p. 989.
[51] Brabandere, E. (2013). *Human Rights Considerations in International Investment Arbitration*, in Fitzmaurice, M. and Merkouris, P. (eds.) The Interpretation and Application of the European Convention on Human Rights, 183–215.

Nevertheless, because investment arbitration considers investment disputes primarily through the commercial viewpoint, commercial considerations tend to take precedence over non-investment issues.

Obligations in investment treaties can violate human rights if interpreted too broadly during arbitration. Therefore, it is necessary to determine whether ISDS has sufficient capacity to resolve treaty disputes in which states' human rights obligations conflict with the state's obligations under the investment treaty.

A tribunal's jurisdiction can be defined as the power to decide a case. In the context of investment arbitration, the scope of the tribunal's jurisdiction depends primarily on the relevant investment treaty that sets out a State's unilateral consent to arbitrate. Therefore, the answer as to whether arbitral tribunals have jurisdiction to rule on human rights issues depends upon the wording of the clause containing the host State's consent.[52]

For instance, in Urbaser v. Argentina case[53], the tribunal upheld jurisdiction over the host State's counterclaim for alleged violation of human rights by the foreign investors under the Spanish-Argentine Bilateral Investment Treaty (BIT)[54]. While Argentina's main argument was that the foreign investors had violated the principles of good faith and pacta sunt servanda by failing to comply with the Concession Contract, the tribunal addressed, for the first time, Argentina's considerations on the basic human right of access to water services.[52]

In the tribunal's view, Article 10 of the Spanish-Argentine BIT was sufficiently broad so as to include counterclaims by Argentina,[55] even though the basis for its counterclaims was human rights law, including the Universal Declaration of Human Rights. In particular, the tribunal noticed that "BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights".*[56]*

Such an approach is rather prudent where the arbitration clause is sufficiently broad, encompassing, for instance, "any dispute between one Contracting State and an investor of

[52] Human Rights Law and Investment Arbitration. *Aceris Law*.[online] (modified 2021-04-25). Available at: https://www.acerislaw.com/human-rights-law-and-investment-arbitration/ [Accessed 30 December 2022].
[53] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*. [ICSID], Nr. ARB/07/26. Available online: https://www.acerislaw.com/wp-content/uploads/2021/04/Urbaser-v.-Argentina-Human-Rights.pdf.
[54] *Bilateral Investment Treaties* (1991) [1992]. Available online: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/154/argentina---spain-bit-1991-.
[55] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, [ICSID], Nr. ARB/07/26, [2016-12-08], paras. 1153-1155.
[56] *Ibid.*, para. 1200.

the other Contracting State concerning an investment of the latter in the territory of the former".[57]

2.2. Investment Arbitrations implicating human rights issues

2.2.1. Piero Foresti and others v. Republic of South Africa case

In Piero Foresti and others v. Republic of South Africa,[58] Italian investors challenged South African laws aimed at redressing the historical, social, and economic inequalities faced by the Black community in South Africa during the apartheid regime. The dispute arose from the 2003 Black Economic Empowerment (thereinafter - BEE) policy,[59] which allowed the government to condition the issuance of state licenses for mining rights on companies' compliance with social, labour, and development objectives. Pursuant to the BEE policy, the government required mining companies to hire both Black or historically disadvantaged South African (thereinafter - HDSA) managers and sell 26 percent of shareholdings to Blacks or HDSAs.

The claim of Italian investors was based on the South Africa-Italy and Belgo-Luxembourg BITs. The Italian investors in a mining company claimed that the BEE's mining regime violated South Africa's investment treaty obligations. In particular, they alleged that the forced divesture of their shareholdings to Blacks and HDSAs was both an expropriation and a denial of fair and equitable treatment. They also alleged national treatment violations, arguing that they were discriminated against by being treated less favourably than Blacks and HDSAs: the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (thereinafter - Mining Charter), introduced 'compulsory equity divestiture requirements' because it requires foreign investors to sell 26 percent of their shares in relevant mining companies to historically disadvantaged South Africans over a ten year period.[58]

According to the investors, the expropriation was achieved by necessary implication rather than expressly, by the introduction of the notion of state custodianship of mineral rights on the part of the State and the conferring of extensive new public law powers of control on the Minister, which are incompatible with the common law notion of rights to minerals.

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[57] Model text agreement between the government of the United Kingdom of Great Britain and Northern Iand for the promotion and protection of investments. art. 8(4). Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download [Accessed 1 December 2022].

[58] Piero v. Foresti. [ICSID]. Nr. ARB/(AF)/07/1, [2009-06-30]. Available at: https://www.italaw.com/cases/446 [Accessed 17 November 2022].

[59] Broad-Based Black Economic Empowerment Act (2004), *Government Gazette*, 25899(463), 2–6 [interactive]. Available online: https://www.gov.za/sites/default/files/gcis_document/201409/a53-030.pdf [accessed 6 November 2022]..

The South African government argued that its two BITs permit it to expropriate and that it met its obligation to provide compensation because South African law provides an effective mechanism for the determination of whether compensation is due.

The government also argued that the Mining Charter's divestment requirements treated all investors equally and if it was determined that it did not, the difference in treatment would fall within the State's margin of appreciation for determining which measures were reasonable and justifiable in advancing critical public interests.

In the end, the investors asked that the suit be dismissed, and the tribunal only had to decide the issue of costs.

In order to fully elaborate this thesis, the obligation of investment treaties such as expropriation need to be examined in more detail. Despite the numerous obligations contained in investment treaties, these obligations have the greatest potential to impose restrictions on state action to protect and promote human rights while at the same time favoring the commercial interests of foreign investors.

2.2.2. Expropriation and Compensation issue

In addition to direct expropriation,[60] expropriation can be indirect, where government interference with the use or possession of an investment deprives the investor of all the benefits of ownership other than legal title.[61]Both direct and indirect expropriations are considered compensable.

Customary international law also recognizes a third form of interference with property. Thus, state regulation, adopted as a legitimate exercise of governmental authority, may affect foreign investments.[62] However, since these state regulations are adopted as part of the "police power" of the state, these types of interference are not considered to amount to interference with property. State, these types of interference are not considered expropriation and, accordingly, are not subject to compensation.[63]

Nevertheless, the line between indirect expropriations and interferences arising from a state's police powers is not clear. Accordingly, the extent to which a state can affect an investment by way of a bona fide regulation to serve a legitimate public purpose without effectuating a taking and triggering compensation is uncertain.

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[60]*Amoco International Finance Corp. v. Iran*. Nr. 56, [1987-07-14], p. 168. Available at: https://www.trans-lex.org/231900/_/iran-us-claims-tribunal-amoco-int-l-finance-corp-v-iran-15-iran-us-ctr-at-189-et-seq/ [Accessed 3 October 2022].

[61] Dolzer, R. (1986). Indirect Expropriation of Alien Property. *ISCID Review: Foreign Investment Law Journal*, 1, 41–65.

[62] Brownlie, I. (2003). *Principles of Public International Law*, 6th ed. Oxford: Oxford University Press, p. 509.

[63] Weiner, A. (2003). Indirect Expropriations: The Need for a Taxonomy of 'Legitimate' Regulatory Purposes. *International Law Forum*, 5(3), 166-168.

Failure to address this issue may result in the restriction of states' human rights initiatives.

For example, in Ethyl Corp. v. Government of Canada, the Canadian government withdrew the legislation banning methylcyclopentadienyl manganese tricarbonyl at least partially in response to a claim for expropriation in an investment arbitration even though the legislation was designed to protect public health.[64]

The contentious issues in Piero Foresti and others v. Republic of South Africa case were of significant public interest in South Africa because they affected the affirmative action policy of the government. Particularly noteworthy is the difference in the way expropriation are treated in the South African BIT and the South African Constitution (thereinafter – Consitution)[65], respectively.

The Section 25 of the Constitution guarantees the right to property. According to the Section 25(5) of the Constitution, "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". It authorizes the State to take legislative and other measures to remedy the results of past racial discrimination: under the Section 25(7), "a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress". It distinguishes between deprivation and expropriation, a distinction not made in the BITs concluded by South Africa. Moreover, terms such as "measures equivalent to expropriation," which appear in most BITs, are entirely absent from the South African Constitution.[66] Furthermore, the failure of South Africa's BITs to distinguish between state regulation and expropriation leaves the possibility that legitimate government regulation will be deemed to constitute a form of 'indirect' expropriation in a BIT arbitration. These differences show that the concept of expropriation is understood differently in South African law and in international investment law.

Also, it is important to note that the BIT often states that timely, adequate and effective compensation must be paid in the event of a breach of contract amounting to expropriation. This differs from the "fair and equitable" standard set forth in Article 25(3) of the Constitution. The latter seeks to strike a fair balance between the public interest and the

[64] *Ethyl Corp. v. Government of Canada*, p. 45. Available at: https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-08.pdf [Accessed 2022 December 5]..
[65] Constitution of the Republic of South Africa - Chapter 2: Bill of Rights (1996). Available online: https://www.zurnalai.vu.lt/teise/about/submissions [accessed 2022 December 5].
[66] Executive Summary of Government Position Paper (2009). *Bilateral investment treaty policy framework review*, 32386, p. 8 [interactive]. Available online: https://www.gov.za/sites/default/files/gcis_document/201409/32386961.pdf [accessed 2022 December 5].

interests of those affected. Factors taken into account include: the current use of the property; the history of acquisition and use of the property; the market value of the property; up to the amount of direct public investment and subsidies for the acquisition and beneficial capital improvements of the property.

These factors make the formula for payment under the Constitution conceptually different from the international formula for prompt, adequate, and effective compensation, which is based largely on market value considerations.

Generally, the strength of expropriation and compensation obligation is also reflected in their ability to create a "chilling effect" on government regulatory capacity.[67] States, fearing that a regulation could be challenged by a foreign investor and then subject to a multi-million dollar damage award under these obligations, may be discouraged from enacting regulations that enforce human rights obligations against foreign investors.[68] In addition, because these obligations are drafted in broad terms and the lack of a precedent system in investment arbitration prevents a harmonious interpretation of these obligations, the uncertainty associated with the scope of the obligations may also negatively impact on state initiatives to regulate human rights.[69]

South Africa's affirmative action policy, which differs from the duty of non-interference under the principle of equality in international law, suggests that arbitration of disputes such as expropriation should go beyond the competence of arbitral tribunals. South African law focuses on the outcome of equality, even if certain groups are treated differently in the process. It is a concept of de facto equality, which is less stringent than the concept of formal equality under international law, which seeks to ensure that the means used to achieve equality are non-discriminatory.[70] One of the fundamental principles of international law is the rule of basic agreement between parties on compliance with the concluded agreements. This provides that every party to a treaty in force is required to perform its obligations under the treaty in good faith and, as a corollary to that obligation; such party may not invoke the provisions of its internal law, including its Constitution, as justification for its failure to perform under the treaty.[71] This principle effectively rules out the possibility of South Africa and other host states relying on the internal laws of the state

[67] World Investment Report 2003: FDI Policies for Development: National and International Perspectives (2003), *United Nations Conference on Trade and Development,* 111.
[68] Wälde, W. (1998). *Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation*. p. 6.
[69] Choudhury, B. *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights.* Vol 46, No 4: Special Issue: International Law and Democratic Considerations. p. 999
[70] Chow, M. (2008) *Discriminatory Equality v Nondiscriminatory Equality: The Legitimacy of South Africa's Affirmative Action Policies under International Law*.
[71] Vienna Convention on the Law of Treaties (1969), art. 2(b), 27.

to avoid BIT obligations. Since South Africa is obliged to comply with both its own internal laws and BIT obligations, a pragmatic solution that would work for both investors and host states – taking into consideration public interests of the host state – would be to negotiate BITs that do not focus on international law as the exclusive criteria for interpreting BIT obligations. The incorporation of internal laws such as the unique property right in South Africa into BITs can be achieved if the interpretation of BITs reverts to the national laws of states for the substantive definition of the content of a right. Through this, the conflict that arises between obligations of state under domestic or human rights law and investment law, can be avoided.[72]

While investment tribunals have not traditionally had Subject-matter jurisdiction jurisdiction over human rights issues, an increasing number of arbitral awards refer to human rights treaties and case law. This trend is exacerbated by the development of amicus curiae submissions, which provide a direct way for human rights organizations to participate and express their concerns in arbitration proceedings.[73] Concepts of human rights are used as benchmarks in the context of state responsibility, limiting state power, and protecting individual rights against the actions of state and private actors.

In particular, against the background of the "silent" investment treaty regime, which prima facie excludes human rights considerations from the jurisdiction of the court, it seems appropriate to analyze the actual practice of invoking human rights in investment arbitrations.

2.2.3. The right to health, the right to water

In addition to Piero Foresti and Glamis, investment arbitrations have also implicated other human rights including the right to water, the right to health, and rights related to culture.

