



Business and Human Rights Mediation and arbitration

International Law Association, Arbitration Institute
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UN Guiding Principles on Business and Human Rights 2011

- State **Duty to Protect** Human Rights (policies, regulation, adjudication)
- Corporate **Responsibility to Respect** Human Rights, no listing of relevant human rights, but as a minimum UDHR 1948, International Covenants (ICCPR, ICESCR), ILO Declaration and 8 core conventions; NB Ruggie: this is not a new legal obligation, but “a global standard of expected conduct” extending to supply chains
- Need for **Access to effective Remedies** (to be provided by both states and companies; judicial/non-judicial and State/non-State; NB Ruggie’s analysis of alleged violations of human rights by business – cf Business and Human Rights Resource Center website for case overview)

Ruggie's analysis - Labour rights impacted

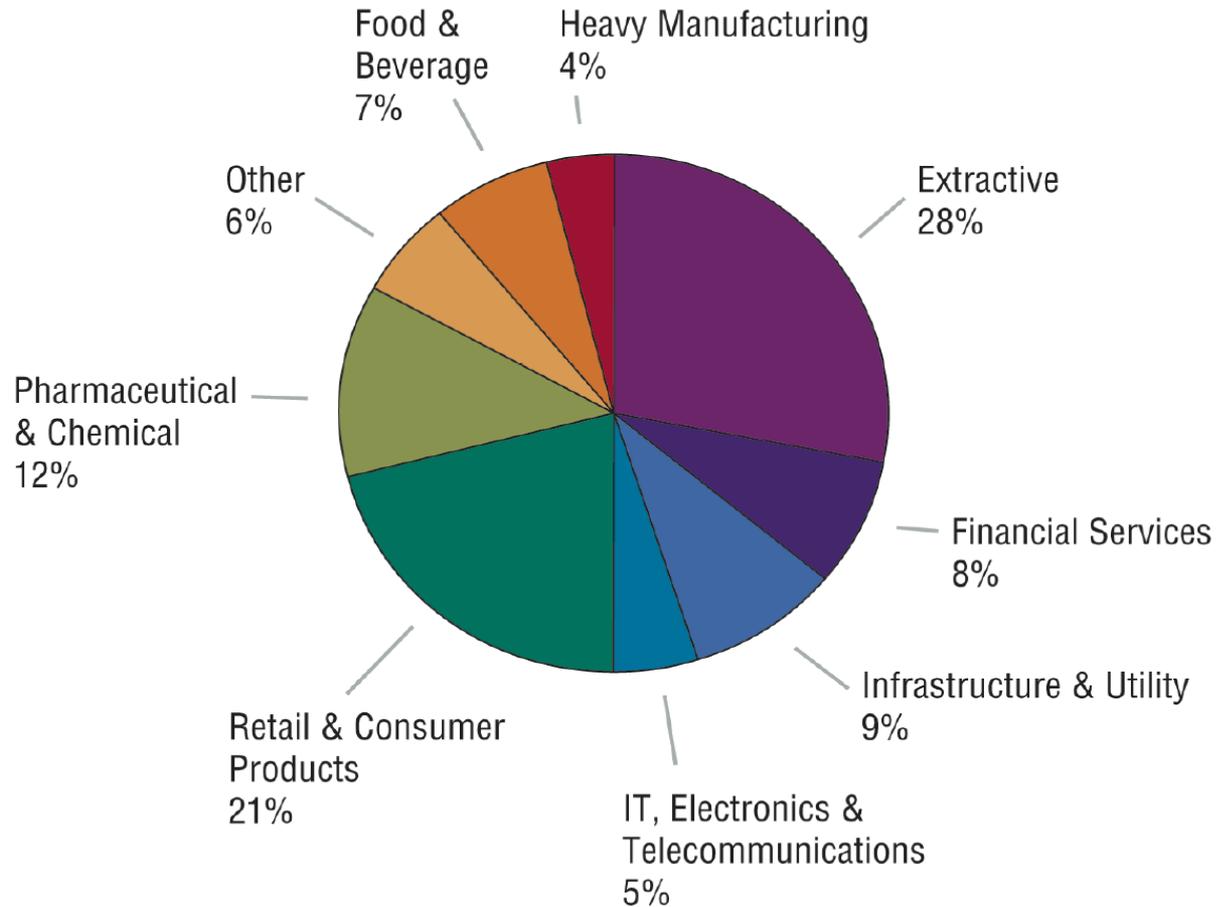
- Freedom of association
- Right to organize and participate in collective bargaining
- Right to non-discrimination
- Abolition of slavery and forced labour
- Abolition of child labour
- Right to work
- Right to equal pay for equal work
- Right to equality at work
- Right to just and favourable remuneration
- Right to a safe work environment
- Right to rest and leisure
- Right to family life

