The Hague Rules
On Business and Human Rights Arbitration

Summary of Sounding Board Consultation Round 1 – Results
Elements Paper on the Hague Rules on Business and Human Rights Arbitration
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CILC
Center for International Legal Cooperation

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Table of contents

Introduction

This paper summarizes the many and often quite well elaborated and appreciated responses to the Elements Paper by the Drafting Team for the Hague Rules on Business and Human Rights (BHR) Arbitration, received from the members of the Sounding Board during the first consultation round, held from 23 November 2018 through 1 February 2019.

Before going into detail on the responses to the various Elements, the first part of this paper will deal first with some general analytical data showing the broad range of stakeholders having participated in the consultation.

The second part of this paper will provide a summary of comments, suggestions and questions raised by members of the Sounding Board directed on the project as a whole or specific cross cutting aspects of a conceptual, descriptive or normative nature.

All contributions were reviewed and reflected in preparatory papers by the Drafting Team members for the purpose of plenary review and discussion in a two-day meeting by the Drafting Team. On the basis thereof a subcommittee, consisting of Martin Doe Rodriguez, Ursula Kriebaum, Steven Ratner and Giorgia Sangiuolo, will prepare draft amendments to the UNCITRAL Arbitration Rules for plenary discussion by the Drafting Team in June and thereupon be submitted to the Sounding Board for the second consultation round, planned to commence in the second half of June and ending mid September. This will allow the Drafting Team to finalise the Hague Rules on Business and Human Rights Arbitration by the end of November, ready for launch in December 2019.

Analytical information

A total of 89 responses were submitted through the online platform organized by the Center for International Legal Cooperation (CILC), the organization managing the project. The majority of responses stems from law firms and academia (see figure 1). In addition, a substantial number of responses, in the form of individual and collective contributions by companies and business organisations, NGOs, civil society organisations, law firms, academic institutions, national governments and IGOs were received as separate contributions.

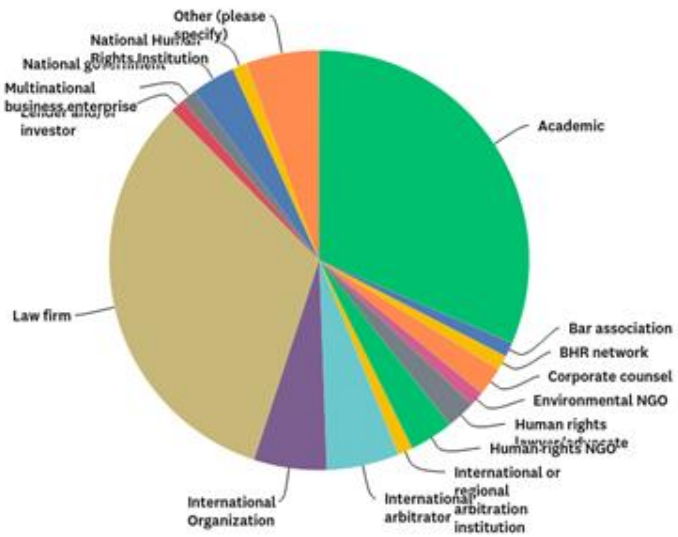

Figure 1: Responses received by community of practice

Also the regional spread of the responses received show a great variety. The online responses came from 9 different countries, of which the majority of responses are from the UK and USA (together 38%). Other

responses came from professionals residing in the Netherlands, France, Italy, Canada and Germany, Sweden, Norway amongst others.

General Sounding Board Comments

1. Terminology: *Business groups* are concerned that certain terms in the EP are prejudicial to their case, e.g., "victims" (rather than "alleged victims") "violations, "and "barriers" resulting from the corporate form. (See also #3 below.)

2. Is there a need for BHR arbitration?: One individual asks whether we know of cases where arbitration would have done a "better job" compared to other fora for resolving a BHR dispute. Another suggests that additional corporate liability (including both parent and subsidiary liability) is not necessary or appropriate.