The right to health, recognized in several international agreements, dictates the right of every person to the highest attainable standard of health [74]In addition to timely and appropriate health care, the right to health also includes the basic determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe

[72] Adeleke, F. (2016). *Human rights and international investment arbitration, South African Journal on Human Rights*, 32:1, 48-70, DOI: 10.1080/02587203.2016.1162436.
[73] Levine, E. (2011). Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation. *Berkeley Journal of International Law*, 29.
[74] International Convention on the Elimination of All Forms of Racial Discrimination (1966). [1969]. Available at: https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf [Accessed 15 October 2022].

food, food and an adequate supply of safe food, nutrition, and housing, as well as healthy working and environmental conditions.[75]

The right to health has been implicated in several investment arbitrations with mixed results. In S.D. Myers Inc. v. Government of Canada, the Canadian government banned the transboundary export of PCB64 waste to ensure that the waste was managed in an environmentally sound manner and to prevent any possible significant danger to human life or health. American investor S.D. Myers challenged the ban in an investment arbitration. Although the Tribunal took note of the health and environmental impacts of the transboundary movement of hazardous waste in its decision, it found that Canada should have used a measure less restrictive on trade to fulfill its objectives. In the end, the Tribunal found in favour of the investor.[76]

At the same time, in Methanex Corp. v. United States of America, for example, a Canadian investor argued that California's ban on methyl tert-butyl ether (MTBE), a gasoline additive, violated the U.S.'s obligations under the NAFTA. California had instituted the ban due to concerns arising from the leakage of MTBE into its water, both contaminating the water supply and endangering the health of California residents. The Tribunal found California's public health concerns justified and dismissed the complaint in its entirety after finding that the regulations were nondiscriminatory in nature and adopted in accordance with due process of law.[77]

It is important to note, that the NAFTA is the first major shift in the other direction for the United States in the direction of public interest in ISDS. Following from the NAFTA experience, the US Model BIT program sought to better balance the need to protect investors abroad, but also to protect the government's ability to regulate. For instance, one of the most progressive MODEL BIT was published in 2012. The 2012 Model includes an "essential security exception" that is self-judging, and therefore not subject to the interpretation of an arbitral tribunal: "Nothing in this Treaty shall be construed to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the protection of its own essential security interests."[78] The 2012 Model also provides further regulatory space in the form of the monetary policy exception, which provides that nothing in this Treaty applies to non-discriminatory measures of

[75] *International Covenant on Economic, Social and Cultural Rights*. art. 12.
[76] *S.D. Myers v. Canada, Second Partial Award* (21 October 2002), para. 162, 254-56.
[77] Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), online: U.S. Department of State [Methanex].
[78] *U.S. MODEL BIT* (2012) [2014], art. 18.

general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies.

The right to water is found in several international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Discrimination Against Women. Pursuant to the right to water, everyone is entitled to quality water that is both available and accessible. Water providers are accordingly required to provide a system of water supply and management that provides "equality of opportunity for people to enjoy the right to water."

In several South American and African states, water services have been privatized and provided by foreign investors. Because this can endanger the quality or availability of water, such private provision of water services raises human rights concerns.

For instance, problems with water quality and water pressure arose after an U.S. investor began the provision of water services in Argentina;[79] in Bolivia, the investor increased water tariffs by 400 percent and began to charge users for water from their own private wells.

These examples demonstrate the problem of finding a compromise between the state's exercise of its power to protect public health on the one hand, and the state's fulfillment of its obligations under the investment treaty to actively promotion and protection of investments on the other hand.

2.3. Infusing Democracy into Investment Arbitration

2.3.1. Limiting the scope of Investment Arbitration

The inclusion of human rights issues in investment arbitration makes investment arbitration from a mechanism for resolving commercial disputes into a system for managing the core values of society. To reflect the public nature of the human rights issues raised in investment arbitration, democratic principles need to be introduced into the process. This can be achieved by reducing the scope of investment arbitration and thereby introducing democratic principles into the investment arbitration process.

One approach to limiting the scope of investment arbitration is to exclude human rights issues in whole or in part from a state's investment obligations under an investment treaty. For example, the United States has specified, in its recently concluded free trade

[79] *Azurix Corp. v. Argentine Republic* [ICSID], Nr. ARB/01/12, [2006-07-14], paras. 46. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf [Accessed 5 October 2022].

agreements, that non-discriminatory regulations that protect legitimate public welfare objectives do not constitute expropriations.

Similarly, both a recent Canadian investment treaty and Norway's model investment treaty exempt regulations that protect human, animal, or plant life, health, and investments in the cultural industries from the remainder of the treaty obligations. States could also curtailed the intersection of investment with human rights by limiting the nature of the investments covered by the treaty. For instance, investments related to the provision of drinking water or state aid used for national development programs and activities may be excluded.

2.3.2 The application of global administrative law to investment arbitration

The infusing of global administrative law (thereinafter – GAL) principles, and, in particular, the principle of deference into Investment Arbitration could be one of the way to expanding the application of democracy in investment arbitration and thereby it makes International Arbitration more suitable for resolving human rights issues. Thus, GAL principles can be used for the hybrid application of domestic and international law in ISDS, through a recognition of the right of states to regulate certain policy matters and deference to domestic law in determining the content and scope of investment treaty obligations.

It is important to note how GAL are defined. The most notable work on GAL, by Kingsbury, Kirsch and Stewart, conceptualises GAL within the existence of global administration.[80] They define GAL as: "The mechanisms, principles and practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of rules and decisions they make".

In the context of this definition, which defines the purposes of the GAL, three normative concepts of the GAL stand out: they are 'internal administrative accountability; protection of private rights or the rights of states; and the promotion of democracy'.[80] The first normative concept is necessary to secure the functioning of an institutional order that is justified independently. The second concept is argued to be more suited towards the right of states because the global society is pluralist in nature and states are in a position to determine whether their concept of rights is collective or individualistic.

The third concept is suggested as a pragmatic approach that protects rights, builds mechanisms for accountability and promotes the values of the rule of law.

[80] Kingsburg, B. (2005). The Emergence of Global Administrative Law. *Law and Contemporary Problems*, 15-18.

All three normative concepts apply to investment arbitration, particularly the protection of state sovereignty and the construction of domestic administrative accountability. The GAL recognizes the right of states to participate in administrative proceedings and to ensure that a state's right is not illegally violated. GAL is generally regarded as an accountability tool. The question is not whether global bodies should be accountable but rather to whom they should be accountable. The accountability can be demanded by the national community, the international community and the global community.[81] Richard Stewart argues that accountability should be to the law of the particular regime; to those subject to regulation to ensure the protection of rights; as well as to the broader public.[82] In the absence of such mechanisms, there is a tendency for a limited form of public access to information from arbitration tribunals, opportunities for public comment, and attendance at hearings. When accountability is reduced to a question of procedure only, the value of accountability in enhancing the legitimacy and legality of the system is diminished.

The GAL gives citizens two basic rights: the right to participate which includes the right to intervene and the right to defense, including recourse to another body for review of decisions.[83] Generally, the narrative from the developing world shows a commitment to principles of participation and accountability with positive consequences. It could be noted that this narrative is consistent with the emerging jurisprudence of the World Trade Organization (thereinafter - WTO), where the notion of legitimacy is promoted through the right to participate. The GAL supports the notion that political power no longer belongs exclusively to the nation-state and that there is an increasing transfer of power to the supranational level, where the BIT arbitral tribunals are located. The necessity of procedural fairness for the benefit of all parties, the right of participation for governments and civil society, as well as the right to information about the operations of the international institution contribute to and enhance global democracy by enabling developing countries to participate in the development of universally applicable substantive rules.

Meaningful participation rights can only be achieved through a three-tiered approach. These include: transparency within the arbitration system, public participation by all relevant stakeholders, and an interpretative approach that includes a hybrid

[81] Krisch, N. (2006). The Pluralism of Global Administrative Law. 17 *European J of Int law* 247, 253–56.
[82] Stewart, R. (2005) US Administrative Law: A Model for Global Administrative Law? 63 *Law and Contemporary Problems*. p. 68.
[83] Davis, D. and Corder, H. Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance on Developing Countries in H Corder (ed) *Global Administrative Law: Innovation and Development* (2009) *Acta Juridica* 68, p. 76.

application of international and national rules in resolving investment disputes, taking into account broader interests beyond those of investors.

The recognition of the right of access to information as a human right is important for investment arbitration. The parties to investment disputes themselves benefit from the transparency of certain areas, which helps their cases. Where awards are published and interpretations of basic principles are subject to scrutiny, parties can benefit from understanding how they should approach their particular dispute and anticipating the outcome of disputes.

For public participation, arbitrators in USIP tribunals can no longer view their role as limited to resolving BIT violations, but must recognize that these investment disputes operate in the broader context of other interests that must be protected. The time is ripe for the introduction of new public-friendly rules for participation in the new BITs being negotiated across the states. In doing so, it is important to view amicus as more than traditional nongovernmental organizations, but also including subnational governments, community-based organizations, and, in some cases, sub regional bodies. This would improve the procedure for amicus participation to be of value not only to the tribunal, but also to the parties and, importantly, to the broader public interest that is currently not adequately addressed.

A hybrid application of domestic and international law can be achieved through the notion of deference. Investment treaty tribunals often refer to the notion of deference, but attribute different meanings to it. Deference may encompasses the idea that international courts and tribunals have to respect the treaty-making power of states, including authoritative interpretations by contracting parties. It also means that tribunals should not rewrite treaty obligations they disagree with for policy reasons.[84]

The deference is inappropriate as a principle of treaty interpretation because being deferent to one contracting state's sovereignty means disregarding the other contracting state's entitlement to have its treaty rights enforced. However, it should be noted that there is a fine line between ignoring a contracting state's right to enforce its BIT protections and interfering in another contracting state's political space to take action on behalf of its population.

For instance, the tribunal in Tecmed v Mexico case, stated that in determining whether a regulatory act constituted an indirect expropriation, the analysis starts at the due deference owing to the state when defining the issues that affect its public policy or the

[84] Schill, S. (2012) Deference in Investment Treaty Arbitration: Re-Conceptualising the Standard of Review through Comparative Public Law. *Society of International Economic Law working paper*.

interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the arbitral tribunal, without thereby questioning such due deference, from examining whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.[85]

The right of the host states to regulate in the public interest is an inherent right of states. This issue could be addressed in relation to the fair and equitable treatment standard to balance investors' expectations with the right to regulate by host states. In *Lemire v Ukraine case*, the tribunal stated that the protection of foreign investors should be 'balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest'.[86]

Adopting a deferential approach to the right to regulate may also be relevant when determining issues involving indirect expropriation, for instance, in regulations that intend to regulate non-investment related issues. The right to regulate could be invoked as a defence to indirect expropriation claims. The defence is satisfied if the protected values apparently outweigh the affected economic interests of the foreign investor and there are strong justifications to adopt the measure concerned.[87]

Also, with the ability to apply domestic law of the democratic states in the cases witch impact on the protection human rights, ISDS confidentiality, which is a major attraction for investors, is not compromised. It provides more regulatory certainty for investors and the state to achieve the goals for which the investment agreement was signed.

It is worth noting that this approach should be applicable only to states with an effective and non-corrupt national legal system, where an independent judicial system and mechanism of checks and balances must be present. In states where all of these are present, national courts are better able to resolve national issues. They better understand the local context and the political interests underlying state regulation. The expertise-based deference – which is based on practical considerations such as gathering and evaluation of complex information, monitoring evolving situations, and taking decisions in certain policy areas – reflects the rationale that a case will turn on the specific facts and local context.

[85] T*ecmed v Mexico* [ICSID], Nr. ARB (AF)/00/2, [2003-05-29], para 122. Available at: https://www.italaw.com/cases/1087 [Accessed 14 November 2022].
[86] *Joseph Charles Lemire v Ukraine*, [ICSID] Nr. ARB/06/18, [2010-01-14], para 273.
[87] C, Lo (2011) Plain Packaging and Indirect Expropriation of Trademark Rights Under BITs: Does FCTC Help Establish a Right to Regulate Tobacco Products? *Conference on International Health and Trade: Globalization and Related Health Issues*, paper 24.

Thus, it could be noted that the deferential standard proposed for BIT arbitration is one that recognises the importance of balancing other competing obligations of a state with investment obligations.

More legitimacy can be given to ISDS through the application of the notion of deference under GAL, if accompanied by a principled and transparent elaboration of the applicable standards of review under GAL. Relevant GAL principles include procedural fairness, independence and impartiality of arbitrators, transparency and public participation. Consideration of the public interest in ISDSs is important, but this does not mean that host states should be able to avoid their investment obligations in favor of non-investment obligations.