Ruggie's analysis Non-labour rights impacted (selection)

- Right to life, liberty and security of the person
- Right to peaceful assembly
- Right to an adequate standard of living (incl food, clothing and housing)
- Freedom from torture or cruel, inhuman or degrading treatment
- Right to marry and form a family
- Right to physical and mental health; access to medical services
- Right to education
- Right to social security
- Right to privacy
- Right to hold opinions, freedom of information and expression
- Right to participate in cultural life, the benefits of scientific progress
- Right to a fair trial
- Equal recognition and protection under the law

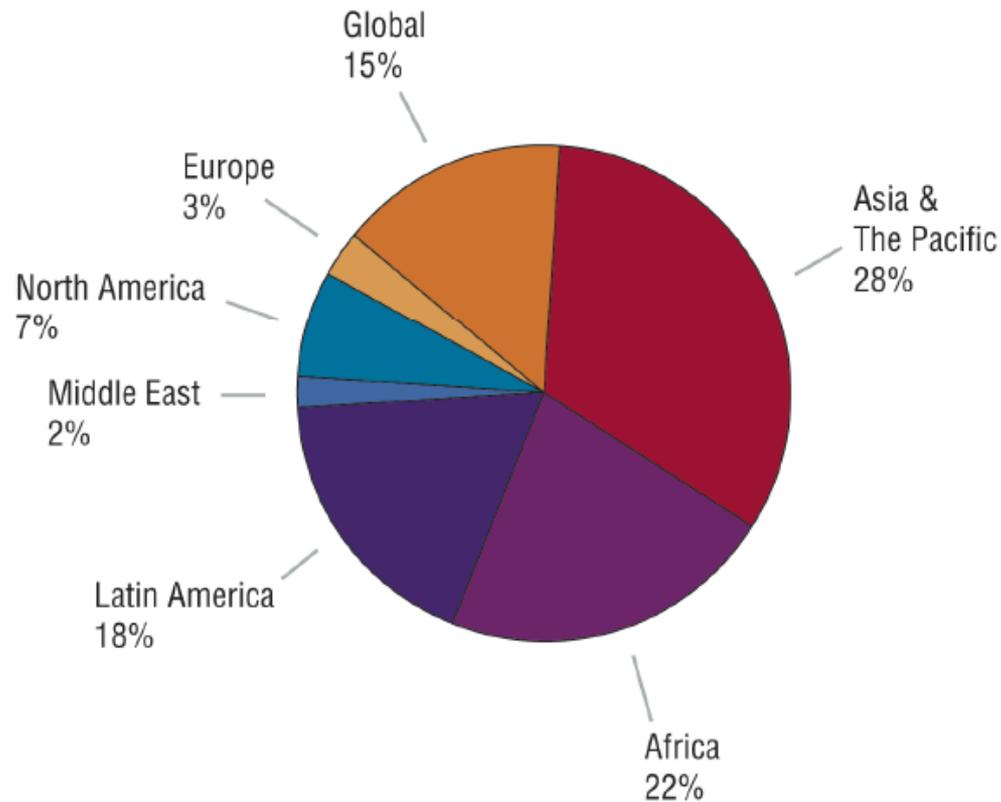
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Allegations by Sector



