

# The Hague Rules On Business and Human Rights Arbitration

## INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTES

### ELEMENTS FOR CONSIDERATION IN DRAFT ARBITRAL RULES, MODEL CLAUSES, AND OTHER ASPECTS OF THE ARBITRAL PROCESS

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## INTRODUCTION

### The History of the Project

The UN Guiding Principles on Business and Human Rights (“UNGPs”) stipulate that states have a duty to ensure that effective judicial and non-judicial remedy mechanisms are available against business-related human rights violations. The UNGPs also provide that, where business enterprises identify that they have caused or contributed to adverse impacts on human rights, they should provide for—or cooperate in—their remediation through legitimate processes. Where adjudication is needed, this should be carried out by means of legitimate, independent third party mechanisms. Yet it has proven to be very difficult to enforce business and human rights obligations and commitments via domestic, regional and international dispute resolution mechanisms, particularly in relation to transnational disputes.

Hence, some years ago, a group of international lawyers (the “Working Group”) started working on the possibility to use international arbitration as a method of resolving disputes over obligations and commitments arising out of human rights violations on the part of businesses. In the following, the dynamics arising from business activities affecting human rights will be referred to as business and human rights (“BHR”).<sup>1</sup> The idea underlying the Working Group’s project, discussed in more detail below, is that international arbitration could overcome some of the legal and practical barriers faced by individuals when bringing human rights claims through the existing mechanisms of redress, particularly national courts. In line with the UNGPs’ corporate responsibility to respect human rights, BHR arbitration would provide both businesses and individuals with a consent-based private judicial process in which expert arbitrators chosen by the parties would be able to ascertain the violation of BHR obligations and offer due relief.

Initial consultations suggested that states, the business community, civil society organizations, and local communities dealing with human rights violations on the part of businesses would welcome the proposal to use international arbitration to help filling the gaps in the current system of protection of rights. Consultations also highlighted the need for some amendments and additions to traditional arbitration rules – originally designed for purely commercial disputes – to facilitate the resolution of BHR disputes. These changes would include, for instance, procedures to facilitate the consideration of community perspectives.

Accordingly, in 2017 the Working Group assigned the task of elaborating a set of rules on the topic – the Hague Rules on BHR Arbitration (the “BHR Arbitration Rules” or the “Arbitration Rules”) – to a “Drafting Team”. The Drafting Team’s members, whose names are listed on the cover sheet of this paper, have diverse professional backgrounds (civil society, NGOs, business, judiciary, academic, practicing attorneys), and possess expertise in human rights, arbitration, operation of supply chains, and other topics relevant to the elaboration of draft BHR-

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<sup>1</sup> The Working Group consists of Claes Cronstedt (Sweden), Jan Eijbouts (Netherlands), Steven Ratner (United States), Martijn Scheltema (Netherlands), Robert Thompson (United States), and Katerina Yiannibas (Spain). The original proposal can be found at <<http://www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf>>.

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specific arbitration rules.

The Drafting Team began its work in January 2018, with a meeting at the Center for International Legal Cooperation (CILC) in The Hague.<sup>2</sup> A second meeting was held in The Hague in October 2018. The work of the Drafting Team and related activities of the project are funded by the City of The Hague, and endorsed by the Foreign Ministry of the Netherlands.

## The Challenge: Addressing the Gap in the Methods of Resolving Disputes over BHR Issues

Disputes over practices of businesses affecting human rights can be solved through techniques ranging from negotiation through mediation all the way to litigation in numerous venues. While non-litigious solutions are in principle most desirable and economical, sometimes adjudication is necessary.

However, as mentioned in the introduction, individual and corporate entities attempting to enforce BHR obligations vis-à-vis companies and business partners may face significant barriers when attempting to use national courts, including the possibility that: (i) the national courts of the country where the alleged violations took place may be unable to fairly adjudicate a complex BHR case; (ii) the parent company of an entity responsible for a human rights' breach may be insulated from liability for the actions of its subsidiaries abroad due to jurisdictional obstacles or legal principles; (iii) the costs of litigation may be overwhelming. In the specific context of supply chains, entities may further not be able to use courts to enforce contractual commitments relating to the protection of human rights vis-à-vis their business partners.

The result of this situation may be a gap in the remedies available to individuals and companies adversely affected by corporate activities. Ideally, such a gap should be addressed through improvements in the functioning of national courts and further development of private international law rules applicable to cross-border disputes involving multinational business enterprises. However, until such solutions become available, arbitration may ensure the adjudication of human rights protection commitments among—and vis-à-vis—businesses.

BHR arbitration seems a useful tool for individuals lamenting human rights violations, as well as for companies and states. To all of them, BHR arbitration would offer: (i) a neutral forum for dispute resolution, independent of both the parties and their home states; (ii) a specialized dispute resolution process in which the parties are able to participate in the selection of competent and expert adjudicators for their dispute; (iii) the possibility to obtain binding awards subjected only to limited judicial review, and enforceable across borders; (iv) means of dispute resolution potentially cheaper and quicker than litigation, which are also able to (v) accord parties broad autonomy to agree upon the substantive laws and procedures applicable to their arbitrations. In some cases, arbitration may even be the only route available to those affected by

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<sup>2</sup> The record of the meeting may be found at <<http://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf>>.

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international business operations, by providing them access to a pathway to remedy BHR violations where none might otherwise exist.

With specific regard to businesses, arbitration would assist them in meeting their responsibilities under the UNGPs to both respect human rights (Pillar Two) and provide a remedy to victims (Pillar Three). BHR arbitration could also be relied upon by corporations to enforce contractual human rights commitments vis-à-vis their business partners (e.g. in supply chains and development projects), and so prevent or resolve BHR violations. In all these situations, BHR arbitration could become a one-stop contractually-selected forum for businesses to have their BHR disputes solved in a fair, transparent, and unbiased manner, rather than being drawn into multiple protracted litigations in various national and international fora.

As for states, the encouragement, facilitation or even prescription to use BHR arbitration would also constitute an additional tool for them to fulfil their responsibilities under UNGPs Pillars One and Three.

In short, BHR arbitration would offer an additional means to settle in a definitive way disputes that arise when international business transactions or activities have adverse impacts on human rights. While arbitration has been used for centuries, the categories of disputes it is used to resolve are continually broadening and – at times—have expanded to include human rights. However, to ensure that international arbitration can meet the effectiveness criteria for BHR dispute resolution procedures set out in the UNGPs—including legitimacy, accessibility, predictability and rights-compatibility of the outcomes, as well as equitableness and transparency of the procedures—there is a clear need to develop BHR-specific arbitration rules. That is the task that the Drafting Team has been assigned by the Working Group.

## The Proposed Method: Basic Mechanics of BHR Arbitration

This section provides a brief introduction for members of the Sounding Board of both the considerations surrounding the use of BHR arbitration, and how the necessary mechanism might come about.