3. SUITABILITY OF COMMERCIAL ARBITRATION IN RESOLVING HUMAN RIGHTS DISPUTES

3.1. Aligning Human Rights in Business

3.1.1. The Clash of Two Transnational Legal Phenomena

International commercial arbitration (thereinafter - ICA) is a private dispute resolution process in which parties from different countries choose to have their disputes decided by one or more arbitrators, without the involvement of the courts of a particular country.

Arbitration may be considered as «a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement».[88]

As the objectives of is to resolve problems between legal entities in the business sphere or states, so it is not easy to find an accurate role for ICA in protecting human rights, but the potential for this mechanism as an effective remedy in resolving disputes concerning human rights is increasing every year.

Human rights are basic rights and freedoms. They are based on dignity, fairness, equality and respect. Businesses have a significant impact on the way people live their life and enjoy these human rights, whether it's as an employee, a customer or simply living alongside companies that share their cities and towns.[89]

Business-related human rights abuses may be linked to, for instance, unacceptable working conditions on the factories, such as child labour and unsafe working conditions. Obviously, every companies operating online need to ensure that they respect people's right to privacy and comply with data protection laws, care home providers need to treat the people they care for with dignity and respect, and all businesses have a responsibility to provide a safe working environment for their employees, enforcing laws that require businesses to respect human rights, creating an internal regulatory environment conducive to business respect for human rights and ensure that human rights are respected in general.[89]

In addition to being the right thing to do, respecting human rights also makes good business sense. Businesses can become embroiled in litigation, suffer reputational damage,

[88] David, R. (1985). *Arbitration in International Trade*, p. 5.
[89] Human rights and business. *Equality and Human Rights Commission*.[online] (modified 2019-08-16). Available at: https://www.equalityhumanrights.com/en/advice-and-guidance/human-rights-and-business [Accessed 30 December 2022].

miss out on business and investment opportunities as well as the chance to hire better employees.[90]

The juxtaposition of human rights and arbitration would probably, in former times would have been met with bewilderment and prejudice. After all, how can international human rights treaties, normatively based on the concept of human dignity, add anything useful to the development of the largely commercialized field of international arbitration? Could human rights arguments really be a tool for participants in international commercial arbitration without morally bankrupting the ideal of human rights protection?

However, in this day and age, when the "exchange of ideas" between different legal systems tends to be viewed positively in applied law, as the utility of reasoning prevails over the separateness of legal subdisciplines, such notions of Unilateralism can be dismissed as obsolete.

In 2011, the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (thereinafter - the UNGPs/UN Guiding Principles), a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations.[91]

The UN Guiding Principles call on businesses to make a public commitment to respect human rights, conduct human rights due diligence and provide remedies when things go wrong. Human rights due diligence is a process whereby a company understands when, where and how it may have an impact on human rights and prioritises that impact for action. It identifies appropriate risk mitigation measures, monitors the effectiveness of its efforts and keeps people informed of its progress.[91]

For instance, under the document, states must ensure that human rights are protected from abuse by third parties, including business enterprises; it refers to the obligation of states to take appropriate steps to protect against business-related human rights abuses through judicial and other measures, and ensure that victims have access to effective remedy.[91]

In 2008, the United Nations endorsed the "Protect, Respect and Remedy Framework" (thereinafter - UN Framework) for business and human rights. On the one hand, the UN Framework unequivocally recognises that States have the duty under international human rights law to protect everyone within their territory and/or jurisdiction

[90] Human rights and business. *Equality and Human Rights Commission*.[online] (modified 2019-08-16). Available at: https://www.equalityhumanrights.com/en/advice-and-guidance/human-rights-and-business [Accessed 30 December 2022].

[91] The UN Guiding principles on Business and Human Rights an Introduction. pp. 2-4. Available online: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf [accessed 2022 December 6].

from human rights abuses committed by business enterprises. However, on the other hand, the UN Framework clarifies that the corporate responsibility to respect human rights exists independently of States' ability or willingness to fulfil their duty to protect human rights. Businesses have a responsibility to accountable for upholding human rights wherever they operate, regardless of their size or industry. This responsibility means that companies must be aware of their actual or potential impacts, prevent and mitigate abuses, and address adverse impacts with which they are involved. No matter the context, States and businesses retain these distinct but complementary responsibilities.[92]

The UN Framework also recognises the duty of states to ensure that the people affected can access not only an effective remedy through the court system but also other legitimate non-judicial process.[92]

In order to ensure respect for human rights, companies must accomplish three crucial things: make a public commitment; identify and address the impact; provide the remedy when things go wrong. Unfortunately, not every company is prepared to carry out these steps.

3.1.2 Bangladesh experience

It is necessary to consider how human rights-related arbitration disputes may manifest themselves in practice. Two types of disputes between business and human rights that can be arbitrated can be distinguished: claims by victims of human rights violations against business; human rights-related claims between commercial parties.

The use of commercial arbitration to resolve claims by victims of human rights violations against business is quite complex, especially considering the issue of consent between the claimant and the defendant, since there is no prior submission of the dispute to arbitration and consideration of the dispute in arbitration can only be started after the parties agree to refer the case to arbitration.

However, by researching at some legal practice regarding the issue, a creative approach to solving this problem and others can be found.

After China, Bangladesh is the second largest textile producer in the world. While the exact number has proven elusive to establish, factories number in the thousands. The garment sector generates roughly eighty percent of the country's export revenue and employs almost five million people, predominantly women, to produce garments for the developed world.

[92] The UN Guiding principles on Business and Human Rights an Introduction. P. 4-5. Available online: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf [accessed 2022 December 6].

Although this sector has thus made a significant contribution to the development of the country as a whole workers in the factories "are mostly illiterate and have very limited knowledge of human rights, working conditions, and labor standards".[93]

Lack of awareness, training, non- compliances of the occupational safety and health (thereinafter - OSH) service standards by the employers, the low involvement of the workers could not achieve the goal of providing safety and health to the workers as intended by the laws. Bangladesh's export oriented industries are too subject to various forms of labor standards of corporate codes–rules and guidelines imposed by buyers upon themselves and along their supply chains.

The OSH service in Bangladesh is still in the learning stage. Here the occupational health and safety refers mainly to needs of workers of industries or some manufacturing processes but does not completely cover all occupations in the country. The main laws related to occupational health and safety in this country are lacking in standard values and not specific rather general in nature.[94]

Moreover, the enforcement department, the Department of Inspections and Factories, which has serious lacking in terms of capacity and manpower, which could not effectively enforce occupational safety and health in Bangladesh.[93]

These conditions led to the collapse of the Rana Plaza factory building in Sawar, a western suburb of Dhaka, the capital of Bangladesh, on April 24, 2013. It causing at least 1,127 [95] about 2500 people were injured.[96] The eight-story building, called Rana Plaza and the property of local People's League leader Sohel Rana, houses several workshops making use of a total of about 5,000 employees. It also housed businesses and a bank. The clothing stores have dealt with various clothing brands including Spanish Mango and Irish Primark. Ahmed Ali Khan, head of civil security and fire fighting in Bangladesh, said the top four floors were built without a permit.[94]

The previous day before collapse happened, workers had "noticed deep cracks forming in the building's walls and support pillars."[97] A local engineer declared the

[93] Rahman, Z. (2014). Accord on "Fire and Building Safety in Bangladesh: A Breakthrough Agreement? *Nordic J. Working Life Stud*, 69, 69–70.
[94] Factories Act (1965) No. 4. Available online: https://www.ilo.org/dyn/natlex/docs/WEBTEXT/47346/65073/E65BGD01.htm [accessed 2022 December 7].
[95] Hoskins, T. (2015). Reliving the Rana Plaza factory collapse: a history of cities in 50 buildings. *The Gurdian.*
[96]The Rana Plaza disaster, Savar, Bangladesh. International Labor Organization. Available online: https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm [accessed 2022 December 5].
[97] Julfikar Ali Manik, Jim Yardley. Building Collapse in Bangladesh Leaves Scores Dead. The New York Times (April 24, 2013). Date of access: February 9, 2015. Archived from the original on April 28, 2013.

building unsafe, and the police ordered it evacuated, but the owner "ordered employees to return the next day or risk losing their jobs."

Facing such pressure, several global clothing brands joined two "unusual initiatives": H&M, Primark, "and other European companies joined with trade union partners to create the Accord," while "Walmart, GAP, and other North American companies set up the Alliance for Bangladesh Worker Safety (thereinafter - the Alliance)." Both temporary mechanisms provided for factory inspections and remediation within five years, with the possibility of extension and members agreed to terminate contracts with Bangladeshi manufacturers who refused to comply with the new safety standards. However, the Alliance and the Accord differ significantly in one central enforcement mechanism: only the Accord includes a mandatory arbitration provision for the resolution of disputes and violations of enshrined rights obligations.

3.1.3 The Accord on Fire and Building Safety in Bangladesh

The Accord on Fire and Building Safety in Bangladesh (thereinafter – Accord), signed on May 13, 2013, commits the parties to a broad and fundamental "goal of a safe and sustainable Bangladeshi Ready-Made Garment industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures."[98] While this statement implicitly extends the Accord's reach to all workers across Bangladesh, the scope is actually limited to "all suppliers producing products for the signatory companies." These suppliers are then subdivided into three tiers, based on the volume of their production as a percentage of the signatory company's annual production in Bangladesh, and subjected to inspections, remediation, and fire safety training requirements to varying extents.

An agreement like the Accord could provide for arbitration based on the Business and Human Rights Arbitration Rules.

The Accord envisions enforcement and realization in three ways. First, the Accord calls for the establishment of a worker complaint process designed to ensure "workers from factories supplying signatory companies can raise in a timely fashion concerns about health and safety risks, safely and confidentially, with the Safety Inspector." Second, the Accord requires signatory companies to immediately implement a notice and warning process leading to termination of the business relationship if the supplier fails to comply with the safety requirements set forth in the Accord. Third, and most importantly, the Accord

[98] Accord on Fire and Building Safety in Bangladesh (2013). Available online: https://www.industriall-union.org/sites/default/files/uploads/documents/2013-05-13_-_accord_on_fire_and_building_safety_in_bangladesh_0.pdf [accessed 2022 December 7].

establishes procedures for the resolution of disputes which conclude with mandatory arbitration.

The Accord is a legally binding agreement where all signatories agree that arbitration awards or enforcement of fees may be pursued in their national legal system under the New York Convention.[99]

Thus, private arbitration, as contemplated by the Accord, has the potential to turn human rights violations into meaningful grounds for corporate liability. This liability is hugely significant. The Accord constitutes the first time "multinational companies have signed with global trade union federations what looks like a legally binding agreement, enforceable through the courts, under which these companies commit to a range of measures aimed at transforming the working conditions at the premises of offshore suppliers who manufacture ready-made garments for them."[100]

The reticence of many brands and retailers who refused to sign Accord is also indicative of this significance. For the most part, "American brands and retailers refused to join the Agreement, complaining that they do not want to be subjected to what they believe to be perpetual liability."[101] It could be noted that "the enforcement provision is one of the defining attributes of the agreement. It is the feature that most distinguishes the Accord from the many voluntary programs that have failed, which have failed." Thus, the Accord is distinguished from others of its kind on the basis of the binding arbitration provision.

While Article 5 does not provide a choice of governing law, or an arbitral seat, it establishes that "the process for binding arbitration shall be governed by the Model Law on International Commercial Arbitration 1985 (thereinafter – UNCITRAL).

Another important element of the arbitration provision in Article 5 is the pre-arbitral requirement it imposes. According to the provision, disputes must first be submitted to the Steering Committee whose "decision" can then be "appealed to a final and binding arbitration." While the requirements of pre-arbitration are not new, the provision may imply a serious first instance review of the complaint by actors with knowledge and interest in the success of the Bangladesh Accord. Beyond that, because the Steering Committee involves participants from international organizations, the provision seems to demand consideration of human rights standards and labor rights, before turning to international arbitration.

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[99] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Available online: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf [accessed 2022 December 7].
[100] Glimcher, I. *Arbitration of Human and Labor Rights: The Bangladesh experience*, pp. 254-271. Available online: https://nyujilp.org/wp-content/uploads/2020/01/NYI104.pdf [accessed 2022 December 1].
[101] Helfer, L. and Slaughter, A. (1997). Toward a Theory of Effective Supranational Adjudication. *The Yale Law Journal*, 107(2), 273-391.

One of the most significant features of the mandatory arbitration provision is the access it gives to all signatories, including unions and non-governmental organizations (thereinafter -NGOs), to arbitration. All signatories have the right to go to arbitration after the pre-arbitration requirements have been met. This serves to increase chances of arbitration in cases of violation because unions have more incentive to arbitrate and fewer potential political costs in doing so than do states. Although this is an innovative approach, it is not without precedent: in recent decades, NGOs have enjoyed growing influence in international tribunals. In addition to serving as amici, NGOs are increasingly recognized as litigants, despite their precarious international legal personality: The African Commission on Human and Peoples' Rights allows NGOs with observer status to file allegations of violations of the of the African Charter[102]and the ECtHR permits an NGO to bring a case in which it claims to be a victim. Recognizing the limitations of state law enforcement, this expansion of NGO access to arbitration is one of the most significant ways in which the Accord promotes the protection of human rights.