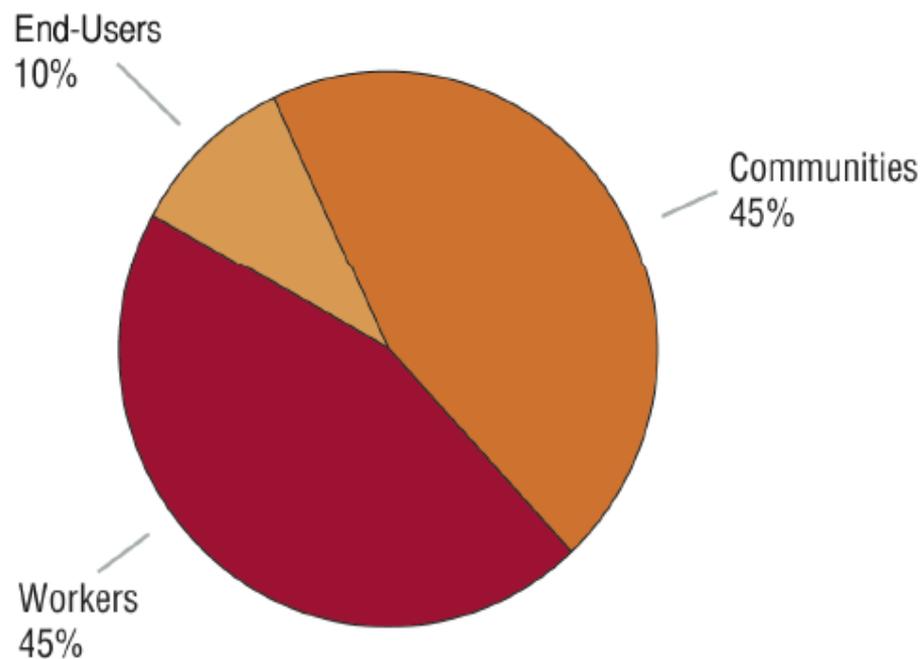
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Regions of Alleged Incidents



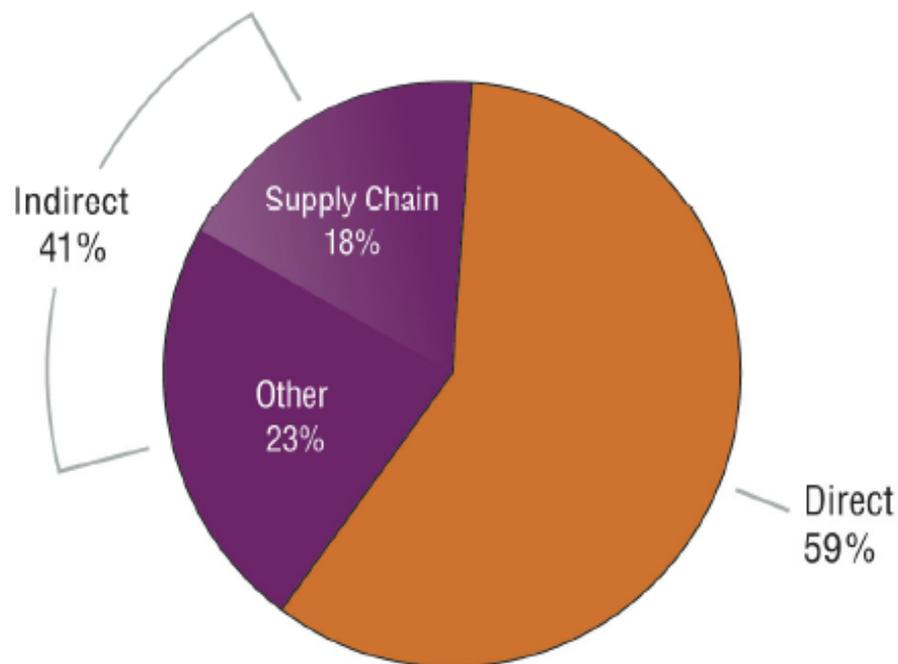
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Persons Affected