3. Consistency with UNGPs on the Corporate Responsibility to Respect Human Rights: A number of *individuals* are concerned that the EP refers to human rights breaches and violations by corporations and that its goal is focused on filling a gap in accountability to victims of such violations. They note that, although corporate activity can have adverse human rights impacts (the phrase used in the United Nations Guiding Principles on Business and Human Rights (UNGPs)), (a) the Rules should not imply that corporations themselves can violate human rights, and (b) the UNGPs requirement on corporations to respect human rights focuses on demanding that companies have in place certain management systems. This is also relevant to Element II.

4. Obtaining Consent to Arbitrate: One individual asks how consent can be meaningfully obtained from individuals or communities.

5. Consistency with UNGPs Regarding Acceptable Remedies (in particular UNGP Principle 31): Various individuals noted that the rules must comply with the criteria of UNGP 31 – *legitimate, accessible, predictable, equitable, transparent, rights compatible, and a source of continuous learning.*

6. Multiple Remedies: certain Business groups wish to make sure that claimants cannot submit claims to arbitration and also sue in national courts. They are also concerned about multiple arbitrations by different victims. Certain NGOs wish to make sure that BHR arbitration is not done to the exclusion of other remedies, such as suits against corporations in national courts and against the states in international human rights courts. They want to ensure that arbitration does not foreclose other options through waivers in contracts (and other instruments of consent) and indeed seem to want to encourage multiple exposures of companies. They propose that the BHR process be used to encourage companies to waive various jurisdictional and forum *non conveniens* objections to suits in in the home or host state.

7. Motivations of Business: some NGOs are concerned that corporations will use the process to avoid accountability, e.g., by passing liability onto their subsidiaries and suppliers in a business-to-business (B2B) arbitration, and view arbitration as less threatening than litigation.

8. Unintended Consequences: one NGO wants to make sure that BHR arbitration does not sidetrack efforts to reform domestic courts. They also want to make sure that it does not stand in the way of the UN BHR treaty process. One individua/ wants to make sure arbitration does not minimalize the primordial importance and further development of state obligations.

9. Relationship to Investor-State Arbitration: NGOs want to make sure that various concerns in the investor-state context are not replicated in BHR arbitration. These concerns include rulings that constrain a state's policy space, lack of independence/impartiality (or the appearance thereof) of arbitrators, and limits on transparency and participation of non-parties.

10. Relationship to Other Corporate Human Rights Oversight Mechanisms (e.g., OECD NCPs): NGOs want to provide for the possibility of referral of cases to courts or non-judicial mechanisms like the OECD National Contact Points (NCPs).

11. Reversal of the Burden of Proof: One business is concerned that the Rules should not reverse the burden of proof from the claimant to the respondent.

12. Institutional Affiliation of the Rules and Arbitrations: In response to Question 67, one *academic* and one *international arbitrator* propose the creation of an independent institution to administer the Rules and arbitrations thereunder. This suggestion also relates to the possibility of an institution having a role in the screening, appointment, and disqualification of arbitrators (Element III).

Responses per Element

Element I – Parties, scope of application

The Elements Paper did not ask specific questions on Element I, since it only aimed at explaining the scope of application with three different constellations of parties that the Rules could cover. Notwithstanding this, quite a variety of comments on Element I were submitted. This overview summarizes the main comments so received.

The Elements Paper distinguishes the following possible constellations[1]:

- Rights Holders to Business (RH2B) ad hoc in a tortious context (but as comments rightly observe this could also be in a contractual context),
- Business to Business (B2B) in a contractual context (could conceivably also be in a tortious context), and
- 3rd party Rights Holders to Business (3RH2B) in a third party beneficiary contractual context.

The first category of comments concerning scope suggested reasons why a particular constellation would not be feasible under the contemplated rules. Comments lead to opposite positions. While business originating comments tend to exclude the RH2B and 3RH2B options for reasons of possible non-arbitrability, non-enforceability or consent-problems, other comments tend to exclude the B2B option for reasons of possible undermining the international business and human rights normative framework created by the UNGPs.