3.2. The jurisdiction of Commercial Arbitration Tribunal to analyze Human Rights claims

3.2.1. Commercial Arbitrations implicating human rights issues

The Accord's arbitration provision was utilized for the first time when IndustriALL Global Union and UNI Global Union brought complaints against two respondent MNCs before the Permanent Court of Arbitration (thereinafter - PCA). While the identity of the respondents has been kept confidential, the unions charged that the first respondent "failed to require suppliers to remediate facilities within the mandatory deadlines," and "failed to negotiate commercial terms to make it financially feasible for their suppliers to cover the costs of remediation."[103]

The Claimants commenced arbitration against the first Respondent on 8 July 2016, and the second Respondent on 11 October 2016. The Parties agreed that the 2010 UNCITRAL Arbitration Rules shall apply to the two arbitrations, that the legal seat of the arbitrations shall be The Hague, that the Secretary-General of the PCA shall serve as appointing authority, and that the PCA shall serve as Registry. While the identity of the respondents has been kept confidential, the unions submitted to the Steering Committee a

[102] Udombana, N. J. (2003) So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights, *American Journal of International Law. Cambridge University Press*, 97(1), 1–37.

[103] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

charge against the first respondent, alleging that he had "failed to require suppliers to remediate facilities within the mandatory deadlines imposed by Corrective Action Plans (thereinafter - CAPs)" as required under Article 12 of the Accord; and "failed to negotiate commercial terms to make it financially feasible for their suppliers to cover the costs of remediation, as required under Article 22 of the Accord".[104]

The Steering Committee concluded that it was "unable to reach a decision on the merits of the charge" and that it would "send a formal letter to all parties informing them of the outcome of the SC decision, noting that in this decision and according to the Dispute Resolution process the Trade Unions have the right to proceed to arbitration."[104]

Claimants commenced arbitration against Respondent on July 8, 2016 pursuant to Article 5 of the Accord and Article 9 and Article 9 of the Dispute Resolution Process. Their Notice of Arbitration includes requests for "a declaration stating that is in violation of its obligations under the Accord".[104]

On October 6, 2016, Respondent filed a Response to the Notice of Arbitration in which it strongly denied allegations that it had not fulfilled its obligations under the Agreement. It also stated that "the claims should be rejected as they are not admissible," arguing that the provisions of the arbitration agreement set forth in Article 5 of the Accord require, as a prerequisite to any claim, that the SC make a decision on the issues in dispute. No such decision has been made in this case, and claimants have no recourse to arbitration under these circumstances.[104]

The respondent also noted that Article 5 of the Accord "suffers from significant deficiencies that potentially render it unworkable as a valid mechanism to arbitrate". Nevertheless, the Respondent stated that without prejudice to the Respondent's position on the enforceability of Article 5 in principle, the Respondent is nonetheless prepared to agree, for the purposes of the current dispute only, that the Claimants' claims be determined by an arbitral tribunal established trader the UNCITRAL Arbitration Rules 2010. However, for the reasons given below, the Respondent maintains that the Claimants' claims have been brought prematurely, prior to the satisfaction of the contractual preconditions set out in Article 5. The claims are therefore inadmissible and should be dismissed.[104]

The parties jointly notified the Permanent Court of Arbitration (thereinafter - PCA) on December 5, 2016 that they had agreed that the Secretary General of the PCA would serve as appointing authority and the PCA would administer the arbitrations. The parties

[104] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

conveyed their agreement that "arbitrations will be conducted under the UNCITRAL Arbitration Rules (as revised in 2010), and that the proceedings, while formally distinct, will be heard by the same arbitral tribunal." The parties also agreed on English as the language of arbitration and The Hague as the seat of arbitration. They asked the Secretary General of the PCA to appoint the presiding arbitrator in accordance with the agreed list procedure, which resulted in the selection of Mr. Donald Francis Donovan, a national of the United States of America.[105]

The Tribunal was formally constituted on February 3, 2017, and it issued its first Procedural Order on April 19, 2017, which provided that the two cases would be heard together by the same tribunal, along with other procedural matters. On September 4, 2017, the Tribunal issued its second Procedural Order, deciding that the preconditions to arbitration had been met such that the claims were admissible and within the Tribunal's jurisdiction, and addressing concerns related to confidentiality and transparency.[105]

The Respondents submit that the Claimants' claims should be dismissed in their entirety, as they are not admissible. According to the Respondents, referral to arbitration under Article 5 of the Accord is subject to the satisfaction of the following three "clear and unambiguous" and "objectively ascertainable" contractual pre-conditions, which form a "commercially prudent escalation process:" (a) first, any dispute between the parties must be presented to the Steering Committee; (b) second, the Steering Committee must decide the dispute by majority vote within a maximum of 21 days; and (c) third, upon request of either party, the decision of the Steering Committee may be appealed to a final and binding arbitration process.[105]

The second and third of these pre-conditions were not met, according to the Respondents, because there was no "majority decision from the Steering Committee which (the Claimants) could seek to appeal." They argue that the Steering Committee "did not reach a decision" as required by the second pre-condition, because there is no document demonstrating a "deliberate and methodological assessment of the merits of the claim," no "detailed analysis of the arguments made or evidence," and thus no "comprehensive record of the claims" presented to the Tribunal. They add that the "requirement for a majority decision from the SC" is directly linked with the right to arbitration under Article 5, making it an "explicit stipulation" that must be fulfilled as a matter of law before proceeding to arbitration.

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[105] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

The Respondents argue that the third pre-condition was not met because the current arbitration proceedings "cannot in any way be characterised as an appeal." In their view, Article 5 of the Accord "expresses a clear and unambiguous intention to limit the scope of the tribunal's role to that of an appellate body" and thus "the mere fact that no underlying (and appealable) decision was ever made is not sufficient to empower the tribunal to assume the role of a first-tier decision maker." The Steering Committee is "undoubtedly best placed" to make findings into the "technical and factual issues" likely to arise under the terms of the Accord, with arbitration providing an appeal mechanism for mistakes, as "an additional layer of scrutiny if the Steering Committee's decision results in any kind of legal or financial consequences." The Respondents also refer to the context of "consensus" in which the Accord was concluded to support their view that the signatories intended any disputes to be "rare and resolved internally and consensually." Thus, arbitration was "always intended to be an exceptional appellate jurisdiction." Further, these arbitrations cannot be considered as "appeals" because the relief sought now is not the same as that sought in the original charges.[106]

Plaintiffs, have articulated four reasons on which they believe Defendants' argument that the Steering Committee's failure to "resolve the dispute by majority vote" constitutes an obstacle to arbitration is untenable: first, that a majority decision is not a mandatory precondition, as the Accord allows either party to appeal a decision and the Accord was not designed to "deprive putative claimants of access to arbitration simply because the Steering Committee failed to act by majority";168 second, that subsequent Governance Regulations clarify that "arbitration [should] be available if a dispute cannot be satisfactorily resolved at the [Steering Committee]"; third, that the Steering Committee "characterized its own actions as 'decisions' that they had reached no agreement on the merits of the charge," thereby fulfilling the pre-arbitration conditions; and fourth, that the dismissal of the claims "would serve no legitimate interest."[106]

In weighing these arguments, the Tribunal identified three points of contention: "any form and content requirements of a Steering Committee 'decision;' the effect of the reference to 'majority vote' (in Article 5 of the Accord); and the meaning of the term 'appeal'.

Regarding "the form and content of a decision", the Tribunal noted that the text of Article 5 does not set out any such requirements as to the content of the decision or the

[106] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

methodology to be followed by the Steeling Committee for its adoption. The Tribunal has no warrant for the inclusion in Article 5 of specific requirements which have not been accepted by the signatories to the Accord.[107]

Regarding what defendants argue, in order to be entitled to a "final and binding arbitration appeal," the decision must be made by a majority vote. They rely on the Article 5 provision that the Steering Committee "shall decide the dispute by a majority vote." The Tribunal held that there was no basis for interpreting the precept in the first sentence of Article 5 that the Steering Committee decides by majority vote by requiring a reading of the second sentence which would not permit any other interpretation.[108]

Finally, the Respondents argued that the use of the word "appealed" in Article 5 expresses a clear and unambiguous intention to limit the scope of the tribunal's role to that of an appellate body whose purpose is simply to provide an additional layer of scrutiny in the event that the Steering Committee may err with legal or financial consequences, rather than conducting a de novo assessment. As with their interpretation of the term "decision", the Tribunal has determined that the text of Article 5 does not support such an interpretation of the term "appeal". As a general rule, the term "appeal" simply means some form of review of the original determination; no more than that, it simply means an application by one party to a higher decision-making body to review or reverse a decision of a lower decision-making body.[108]

Taken all together, the Tribunal determined that all of the Accords' preconditions had been fulfilled and the arbitration could proceed.

It is important to consider confidentiality or transparency of proceedings. The UNCITRAL Arbitration Rules 2010 are silent on matters of transparency and confidentiality, except for Article 28(3), concerning the privacy of hearings, and Article 34(5), governing the publication of awards. Under the Article 28(3), "hearings shall be held in camera unless the parties agree otherwise". Under the Article 34(5), "An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority".[108]

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[107] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

[108] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15 Octeber 2022].

Typically, in arbitration proceedings, Respondents insist on an approach that favors confidentiality, while Claimants favor greater transparency[109].

In this arbitration, the parties have agreed that, with respect to other aspects of this proceeding, the Tribunal has the general discretion to determine the appropriate degree of confidentiality and transparency, taking into account considerations of fairness and efficiency. The Parties also submitted that, in exercising its discretion, the Tribunal should be guided by the Accord framework. The Accord, itself a public document, contains provisions both promoting transparency and protecting confidentiality of signatory brands.

In analyzing the 2010 UNCITRAL Rules, which the parties have agreed to apply. It is worth noting that these rules contain two articles that deal explicitly with transparency and confidentiality. These are Article 28(3), which requires private hearings unless otherwise agreed by the parties, and Article 34(5), which states that an award may be made public with the consent of all parties or, if required of a party by legal duty.

It may be noted that the Tribunal has to determine the appropriate degree of confidentiality and transparency. Neither Article 28(3) nor Article 34(5) makes confidential the existence of the arbitration, the identity of the parties or the subject matter of the dispute. As the history of the drafting of the UNCITRAL Rules confirms, the "prevailing view" among the drafters was that, in addition to the specific provisions of the Rules, the issue of confidentiality should be decided by the Tribunal on a case-by-case basis.[109]

Before turning to the provisions of the Accord, the Tribunal considered the positions of the Parties as to the applicable law. Both Parties acknowledged that the legal systems of the Netherlands and Bangladesh do not contain explicit confidentiality or transparency requirements in international arbitrations. Neither Party pointed to any source of Dutch or Bangladeshi law that compels one to believe that an implied duty of confidentiality could apply here. On the other hand, they pointed to comments by government officials, practitioners, and academics that support the view that in any system, parties and tribunals in particular cases must decide the appropriate level of confidentiality or transparency depending on factors such as "public interest," "public law component," and "importance" of confidentiality to the litigants. Consequently, whether confidentiality is governed by the law of the arbitration agreement or the law of the arbitration proceedings, whether Dutch law, Bangladeshi law or transnational principles, the Tribunal's discretion in determining

[109] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15 Octeber 2022].

the degree of confidentiality is limited only by the UNCITRAL Rules as agreed upon by the Parties.[110]

It is worth noting that similarly, in the context of international arbitration practice generally, while Respondents point to sources suggesting a general expectation of confidentiality among commercial users of international arbitration, and Claimants have noted a trend toward greater transparency, particularly in the context of investor-state arbitration. No such practice or trend, however, can substitute for careful consideration by the Arbitral Tribunal of the proper balance to be struck in light of the parties, their dispute, and the underlying arbitration agreement. In the course of this case, the Parties agreed that the Tribunal should take into account considerations of fairness and efficiency and be guided by the framework of the Accord.[110]

According to the Arbitration Court, this case cannot be characterized either as a classic "public-law" arbitration (with the state as a party) or as a traditional commercial arbitration (involving private parties and interests), or even as a typical labor dispute. A number of features distinguish the Accord from such categories, including the creation of the Accord after the Rana Plaza tragedy; the number of signatories to the Accord (over 200 as of the date arbitration proceedings began); the number of supplier factories affected by the Accord (over 1600); the number of workers in the ready-made clothing industry protected by the Accord (over 2 million); participation of international organizations in the negotiations and administration of the Accord (including ILO); the participation of states and state entities in the negotiation and oversight of the Accord (including the Government of Bangladesh); the involvement of Bangladeshi and international non-governmental organizations as witnesses to the Accord and as consultants; and the public nature of the Accord itself and many related documents, as well as detailed information on the restoration of the plants under the Accord.[110]

Thus, it was important for the Tribunal on the one hand not to lean toward imposing the general confidentiality order sought by Respondents; however, on the other hand, the Tribunal must take into account the competing factors arising from the formulation of the Accord and practice under it that point to an obligation to protect certain information about the brand companies involved.[110]

As noted in paragraph 10, the Accord contains provisions that both promote transparency and protect the confidentiality of signatory brands.

