INTERNATIONAL BUSINESS AND HUMAN RIGHTS ARBITRATION

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Count up the results of fifty years of human rights mechanisms, thirty years of multibillion dollar development programs and endless high level rhetoric and the general impact is quite underwhelming . . . this is a failure of implementation on a scale that shames us all.

Mary Robinson, former President of Ireland
and former United Nations High
Commissioner for Human Rights (1998)

[1] See Appendix A for biographical sketches of the authors and other members of the

Executive Summary

International arbitration holds great promise as a method to be used to resolve human rights disputes involving business. These disputes often occur in regions where official national courts are dysfunctional, corrupt, politically influenced or simply unqualified. Parties to such disputes, generally multinational business enterprises (MNEs)[2] and the victims[3] of human rights abuse linked to MNEs, have need of a private system that can function in these regions. Arbitration also has certain unique attributes that could serve the parties well even where fair and competent courts are available. And arbitration can serve a useful purpose in assisting MNEs to prevent abuse from occurring in their supply chains and development projects.

The rules in use today for international arbitration were written without a focus on the special requirements of human rights disputes. Hence, changes are needed to ensure that, among other things, there is greater transparency of proceedings and awards, that numerous victims are able to aggregate their claims and that the arbitrators chosen are prominent experts in business and human rights matters.

The drafting of the rules designed for international business and human rights arbitration (BHR Arbitration Rules) would begin with the formation of a drafting team composed of experts in various aspects of international human rights disputes and chaired by a leading specialist in international arbitration. To assist the drafting team in identifying needed changes, there would be an open and transparent consultation process involving the principal stakeholder groups in the business and human rights area.

The BHR Arbitration Rules could be applied in a number of contexts. For example, they could be the rules selected by the parties to be used in an arbitration that they conduct entirely by themselves, i.e., without any

[2] The term "MNEs," when used in this paper, refers to the collectivity of legal entities belonging to a multinational group of companies, in law represented by the parent company of the group either or not in combination with relevant direct or indirect wholly or majority-owned or -controlled subsidiaries. Business enterprises that operate entirely within a single country could also make use of arbitration.

[3] Victims of human rights disputes are often represented by international human rights NGOs or other private groups.

assistance from an arbitration institution. Or the parties could agree to use the BHR Arbitration Rules for arbitration that is administered with the assistance of an arbitration institution. Or the parties could select an arbitration institution that has adopted the BHR Arbitration Rules as its own "optional rules," i.e., rules to govern business and human rights arbitration proceedings to be conducted under the auspices of the institution itself. Irrespective of the context, BHR Arbitration Rules would provide for expert arbitration panels to hear and decide business and human rights disputes (BHR Arbitration Panels).[4]

Parties to business and human rights arbitration will need to have access to arbitrators who have expertise in business and human rights. In order to ensure this, it may be necessary for professional arbitrators who seek to serve on BHR Arbitration Panels to augment their skill sets, for new specialists to be trained and for parties to be able to appoint qualified arbitrators to a BHR Arbitration Panel, even though they may not be listed on the formal roster of an arbitration institution.

Once the BHR Arbitration Rules have been finalized, MNEs could immediately begin to work with their opponents to engage in arbitration (as opposed to court litigation) of disputes that arise as a result of an MNE's own activities or those of its business partners and for which victims or others are attempting to hold the MNE accountable.

Another important use would be for MNEs to build international arbitration into their programs for carrying out their responsibilities under the UN Guiding Principles on Business and Human Rights (the UNGPs) and other international and national instruments. Many prominent MNEs are increasingly putting terms and conditions in place in their supply chain and other contracts aimed at observance of human rights norms.

These terms and conditions should include clauses that require business partners to observe specified international human rights norms. They should specify the particular practices to be avoided that abuse international human rights norms. They should contain provisions for monitoring compliance,

[4] In response to extensive feedback on earlier versions of this proposal, the Working Group has decided to use the terms "BHR Arbitration Rules" and "BHR Arbitration Panel," rather than the term "International Arbitration *Tribunal*" used in the earlier versions. The proposal does not call for the establishment of a new arbitration institution.

together with escalation clauses that require, first, informal discussion of non-compliance, then, if discussion is not successful, mediation and, finally, binding arbitration before a BHR Arbitration Panel. They could specify the location of any proceedings. They could include clauses that allow potential victims the right to enforce the human rights clauses. In order to give effect to their supply chain responsibility, they could include so-called "perpetual clauses" that require suppliers and contractors throughout the entire chain of suppliers, contractors, subcontractors and others to insert the same provisions into their own contracts.

These steps would create a chain of contracts that protect victims from human rights abuses and also provide MNEs a way to reduce or eliminate the risk of abuse for which they may share a degree of responsibility. A supplier or contractor that commits an abuse could be held accountable by anyone in the chain of contracts and possibly injured workers, members of affected communities and others. Final awards could include monetary damages, injunctive relief and close monitoring of future compliance. Awards would be enforceable in the courts of 156 states that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Efforts need to be made to deal with the "inequality of arms" that victims face when attempting to assert their rights. This could include permitting representation of victims by human rights NGOs and labour unions, legal aid, pro bono services by lawyers, third-party funding and the establishment of trust funds that could accept both private and public contributions.