[1] Of course other constellations could be contemplated if privity of contract could be established between consenting parties.

Regardless of the comments on whether each of these categories should be contemplated by the Hague BHR Arbitration rules, some comments raise the suggestion that they are so different in dynamics and aspects that three different sets of rules should be developed. Although important, most of these comments refer to the possible utility of the rules as perceived by the contemplated parties in the constellations rather than the overall legal feasibility of the rules.

A second scope-related set of legally oriented comments is related to the multi-claimant nature of many BHR disputes, while it is recognized that international class arbitration in a commercial context is developing. The latter, however, does not exclude the possibility of multi-claimant cases, which could also be organized on an ad hoc basis with tailor made party agreed provisions.

A third scope related aspect concerns the identity of the respondent-company or companies. The UNGPs extend corporate responsibility to respect human rights to national and cross border subsidiary companies and supply chains to the extent within the control of the parent company. Some comments were raised regarding the Elements Paper's reference to the involvement of the parent company as respondent in a BHR dispute as a remedy, specifically that the rules should not create a new substantive norm on parent company liability. These comments point to incompatibility both with the internationally accepted legal principle of corporate separateness, subject to only very specific exceptions, as well as with prevailing corporate policy, aimed at shielding the parent company against this type of exposure. Although arbitration is a consensual process, this should deserve attention.

Finally, the consensual aspect of BHR Arbitration has generated important comments on the aspect of consent, in essence in two distinct ways: (1) rights holders should not be forced into arbitration (either formally by an exclusionary arrangement or in practice, since there may be no other remedy in practice), and (2) how to arrive at a meaningful way of obtaining consent in multi-claimant situations, and this from two angles: (a) business being concerned that the system will be able to distinguish between real claimants on the one hand and non-interested or frivolous claimants on the other hand, and (b) NGOs being concerned that not all really affected rights holders will be included in the arbitration.

Element II – Law to be applied

Limitation to the selection of a seat for Business and Human Rights (BHR) arbitration

The position of the SB is a clear preference against eligibility restrictions to jurisdictions where human rights are considered to be part of the public policy. The reasons mentioned against such a limitation were that it is hard to tell if a state includes human rights in its public policy and which human rights would be relevant. It limits party autonomy and is likely to turn out to be ineffective since it would often not preclude the enforcement of awards.

Reference to specific human rights instruments in the applicable law provision of the BHR Arbitration Rules

The reactions of the SB varied considerably. One extreme was that the rules must include all HR treaties, custom, including humanitarian and environmental law, as well as soft law instruments in order to be compatible with UNGP 31(f). Some NGOs and some academics supported this position. Overall, there was a slight preference for an illustrative list. However, stakeholders involved in the representation of businesses made it quite clear that including any human rights

instruments in the rules that are not binding on businesses as mandatorily applicable, would make the rules a non-starter. An arbitration institution suggested that we should follow the ICSID Model, i.e. establishing a framework for dispute settlement in the form of arbitration without defining the substantive human rights standards.

Ex aequo et bono decisions upon express agreement of the parties

This is a standard provision in investment and commercial arbitration rules and has not raised any criticism.

Model choice of law clauses in an annex or a commentary to the BHR Arbitration Rules

The SB answers vary. One academic mentioned that rules would refer to tort or company law at the place of harm or incorporation and it would not be necessary to suggest model choice of law clauses. Other academics, as well as some NGOs considered it advisable to have model choice of law clauses with reference to CSR instruments. Another NGO suggested having clauses that specify advantages and disadvantages from the perspective of claimants. One comment was to follow the ICSID model.