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[110] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

The Article 19 requires the Steering Committee to "make publicly available and regularly update information on key aspects of the programme". While this requirement includes publishing compliance data, safety inspector reports for "all factories", and a list of "all suppliers in Bangladesh (including sub-contractors) used by the signatory companies", Article 19 also contains the express limitation that "volume data and information linking specific companies to specific factories will be kept confidential".[111]

The Tribunal noted that it is appropriate to balance both sets of interests emphasized by the parties by disclosing certain basic information about the existence and progress of the arbitration proceedings, while maintaining the confidentiality of the Respondents' identities. The Tribunal also notes that it welcomes the parties' willingness to compromise to achieve this balance. It also notes that both Parties have referred to the possibility of developing a "limited confidentiality protocol", or a "comprehensive confidentiality order in keeping with standard international arbitration practice".[111]

Thus, bearing in mind the Tribunal's discretion under article 17 of the UNCITRAL Arbitration Rules 2010 to conduct the arbitration in such manner as it considers appropriate and its obligation to conduct the proceedings in such a manner as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute, the Tribunal established certain principles of confidentiality and transparency and invited the parties to agree and propose appropriate Arbitration Rules. In order to facilitate this process, the Tribunal annexed to the Procedural Order some draft texts that the parties may use as a starting point for their deliberations.

Thus, the Tribunal held:

- Concerning jurisdiction and admissibility, it confirmed its jurisdiction over the Claimants' claims, recalling the Parties' agreement, in Paragraph the 2.3 of the Terms of Appointment that, "subject to the Respondents' admissibility objection, the Tribunal has jurisdiction" over these cases; and the Tribunal rejected the Respondents' Admissibility Objection and holds admissible the Claimants' claims.[111]

- Concerning confidentiality and transparency, it directed the Parties to confer and develop a Protocol on Confidentiality and Transparency in line with the guidelines set out in this Procedural Order, and to reported back to the Tribunal with a draft indicating areas of agreement and/or disagreement, by 19 September 2017. The Tribunal will subsequently issue the Protocol on Confidentiality and Transparency in the form of a procedural order.[111]

[111] *In the matter of an arbitration commenced pursuant to the Accord on fire and building safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules* [PCA], Nr. 2016-36 [2018-06-17]. Available at: https://pcacases.com/web/sendAttach/2438 [Accessed 15Octeber 2022].

Subsequently, the Tribunal formalized the Protocol on Confidentiality and Transparency in the form of a procedural order.

Consequently, this case and arbitration award as well provide a useful case study for evaluating arbitration as a mechanism for enforcing human rights obligations. At the same time, the Bangladesh Accord has tangible implications for future agreements regarding the issue of human rights disputes in arbitration, and also helps to analyze the specific arbitration's challenges as a mechanism for the settlement of human rights disputes.

However, the Accord and its binding arbitration provisions are not a panacea. Perhaps the most significant flaw in the Accord was its failure to meaningfully involve the Bangladeshi government. By excluding the Bangladeshi government from the improvement efforts taken across the country, the Accord left many factories in the dark and failed to incentivize or require the government to regulate improvements in the ready-made garment sector. This sidelining is especially problematic given the temporary nature of the Accord itself.

3.2.2. The Usefulness of Applying Human Rights Standards in Arbitral Proceedings: the relation between the European Convention on Human Rights and Commercial Arbitration

There is little evidence to suggest that international arbitration remains separate from the forms of jurisdictional influence from which it originally exiles. Currently, courts often consider procedural human rights standards to be binding or applicable to arbitral awards.[112]

The adoption of the ECHR represented a major milestone in the protection and protection and enforcement of human rights. By signing the Convention, state parties pledged to ensure that the human rights standards of the Convention are respected for all persons subject to their jurisdiction, including procedural guarantees of human rights under Article 6(1) of the Convention.

Pursuant to Article 6(1) of the Convention in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The emergence of the Convention coincides with the growing popularity of international commercial arbitration as an alternative to international litigation. The

[112] Raulušonė, G.Should awards that have been annulled at the seat nevertheless be enforced by courts in other jurisdictions? Available at: https://www.teise.pro/wp-content/uploads/2021/11/Arbitrazas-Nr.7-G.-Raulusone.pdf [Accessed 17 October 2022].

exceptional nature of arbitration as a method of dispute resolution leads to the need for minimum procedural standards. Fears that individuals are given too much freedom at the expense of the fairness of arbitration lead to speculation about the limits of party autonomy and arbitration per se. In addition to considering the provisions of New York Convention that aimed at ensuring the fairness of arbitration, the procedure established by the parties, must comply with any mandatory rules and the requirements of public policy requirements of the law of the legal seat of arbitration. This leads to the question of the relation between the Convention and Commercial Arbitration.

Further, the question of the applicability of ECHR in arbitral proceedings should be clarified. Since the Convention is an international treaty concluded by sovereign States and is undoubtedly binding on them, the question of applicability will be examined primarily in terms of the obligations of States under the Convention. The obligations of arbitral tribunals derive from the international obligations' incumbent upon each State. Since States are obligated to apply the provisions of the Convention in reviewing an arbitral award, it is implausible to deny the corresponding obligation of arbitrators to comply with the Convention. After all, the ultimate purpose of arbitration is to render an enforceable award. States are not obligated to implement the Convention into municipal law. They enjoy wide discretion as to the means of ensuring that their legal system complies with the requirements of the Convention as set out in Article 6(1) of the ECHR. States may adopt laws or other measures to comply with their Convention obligations.

Pursuant to Article 1 of the Convention the Contracting States shall secure to "everyone" "within their jurisdiction" the rights and freedoms defined in Section 1 of the Convention. "Jurisdiction" implies primarily events and acts, which are subject matter of the complaint, taking place within the territory of a State but is not limited thereto. Compatibility, because of the relevant place or territory, requires the alleged violation to have taken place within the jurisdiction of a State Party or in a territory effectively controlled by it.[113]

According to Article 1 of the Convention: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Thus, Article 6(1) of the Convention obliges States to establish judicial system accessible to everyone within their jurisdiction (the obligation to ensure access to a court) and to ensure that judicial proceedings comply with the requirements of

[113] *Case of Drozd and Janousek v. France and Spain* [ECHR], Nr. 12747/87 [1992-06-26]. Available at: https://hudoc.echr.coe.int/fre?i=002-9865 [Accessed 3 December 2022].

independence, impartiality, a fair and public hearing and a reasonable length of time (the obligation to administer justice of a certain quality).

The Article 6(1) governs judicial proceedings. Unlike litigation, arbitration is a form of private justice which is (to a certain extent) independent of the State.

The degree of independence will vary according to the degree of state involvement in the form of assistance, review, or enforcement by national courts.

For a variety of reasons, individuals prefer arbitration as an alternative to state proceedings. However, like litigation, arbitration seeks to resolve a dispute between the parties. Consequently, it can be argued that by choosing arbitration and waiving the right to apply to a state court, the parties to the arbitration agreement were not prepared to waive their right to a fair trial within the meaning of Article 6(1) of the Convention.

Further, it is important to determine what role the arbitration agreement plays in the relation between the ECHR and the Arbitration.

In general, a valid arbitration agreement performs several functions. Based on the principle that establishes the compliance with the agreement, concluded between the parties (pacta sunt servanda), it obliges the parties to submit their disputes to arbitrator or an arbitral tribunal. In addition, the arbitration agreement empowers the arbitral tribunal to decide all disputes within the scope of the agreement and excludes the jurisdiction of national courts to render a final and binding decision on the merits of the dispute. At the same time, an arbitral award as resulting from arbitration proceedings is enforceable against the will of the losing party in the same manner as a judicial decision.

Finally, an arbitration agreement obliges the national courts to terminate proceedings at the request of one of the parties and refer them to arbitration unless it finds that the arbitration agreement is invalid, inoperative, or unenforceable. Thus, contracting States have an obligation to ensure effective implementation of the right to a fair trial, including the right to timely enforcement of an award. In order to achieve the objective, set out in Article 6(1), States shall enact arbitration law and provide for setting aside and enforcement proceedings. This obligation of result has a direct implication for arbitration proceedings. Article II (1) of the New York Convention provides that the Contracting States shall recognize an agreement in writing under which the parties undertake to submit their disputes to arbitration. The functions of an arbitration agreement would be deceptive if not coupled with procedural guarantees provided for in national legal systems.

The duties of arbitrators are primarily directed at the parties. The arbitrator is obligated to issue an award that is enforceable. However, an arbitral award will be set aside if it conflicts with the requirements set forth in the Convention.

It is important to note that, regardless of the fact that sui generis rules have been developed governing the liability of contracting parties for breach of the provisions of the Convention, the provisions of general international law must also be taken into account, since breach of an international treaty such as the Convention gives rise to State responsibility under general international law.

The case of Suda v. the Czech Republic[114] provides an example of the Czech courts violating the Convention by not taking into account procedural requirements under Article 6(1). In Suda a request made by the applicant for the redemption value of his shares to be reconsidered was dismissed by the ordinary court on the basis of an agreement to submit to arbitration made by third parties. In particular, the arbitration agreement was concluded between the company of which the applicant was a minority shareholder and the main shareholder of that company. The ECHR unanimously found a violation of the Convention. It ruled that the arbitral proceedings would not fulfil two of the basic guarantees of Article 6(1). Firstly, the requirement of a lawful tribunal because the arbitration clause was concluded in favour of arbitrators on the list of a limited liability company that was not an arbitral tribunal established by law. Secondly, the requirement of a public hearing because the arbitral proceedings would not have been held in public and the applicant had not by any means waived his right to a public hearing. Moreover, the ECHR held that requesting the applicant to submit his pecuniary claim to arbitration body that did not comply with basic guarantees of Article 6(1), without his having renounced those guarantees, resulted in breach of the applicant's right to a court.

Even more importantly Section 106 of the Czech Civil Procedure Code[115] stipulates that a court shall stop the proceedings at the request of one of the parties as soon as it ascertains that the matter is subjected to arbitral proceedings. Nevertheless, the court will not stop the proceedings if the parties declare not to abide by the arbitration agreement. In addition, the court will hear the case if it ascertains that the matter is not arbitrable under Czech law, or that the arbitration agreement is invalid or non-existent, or that the matter goes beyond the mandate entrusted to arbitrators, or that the arbitration court refused to hear the case. Thus, the relevant standards of Article 6(1) may be enforced by the domestic courts when deciding whether to stop the court proceedings and renounce jurisdiction in favour of arbitration.

[114] *Suda v. the Czech Republic.* [ECHR], Nr. 1643/06 [2012-10-28]. Available at: https://cjc.eui.eu/data/data/data?idPermanent=118&triial=1 [Accessed 5 December 2022].
[115] Czech Civil Procedure Code. Available online: https://is.muni.cz/el/1422/jaro2008/SOC026/um/99-1963_EN.pdf [accessed 2022 December 12].

In Renault Jacquinet v. Sicea,[116] for instance, in a case regarding the execution of an arbitral award in a dispute over the quality of corn, there is a very short time limit for invoking the inferior quality of corn inherent in the agreement between the parties did not violate principles of order public, and that "the outcome of this case is in conformity with the principle of safeguarding judicial rights as one of the fundamental 'human rights". The court essentially felt that there was sufficient leeway for the party invoking the time limit for safeguarding its procedural rights in the dispute, and that this was in conformity with the principles of order public and human rights.[116]

In the Republic of Guinea v. The Arbitration Chamber of Paris case,[117] French courts cancelled the contractual relationship entered between the Paris Arbitral Chamber and the Republic of Guinea and its three former contractual partners on grounds that Guinean authorities were entitled to claim that it could no longer trust the arbitral tribunal set up under the Chamber. The Courts have based their decisions on the principles of neutrality and objectivity inherent in the due process clause of Article 6 of the ECtHR.[112]

Secondly, it should be recalled that arbitration as a dispute settlement method is not unknown for handling what could be coined as human rights violations, particularly in the field of property rights.[118] Indeed, there have been many arbitral tribunals and conciliation commissions that have dealt with these issues, such as those set up under the First and Second World War Peace Treaties,[119] and the Arbitral Tribunal of Upper Silesia.[120]

Others dispute resolution bodies based on the arbitration model, dealing with human rights include the Property Claims Commission in Bosnia-Herzegovina,[121] the PCA,[122] and, perhaps most notably, the U.S.-Iran Claims Tribunal, which has considered property rights cases and, indeed, relied on human rights arguments in their decisions as well.