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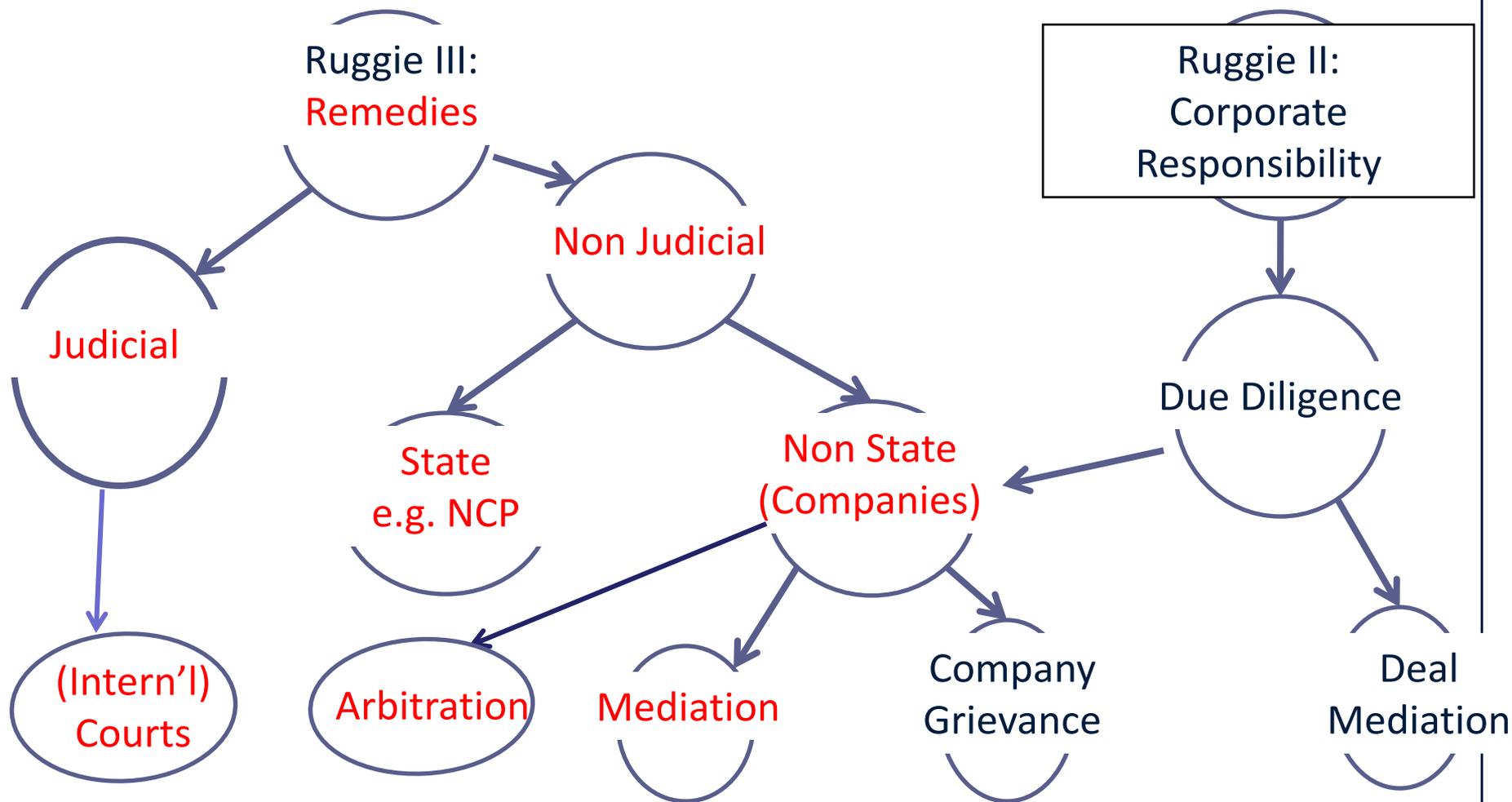
Dominant Form of Company Involvement



Access to Remedy

1. Foundational Principle
2. State-based Judicial Mechanisms
3. State-based Non-judicial Mechanisms
4. Non-state-based Grievance Mechanisms
 1. States: facilitation
 2. Companies: operational-level Grievance Mechanisms (GM's)
 3. MultiStakeholder Initiatives: provide for GMs too
 4. **Effectiveness Criteria** for GMs: Legitimate, Accessible, Predictable, Equitable, Rights-Compatible, Transparent (Based on Dialogue and Engagement, UNGP Pr. 31)

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EU CSR strategy 2001 > 2011, a paradigm shift

- CSR is a **concept**, whereby companies integrate social and environmental concerns in their business and in their interactions with their stakeholders on a **voluntary** basis (EU Commission 2001)
- CSR is the “**responsibility of enterprises for their impacts on society**” (EU Commission 2011)
- No “one size fits all”: for most SME’s CSR remains informal, complying with legislation and collective agreements with social partners
- Beyond that enterprises should have a process in place to **integrate social, environmental, ethical human rights, anti-corruption and consumer concerns** into their business operations and core strategy in close cooperation with their stakeholders, aimed at
 - **Maximising creation of shared value**: create returns on investment for shareholders and ensuring benefits for the company’s other stakeholders (regulation to stimulate positive impacts), and
 - **Identifying, preventing and mitigating possible adverse impacts** on society (regulation to remedy negative impacts)

EU Commission's smart mix (2011)