"Usage of trade applicable to the transaction" as part of the applicable law

The answers vary a lot. Some academics, lawyers and HR lawyers consider the term "usage of trade" too unspecific in the context of BHR arbitration. Others suggested including it, but stressed the necessity to specify that they include Codes of Conduct. Especially stakeholders involved in the representation of businesses found it unacceptable to turn Codes of Conduct into binding obligations by using "usage of trade" as trigger mechanisms. Some HR lawyers found it doubtful whether Codes of Conduct would amount to usages of trade. Especially law firms mentioned that the term "usage of trade" would be too unclear in the context of BHR arbitration to use it as a source of applicable law.

Element III - Election criteria and appointment of arbitrators

Designating and appointing authority

The overwhelming majority of the comments support the Secretary-General of the Permanent Court of Arbitration at The Hague (PCA) as the appointing authority in the BHR Arbitration Rules. However, there is also some support for an institution with a special focus on Business and Human Rights Arbitration—with a dedicated appointing authority and staff. In a perfect world the BHR Arbitration Rules could be administrated by a distinct institution, more tailored to the needs of the BHR Arbitration Rules.

Number of arbitrators

The overwhelming majority of the comments of the SB reflect a preference for a tribunal with three members. Nevertheless, concerns include the cost of arbitration when three arbitrators are involved, with some leaning towards a possibility of a sole arbitrator in certain cases. Other concerns, include the need for different kinds of expertise that in some cases may push for a tribunal with more arbitrators, especially if the case involves particularly challenging issues.

Appointment of arbitrators

The appointment of arbitrators is a topic with many important questions to be decided by this group. In general, the comments reflect a broad consensus for party-appointed arbitrators as well as for arbitrators with expertise in "business and human rights"—the latter requirement being especially popular but difficult to operationalize.

There is less consensus however on other aspects. Useful suggestions include the addition of references to the nationality of the arbitrator, as well as stronger requirements regarding impartiality and independence of arbitrators in the BHR Arbitration Rules. As mentioned, the overwhelming majority of the comments suggest that the arbitrators shall have expertise or experience in "business and human rights". However, some commentators caution against intruding too much on the autonomy of the parties, especially given the small cadre of professionals with this expertise and the complexity of defining "business and human rights".

Disclosures by and challenge of arbitrators

Finally, the comments of the SB express a preference for granting the Secretary-General of the PCA the authority to resolve the challenges of arbitrators (next to acting as appointing authority).

Element IV – Transparency

Should transparency be the default position in the BHR Arbitration Rules?

Half of all of the comments received commented on the issue of transparency, including on the question of whether transparency should be the default rule. Of those, only two said there should be no transparency (5%) whereas 75% said transparency should be the default rule and 20% said it depends. The answers in "depends" mainly point to exceptions to transparency in case of "confidential information and business secrets" as well as some others. There was a concern of few SB members that meritless suits may damage a business' reputation.

Should one or both parties be able to waive transparency provisions?

The predominant answer from the SB on the possibility of waiver was "it depends" (around 60%): "depends on the specific issue (award-both parties, witnesses, trade secrets-one party, etc.)" with some saying that transparency should not be waivable. The overwhelming voices out of the 60% said it needs both parties to waive transparency. As one commentator stated: "If a waiver is to be on the table in the rules, no waiver should be unilateral. This would render the transparency provisions largely ineffectual."

Should there be minimum transparency requirements that parties cannot decide to waive? If so, what should they cover?

This connects to the question of waiver. Again, the majority wanted minimum requirements or said it depends, but feedback of the SB varied widely.

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 deemed insufficient, what would you add?
The answers of the SB are inclusive; about half say that the UNCITRAL Transparency Rules are insufficient. Many said they are not familiar with human rights rules of procedure or the ICC rules.

What should be the role of the repository concerning privileged information and costs?
Only few answers were given. The question seems to have been unclear for some members of the SB. It had to be decided who does what, tribunal or repository. There was general consensus among the SB that all decisions concerning confidentiality be taken by the tribunal and the repository should not be in the position to review those decisions. The repository should publish information, including statistics, about the cases (as the ICSID Secretariat does).

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). What is your opinion on the best option?
The substantive answers to this question were inconclusive, 57% of the reactions being in favor of the bundle solution.