Furthermore, it should be noted that there is nothing in the human rights law that makes it inapplicable in a commercial context. It can be said that human rights law has become a vehicle for the legal strategies of commercial actors, just as other forms of law.

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[116] *Renault Jacquinet v. Sicea*. [ICCA], Nr. 284/28 [1977-05-3].
[117] *Republic of Guinea v. The Arbitration Chamber of Paris*, [1987-11-18]. Available at: https://jusmundi.com/en/document/decision/en-icc-case-id-no-508-wednesday-1st-november-2017 [Accessed 18 November 2022].
[118] Prosper, A. and Douglas, J. (1997). The Arbitration of Human Rights Complaints: The New York Experience, p. 47.
[119] Simpson, J. and Fox, H. (1956) *International Arbitration: Law and Practice*, p. 16.
[120] Kaeckenbeeck, G. (1942). The International Experiment of Upper Silesia: A Study in the Working of the Upper Silesian Settlement, 1922–1937.
[121] Houtte, V. (1998). The Property Claims Commission in Bosnia-Herzegovina: A New Path to Restore Real Estate Rights in Post-War Societies? *International Law: Theory and Practice*, p. 594.
[122] *France v. Greece*, [ICCA], Nr. 59, [1934-03-17]. Available at: http://www.worldcourts.com/pcij/eng/decisions/1934.03.17_lighthouses.htm [Accessed 12 November 2022].

Thus, human rights norms are increasingly seen not only as ideals but also as having an instrumental function. This is particularly evident in the field of ECHR law. Supranational European human rights law offers numerous evidences of the applicability and the importance of human rights standards in the commercial context. ECHR Article 34 makes clear that human rights litigation before the European Court of Human Rights is open not only to individuals, but to legal entities (companies included) as well and companies have utilised ECHR rights ever since the inception of the supervisory system. Since companies are the primary users of international commercial arbitration, and since individuals are in no way excluded, arbitration proceedings do meet the "everyone" requirement of Art. 6(1) ECHR. Under the Article 34 of the ECHR, there is no incompatibility of such ECHR right with arbitration. Most ECHR principles are now relied upon by commercial actors, including freedom of freedom of expression, freedom of association, the right to privacy and the right to property.

Another challenge is whether, in signing the arbitration agreement, a party waives its Article 6(1) fair trial guarantees. At first sight, it might seem illegitimate to divide the waiver issue into two categories. Some might argue that once an individual waives his right of access to a court he automatically waives his substantive procedural rights under Article 6(1) of the Convention. This objection lies upon the presumption that a waiver is without restrictions. Nevertheless, if we look into different arbitration laws over the world, most jurisdictions would treat the arbitration agreement as a bar to initiate court proceedings but at the same time they would provide for at least a limited court review in the form of setting aside proceedings and enforcement proceedings. And that is the underlying logic in dividing the waivers into two categories- waivers of the right of access to a court and waivers of substantive procedural guarantees.

Osmo Suovaniemi and others against Finland case[123], the right to an independent and impartial judge was at stake. The applicants had challenged impartiality of the arbitrator during arbitration proceedings. The arbitrator announced that he was ready to leave his tasks due to these concerns, but the applicants explicitly approved that he could remain in function. Afterwards the applicants allegedly found a letter newly raising impartiality doubts. However, they did not bring up the issue again. The ECHR stated: a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. Waiver may be permissible with regard to certain rights but not with regard to certain others. A

[123] *Osmo Suovaniemi and others against Finland* Application. [ECtHR], Nr. 31737/96, [1999-02-23], Available at: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-58033%22]} [Accessed 12 December 2022].

distinction may have to be made even between different rights guaranteed by Article 6." Waiver of the right to a public hearing was found compatible with the Convention even in the ordinary court proceedings.[124]

The ECtHR held that the same applies, a fortiori, to arbitrations, one of the prerogatives of which is the avoidance of publicity. Confidentiality is one of the hallmarks of arbitration proceedings and often an important reason why businessmen choose to go to arbitration.

Regarding the right to an impartial judge, the ECtHR noted that despite the fact that the objective impartiality of one of the arbitrators was in doubt under domestic law, the applicants had clearly accepted this situation in the arbitration proceedings. Moreover, the Court also noted that the waiver of the right to an impartial tribunal was accompanied by sufficient safeguards commensurate with its importance, since the applicants had been represented by counsel throughout the arbitration proceeding.

It appears from the Osmo Suovaniemi and others against Finland case that the arbitration agreement is really not a waiver of all rights protected by Article 6(1). The Court expressly affirmed that the right to a fair trial or the obligation to administer justice of a certain quality from perspective of States is relevant to arbitration proceedings. Furthermore, it is apparent that a waiver of the right to a public hearing is unproblematic under the Convention.

As regards to the possibility to waive the fundamental right to an impartial judge it should be emphasized that in Osmo Suovaniemi and others against Finland case the ECHR considered the situation when the applicants failed to raise an objection timely and consequently lost their right to challenge the impartiality of an arbitrator. Such a scenario is sometimes called "waiver after the fact" or "collateral estoppel". Collateral estoppel is enshrined for example in Article 4 of the UNCITRAL Model Law which provides that: "A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object". To put it simply, the applicants did not waive their right to an impartial judge prior to the commencement of the proceedings rather did not take appropriate steps available during the course of the proceedings.

[124] *Hakansson and Sturesson v. Sweden*. [ECtHR], Nr. 11855/85 [1990-02-21], paras 66-67.

Although the ECtHR dismissed the complaint because it found no violation of Article 6(1) of the Convention, the decision is notable in that the ECtHR for the first time considered the conformity of certain aspects of arbitration proceedings with human rights standards. In brief one must strictly distinguish between the right to court proceedings, which represents the right of access to a State court or other public authority, and the right to legal protection. Whereas the right to court proceedings can be waived on the basis of party autonomy, the right to legal protection cannot.

Legal disciplines come of age, they have the potential to develop patterns of similarity in structure and purpose. So too, with the once-distant fields of human rights law and the law of international arbitration. Certain overriding procedural principles permeate all developed legal systems, either national, international or transnational. The many complex supranational human rights tribunals have developed and refined these principles, and thereby making them to a degree unsurpassed by their pronouncement under comparable conceptual paradigms. In particular, the interpretation of ECHR Article 6 by the European Court of Human Rights presents an impressive array of material for usage by dispute-settling bodies of other jurisdictions. The ECtHR body of case law is highly accessible; it provides a degree of tangibility that can only be surpassed by the highest courts of national jurisdictions. It is this comprehensive and tangible body of jurisprudence makes ECHR law a particularly appropriate point of reference in international litigation, including arbitration. The reliance, or reference to former decisions of another jurisdiction with notable similarities to international commercial arbitration seems justified and reasonable. Examples of such sharing of ideas across jurisdictional borders could be examined in the context of Article 6 of the ECHR, in connection with the property rights provision of the ECHR. The application of human rights arguments to international commercial arbitration thus bears an instrumental function: human rights norms articulate a stratum of existing arguments relevant to the arbitral process.

4. THE LEGAL BASIS FOR RESOLVING DISPUTES CONCERNING HUMAN RIGHTS IN ARBITRATION

4.1. The Hague Rules on Business and Human Rights Arbitration

4.1.1. Introduction to the Hague Rules on Business and Human Rights Arbitration

After studying the rules and regulations applied in international commercial arbitration, it could be noted, that for the most part they are aimed at resolving disputes between commercial entities. Consequently, it cannot be unequivocally said that these rules and regulations take into account the peculiarities of disputes arising in the area of human rights violations.

There is a gap in the business and human rights field in the means to effectively address human rights violations. In seeking to implement the third pillar of the UN Guiding Principles on Business and Human Rights, which focuses on providing effective remedy to rights holders who are harmed by corporate human rights abuses, arbitration has been proposed as a new platform to address such abuses.[125]

The public outcry following the collapse of a garment factory in Bangladesh in 2013 and a number of other cases has demonstrated the need to impose on TNCs the responsibility to respect and accountability for human rights violations, while at the same time showing that violations can cause significant damage to TNCs' business reputations.

In this regard, in recent years, the international community has developed a number of documents aimed at protecting human rights from the negative impact of TNCs. The Guiding Principles on Business and Human Rights can serve as an example since, despite their recommendatory nature, the Guiding Principles are widely accepted and serve as a basis for defining policies to protect human rights in business.

The Hague Rules on Business and Human Rights Arbitration[126] provide a set of rules for the arbitration of business and human rights disputes. The Hague Rules represent the result of a more than five-year long project involving the elaboration of the concept of business and human rights arbitration, consultation with numerous stakeholders and drafting of the text. The project began with the creation of a Working Group on Business and Human Rights Arbitration.[142]

The Hague Rules on Business and Human Rights Arbitration provide a set of procedures for the arbitration of disputes related to the impact of business activities on

[125] The UN Guiding principles on Business and Human Rights an Introduction. pp. 2-4. Available online: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf [Accessed 6 December 2022].

[126] The Hague Rules on Business and Human Rights Arbitration (2019). *Center for International Legal Cooperation*. Available online: https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [Accessed 7 December 2022].

human rights. The Hague Rules are based on the Arbitration Rules of the UNCITRAL Rules, with modifications needed to address certain issues likely to arise in the context of business and human rights disputes. Each article is accompanied by a commentary, which includes background on the drafting of various provisions in the Rules, explaining in particular the reasons for possible deviations made from the UNCITRAL Rules. The Commentary may be useful in interpreting and applying the Rules, but it is not part of the Hague Rules.

As with the UNCITRAL Rules, the scope of the Hague Rules is not limited to the type of claimants or respondents or to the subject matter of the dispute and extends to any dispute which the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Thus, parties may be commercial organizations, individuals, trade unions and organizations, states, public entities, international organizations and civil society organizations, as well as any other parties of any kind.

It can be assumed that the scope of the Hague Rules is defined quite broadly.

The Article 1, they apply if the parties have agreed that all disputes arising between them shall be resolved on the basis of these Rules. It does not matter who the plaintiff and the defendant are, whether the relationship from which the of a contractual or non-contractual nature. In other words, parties to a dispute under the Hague Rules may include both business entities and individuals, trade unions, states and international organizations.

A dispute does not need to qualify as relating to business and human rights in order to apply the Hague Rules, if the parties have agreed to resolve the dispute in accordance with this document. Moreover, the Rules themselves do not disclose the content of the terms “business” and “human rights”. As the drafters of the Hague Rules note, this was done intentionally, in order to interpret these terms as broadly as possible, which should be understood at least to the extent that they are understood in the context of the UN Guiding Principles. However, in the vast majority of cases, no definition of these terms should be necessary at all.[127]

4.1.2. Key differences of the Business and Human Rights Arbitration Rules from the UNCITRAL Arbitration Rules

The Article 1(1) modifies Article 1 of the 2013 UNCITRAL Arbitration Rules to impose a formal requirement of an expression in written form for deviations from the Hague Rules. This approach reflects the general desire to avoid too many deviations from the

[127] The Hague Rules on Business and Human Rights Arbitration (2019). *Center for International Legal Cooperation*. p. 3,17. Available at :https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [Accessed 1 December 2022].

Hague Rules, which might upset the balance sought in various provisions among the many varied legitimate interests at play in the resolution of business and human rights disputes. Arbitration rules cannot, of course, limit the parties' autonomy to derogate from the Hague Rules as they choose (consistent with mandatory applicable law) as long as such derogations are made in the proper form. It could be noted that The Model Clauses to Hague Rules[128] provide potential parties with draft language to adapt these Rules to the specific circumstances of their disputes.

Article 1(2) contains a deeming provision intended to opt in to the enforcement regime of the New York Convention and to effect a waiver of certain potential defences to its application, even where the underlying relationship or transaction may not be considered "commercial" under applicable law. Although the stipulation of "commerciality" in Article 1(2) is not binding upon national courts tasked with deciding upon the enforcement of an award rendered under these Rules in accordance with the New York Convention, it can be expected that national courts will accord substantial weight to the expectations and intentions of the parties as expressed in this provision. The provision may therefore operate in many cases to preclude a party from making an objection to the enforcement of an award rendered under these Rules on the basis of a "commercial" reservation made by the relevant contracting states to the New York Convention. In any case, it is hoped that national courts will avail themselves of their discretion, both under the New York Convention and other applicable law, to enforce an award rendered under these Rules where they conclude that such award is human rights-compatible and otherwise satisfies the requirements for recognition and enforcement. Similar issues may arise with respect to the arbitrability of business and human rights disputes under national laws.