### a. Consent to Arbitrate

BHR arbitration is a consent-based process, in which both parties agree that disputes arising between them will be referred to an arbitral tribunal. Parties' consent to arbitrate could be established by: (i) contracts imposing human rights-related obligations on business enterprises (e.g., an employment contract, supply contract, or a service contract with a municipality), or including an arbitration clause broad enough to cover non-contractual human rights claims (e.g., torts or violations of health and safety regulations, discrimination laws or consumer protection laws); (ii) later agreements to submit a dispute to arbitration (a “submission agreement” or “*compromis*”); (iii) multilateral, independent agreements, like the Bangladesh Accord.<sup>3</sup> Under these

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<sup>3</sup> Accord on Fire and Building Safety in Bangladesh of May 15, 2013, as replaced by the 2018 Accord on Fire and Building Safety in Bangladesh. Full text available at < <http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf> >. Proving the effectiveness of the dispute resolution mechanism

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agreements to arbitrate, victims and businesses would be able to start proceedings over the violation of contractual human rights protection clauses.<sup>4</sup> Such instruments could be drafted to also give third party beneficiaries of BHR commitments the right to start an arbitration or to participate in an arbitration initiated by another party to the contract or instrument.<sup>5</sup> This may include giving standing to NGOs, unions, or others to represent the interests of claimants in BHR disputes.

## b. Applicable Law and Procedure

The selection of an arbitral “seat” in a particular jurisdiction usually determines the procedural law of the arbitration and which national courts will be responsible for supervising the arbitration and the validity of resulting arbitral awards.<sup>6</sup>

Arbitral tribunals will generally decide the dispute on the basis of the law selected by the parties (“choice-of-law clauses”) or default rules. The balancing between the general principle of the parties’ freedom to select the substantive law applicable to their dispute and the need for a default rule is discussed further in Element II.<sup>7</sup>

## c. Effect of International Arbitration Agreements and Awards

International awards that meet certain criteria are enforceable under international arbitration conventions (particularly, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the “New York Convention”<sup>8</sup>] which has nearly 160 states parties). International-arbitration produces-binding and final awards subject only to limited grounds for challenge in national courts, and enforceable in multiple jurisdictions. The question of whether international arbitration awards that resolve BHR disputes will be enforceable under international arbitration conventions and national arbitration legislation is discussed in Element X.<sup>9</sup>

Domestic judicial review of international arbitral awards in most countries is narrowly confined to issues of jurisdiction, procedural fairness and public policy, and highly deferential to the arbitrators’ substantive decisions. Certain national legal frameworks prohibit appeals of arbitral awards or provide additional grounds for review of arbitral awards. The Drafting Team has decided not to discuss appeal procedures as a stand-alone principle at this stage.

## Party Autonomy and Rights Compatibility

A key theme of BHR arbitration is the need to both respect the autonomy of parties—a key appeal of arbitration—and ensure a human rights-compatible remedy as demanded under the UNGPs.

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provided therein, the Bangladesh Accord has already given rise to two arbitrations between global brands and trade unions (PCA Case No. 2016-36 and PCA Case No. 2016-37), recently settled.

<sup>4</sup> See Element I (Parties to the Dispute) below.

<sup>5</sup> See Element V (Participation of non-Disputing parties) below.

<sup>6</sup> Under most international arbitration rules hearings do not necessarily take place at the seat of the arbitration, rather they can be held at any place convenient for the parties.

<sup>7</sup> See Element II (Law to be applied to BHR disputes) below.

<sup>8</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series, vol. 330, No. 4739, p. 3, at <[treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en)>.

<sup>9</sup> See Element X (Recognition and Enforcement) below.

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Indeed, under international and national law, parties to an arbitration generally enjoy substantial autonomy to choose the procedures and the law that will govern the arbitration. Party autonomy includes issues such as applicable law, the appointment of arbitrators, and various procedural matters. At the same time, according to UNGP 31, BHR arbitration will have to fulfil various conditions to be effective, including compatibility of its outcomes with international human rights.

The Drafting Team will seek to design BHR Arbitration Rules that reflect and, when needed, balance these appealing remedy concerns. Thus, the rules will need to afford the parties significant flexibility in the design of the arbitral mechanism in order to make it an for different stakeholders. At the same time, both the procedures used by tribunals and the outcomes of BHR arbitration need to be rights-compatible. With that in mind, the discussion of several of the elements of the proposed BHR Arbitration Rules set out below considers whether particular arbitration rules should be drafted to give full autonomy to the parties, create a default position subject to override by one or both of the parties; or set out a rule that is independent of their will. On some instances, the discussion below also raises the question of whether the BHR Arbitration Rules should be complemented with model clauses for arbitration agreements.

## Objectives and Methodology

The Drafting Team has collected the views of its members regarding the need for—and the possible elements of—bespoke BHR arbitration rules in the present paper, divided by topic, called “elements” (the “Elements Paper”). Rather than diving into the technical intricacies of international arbitration, the primary objective of this Elements Paper is to educate, inform and garner input from the potential stakeholders of BHR arbitration in view of the next step of the project of drafting of the BHR Arbitration Rules. For this reason, instead of putting forward recommendations, the Elements Paper discusses the complexity of the issues that will have to be taken into account in the following phase of the drafting of the BHR Arbitration Rules. The direct involvement in the present process of a variety of stakeholders is particularly important, given that BHR disputes cut across a large number of sectors and impinge upon divergent – and even opposing – interests. The Drafting Team believes that it would be premature to take any definitive decisions concerning the structure and content of the Arbitration Rules before carrying out the present consultation procedure.

The Drafting Team acknowledges that arbitration rules can only address procedural matters and leave out important issues of substance relating to BHR arbitration. It appears inevitable that many solutions to the identified issues will be best tackled outside of the Arbitration Rules (e.g. through the drafting of model arbitration clauses, model substantive clauses for contracts, or external mechanisms). Therefore, stakeholders participating in the present consultation are asked to support the Drafting Team also by distinguishing procedural and substantive issues arising out BHR arbitration, in addition to flagging any issues or considerations that have been missed.

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## a. Consultation Procedure

The Elements Paper is structured as a compilation of issues for discussion accompanied, where relevant, by a set of questions. Please consult [this link](#) to be redirected to an online platform where contributors are provided a space to answer the questions posed in the Elements Paper. Contributors may answer some or all the questions posed. Individual contributions will not be made public. The Drafting Team will instead publish an analytical document providing an overview of the results of the consultation. The consultation procedure will begin on 23 November 2018 and will end on 31 January 2019.