Element V – Non-disputing parties

Party influence on BHR Tribunal discretion over allowing non-disputing parties
The majority responses do not favor such influence. Academics saw this as a matter that should be left entirely to the tribunal's discretion, except for "exceptional circumstances" in the early stages of BHR arbitration, given public interest in hearings and the need for legitimacy as an "overriding concern". The human rights lawyers/advocates favor a limited right for parties to influence the tribunal's discretion, where "parties to the dispute should have an opportunity to challenge the opposing party's evidence", especially in order to assist the arbitrator in "determining which outsiders to allow". A human rights NGO favored a more sweeping influence where each application as a non-disputing party should be "heard in writing with the Tribunal's discretion to call a hearing on the matter of a third party's participation, or to send specific questions to the parties related to [such] participation."

The minority responses were from international arbitrators and law firms, largely split in favor of permitting such influence. These positions were not elaborated on in the comments.

Should BHR arbitration rules specify criteria for tribunals on allowing participation of non-disputing parties?
The majority responses do favor such specific criteria. No reasons provided. The minority responses (not favoring such specific criteria) came from two academics and one human rights NGO. No reasons provided.

Should BHR arbitration rules specify forms of permissible participation by non-disputing parties?
The majority of responses do favor such specification of forms of permissible participation by non-disputing parties**.** There was a preference by academics for illustrative, rather than exhaustive lists. A human rights NGO prefers a broader formulation of the rules to allow it to evolve over time with the new processes of BHR arbitration, but with a sense of what the default rules would be for negotiation with business parties to disputes. International arbitrators proposed having independent legal counsel to amici to assist in their participation – which could be in-house attorneys or university clinics/educational institutions providing such assistance. An academic also stressed that non-disputing parties "should not have automatic access to any of the documents before the tribunal. They can only have access to the documents and evidence as determined by the tribunal, on which the parties may make submissions."

The minority response did not prefer such specification, as seen from the views of three academics. No reasons were provided. A human rights NGO urged that "indigenous peoples or local communities with customary rights may very well have their own experts on relevant matters that should be considered – merely treating them as witness would not seem like an equitable solution."

Should states have the unconditional right to file amicus briefs or be granted any other participatory rights?
The majority responses favor giving States the unconditional right to file amicus briefs or be granted any other participatory rights**.** Academics favoring the conferral of this right on States commented that any such right must be "clearly defined", since States will "seek to enter briefs according to their interests" but should "not be allowed to use this power to obfuscate or delay proceedings or to avoid criticism of their own role in possibly facilitating business abuses". Human rights lawyers and advocates took a similar position, noting that "states use a series of doctrines related to foreign policy and separation of powers to preclude such cases in domestic courts…States will make these same arguments in their amicus briefs, but the arbitrators' role should not be to represent the state."

The minority responses did not favor conferring such rights on states. A human rights NGO commented that even if such rights are granted to states, they should be under the same rules as all other non-party participants. An international arbitrator noted that no one should be granted the unconditional right to intervene as amici. Some law firms commented that the state right to file amicus briefs in a BHR dispute "should be left to the discretion of the relevant arbitral tribunal subject to some specified criteria."

Element VI – Evidence

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?
The positions of the SB are generally divided between (a) those who feel diverging from the current UNCITRAL rules would create a biased process and may result in broad discovery or fishing expeditions which are not allowed in international arbitrations and (b) those who feel a balance of power especially vis-a-vis rightsholders is required which necessitates additional measures to assist these rightsholders. The latter suggest access to documents (evidence) is considered a relevant factor to balance inequality and suggest a reversal of the burden of proof. They suggest, for example, even if a witness would be willing to testify, the witness statement, may be considered biased or not very

clear (especially if the relevant facts have occurred a long time ago), whereas documents (usually in the possession of a company) are more convincing. Thus, a lack of access to these documents would amount to inequality towards rightsholders. However, as some suggest, even enhancing access to evidence would not be sufficient as this would not solve the issue of documents residing under a parent company when a subsidiary is party to the arbitration or the other way round. Furthermore, issues are mentioned in connection with e-discovery and the high cost of gathering of evidence.