“The development of CSR should be led by enterprises themselves. Public authorities should play a **supporting role through a smart regulatory mix** of voluntary measures and, **where necessary, complementary legislation**, for example to promote transparency, create market incentives for responsible business conduct and **insure corporate accountability**”

Conflict Management

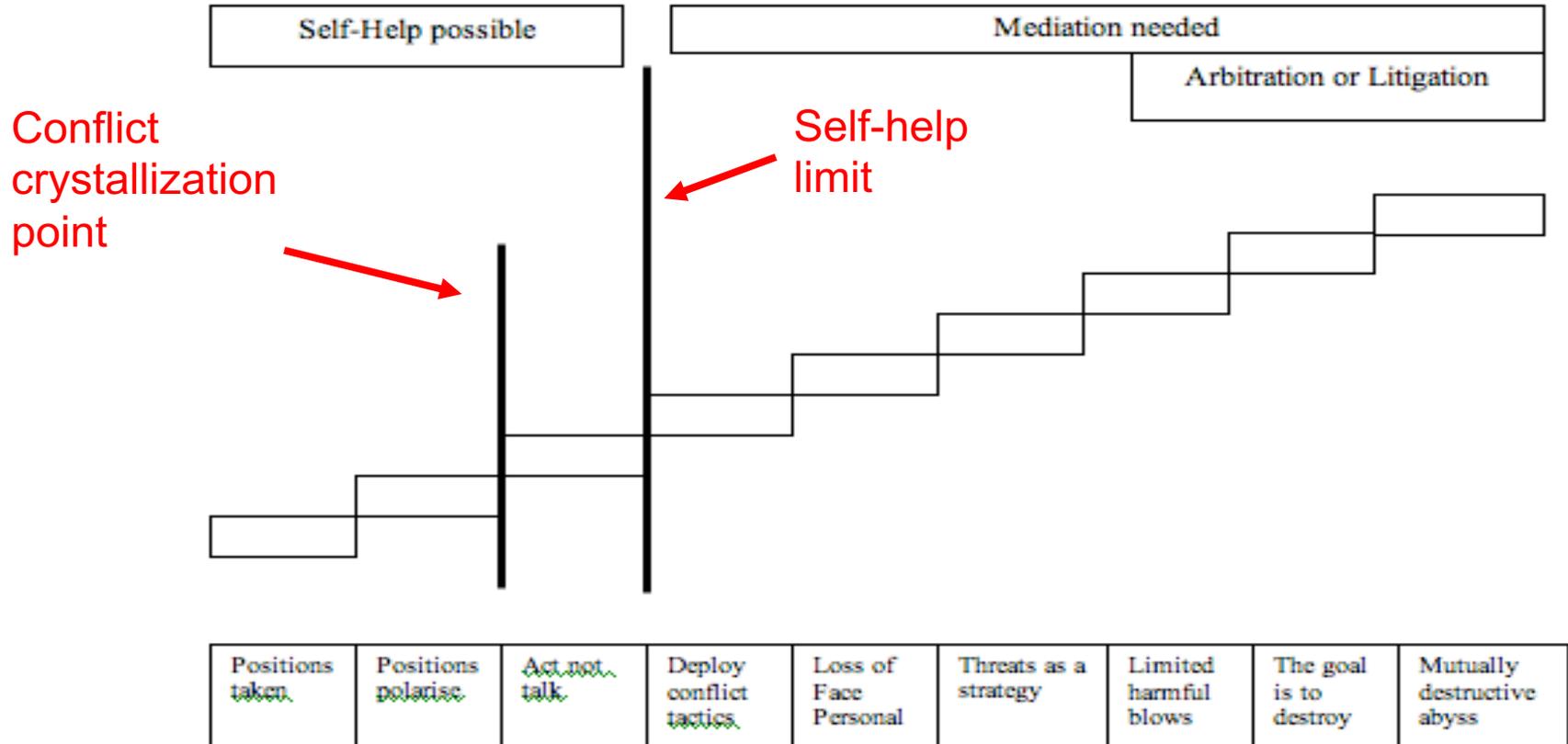
The Pathology of Litigation

Litigation has become an inevitable stage in the life cycle - slightly beyond adolescence but before maturity. It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels. It is exorbitantly expensive, agonizingly slow and exquisitely designed to avoid any resemblance to fairness or justice. Yet, in strange and devious ways, it does settle disputes - to everyone's dissatisfaction.'