## Element I: Parties to the Dispute

The proposed BHR Arbitration Rules aim at regulating consent-based arbitral proceedings over human rights breaches on the part of businesses between three categories of litigants:<sup>10</sup>

- ▲ Victims and corporations, based on the latter's alleged human rights violations.
- ▲ A corporation and one of its business partners, arising from the latter's breaches of its contractual obligations to respect human rights (eg. suppliers in a supply chain).
- ▲ Victims of human rights violations and a corporation, where victims may rely on an intra-businesses arbitration clause granting them the third-party beneficiary right to autonomously litigate against one of the stipulating business parties.

In each of the above situations, the question of consent to arbitration must be considered more closely:

- ▲ **Proceedings between Victims and Corporations:** The parties to this first group of disputes will typically be an individual victim or a class of multiple victims,<sup>11</sup> on the one hand, and an individual company or a group of companies, on the other. In a dispute of this kind, there is normally no pre-existing contractual relationship or arbitration agreement between the parties. Therefore, in most cases victims and corporations will need an ad hoc agreement to submit their dispute to arbitration.
- ▲ **Proceedings between Business Partners:** This second group of disputes regards arbitration clauses included in intra-businesses contracts providing for BHR arbitration in case of violation of human rights commitments on the part of one of the business partners. For instance, this situation may occur in a supply chain agreement between a company and its manufacturer who has allegedly violated human rights obligations to its employees or other third parties in breach of the supply agreement. Other situations are also foreseeable, such as an arbitration between a company and its intermediary. In this case, the consent to arbitration will normally be provided in the contracts concluded between business partners.

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<sup>10</sup> This section only deals with the primary parties to the dispute. The possibility that other parties interested in the disputes (, e.g. states or NGOs) may be granted certain rights of participation in the proceeding is dealt with in Element V below.

<sup>11</sup> BHR disputes may comprise multiple victims. It seems thus necessary to consider the possibility of multiple claimants, in the form of collective redress or class actions. In principle, collective redress is foreseen in arbitral cases, however, in order to make it applicable to BHR disputes it may be advisable to expressly foresee this option in the BHR Arbitration Rules.



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- ▲ **Proceedings between Third Party Beneficiaries and Corporations:** In this third scenario, victims of human rights violations may benefit, as third-party beneficiaries, of the right to recourse to arbitration for human rights violations arising out of contractual clauses among business entities (for instance in a supply chain). In this case, the consent will be provided in the wording of the contractual clause included in the agreement relied upon.

## Element II: Law to be applied

Arbitration proceedings may be governed by different sets of rules simultaneously: the rules governing the arbitration procedure, the law of the seat, the provisions of the arbitration agreement or the substantive contract, and the law of the state(s) where the award will be enforced. All these rules have an impact on the human rights' compatibility of the arbitration.

Some norms that will apply are dependent on the legal frameworks of the state of the seat of the arbitration and the state of enforcement. The mandatory norms of the states involved (forum and place of enforcement) will always be applicable and, where human rights appertain to the state's public policy, these rules will impact on the validity and enforceability of a BHR award.

The parties to an arbitration may also determine the substantive law applicable to their dispute by means of choice of law clause(s) in the instrument of consent to the arbitration.

Given the plurality of the legal sources of BHR arbitration, and the need to ensure that the applicable law is tailored to the specificities of BHR disputes and ensures consistency and predictability of the outcomes of the proceedings, the BHR Arbitration Rules should include provisions guiding the arbitral tribunal in the identification of the applicable substantive law.<sup>12</sup> On the other hand, it does not seem advisable to design substantive standards for disputes arising out of human rights' violations on the part of businesses: like the rules governing arbitration proceedings generally, substantive standards can equally stem from a variety of legal instruments, including domestic law, contract, (human rights) treaties, and soft law standards (e.g. UNGPs, OECD Guidelines for Multinational Enterprises).

The rules on applicable law will need to be flexible enough to be able to deal with the patchwork of norms potentially stemming from different legal sources. Flexibility is also necessary to regulate both situations where the consent to arbitration stems directly from an agreement, and situations of "arbitration without privity", where such consent instead arises out of the law, a treaty or a contract creating rights for third parties. This flexibility needs however to be combined with certainty, so that it remains foreseeable to all parties to a dispute which norms will be applicable to it.

To this aim, it seems advisable that the identification of the applicable rules follows a three-steps approach:

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<sup>12</sup> The following instruments were used as a source of inspiration for BHR arbitration: UNCITRAL Arbitration Rules 2010 (as adopted by the UN General Assembly on 16 December 2013, Res 68/109 (2013)), UNCITRAL Arbitration Rules 1976, Permanent Court of Arbitration Rules 2012, PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources 2001, ICSID Convention and Arbitration Rules, last amended in 2006, see footnote 30.

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- ▲ The parties can agree on “the law or rules of law” to be applied to their dispute. The phrasing “the law or rules of law” would grant maximal autonomy and flexibility to the parties, allowing recourse to provisions of different nature (hard law/soft law; public/private) and origin (international/national).
- ▲ In case the parties did not designate the applicable law, a default rule ought to be provided. The default option would include only hard law instruments that are both in force and applicable to the relationship between the disputing parties. Indeed, to mention soft law instruments that have not yet reached the status of customary international law – or instruments designed to apply in the relation between, for instance, states and individuals – risks undermining the legitimacy of the BHR Arbitration Rules. Within this framework, the arbitral tribunal would have broad discretion to determine the applicable legal rules. It remains debatable whether specific human rights instruments should be included in the applicable law provision of the BHR Arbitration Rules: to date, treaties have yet to deal comprehensively with BHR issues, though inclusion of language on overall human rights compatibility of tribunal decisions is being considered. In any case, if a comprehensive human rights treaty with binding effect were to be adopted in the future, the flexibility of the applicable law clauses in the BHR Arbitration Rules will allow its automatic incorporation in BHR arbitration.
- ▲ Upon express agreement of the parties, a BHR tribunal may decide *ex aequo et bono*.

### Questions

1. In order to ensure that an award that fails to comply with human rights can be set aside, should only jurisdictions where human rights are considered to be part of the public policy be eligible as seat for a BHR arbitration?
2. Should specific human rights instruments be mentioned in the applicable law provision of the BHR Arbitration Rules as, to date, international treaties have yet to deal comprehensively with BHR disputes?
3. Should an annex/commentary to the BHR Arbitration Rules contain some model choice of law clauses?
4. Should the applicable law clause included in the instrument of consent provide that the Tribunal “shall take into account any usage of trade applicable to the transaction” as under UNCITRAL Rules article 35(3)? (An example could be a human rights provision included in a code of conduct of the kind used in the supply chain of a particular sector).

### Element III: Election Criteria and Process of Nomination and Appointment of Arbitrators

The election criteria and the process of nomination and appointment of arbitrators raise many important issues for the BHR arbitration regime. A system formed of independent experts

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possessing recognizable expertise in human rights and business law, would be – and would appear to be – impartial vis-à-vis the disputing parties and other stakeholders – from civil society organizations to shareholders of corporations – ultimately conferring legitimacy onto the entire BHR regime. An effective and legitimate nomination and appointment system may also enhance the authority of BHR awards in the eyes of domestic courts, which remain ultimately in charge of the recognition and enforcement of the awards of arbitral tribunals. A perceived lack of legitimacy could instead be fatal to BHR arbitration.