Should the BHR Arbitration Rules provide additional guidance on the taking of evidence by incorporating more specific rules (e.g IBA Rules or the Prague Rules on the Taking of Evidence in International Arbitration)?
Some suggest the IBA Rules on the taking of evidence include a nuanced way to address this issue and should be applicable in addition to the UNCITRAL rules. Others suggest to refer to the Wallenberg rules.[2] The Prague rules are not seen as a viable reference.

Should parties have the option to produce evidence in the form of information gathered outside judicial procedures (e.g. through third parties or institutions like the Compliance Advisor Ombudsman of the World Bank)?
Some suggest this type of information (if not confidential) may be used in the arbitration without additional rules being required.

Element VII - Protection of witnesses

Would rules on restrictions of transparency be the only tool to contribute to protection of witnesses, in case the BHR Arbitration Rules were to include rules on such protection?
The main comment received from NGOs has been that protections should go beyond transparency. On the issue of transparency, while human rights arbitrations in principle require a higher level of transparency, protection of claimants/witnesses may be at odds with transparency and hence, in their view, transparency may be optional in this context. Some however, note that increased transparency may contribute to protection of witnesses or claimant and claimant's counsel. On balance, when it comes to transparency in the context of protection of witnesses, no specific adaptions are proposed by the SB next to the ones raised in connection with element IV-Transparency.

What measures, beyond rules on transparency, should be considered by the tribunal and should they be included in the BHR Arbitration Rules?
Positions are mixed. While some feel any additional protection for witnesses is not required and may hamper a fair and foreseeable process, some even consider protection of witnesses/claimants to be contradictory to due process. Others, however, feel additional protection may be required. One member referred to the *Kalma & Ors v. African Minerals Ltd & Ors* [2018] EWHC 120 (QB) decision, which adopts a so called 'confidentiality club' in connection with witnesses. Pursuant to this decision the burden of proof of an interest in restricting the number of representatives being aware of the

[2] The Wallenberg Institute Rule of Law Guide, see https://rwi.lu.se/app/uploads/2012/09/Rule-of-Law-a-guide-for-politicians.pdf.

identity of witnesses (claimants) rest on the party seeking the restriction. It has to show it would be prejudiced by publicity. Also art. 2 and 3 ECHR may require such restriction if physical disadvantage is feared. Subjective fear (to lives or livelihood) is considered sufficient as long as it is genuine. This may even be true, if others have testified and no retaliation has occurred, but this is obviously relevant in determining whether a relevant subjective fear is present. Alternatively, a limited number of party representatives may be informed of the identity of the witnesses. This may also depend on what is already in the public domain. In connection with this the sounding board member also points out that parties should be consulted on this type of confidentiality and this should also be communicated to other stakeholders. Others point at comparable measures in (articles 23 and 24 of) the procedural rules of the Dutch International Responsible Business Conduct Agreement in the Textile sector dispute mechanism, which also provide for restrictions if so required. However, sounding board members acknowledge that this type of protection may be more frequently required for witnesses than for claimants or counsel. Finally, some suggest measures should be implemented, if a respondent is implicated in retaliation against witnesses, claimants or their counsel.

Element VIII – Interim measures

Should the threshold for interim measures in BHR arbitration be modified, whether by reference to the "precautionary principle" or otherwise? 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?
The feedback received from the SB consultation generally, although not unanimously, favored the elaboration of a broad and flexible interim measures provision, including reference to the "precautionary principle", as found in the PCA Environmental Rules. At the same time, it was noted that this would place greater trust in the arbitrators, heightening even further the need for experienced arbitrators in BHR arbitration cases. A significant minority, however, indicated a preference for maintaining existing standards of "irreparable harm" and greater general guidance for tribunals. This seemed in particular to be the view of the business community.