J.S. Auerbach, Welcome to litigation, New Republic 1981

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The Nine Levels of Conflict Escalation – Friedrich Glasl



Mediation, arbitration and litigation compared

	Mediation	Arbitration	Court litigation
Contract based	Yes (ad hoc or clause)	yes/no (ISDS)	yes/no
Control over process	parties	parties and tribunal	court
Degree of formality	low	medium	high
Adversarial/ conciliatory	conciliatory	adversarial/ conciliatory	adversarial
Focus (interests or positions)	interests	both	positions
Confidentiality	yes	yes (NB Uncitral)	no
Enforceability	depends	domestic law or NY Convention	(few) bilateral or multilateral treaties

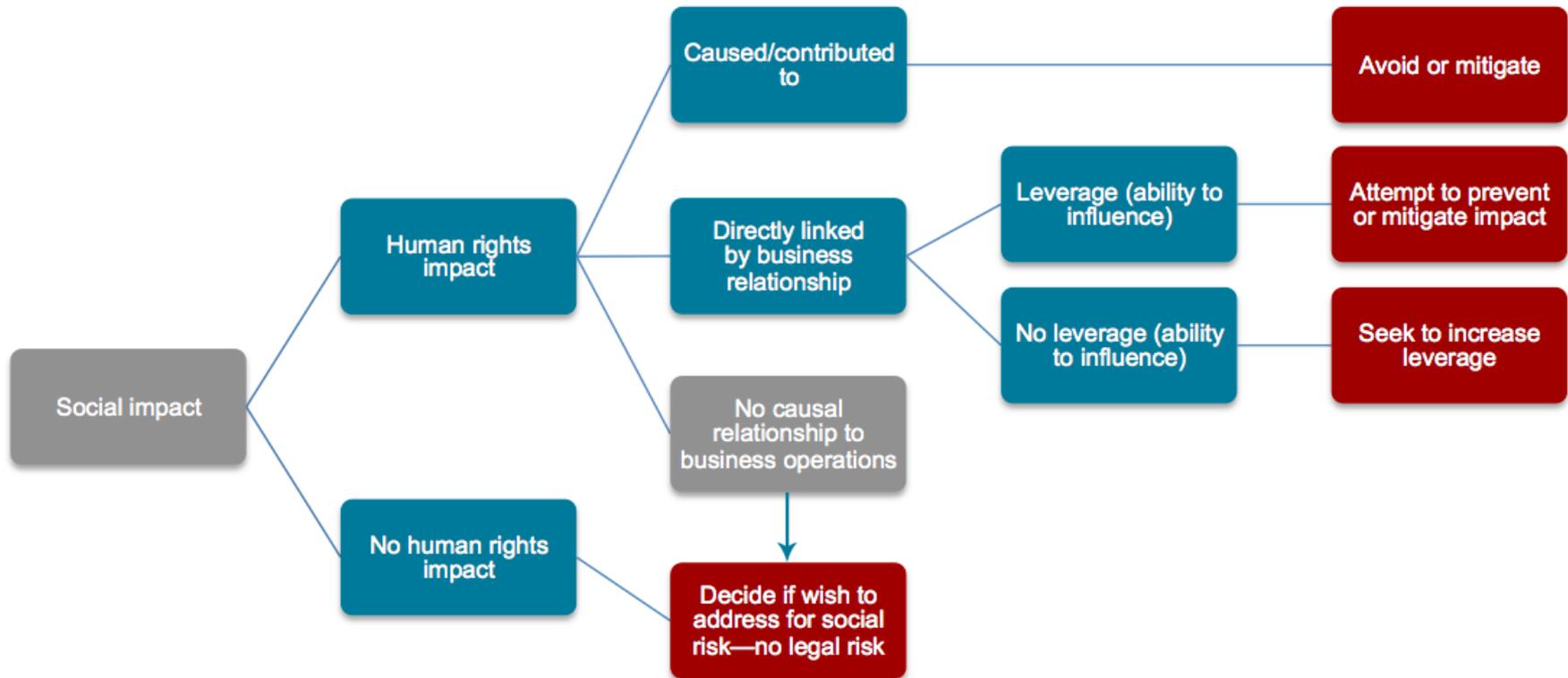
Arbitration in B&HR context

- Scope: direct company-rights holders and supply chain issues
- Substantive rules: International Bill of Rights, regional conventions, national legislation and contractual provisions
- Procedural rules: National law (place of arbitration), Uncitral Arbitration Rules, PCA Rules 2012, Rules of Arbitration Institutes, collective redress-class actions
- **Remedies** (national law): declaratory judgments, preliminary measures, restitution, (punitive) damages, injunctive relief
- Enforcement: New York Convention 1958 (156 states)
 - NB commercial reservation and public policy exception
 - NB Public interests may be involved (academic studies ongoing; Drafting Committee attention)