The issues revolving around the appointment of arbitrators can be tackled through three main tools: the BHR Arbitration Rules, a code of conduct, and professional guidelines (or other similar instruments). Rules are binding on the parties and the arbitrators, but difficult to amend and update; whereas guidelines are only binding in their aims, but can be more easily updated from time to time. Codes of conducts stand in between rules and guidelines, as they are binding, but can normally be amended more easily than rules. Given the complexity of the issues and the relevant practice in the field, the provisions on appointment and qualifications of arbitrators would perhaps be more suitably included in the BHR Arbitration Rules.

In terms of the content of the norms on appointment of arbitrators, a balanced system would require allowing the parties to participate in the formation of the tribunal. This may include allowing party appointments, appointments by agreement of the parties, and participation of the parties in the selection of the missing arbitrators. It might also call for limited precision (i.e., more general hortatory statements) of the requirements that address expertise, independence, and impartiality with limited *ex ante* ‘filtering’ of these requirements, but with a strong(er) *ex post* ‘accountability’ system.

Rules on the number and method of appointment of arbitrators; their expertise; and the process and authority to resolve challenges, are also arguably best included in the BHR Arbitration Rules, possibly in connection to a code of conduct for arbitrators and best practices for the parties and their lawyers. Specific provisions included in the code and/or the guidelines could refer to, among other things, limitations for arbitrators in terms of the number of cases they are allowed to undertake per time, clear guidance on conflicts of interest, and rules on the roles of arbitration professionals (to avoid, for instance, double-hatting).

### Questions

5. What issues emerging from the nomination and appointment of arbitrators should be included in the BHR Arbitration Rules? What issues should be left to a code of conduct and/or to flexible guidelines incorporated by reference?
6. What should be the default number of arbitrators?
7. Should there be a default principle in favour of party-autonomy for the appointment and selection of arbitrators?
8. Who should be the appointing authority?

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9. What specific qualifications should be required to serve as BHR arbitrator, and how should these qualifications be ensured?
10. To ensure the appropriate expertise, should appointments be restricted to lists of duly qualified arbitrators?
11. Who should bear the authority to resolve challenges relating to the qualifications and ethical behaviour of arbitrators? Should the BHR Arbitration Rules allocate this role to an independent institution, and, if so, to which one?

## Element IV: Transparency

- ▲ **Transparency as default and waivers:** Transparency is of major importance in BHR arbitration. Thus, a preliminary reflection is whether transparency should be a guiding principle and a default rule of BHR arbitration proceedings, or whether it should be left to party autonomy (as it is the case in the ICSID Rules). If transparency is the default rule, the question arises of whether it could be waived by one party alone, or whether the consent of both parties should be required to hold confidential proceedings. That choice could also be made dependent on the specific issue or phase of the arbitration proceeding (e.g. confidentiality regarding witnesses' protection would need the consent of only one party whereas the confidentiality of the award would need consent of both parties).
- ▲ **Drafting technique:** There are two main options concerning the drafting technique, i.e., how to integrate transparency provisions in the rules: (i) including them in the relevant provisions of the BHR Arbitration Rules e.g. in the Rules on submissions, hearings and awards; or (ii) including them as a bundle in a specific section of the Arbitration Rules covering all stages of the proceedings (like the UNCITRAL Rules on Transparency).<sup>13</sup>
- ▲ **Minimum transparency requirements:** Options are also manifold concerning the minimum transparency requirements in BHR arbitration. The BHR Arbitration Rules could establish a mandatory minimum degree of transparency or leave that decision to the parties. Minimum requirements could include, for instance, the notice of arbitration, the identification of the parties, the submissions and pleadings, the hearings and the award. The BHR Arbitration Rules may also rely as a minimum on the ICSID Rules on transparency, which provide that, in case of non-publication of an award, ICSID is to include in its publications excerpts of the legal reasoning of the Tribunal.<sup>14</sup>
- ▲ **Exceptions:** Exceptions could be entirely at the discretion of the parties or confined to business and state secrets, and victims/lawyers/witnesses' protection. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>15</sup> could be considered

<sup>13</sup> The UNCITRAL Rules on Transparency contain detailed provisions on publication of case-related information, publication of documents, submissions by a third person, submissions by a non-disputing party to the treaty, hearings, and exceptions to transparency. See, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014, at <<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>>.

<sup>14</sup> ICSID Arbitration Rule 48(4), see footnote 30.

<sup>15</sup> UNCITRAL Rules on Transparency, see footnote 13.

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sufficient for BHR arbitration. Alternatively, additional guidance could be also found in the rules of procedure of the International Criminal Court,<sup>16</sup> or in the transparency rules applicable to other human rights bodies dealing specifically with human rights violations, which are more detailed in terms of victims and witness protection. Where provided, exceptions may also vary in respect to their form: the choice in that case would be between the mere redaction of the identities of the parties and/or witnesses, and allowing more extensive omissions.

- ▲ **Repository:** The BHR Arbitration Rules should determine the repository and which information can be qualified as “privileged”.

## Questions

12. Should transparency be the default position in the BHR Arbitration Rules?
13. Should one or both parties be able to waive transparency provisions?
14. Should there be minimum transparency requirements that parties cannot decide to waive? If so, what should they cover?
15. Are the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) sufficient for BHR arbitration or should other rules, such as the Rules of the International Criminal Court or other human rights bodies, also be resorted to procedure? If the UNCITRAL Transparency Rules are considered insufficient, what would you add or change?
16. What should be the role of the repository concerning privileged information and costs?
17. There are two main options concerning the drafting technique, i.e., how to integrate transparency provisions in the rules: (i) including them in the relevant provisions of the Arbitration Rules e.g. in the Rules on submissions, hearings and awards; (ii) including them as a bundle in a specific section of the Arbitration Rules covering all stages of the proceedings (like the UNCITRAL Rules on Transparency).<sup>17</sup> What is your opinion on the best option?

## Element V: Participation of Non-Disputing Parties

BHR arbitration adds complexity to the work of arbitral tribunals, called to adjudicate both the public and private law issues inevitably involved in these disputes. Stakeholders in BHR disputes include states; intergovernmental organizations, agencies, and specialized bodies tasked to monitor implementation of human rights treaties and instruments, interested NGOs and civil society groups, and independent technical experts (e.g. environmental, labour experts, cultural heritage experts). Their knowledge, experience or expertise could contribute to the tribunal's tasks of fact-finding and legal interpretation. In most cases, these stakeholders will not be actual parties to the arbitration, nor will they be intervenors to the dispute. However, consideration

<sup>16</sup> International Criminal Court, Rules of Procedure and Evidence, at <<https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>>.