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?
The SB overwhelmingly supported the inclusion of an emergency arbitrator mechanism in the rules to address situations in which urgent interim relief is required before the constitution of the tribunal. The responses also favored that such mechanism be structured as an opt-out mechanism, although many comments mixed this opinion with issues regarding the costs of such a system. In regard to such costs, most views supported having the costs initially covered by the requesting party but ultimately apportioned by the tribunal along with all other costs. The desire to see specific financial assistance for worthy BHR arbitration claims was also reiterated in this context.

Should the BHR Arbitration Rules include an explicit power to order penalties for noncompliance with its interim measures orders, or should this be left to otherwise applicable law?
The feedback received from the SB consultation strongly favored empowering the arbitral tribunal to order penalties for non-compliance with its interim measures orders. Several comments suggested that such penalties are against public policy and unenforceable under the NY Convention or that such matters should be left to otherwise applicable law. Such comments did not appear, however, to

be made in the knowledge that penalties are not universally considered to be against public policy, or that many applicable laws require express authorization in the arbitration rules in order to empower an arbitral tribunal to order such penalties.

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?

The SB feedback favored some modulation of the rules on security and liability for interim measures. However, the only concrete suggestion made was to limit liability to cases of gross negligence or intentional misconduct, presumably on the basis that such conduct is more deserving of sanction and deterrence. At the same time, a significant number of responses recognized that constraints in this regard may discourage arbitral tribunals from granting interim relief in the first place. An alternative approach might therefore be to establish an obligation for the arbitral tribunal to consider the effect of its decision on security or liability on access to justice (Option 3).

Element IX – Types of remedies

Should the BHR Arbitration Rules explicitly articulate the scope of remedies that arbitrators may be able to provide in BHR disputes? 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?

In terms of numbers, the feedback received from the SB supported an explicit provision on the scope of remedies available. However, the nature of the feedback was mixed, with some suggesting an illustrative list, some a comprehensive provision, and others a flexible and general provision. In addition, some favored monetary remedies due to their ready enforcement, while many emphasized the inadequacy of monetary compensation in various situations. Given the overlap with substantive law and the law of the seat of arbitration, both the risks and rewards of innovation in this area were highlighted.

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?

As with interim measures, the SB strongly favoured empowering the arbitral tribunal to include potential economic sanctions in its awards for the event that a party fails to comply with the tribunal's orders. Some comments reiterated that such penalties would be against public policy and unenforceable under the NY Convention in certain jurisdictions or that such matters should be left to otherwise applicable law. Others reiterated the need for such powers precisely because of questions regarding the direct enforceability of injunctive relief in certain cases.

Element X – Enforcement

On the questions, whether BHR disputes meet the "commercial relationship" requirements in certain of the scope of application situations, and whether the BHR disputes would be arbitrable in the sounding board member's jurisdiction, few and mostly inconclusive comments were received. As could be expected, in most cases reference was made to the law of the seat and the law of enforcement of the award as being decisive for the answers to these questions and it was not considered practical for the BHR Arbitration Rules to define arbitrability.

Element XI – Claims manifestly without merit

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?
The feedback received from the SB emphasized the importance of this issue to prospective respondents in BHR arbitrations, and in particular to the business community. Responses overwhelmingly favored adjustments to facilitate the early dismissal of claims manifestly without merit, but were split between the options of simply eliminating the strict requirement to hold an in-person hearing or establishing a specific procedure for early dismissal.

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?
The consultation strongly opposed adding any further requirements or thresholds for the initiation of the arbitration or the constitution of the tribunal beyond those that already exist under the UNCITRAL Rules. Nor were any specific ideas for such further requirements offered (beyond the mention of Article 36(3) of the ICSID Convention in the Elements Paper).

Element XII – Costs

Should financial assistance be explicitly addressed in the BHR Arbitration Rules or in associated instruments?
The majority of responses favored the inclusion of financial assistance in the BHR Arbitration Rules, while the minority of responses favored the creation of an associated instrument to the BHR Arbitration Rules.