The waiver of immunity provision in Article 1(3) clarifies that, regardless of the general provision of applicable law, an agreement to arbitrate under the Hague Rules constitutes a waiver of the immunity of a sovereign or international organization from arbitral jurisdiction, but does not constitute a waiver of such immunity with respect to measures relating to the enforcement of an award (or other decision) made under the Hague Rules. A waiver of immunity from execution would require a separate and express waiver.

[128] The Hague Rules on Business and Human Rights Arbitration. Model clauses for pre-dispute submission to arbitration (2019). *Center for International Legal Cooperation*. p. 101. Available at: https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [Accessed 5 December 2022].

4.2. Hague Rules as a common applicable rules for disputes concerning human rights

4.2.1. The issue of Consensus in the case of a human rights violation

A dispute between business and human rights can only be resolved by arbitration if all parties involved agree to arbitration. However, the issue of establishing consent in the case of a human rights violation is not a simple one. Because companies fear that by establishing a consensus to arbitrate disputes regarding human rights violations, they impose additional obligations on themselves. For instance, some businesses are concerned that by including human rights commitments in their commercial contracts, they risk exposing themselves to greater liability. Assuming that a company has the right to terminate a contract with a supplier for violating human rights standards, in which case that company must exercise that right under certain circumstances; however, if the company does not have that right, then it cannot be blamed for not terminating the commercial relationship.

In general, there are different possibilities for establishing consent: consent would be given before a dispute arises; it is also possible for parties to enter into an arbitration agreement after a dispute has arisen.

Like the UNCITRAL rules, the Hague Rules do not address the terms by which parties to arbitration may consent to arbitration, nor the content of such consent, which are relevant to the parties. Consent remains the cornerstone of business and human rights arbitration, as with all arbitration, and it can be established before a dispute arises, e.g. in contractual clauses, or after a dispute arises, e.g. in a submission agreement (compromise). Under the Model clauses for the Hague Rules: there are Model clauses for pre-dispute submission to arbitration, Model submission agreement for existing disputes, Model clauses to incorporate the Hague Rules into existing arbitration agreements options.

International organizations, such as the World Bank or the International Monetary Fund, could require that companies receiving funding agree to submit to arbitration under the Hague Rules on Business and Human Rights. The same is true for National Development Agencies or Foreign Investment Insurance Companies that could condition funding or insurance on an offer to arbitration by the company vis-à-vis potential victims of future human rights abuses by the company benefitting from the funding or insurance.

Local communities contracting with local or foreign investors, such as in the public services, may require that the local or foreign company or foreign parent company provide for an offer of consent to arbitration if its activities would result in human rights abuses. The same is true, for example, in the mining sector, where states may condition the issuance

of mining licenses subject to the offer of arbitration under the Hague Rules on Business and Human Rights by the mining company.

It is important to notice that although the PCA may already be called upon to provide institutional support to the arbitration under Article 1(5) of the Rules, the parties may wish to provide expressly for such administrative support by the PCA or to provide for administrative support by another arbitral institution. [129]

Let us assume that a company and its supplier (e.g. a shoe producer and its suppliers) have a contractual dispute that involves a human rights issue, such as unhealthy working conditions in the premises of the supplier. There will be a supply agreement that will usually include an arbitration agreement. This could provide for arbitration based on the Hague Rules on Business and Human Rights Arbitration. In this way the company would comply with its obligations under Pillar II of the UN Guiding Principles.

4.2.2. The potential imbalance of power between disputing parties in business and human rights disputes

At the same time, despite the fact that the Hague Rules aim to eliminate barriers to access to justice, arbitration is only possible where it is reasonable to assume that all parties have at least minimal resources at their disposal to cover the basic costs of arbitration and representation (either they have the ability to obtain legal assistance, or to get third parties to finance the proceedings, or they have entered into an agreement to distribute asymmetrical costs between the parties), which may constitute a barrier to the filing of a lawsuit by the victims.[130]

Therefore, it is important to pay particular attention to the potential imbalance of power between disputing parties in business and human rights disputes.

Such inequality of arms may arise, for example, in cases between rightsholders and businesses, or in a suit by a large multinational company against a small local supplier. Equally, counterclaims may affect the amount in dispute and the initial decision by claimants to represent themselves.

[129] The Hague Rules on Business and Human Rights Arbitration. Model clauses for pre-dispute submission to arbitration (2019). *Center for International Legal Cooperation*. p. 101. Available at: https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [Accessed 10 December 2022].

[130] Roll, D. (2019). Out the Red Carpet: The Hague Rules on Business and Human Rights Arbitration are Finally Here! Kluwer Arbitration Blog, [blog] 26 December. Available online: http://arbitrationblog.kluwerarbitration.com/2019/12/26/roll-out-the-red-carpet-the-hague-rules-on-business-and-human-rights-arbitration-are-finally-here/ [Accessed 10 December 2022].

This problem could, in particular, be solved through representation and assistance to a party which has barriers to accessing legal remedies. These barriers could be lack of adequate representation, language, expense, and fear of reprisals.

Under the Article 5/2 of the Hague Rules, in such a case, the arbitral tribunal must make an effort to ensure that the unrepresented party can present its case in a fair and efficient manner, including by adopting more proactive and inquisitorial rather than opposed to adversarial, procedures.

To allow the arbitral tribunal to take into account a possible imbalance of power in access to evidence in arbitration proceedings, under the Article 22(4) of Hague Rules, «the statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them». This applies to both situations of economic imbalance and situations of imbalance of power. An economic imbalance can lead to a situation where the cost of obtaining documents is prohibitive. An imbalance of power can lead to a situation where a party knows certain documents exist, but cannot obtain them. The reason for this may be that they are in the possession of the other party or third parties. In these instances, the arbitral tribunal may admit a statement of claim even if it is not accompanied by certain evidence that would otherwise be necessary. The arbitral tribunal could address this issue subsequently through its power to order the production of evidence or other means of organizing the taking of evidence in the particular proceedings.[131]

With respect to written pleadings, tribunals are encouraged to actively manage written proceedings to ensure efficiency and equality of arms without prejudice to due process.[131]

A number of factors must be balanced with respect to obtaining evidence, particularly fairness, efficiency, cultural appropriateness, and compatibility with rights in arbitration proceedings. The court can respond to possible inequalities between the parties in the context of access to evidence through certain tools available to the tribunal to address these issues. These include procedures for production of documents, the ability to limit the amount of evidence presented, and the power to impose sanctions for failure to comply with orders to produce evidence through adverse inferences or shifting the burden of proof. The arbitral tribunal should take into account best practices in this area.[131]

[131] Roll, D. (2019). Out the Red Carpet: The Hague Rules on Business and Human Rights Arbitration are Finally Here! Kluwer Arbitration Blog, [blog] 26 December. Available online: http://arbitrationblog.kluwerarbitration.com/2019/12/26/roll-out-the-red-carpet-the-hague-rules-on-business-and-human-rights-arbitration-are-finally-here/ [Accessed 11 December 2022].

For instance, under Article 32(4) of Hague Rules, the tribunal has to arrange the taking of evidence in accordance with best practices and subject to general considerations of fairness, efficiency, cultural appropriateness and compatibility with rights. This article recognizes that the production of documents may be required in order to give a party a reasonable opportunity present its case. The tribunal shall take the difficulty into consideration that certain parties may face in collecting evidence (or making precise document requests). Furthermore, it shall consider the potential cost and other burdens that may be caused by document production procedures.

Article 32(6) provides for discussion between the court and the parties about potential difficulties. It may enable the tribunal to be aware of the consequences of a potential power imbalance in taking evidence. It will enable it to determine what evidence may be relevant, material and necessary to provide each party with a reasonable opportunity to present its case.

The rules on the fees and expenses of arbitrators and allocation of costs also contain provisions that allow tribunals to take into account situations of economic imbalance.

The important thing is to lower the barriers to access to remedy. Nevertheless, the parties will need a minimum of funds to cover the basic costs of arbitration and their own representation. This could either be through own funds, or through the “legal aid” system, contingency funding, or an agreement to asymmetric sharing of costs and deposits between the parties.

4.2.3. The issue of Applicable Law in Arbitral procedure

It is important to consider the issue of rules for the arbitral tribunal on how to determine the applicable substantive law for disputes concerning the protection of human rights in arbitration. On the basis of the Hague Rules, the development of rigid substantive law standards does not seem to be advisable. Therefore, substantive rules can arise from a variety of sources, such as domestic law, treaties, human rights treaties and soft law standards. The use of the complete phrase “law, rules of law or standards” in Article 46(1) of Hague Rules, intends to provide the parties with the broadest possible flexibility in choosing the normative sources from which the applicable law is drawn, including, for example, industry or supply chain codes of conduct, statutory commitments or regulations from sports-governing bodies or any other relevant (business and) human rights norms which the parties have agreed to apply. It is important to note that the applicable law or law

determined by the tribunal under Article 46(2) may include international human rights obligations.[132]

This flexibility of applicable law must be combined with certainty, so that all parties to a dispute can anticipate which rules will apply to their dispute. Under Article 46(4).

Both parties must have agreed to apply these laws, rules of law or standards. It allows applying combinations of rules emanating from different legal systems and from non-national sources.

In general, in determining the applicable law, commercial arbitrators may apply the four-step approach of the UNCITRAL Rules: the possibility of an agreed choice of law; a default rule of applicable law; an express agreement of the parties for decision by the tribunal, where the tribunal is making a decision, in which it is not bound by strict rules of law, but it sticks to considerations of justice and common sense (an ex aequo et bono); various additional binding rules; the clause on agreed choice of law, uses "law, rules of law or standards."[132]

Regarding the procedure, first of all, under Article 6 of Hague Rules, the PCA, given its intergovernmental nature and experience in business and human rights disputes, serves as appointing authority unless otherwise agreed by the parties. Considering that the legitimacy of the arbitral proceedings is closely tied to the selection of suitable arbitrators, parties are encouraged to consider the matter carefully before choosing a different appointing authority.

The proceedings may be based on arbitration conducted under the rules of any permanent arbitral tribunal. However, some derogations are necessary due to the specific nature of the disputes. Proceedings shall be initiated by filing a Notice of Arbitration. Once the procedural documents have been exchanged, the arbitral tribunal shall be constituted. The dispute shall be heard by one or three arbitrators, which (in the absence of an agreement of the parties to the contrary) shall be appointed by the Secretary General of the Permanent Court of Arbitration.[132]

However, at the written request of any of the parties and subject to the consent of the arbitral tribunal and the Secretary-General of the Permanent Court of Arbitration, the Chamber shall also act as the secretariat.[132]

[132] Roll, D. (2019). Out the Red Carpet: The Hague Rules on Business and Human Rights Arbitration are Finally Here! Kluwer Arbitration Blog, [blog] 26 December.
Available online: http://arbitrationblog.kluwerarbitration.com/2019/12/26/roll-out-the-red-carpet-the-hague-rules-on-business-and-human-rights-arbitration-are-finally-here/ [Accessed 12 December 2022].

It is important to emphasize that under the Article 18(1) of Hague Rules, there is an obligation to conduct the proceedings in such a way as to ensure human rights-compatible process in accordance with the UN Guiding Principle.

Under Article 30 of Hague Rules, in order to prevent substantial violation of human rights, as well as alienation of assets and destruction of evidence, arbitrators have the right to take interim measures. The list of these measures is not exhaustive and also establishes penalties for their violation (it provided that the applicable domestic law allows this possibility).

Also, under Article 33 of Hague Rules are also characterized by the possibility for arbitrators to adopt special measures for the protection of witnesses, including the non-disclosure of the identity and whereabouts of the persons concerned and persons associated with them, by removing their identifying information from public records or by imposing a ban on the publication of documents containing such information, the use of devices that alter the appearance and voice of witnesses, etc.

Importantly, the Hague Rules contain provisions on joinder of an additional party to the proceedings, expedited proceedings, financing of arbitration by third parties.

Under Articles 18 and 33 of the Hague Rules the proceedings, as well as the hearings shall be conducted in such manner as the arbitrators deem most appropriate, provided that the parties are treated equally and given a reasonable opportunity to present their case. In doing so, arbitrators should be guided by best practices in the field of dispute resolution and human rights and act in a manner that avoids unnecessary costs, delays and ensures that the proceedings are fair, efficient, acceptable and compatible with human rights standards.

Under Article 26 of Hague Rules, upon application of a party arbitrators are entitled to conduct “summary proceedings” in which the application for a question of law or fact that is not well-founded will be reviewed, essential to the resolution of the dispute. The introduction of this rule is due to the need to prevent frivolous claims, which could entail costly proceedings and harm a party's business reputation, as well as frivolous objections, which could be used as a means of prolonging the process.