<sup>17</sup> The UNCITRAL Rules on Transparency contain detailed provisions on publication of case-related information, publication of documents, submissions by a third person, submissions by a non-disputing party to the treaty, hearings, and exceptions to transparency, see footnote 13.

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needs to be given to whether these stakeholders should participate as non-disputing parties in a way that contributes to the just, efficacious, and expeditious resolution of BHR disputes.

The parties to the arbitration may agree to confer on the BHR tribunal the power to allow participation of non-disputing parties. It is worth considering whether such participation should also be addressed in the BHR Arbitration Rules. The BHR Arbitration Rules could, for instance, explicitly allow the tribunal to use its discretion to decide on the participation of non-disputing parties, provided that these are treated equally. Alternatively, the power to allow participation of non-disputing parties may be limited by agreement of the parties. Either way, the tribunal could provide differentiated means of participation of non-disputing parties. These could include the possibility to contribute information in written or oral proceedings, to participate as observers, to monitor the proceedings, and to access documents.

Participation of states as non-disputing parties deserves special attention. A vast array of states may have interest in participating in BHR disputes: (i) the state(s) where the relevant conduct took place, (ii) the state of nationality of a business; (iii) the state of nationality of the victim; (iv) the state as a contractual party of a business; (v) a state that one party to the dispute alleges has played a role in the violations; (vi) states party to the human rights treaties relevant to the BHR dispute; (vii) states where the enforcement of a BHR award might be sought; and (viii) states parties to an international investment agreement relevant to the dispute (some states will play several of these roles). Each of them may have perspectives or information that would benefit the BHR tribunal. These may include the relevant domestic laws and regulations; the international human rights obligations of the states involved, and their capacities to respect, protect, and fulfil human rights and design remedies for violations. It is thus worth considering whether states should be given a special right to make *amicus curiae* submissions to a BHR tribunal or engage in the dispute in another capacity.

### Questions

18. Should the parties to a dispute be able to influence the BHR tribunal's discretion to allow participation of non-disputing parties?
19. Should the BHR Arbitration Rules specify the criteria that the tribunal should apply in allowing participation of non-disputing parties in the arbitral proceeding?
20. Should the BHR Arbitration Rules specify the forms of permissible participation by non-disputing parties in BHR arbitration?
21. Should states be granted the unconditional right to file *amicus* briefs in a BHR dispute? Should they be granted any other participatory rights?

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## Element VI: Evidence

Pursuant to article 27(1) of the 2010 UNCITRAL Arbitration Rules<sup>18</sup> the burden of proof rests in principle on the party which relies upon it to support its claim or defence. Article 19(2) of the UNCITRAL Model Law,<sup>19</sup> attributes to the tribunal the power to determine rules on evidence if the parties have not agreed on applicable (further) rules of evidence. The issue that may arise with BHR arbitration is that affected individuals or local communities may not be willing to engage in it if they feel that their access to relevant evidence (which, for instance, may be in the realm of the company involved in the human rights violation) is insufficient. More generally, BHR arbitration may raise specific issues in connection with the taking of evidence due to the inequality of powers between the companies and the individuals or local communities involved.

The question is thus whether the BHR Arbitration Rules need to include rules on evidence fitting the subject-matter of these proceedings. For example, adaptations may be necessary to make use of witness evidence in BHR arbitration because of the specific position of witnesses in BHR cases. Elaborating on the taking of evidence in order to make the collection and production of evidence more transparent and predictable would have the merit to enhance trust in the mechanism (cf. UNGP 31).

The model adopted in the binding dispute resolution mechanism of the Dutch Agreement on Sustainable Garment and Textile<sup>20</sup> is an example of special rules on taking of evidence tailored around BHR disputes. Articles 23 and 24 of its procedural rules entail provisions to hear witnesses in such a way that they are protected from retaliation, and also envisage the use of an independent facilitator. Under these provisions the arbitral tribunal may formulate questions to the witnesses on which the parties may comment, but without being allowed to attend the hearing or conduct cross-examination. The witnesses' examination may also be conducted with the assistance of a facilitator, a figure that generates trust on the part of witnesses and is capable to relate to them in a culturally appropriate manner. The mentioned Dutch model establishes equality between the parties by allowing them a right to comment on the witness statements and request the hearing of other witnesses after this procedure.

## Questions

22. Where parties have not agreed on specific rules on the taking of evidence, would the discretion afforded to arbitrators under the UNCITRAL Rules suffice as a default framework for the BHR Arbitration Rules?
23. Should the BHR Arbitration Rules provide additional guidance on the taking of evidence by incorporating more specific rules, such as articles 3 and 4 of the IBA Rules on the

<sup>18</sup> UNCITRAL Arbitration Rules as revised in 2010, United Nations Commission on International Trade Law, 2011, at <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>.

<sup>19</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments, as adopted in 2006, at <[https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>.

<sup>20</sup> Agreement on Sustainable Garment and Textile, Sociaal-Economische Raad, 2016, at <<https://www.ser.nl/~media/files/internet/talen/engels/2016/agreement-sustainable-garment-textile.ashx>>.

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- Taking of Evidence in International Arbitration or, articles 3 to 6 of the Prague Rules on the Taking of Evidence in International Arbitration?<sup>21</sup>
24. Should the BHR Arbitration Rules provide for specific human rights-oriented rules on the taking of evidence, such as those included under the Dutch Agreement on Sustainable Garment and Textile?
  25. Should parties to BHR arbitration have the option to produce evidence in the form of information gathered outside judicial procedures, e.g. through third parties or institutions like the Secretariat of the Dutch Agreement on Sustainable Garment and Textile or the Compliance Advisor Ombudsman of the World Bank?

## Element VII: Protection of Witnesses, Human Rights Defenders, and Counsel

BHR arbitration is different from commercial arbitration due to the inequality that most times will exist between the parties, for instance, in terms of access to information, funding, expertise and skilled counsel. This inequality may be exacerbated by the vulnerable position of witnesses on behalf of the victims of human rights violations and of those speaking up for victims. This may even be true for the victims' counsel. Oftentimes witnesses, human rights defenders, or counsel face reprisal and retaliations from either governments or the litigating businesses.<sup>22</sup> While it is the primary duty of states to protect witnesses or human rights defenders, in practice states may be either incapable or reluctant to provide such protection.

The issue may be partly addressed by transparency. Public knowledge of the identity of the witnesses, human rights defenders, or counsel involved in BHR arbitrations may, to a certain extent, protect them from retaliation. However, in some cases that same transparency can put them at risk: thus additional protection may be required.