A significant minority did not favor that financial assistance be explicitly addressed in either the BHR Arbitration Rules or in associated instruments, however without explaining why.

Mechanisms for establishing financial assistance for claimants in the BHR Arbitration Rules
Responses from academics, human rights lawyers/advocates, human rights NGOs, international or regional arbitration institutions, international arbitrators, and law firms can be categorized into the following:

1. Legal aid center, pro bono legal assistance or counsel list, waiver of administrative fees for indigent clients
2. Independent funding set up by administrative institution handling the arbitration (similar to that established by the Permanent Court of Arbitration)
3. Permanent, separate, renewable and neutral technical assistance fund with seed funding from either States or foundations or an anonymized pool by industry/sector, with such fund to be administered by the United Nations or UNCTAD or any other UN body
4. Fixed financial contributions by transnational corporations that choose to adopt a BHR arbitration clause
5. Fee shifting arrangements and/or contingency agreements enabling victims to obtain counsel
6. Flexible third-party funding (by an NGO or private actor)

Should BHR Arbitration Rules provide for explicit cost saving guidance to arbitral tribunals (e.g. limits to written/oral submissions, delays such as in requests for document production)?

The majority of respondents overwhelmingly favor including such cost-saving guidance to arbitral tribunals. Academics favor some default rules on cost-saving, from which parties can opt-in or opt-out, with a test for reasonability subject to the tribunal's control. A human rights NGO raised concerns about the resource disparities between victims and corporations, and the inability of victims to support sustained or protracted arbitration.

An international arbitrator raised the problem that the biggest delay to arbitration is an overbooked arbitrator, which the BHR Arbitration Rules should address through rules on time conflicts of arbitrators.

Will there be arbitrators or counsels willing to work pro bono or at reduced costs in BHR Arbitrations?

The majority of respondents overwhelmingly state that there are arbitrators or counsels willing to work pro bono or at reduced costs (as the recent PCA administered arbitrations in the Bangladesh Accord cases confirm).

Academics state that this will happen based on individual circumstances – if pro bono was the norm then the pool would tend to be a select group of those who can afford to go without pay and may not end up being the best public interest defenders. Another academic said arbitrators should be paid but counsel should be free to make their decisions on pro bono or reduced costs. Law firms stated that some lawyers might permit this for reduced rates.

Some international arbitrators raised the point that reliance on pro bono would be unsustainable and inappropriate for BHR cases, and suggested that the institution administering the BHR Rules should have legal staff able to represent indigent parties and provide legal support to amicus. In some jurisdictions, it is unethical for lawyers to work without pay and this rule would exclude lawyers from these jurisdictions. Caution was raised that pro bono representation or arbitrator work could lead to unsavory practices such as overbooking of arbitrators or exclusion of otherwise qualified lawyers. Another international arbitrator wrote that pro bono should be left as an option and not made mandatory because "talent often goes with compensation".

Should the BHR Arbitration Rules address the allocation of costs?

The majority of responses overwhelmingly favor that the BHR Arbitration Rules should address the allocation of costs.

Academics said the rules must provide for this, but ensure that final discretionary power rests with arbitrators. A human rights NGO took the same position that the BHR Arbitration Rules should provide default rules that parties could modify by agreement. An international arbitrator said that "costs follow the event should be the rule, with exceptions aimed to protect non-affluent parties."

Element XIII – Mediation

Several submissions, both from business and NGOs emphasize the importance of mediation, pointing to the same considerations mentioned in the Elements Paper. Business comments even recommend that the DT consider the imposition of requirements of consultation or mediation as conditions to consent. Civil society adds to its support for mediation the caveat, that as for arbitration also for mediation the effectiveness criteria of UNGPs Principle 31 should be taken into account.

There are also comments on the relation of arbitration and other non-judiciary mechanisms as the OECD NCP process, which is based on mediation.

Sounding board comments on transparency highlighted the importance of transparency for B2B settlements agreements, which may have an effect on the human rights of third parties.