Direct company- and supply chain based human rights holders issues

- Resolution of direct company – HR-victims issues in ad hoc arbitration (code of conduct “breach” or tort based)
- Supply chain issues, two dimensions:
 - arbitration clause in sourcing agreements to resolve issues between company and supplier
 - third party beneficiary rights to allow HR victims of supplier access to remedy

Human Rights Due Diligence and Supply Chain (Enodo Rights)



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French “FDL” Law – Devoir de Vigilance 2017

- Relevant Parent companies must **identify and prevent adverse human rights and environmental impacts** resulting from **own activities**, activities of **companies they control**, and activities of **subcontractors and suppliers**, with whom they have an established commercial relationship.
- The companies shall assess and address the risks of serious harms to people and the planet under **annual, public vigilance plans**.
- Liability, if companies default on their obligations, including the absence of a plan or faults in implementation.
- Interested parties – including affected people and communities – may require judicial authorities to **order a company to establish, publish and implement a vigilance plan**, or account for its absence.
- In addition, the judge can impose **a fine up to 10 million Euros**.
- Interested parties may also engage the company’s **liability through civil action claiming compensation**, if the violation of the legal obligation has caused damages. In addition to the compensation, the judge can impose a **fine of up to 30 million euros**.

Distinguishing ISDS and B&HR Arbitration

- ISDS is “vertical” process, (company – State, in which company is victim/claimant), treaty/contract based, companies are “rights holders”
- B&HR arbitration is “horizontal” process (HR-holders – companies, in which “HR holders” are victims-claimants), procedurally contract and substantively tort based
- ISDS is confidential (although UNCITRAL Transparency Rules may soften this aspect), while B&HR arbitration in principle should be as transparent as possible
- ISDS has predominant public interest character (chill factor)
- B&HR arbitration has predominant private litigation character

Distinguishing NCP and B&HR arbitration

- NCP is complaints based, B&HRA is consensual process
- NCP scope covers full CSR scope, B&HR is HR focused
- NCP's geographical competency scope is limited to OECD member and adhering countries, B&HRA is "available" in NY Convention states (>155)
- NCP is forward looking (future improvement), B&HRA is backward looking (remediation of harm)
- NCP is soft law based, B&HRA is hard law based
- NCP focuses on mediation, B&HRA focuses on legal process, but may also be preceded by mediation or be transformed into mediation (CEDR process)
- NCP process may turn into "one sided arbitration" (naming and shaming beyond company control), B&HRA remains jointly controlled

A UN B&HR Treaty **and** B&HR Arbitration?

- UN Treaty initiative by Latino States, led by Ecuador (Chevron case?) as reaction to non-binding UNGP's
- Controversy in UN HRC between proponent states (some 70) and "developed" states (remember UN group of 70 in the 70-ies)
- UN HRC Open Working Group to prepare proposal
- Ruggie critical (excuse for proponent states to disregard the UNGP's?)
- Many complexities, eg only MNE's or also national companies
- Which court, substantive and procedural norms?
- Examples of BHR arbitration: Bangladesh Accord and Dutch Multistakeholder Initiative for Textile Industry

Concluding: Why Business & Human Rights Arbitration?

- Accountability gap, no/insufficient national and international legislation
- significant shortening of the time and cost for resolving a dispute, court proceedings often take five to ten years to reach a decision
- No judges chosen by “the luck of the draw” in national courts, but independent and impartial arbitrators experienced in B&HR disputes
- Skilled mediators available, specialized in assisting in the resolution of human rights conflicts at an early stage to avoid escalation in legal disputes and reduce legal costs (**NB ACCESS Facility**)
- Hearings could take place anywhere in the world and even online
- Legal development on B&HR law to be enhanced through creation and publication of a body of reasoned arbitration decisions
- existing mechanisms for enforcement of international arbitral awards , including the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (156 States)
- **Attractive measure for CSR-companies to resolve their B&HR issues**
- Trust fund to support victims



Thank you, questions?