To ensure a greater likelihood of value pluralism in adjudication, the appointment of arbitrators should seek to select both those who advocate for investment and commercial interests and those who advocate for broader societal interests.

Under Article 11(b) of the Hague Rules, persons appointed as arbitrators must have high moral character and be relied upon to render an independent and impartial award before international courts and tribunals. Crucially, no person who has previously been

involved in a dispute in any capacity (e.g., in business and human rights law and practice, relevant national and international law, or knowledge of the relevant field or industry) can be appointed as an arbitrator. In general, the general principle that no arbitrator should have been previously involved in a dispute is enshrined. In addition, the presiding or sole arbitrator must have 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. The presiding or sole arbitrator shall not be a national of the states of which the parties are nationals or of any state which is a party. The nationality of a party shall be construed to include the nationality of its controlling shareholders or equity holders.

In addition, the Hague Rules contain a special Code of Conduct for Arbitrators. The Code's key innovations include strong duties of disclosure; a ban on double-hatting involving the same issues; certain restrictions on former arbitrators; and the possibility for the Permanent Court of Arbitration to create a Code of Conduct Committee to update the Code as needed as best practices change.

Under the Article 31 of Hague Rules, if there are circumstances indicating the possibility of destruction of evidence and alienation of assets (at the expense of which later, probably, the party may apply for the appointment of an emergency arbitrator, who may decide on interim measures even before the Arbitral Tribunal is constituted emergency arbitrator, who may decide on interim measures even before the Arbitral Tribunal is constituted.

The time limit for appointment of such arbitrator is maximum two days of the application. At the same time, in order to prevent unjustified applications for emergency measures, the Rules stipulate, that the measures taken will be set aside if an application for arbitration is not filed within 10 days of the filing of the petition for emergency arbitrator. Once the arbitration is constituted, the parties are also empowered to make certain motions.

A special place should be given to the issue of transparency in the proceeding. The Hague Rules contain a detailed section on transparency. Based on many of the ideas of the UNCITRAL Transparency Rules,[133] they provide a new set of default rules that lean heavily in favor of transparency during the proceedings. At the same time, the Hague Rules

[133] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014). United Nations Commission on International Trade Law. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf [Accessed 2022 December 13].

recognize that for business-to-business arbitration without a public interest, transparency may be neither required nor desirable, so that the tribunal may decide not to apply it.

Thus, according to Article 40 of the Hague Rules, the main documents (the notice of arbitration, statement of claim Statement of claim, statement of defense; list of annexes to these documents and to expert reports and witness statements; as well as orders, rulings and decisions of the arbitral tribunal) must be publicly available. In addition, unlike the rules of the leading arbitral institutions, mandating private hearings (it is necessary to preserve the confidentiality that is the cornerstone of international commercial arbitration), under the Article 41 of the Hague Rules provide for open hearings, allowing for exceptions only in cases where to be made public only if confidential or other non-public information is to be disclosed.

The award shall be made by a simple majority vote of the arbitrators and shall be in writing. The arbitral tribunal may award monetary compensation, apologies, restitution, rehabilitation, and to prevent further damages (for example, through injunctive relief or "guarantees of non-repetition"). The decision must contain the reasons on which it is based and must also be compatible with human rights.

In doing so, in order to ensure that judgments rendered in cases of human rights violations can be recognized and enforced in accordance with the New York Convention, the Article 1(2) of the Hague Rules, declares: "The parties agree that any dispute that is submitted to arbitration under these Rules shall be deemed to have arisen out of a commercial relationship or transaction for the purposes of Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)".

Therefore, satisfying the demands derived from the concept of "effective" remedy forces the judicial mechanism recognizes the values of equality, humility, and human dignity. These values were probably alien to the mechanism of international arbitration. Rather, the emphasis on speed, confidentiality and power. The Hague Rules is one of the instruments to make these values coexist.

The Hague Rules are a concrete example of how BHR arbitration can be designed. The Hague Rules introduce a number of innovations to the UNCITRAL Rules to facilitate proceedings suitable for sensitive and complex human rights cases. Importantly, the Rules provide for a variety of subjects to commence and join arbitration, the Hague Rules take significant steps to make arbitration more human rights-friendly, for instance by recognizing the need to strike a balance between transparency and confidentiality measures,

allowing the arbitral tribunal to give due regard to the differences between the parties and allowing the award of broad compensatory measures to the winning claimant.

However, the practical impact that the Hague Rules can have on providing an effective remedy depends in part on whether there is sufficient support for these rules among states, corporations, third-party sponsors, and, rightsholders.

4.2.4. Transparency

Under the transparency rules of the Hague Rules, as set out in Articles 38 to 43, the arbitrators, as compared to the UNCITRAL Transparency Rules, are given discretion, but the exercise of that discretion must take into account: the safety, privacy and confidentiality concerns of the parties, witnesses, representatives and others involved in or affected by the arbitral proceedings; and the potential for aggravating conflicts between and among relevant stakeholders. Also, when deciding how to adapt the transparency regime to the cases before them, arbitral tribunals have wide flexibility and may, for example, allow disclosure to the public after a certain period of time.

At the same time it is important to give the arbitral tribunal the power to exclude transparency rules in whole or in part in situations where it is not necessary or appropriate in the circumstances of the case. Also, the Hague Rules cannot limit the parties' discretion to deviate from them as long as such deviations are made in proper writing. Thus, the parties have discretion to waive certain provisions that do not meet their needs in the dispute at hand. Therefore, potential parties to arbitration proceedings may adjust the degree of transparency or confidentiality of the proceedings to suit their needs.

However, the right of access to information is now one of the most important human rights. Thus, arbitral tribunals have to recognize that the disclosure of information should not be left to the complete discretion of the parties. At the same time, it is undesirable for parties to make too many deviations from the Hague Rules, as this may upset the balance between the many different legitimate interests at stake in business and human rights disputes.

For instance, regarding investment arbitration procedure, since investment arbitration may lead to limitations on sovereign powers and multimillion-dollar awards of damages that are paid out of state tax funds, the need for greater application of deliberative democracy in investment arbitration is growing. One way to achieve this is to increase opportunities for public participation and input. Therefore, transparency in the process is important. This facilitates public access to information about disputes, increases public confidence in the process and, most importantly, ensures a degree of accountability for

arbitrators, giving them a greater incentive to consider the public interest and the value it attaches to the measures taken in the dispute.

Under Article 40(1) of the Hague Rules: 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 shall be made available to the public. This list is limited to the documents necessary to make business and human rights arbitrations known to the public and to foster a culture of human rights protection; at the same time, considering the direct costs of access and publication or the reputational costs to parties by raising awareness and legal certainty. It is important to note, also, that given the default transparency adopted by the Hague Rules, arbitral tribunals must make available to the public any material information that is not subject to the legal requirement of confidentiality, including anything necessary to understand the tribunal's reasoning in its award.

Subject to paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument shall be public. Art 41(1) The Article 41(3) gives the arbitral tribunal broad flexibility in arranging logistical arrangements for public access to hearings, which may include video links or such other technical means that best provide a level of access that the arbitral tribunal considers appropriate and compatible with the need to prevent disclosure of confidential or protected information.

Also, regarding the involvement of the amicus in the procedure, it is important to conceive the amicus as one larger than the traditional non-governmental organisations but also includes sub-national governments, community organisations, and in some cases sub-regional bodies. This will allow the improvement of the amicus participation procedure to be of value, not only to the tribunal but to the parties and importantly, the wider public interests which must be taken into account in certain ways in cases related to the protection of human rights in the business environment.

However, not all information may be freely available upon request, as legitimate commercial interests of investors and certain public information are customary exceptions to public disclosure. There are exceptions: if there is a need to protect confidential or restricted information or the integrity of the arbitral process, the arbitral tribunal must take appropriate measures to conduct the closed portion of the hearing requiring such protection. This gives the arbitral tribunal an opportunity to consider the sensitivity of the interests and situations that may be involved in the arbitration.

It is worth noting that under the Article 42(2) of the Hague Rules, confidential or protected information consists of: names and addresses of the parties and their representatives protected by an order of the arbitral tribunal, as well as of witnesses protected by an order of the arbitral tribunal; confidential business information, information that has been classified as secret by a Government or a public international institution and any other information deemed confidential under any other grounds of confidentiality that the arbitral tribunal determines to be compelling; Information that is protected against being made available to the public under the arbitration agreement; Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; Information the disclosure of which would impede law enforcement; or Information the non-disclosure of which is necessary to protect the safety, physical and psychological well-being and privacy of parties, witnesses, representatives and others involved in or affected by the arbitral proceedings.

It is important to note, however, that the tribunal, after consulting with the parties, must take steps to ensure that any confidential or protected information is made public. To do this, the arbitral tribunal may apply measures such as establishing a time limit within which a party or third party must give notice that they are seeking protection for such information in the documents; procedures for promptly designating and redacting specific confidential or protected information in such documents; and procedures for holding in camera hearings.

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

Thus, the Hague Rules are a clear public participation mechanism is needed to ensure that proceedings of arbitration are not exclusively private and an improved transparency mechanism for ISDS needs to be embraced. It is important to note that it reduces the number of disputes about the legitimacy of investment arbitration.

CONCLUSIONS

Therefore,

1) Arbitration can be an additional method of alternative dispute resolution to protect civil rights, in states where other human rights protections are ineffective because of a corrupt judicial system or other legal problems.

2) The evolutionary interpretative practice of the International Court of Justice can serve as an example for the expansion of human rights norms in investment treaties.

3) With the increase in number of investment disputes, states are beginning to cite their human rights obligations and other non-investment obligations as a defence to avoid liability under investment treaties.

4) The domestic law of states to have a greater role to play in investment arbitration and for GAL principles to be applied in ISDS. However, this approach applicable only to states with a democratic political regime and an independent adjudication system.

5) Investment arbitration can be an effective means of protecting human rights, provided that appropriate interpretations in human rights treaties are applied, and that democratic states become more involved in resolving issues related to the protection of human rights. Since investment arbitration may lead to limitations on sovereign powers and multimillion-dollar awards of damages that are paid out of state tax funds, the need for greater application of deliberative democracy in investment arbitration is growing. One way to achieve this is to increase opportunities for public participation and input. Therefore, transparency in the process is important. This facilitates public access to information about disputes, increases public confidence in the process and, most importantly, ensures a degree of accountability for arbitrators, giving them a greater incentive to consider the public interest and the value it attaches to the measures taken in the dispute.

6) The use of commercial arbitration to resolve claims by victims of human rights violations against business is quite complex, especially considering the issue of consent between the claimant and the defendant, since there is no prior submission of the dispute to arbitration and consideration of the dispute in arbitration can only be started after the parties agree to refer the case to arbitration. Bangladesh experience is a example of a creative approach to solving this problem.

7) The Hague Rules are a clear public participation mechanism is needed to ensure that proceedings of arbitration are not exclusively private and an improved transparency mechanism for ISDS needs to be embraced. It is important to note that it reduces the number of disputes about the legitimacy of investment arbitration.

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SUMMARY

Human Rights and Arbitration

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This master's thesis analyzes the International Investment Arbitration and the International Commercial Arbitration as bodies capable of resolving issues related to the protection of human rights in the business sphere; it also examines how human rights law affects arbitration in general, examining both the relevant the doctrine and interpretation of jurisprudence.

This topic is most fully explored through the prism of the implementation of the universally recognized fundamental principle of the universality of human rights, which implies that everyone equally possesses their rights. Human rights are inalienable. No one may be deprived of rights except in particular cases and in accordance with due process of law. For example, the right to liberty may be restricted if a court finds a person guilty of a crime. The Universal Declaration of Human Rights enshrines the right of everyone to social security and to enjoy the economic, social and cultural rights necessary for his dignity and the free development of his personality, through national efforts and international cooperation and in accordance with the structure and resources of each State. This implies the right to decent working conditions and freedom from discrimination on any grounds, which, in turn, cannot be questioned even if it conflicts with the State's obligations under the investment treaty. In order to avoid such conflicts, it is necessary to democratize the International Investment Arbitration (this can be done through greater public involvement in the arbitration process, for example) and to establish clear regulatory rules for the International Commercial Arbitration Tribunal in resolving human rights disputes.

Considering this topic of the master's thesis, considers the “evolutionary interpretation” of the law, which is successfully applied by the International Court of Human Rights, and is also applied by the Court, the main task of which, like arbitration, is not to consider human rights issues - the International Court of Justice. This interpretation can serve as an additional tool for the democratization of International Investment Arbitration, which makes it even more suitable for resolving human rights issues. Also, the master's thesis considers the experience of Bangladesh as a good example of the resolution of a dispute related to human rights by International Commercial Arbitration.

The research analyzes the Hague Rules which are the legal basis for adjudication of human rights disputes by Arbitration.