Another form of witness protection regards the modalities of their interrogation: interrogations conducted geographically far from the witnesses' place of residency, according to "Western style" methods (especially through cross-examination), and in a culturally inappropriate manner, may intimidate witnesses and make them reluctant to testify.<sup>23</sup>

The question is thus what powers BHR tribunals should have with regards to witness protection. For instance, in terms of interrogation of witnesses, the BHR Arbitration Rules may provide for the possibility of interrogation on the ground, though neutral facilitators. In particular circumstances, testimonies may even be anonymized. In terms of witnesses' protection from reprisals, a possible remedy would be that of reversal of the burden of proof in case of manifest intimidation of witnesses, human rights defenders and counsel.

<sup>21</sup> Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), currently under discussion, see draft of September 2018, at <<http://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf>>.

<sup>22</sup> See, for example, Acts of intimidation and reprisal for cooperation with the United Nations in the field of human rights, Office for the High Commissioner of Human Rights at <<https://www.ohchr.org/EN/Issues/Reprisals/Pages/ReprisalsIndex.aspx>>. See also in relation to the protection of whistleblowers: Whistleblower Protections: A Guide, IBA Whistleblower Protections Project, at <<https://www.ibanet.org/Conferences/whistleblowing.aspx>>.

<sup>23</sup> See also Element IV on Evidence above.



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## Questions

26. In case rules on protection of witnesses and human rights defenders were to be included in the BHR Arbitration Rules, would rules on transparency be the only tool to contribute to such protection?
27. In case of a negative answer to this latter question, what measures, beyond rules on transparency, should be considered by the tribunal and should they be included in the BHR Arbitration Rules? We think, for example, of anonymous interrogation of victims by a neutral facilitator; or reversal of the burden of proof if manifest intimidation of witnesses, human rights defenders or counsel occurs. In this latter case, should the reversal of the burden of proof depend on the viability of allegations against the company party to the arbitration involved in the intimidation or having incentivized it?
28. Should recourse to – and/or continuation of – BHR arbitration be dependent on the sufficient protection of witnesses, human rights defenders or counsel?

## Element VIII: Time-Sensitive Situations

The regime of interim measures in BHR arbitration may require adjustments to respond appropriately to time-sensitive situations. Given the fundamental character of human rights and the potential for irreparable damage to victims of BHR violations, the threshold for the granting of provisional relief in BHR cases might be made more flexible, such as through recourse to the precautionary principle in cases of high uncertainty.<sup>24</sup> BHR arbitration may also require greater flexibility in respect of the form of such measures, as well as an “emergency arbitrator” mechanism to grant protection in urgent situations even before an arbitral tribunal has been able to be constituted.<sup>25</sup> The arbitral tribunal might additionally be expressly empowered to order penalties for non-compliance with its interim measures, in order to give them more teeth.

On the other hand, it may be argued that “irreparable harm” may already be construed broadly enough in BHR scenarios so as not to require different standards. Moreover, deviating from well-established standards may render them ambiguous or subjective and lead to arbitrariness in detriment of both businesses and victims. It may also carry adverse consequences for the party seeking the interim measures, who may be held liable for the costs of such measures if they are ultimately proven unjustified.

## Questions

29. Should the threshold for interim measures in BHR arbitration be modified, whether by reference to the “precautionary principle” or otherwise?

<sup>24</sup> See, for example, Article 26 of the PCA Environmental Rules, 2001, at <[https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and\\_or-Natural-Resources.pdf](https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf)> (“the arbitral tribunal may [...] take any interim measures [...] it deems necessary to preserve the rights of any party or to prevent serious harm to the environment falling within the subject-matter of the dispute.”).

<sup>25</sup> See, for example, Article 29 of the ICC Arbitration Rules, 2017, at <<https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf>>. Similar mechanisms are also included in the rules of SCC, ICDR, SIAC, HKIAC, and various other arbitral institutions.

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30. Should the BHR Arbitration Rules be made broad and flexible in respect of the potential form of interim measures, or should they be made more specific in order to provide concrete guidance as to appropriate measures for given situations?
31. Should an “emergency arbitrator” mechanism be included in the BHR Arbitration Rules? If so, should it be structured as opt-in or opt-out mechanism? How should the costs of such a mechanism be covered, if not by the applicant party?
32. Should the BHR Arbitration Rules include an explicit power to order penalties for non-compliance with its interim measures orders, or should this be left to otherwise applicable law?
33. Should the BHR Arbitration Rules modify the rules on the provision of security in connection with a request for interim measures of protection or limit the potential liability of victims in cases where the arbitral tribunal later determines that the provisional measure should not have been granted? Will doing so potentially discourage arbitrators from ordering interim measures where there is a significant cost associated with the measures?

## Element IX: Types of Relief

It has been noted that “[t]he right to an effective remedy for harm is a core tenet of international human rights law.”<sup>26</sup> The effective reparation of business-related human rights violations may therefore need a much broader scope of remedies than merely an award of damages, especially with regard to ensuring non-repetition.

Even though arbitral tribunals’ powers to grant non-monetary relief are clear under both the UNCITRAL Rules and most potentially applicable legal frameworks, an explicit stipulation in this regard might nonetheless serve to reassure arbitrators about their powers and the propriety of ordering certain remedies. On the other hand, such a redundant stipulation may be liable to cause unintended confusion if not carefully drafted.

Another question that may merit consideration in the context of BHR disputes is whether arbitral tribunals should be authorized to use economic sanctions or other measures in order to induce a party to comply with non-monetary relief granted in the award (i.e. economic sanctions which would be stipulated in the award for the event that a party fails to comply with the tribunal’s orders). There may be different positions as to whether this should be included in the BHR Arbitration Rules. Permitting arbitral penalties or other measures to sanction non-compliance would reinforce the effectiveness of the arbitral process in relation to non-monetary relief, which may be of crucial importance in BHR disputes. An explicit conferral of such powers may be enabling under certain arbitration laws and may make arbitrators more disposed to invoking them even where such powers are clear under applicable law. On the other hand, such measures may not be permitted or enforceable in certain jurisdictions. The validity and

<sup>26</sup> Report of the United Nations High Commissioner for Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse, UN Doc. A/HRC/32/19, 10 May 2016, para. 6, at <[https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A\\_HRC\\_32\\_19\\_AEV.pdf](https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf)>.

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enforceability of such sanctions would fall to be determined by national courts at the time of enforcement, as would their concrete application in the case at hand (e.g. in the same way as post-award interest is applied to monetary awards).

## Questions

34. Should the BHR Arbitration Rules explicitly articulate the scope of remedies that arbitrators may be able to provide in BHR disputes?
35. Are there any particular issues regarding the form and types of relief that should be taken into account in BHR disputes and be subject to specific rules within the BHR Arbitration Rules, or should such issues be left to the tribunals' discretion to tailor an appropriate remedy?
36. Should the BHR Arbitration Rules establish the competence for an arbitral tribunal to include in their award potential economic sanctions or other penalties to be applied in the event that a party fails to comply with non-monetary relief that is granted in the arbitral award?

## Element X: Recognition and Enforcement

The Drafting Team seeks to address potential challenges to the use of international arbitration to resolve international disputes involving BHR commitments and obligations. The Drafting Team would be interested to hear from members of the Sounding Board, particularly from civil law jurisdictions, about the law and practice in their jurisdictions in relation to the following issues.

### ▲ Whether BHR disputes would meet the “commercial relationship” requirements.

Nearly 50 states have made declarations under Article 1(3) of the New York Convention that it will apply “only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial”. Similarly, many national arbitration statutes are limited to “commercial” matters or “transactions involving commerce.”

Whether courts would consider a BHR dispute to be “commercial” will vary depending on the nature of the relationship between the parties to the dispute. (i) In relation to commercial contracts, a BHR dispute might arise under a clause that requires respect for (or the fulfilment of) certain rights of third-party beneficiaries in a supply chain contract or in a loan agreement. (ii) In relation to employment contracts, a BHR dispute might arise concerning to contractual or non-contractual human rights claims (e.g. violations of health and safety regulations, discrimination laws, breach of privacy, forced labour etc.). (iii) In relation to non-contractual claims, a BHR dispute might arise between a company and alleged victims of human rights violations in the absence of any contract requiring the company to respect human rights – i.e., a dispute involving only tort law claims. Arbitration might be used to resolve such a dispute either if the company and the alleged victims entered into a *compromis* agreement to submit the tort law claims to arbitration after they arose; or if the company had

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made a standing offer to arbitrate tort law claims (e.g., in an agreement with the host state), before the claims arose.

- ▲ **Concerns about whether BHR disputes are “arbitrable.”** The New York Convention and most national arbitration statutes exclude the obligation to enforce the awards when these are rendered in disputes that are not “capable of settlement by arbitration.” Some domestic courts, usually in civil law jurisdictions, determine whether a certain dispute or claim is “arbitrable” by reference to a “general normative standard” of arbitrability set out by statute. The courts in other jurisdictions, usually common law jurisdiction, develop case law regarding certain types of disputes or claims.
- ▲ **Concerns about the “rights-compatibility” of BHR arbitration.** Some may be concerned that using international arbitration to resolve international disputes involving BHR commitments and obligations has the potential to result in awards that contradict internationally-recognised human rights norms (i.e., awards that are not “rights-compatible”, as expressed in UNGP 31). The “public policy” exception to the presumptive validity of parties’ choice of law agreements and to the enforceability of arbitral awards, as well as the model choice of law clauses, might however allay these concerns.

## Questions

37. Would BHR disputes meet the “commercial relationship” requirements in your jurisdiction if they arose under commercial contracts or employment contracts, or were non-contractual claims in the absence of a contract?
38. Would BHR disputes be “arbitrable” in your jurisdiction?
39. Would the public policy exception apply in your jurisdiction to ensure the non-recognition of agreements and awards that are not deemed “rights compatible”?
40. Should the Drafting Team draft model choice of law clauses to help allay some of these concerns?

## Element XI: Claims Manifestly without Merit

One of the main concerns of the business community in relation to BHR arbitration is the existence of mechanisms to address claims manifestly without merit in an efficient and expeditious manner.

Some mechanisms already exist under the UNCITRAL Rules in order to allow for the early dismissal of manifestly unfounded claims. These mechanisms include the arbitral tribunal’s power to order the bifurcation of the arbitral proceedings under Article 23(3) of the 2010 UNCITRAL Rules, and the arbitral tribunal’s general procedural power under the same rules’ Article 17(1) to “conduct the arbitration in such manner as it considers appropriate”. Such mechanisms already permit the arbitral tribunal to organize the proceedings to dispose of claims in a preliminary or expedited manner. However, the requirement under Article 17(3) of the UNCITRAL Rules to

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hold an oral hearing if any party so requests may frustrate the ability to achieve an early and efficient dismissal of frivolous claims in the context of BHR disputes. The BHR Arbitration Rules might consider discarding this requirement, or, alternatively, providing a specific procedure for objections that a claim is manifestly without merit.<sup>27</sup>

In addition, at the stage of the constitution of the tribunal under the UNCITRAL Rules, the Secretary-General of the PCA conducts a *prima facie* assessment of competence when requested to designate an appointing authority or to act as appointing authority. Although it is a low threshold for a potential claimant to meet, it may nevertheless fail to be satisfied in the case of claims manifestly without merit, leading the Secretary-General of the PCA to refuse to permit the constitution of an arbitral tribunal.

Furthermore, the PCA will charge an administrative fee for a request to designate an appointing authority or to act as appointing authority. While modest in amount, the need to pay such a fee can discourage parties from commencing an arbitration before having undertaken a proper assessment of the merits of their claim.<sup>28</sup> In addition to these already existing provisions, the BHR Arbitration Rules might consider adopting an institutional mechanism akin to Article 36(3) of the ICSID Convention,<sup>29</sup> whereby the Secretary-General of ICSID is expressly empowered to refuse to register a request for arbitration if (s)he determines “that the dispute is manifestly outside the jurisdiction of the Centre”.

## Questions

41. Should the BHR Arbitration Rules contain specific provisions on early dismissal of claims manifestly without merit, either by elimination of the strict requirement to hold an in-person hearing, or through the establishment of a specific procedure to this aim?
42. Should the BHR Arbitration Rules include specific thresholds for the initiation of the arbitration or the constitution of the tribunal beyond the *prima facie* standard already applied to such matters under the UNCITRAL Rules?

## Element XII: Costs and Financing

BHR arbitration will most likely witness a disparity in the resources available to the parties. Unless their claims are separately funded by other organizations, or there is ready access to available *pro bono* arbitration counsel services, individual or human rights victims may not have sufficient resources to sustain the costs of litigation. Such costs include, for instance, those needed for hiring counsel, for fact-gathering and preparation of evidence, as well as for covering the associated administrative fees and related expenses for the conduct of arbitration

<sup>27</sup> See, for example, Article 41(5) of the ICSID Arbitration Rules, footnote 30.

<sup>28</sup> See “Designation of an Appointing Authority” at: <https://pca-cpa.org/en/services/appointing-authority/designation-of-appointing-authority/>; “Designation of an Appointing Authority”, at <<https://pca-cpa.org/en/services/appointing-authority/pca-secretary-general-as-appointing-authority/>>. In practice, the PCA reserves discretion to waive the administrative fee in appropriate circumstances.

<sup>29</sup> ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as last amended in 2006, including Regulation and Rules, at <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>.

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proceedings. Third-party funding thus far has not been widely available to human rights victims, but rather is mainly used for commercial claims.

In order to ensure that BHR arbitration is a genuinely accessible remedy to potential human rights claimants, there might be a need to set up some form or mechanism for financial assistance. The question is whether such financial assistance mechanism should be built into the BHR Arbitration Rules. Early examples of such mechanisms can be found in environmental pollution cases (such as oil spill funds set up in advance for dispute resolution),<sup>30</sup> and state-based models for claims compensation commissions such as those established to support the Iran-United States Claims Tribunal<sup>31</sup> or the United Nations Compensation Commission.<sup>32</sup> The establishment of a financial assistance facility in the form of direct payments to the administering institution and/or the Tribunal by members of the private sector may instead give rise to concerns over the perceived and actual impartiality of the BHR arbitration proceeding.

These concerns could be addressed by means of the establishment upfront of a financial assistance fund or of a technical assistance program (e.g. *pro bono* arbitration counsel services facility, similar to the World Trade Organization's technical assistance and training programs for developing countries) governed by a separate administering authority to which human rights claimants may apply for either funding (remaining free to select their own counsels), or legal assistance (selecting *pro bono* counsel from a roster made available within the facility). Another possibility would be for specific industries or sectors to set up a general or anonymized pool of common dispute resolution funds, available for access to human rights claimants in BHR disputes involving such industries or sectors. The constraint on resources available for industry-specific disputes would also encourage all parties to the litigation – including tribunals – to conduct arbitration proceedings expeditiously and efficiently.

A further question to be considered is whether the BHR Arbitration Rules should provide for “fast-track arbitration”, on the model of the strict schedules applicable to certain arbitration mechanisms in the construction industry. These mechanisms *inter alia* enable tribunals to prescribe, in consultation with the parties, limits to the volume, frequency, and timing of parties' written submissions, as well as restrict the scope and length of their oral submissions during the hearings. Given that tribunals ordinarily conduct arbitrations with relatively wide discretion to shape the proceedings, so long as they are mindful of the equal treatment of the parties, it may be worth considering whether BHR tribunals should be left discretion to prescribe themselves cost-saving measures in the conduct of the arbitration (e.g. narrowing discovery procedures, if any, or defining early on the disputed issues of fact and law between the parties to limit evidentiary presentations in a time and cost-saving way).

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<sup>30</sup> International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1971 (entry into force with modifications, 1996), at <[http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-on-the-establishment-of-an-international-fund-for-compensation-for-oil-pollution-damage-\(fund\).aspx](http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-on-the-establishment-of-an-international-fund-for-compensation-for-oil-pollution-damage-(fund).aspx)>.

<sup>31</sup> For more information on the Iran-United States Claims Tribunal, see <<http://www.iusct.net/>>.

<sup>32</sup> For more information on the United Nations Compensation Commission, see <<https://uncc.ch/home>>.

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Finally, the question arises whether the BHR Arbitration Rules should be provided with in-built provisions explicitly governing the allocation of costs between the parties, particularly those resulting from parties' misconduct or abuse of process. While in arbitral case-law much of the cost-shifting analysis has taken place under substantive or interpretive criteria and tribunals' evidentiary appreciation, the inclusion of explicit rules on the matter may incentivize parties to ensure an expeditious and efficient presentation of evidence in a manner that is fine-tuned to address the actual disputed legal and factual issues.

### Questions

43. Should financial assistance be explicitly addressed in the BHR Arbitration Rules or in associated instruments?
44. What mechanisms could be developed to establish financial assistance for claimants in the BHR Arbitration Rules?
45. Should BHR Arbitration Rules provide for explicit cost-saving guidance to arbitral tribunals, particularly setting limits to parties' written and oral submissions, as well as limits to other procedures that could unduly and unjustifiably delay the arbitration (such as requests for document production)?
46. Will there be arbitrators or counsel willing to work *pro bono* or at reduced costs?
47. Should the BHR Arbitration Rules address the allocation of costs?

### Element XIII: Settlement by Mediation

The BHR arbitration project aims at contributing to filling the judicial remedy gap in the UNGPs by providing an international private remedy for both victims of human rights violations on the part of companies, and companies themselves in relation to human rights violations carried out by their business parties.

In his approach to remedies, UN Special Representative John Ruggie acknowledged that judicial remedies have not yet offered sufficient redress to victims of BHR violations. However, he also emphasized that non-judicial remedies are equally important for a variety of reasons: non-judicial remedies are not only an expression of acceptance by corporations of their responsibility to respect human rights, but also have the practical advantage of avoiding the escalation of disputes into long-lasting legal procedures. Hence, a variety of non-judicial procedures, both state- and non-state based, is important with a preference for mediation, a mechanism based on negotiations between the parties.

In addition to the mediation procedure foreseen in relation to the National Contact Points (NCP)-process, a state-based non-judicial remedy aimed at settlement of disputes through mediation,<sup>33</sup> corporations may also voluntarily agree to or offer mediation as remedy for actual or

<sup>33</sup> National Contact Points are instruments set up under the OECD to further the effectiveness of the Guidelines for Multinational Enterprises. NCPs fulfil multiple roles in relation to the OECD Guidelines: promotional, informative and of assisting enterprises contributing to the resolution of issues arising out of their alleged violation through mediation. For more details, see < <https://www.oecdguidelines.nl/ncp>>.

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potential human rights violations. Arbitration could constitute a further dispute settlement mechanism where mediation, in whole or in part, has failed.

Even when the parties submit their dispute directly to BHR arbitration, reaching a settlement during the arbitration proceedings should always remain possible. The Rules for the Facilitation of Settlement in International Arbitration of the Centre for Effective Dispute Resolution (CEDR)<sup>34</sup> may serve as a useful guide for arbitrators to assist parties in resolving their dispute amicably. However, special rules will be required to this effect, since, as a matter of principle, arbitrators cannot act as mediators and then return, in case the mediation does not succeed, to sit again as arbitrators in the same proceeding.

Settlements resulting from mediation may either be enforced, or give rise to negotiation, mediation and then arbitration of the dispute. However, in certain jurisdictions and under certain arbitration rules, settlements may take the form of an award on agreed terms and be enforced as any arbitral award.

In various jurisdictions the possibility also exists that settlements reached with the assistance of members of the Bar under agreements prepared and co-signed by the parties' advocates may be enforced in court.

## Consultation Procedure

The Elements Paper is structured as a compilation of issues for discussion accompanied, where relevant, by a set of questions. Please consult [this link](#) to be redirected to an online platform where contributors are provided a space to answer the questions posed in the Elements Paper. Contributors may answer some or all the questions posed. Individual contributions will not be made public. The Drafting Team will instead publish an analytical document providing an overview of the results of the consultation. The consultation procedure will begin on 23 November 2018 and will end on 31 January 2019.

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<sup>34</sup> CEDR Rules for the Facilitation of Settlement in International Arbitration, 2009, at <[https://www.cedr.com/about\\_us/arbitration\\_commission/Rules.pdf](https://www.cedr.com/about_us/arbitration_commission/Rules.pdf)>.