There are important differences between arbitration involving a BHR Arbitration Panel and other forms of arbitration, such as international arbitration used in investor-state arbitration proceedings or the commercial arbitration required to resolve disputes over consumer products and services.

The availability of international arbitration would facilitate responsible conflict management by MNEs and human rights victims and should assist MNEs in managing their supply chains to avoid human rights abuses.

To sum up: International arbitration using a BHR Arbitration Panel would amount to a judicial system without a country. It would reinforce global governance by effectively protecting the rule of law and fundamental rights − creating its own momentum.

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I. Introduction

Victims of business-related human rights abuses have little or no access to justice. They face wide gaps in national and international laws and court systems as well as daunting legal and practical obstacles that discourage the filing of claims.[5] For a variety of reasons, courts at all levels have largely been unable to meet their needs. Claims brought in national courts against MNEs by or on behalf of victims often drag on for years and end inconclusively.[6]

Some reported instances of abuse are attributable to MNEs' own actions. Others are caused by MNEs' contractors that build and operate projects in developing countries, such as dams, airports, oil fields and mines. There is also the abuse for which MNEs are blamed that is attributable to suppliers of goods or raw materials in supply chains crossing multiple national borders. In some instances, MNEs doing business in repressive states may be tarred by the abusive actions of official security forces or other state actors. MNEs may not be the cause of the abuse, or even contribute towards it, but even so they may be "directly linked" to it. According to the UN Guiding Principles

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[5] See "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Report of the United Nations High Commissioner for Human Rights (A/HRC/32/19, 10 May 2016), available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf.

For a comprehensive discussion of the principal obstacles, see Gwynne Skinner, Robert McCorquodale and Olivier de Schutter, with case studies by Andie Lamb: "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business," (ICAR, CORE and ECCJ, 2013), available at http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf. See also Robert C. Thompson, Anita Ramasastry and Mark B. Taylor, "Translating Unocal: The Expanding Web of Liability for International Crimes," 40 George Washington International Law Review 841 (2009) (hereinafter Translating Unocal). This article (beginning at p. 889) contains a listing of legal and practical obstacles to justice reported by lawyers from sixteen countries involved in a study. Available at http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-1-Thompson.pdf.

[6] The reader may find numerous examples of such legal actions on the Business and Human Rights Resource Centre website, https://business-humanrights.org/en/law-lawsuits.

on Business and Human Rights (the UNGPs),[7] MNEs must deal with their own abuse and use their "leverage" to persuade their business partners in supply chains and development projects to curtail "directly linked" abuse, irrespective of whether the laws of the host country allow or tolerate such abuse.[8] MNEs require effective access to judicial remedies in order to enforce contracts and resolve human rights disputes as they arise. Where fair and competent national courts are not accessible, MNEs may face challenges in effectively implementing the UNGPs. This leaves the victims without adequate state remedies. The MNEs could face severe reputational damage.

This situation cannot be said to serve anyone's interests, either victims' or MNEs.' If we are to improve upon the dismal state of affairs that Mary Robinson deplores, we must contribute to the creation of a new system designed to meet the needs of all parties to human rights disputes.

Much as the merchants in the late Middle Ages devised a private *Lex Mercatoria* to fill the void in justice due to the failings of official courts in their time, we need to explore a private solution to today's situation.[9]

II. Features of BHR Arbitration Panels

We propose that new arbitration rules (BHR Arbitration Rules) be drafted that would enable parties to human rights disputes involving business to resolve those disputes using specialized business and human rights arbitration panels (BHR Arbitration Panels), no matter where in the world the disputes have arisen. The BHR Arbitration Rules would be a revision of international arbitration rules currently in use and aimed at meeting the special needs of business and human rights arbitration. A suggested process

[7] The UN Guiding Principles on Business and Human Rights are available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[8] The UNGPs, Principle 19 and Commentary thereto.

[9] For a further discussion of the emergence of a "New Lex Mercatoria," see Claes Cronstedt and Robert C. Thompson, "A Proposal for an International Arbitration Tribunal on Business and Human Rights," Harvard International Law Journal (July 7, 2016), available at http://www.harvardilj.org/2016/07/a-proposal-for-an-international-arbitration-tribunal-on-business-and-human-right

for the drafting of the BHR Arbitration Rules is discussed below.[10] The BHR Arbitration Rules would be flexible enough to be used in a variety of contexts. For example, they could be the rules selected by the parties to be used in an arbitration that they conduct entirely by themselves, i.e., without any assistance from an arbitration institution. Or the parties could agree to use the BHR Arbitration Rules for arbitration that is administered with the assistance of an arbitration institution. Or the parties could select an arbitration institution that has adopted the BHR Arbitration Rules as its own "optional rules," i.e., rules to govern business and human rights arbitration proceedings to be conducted under the auspices of the institution itself.[11]

As is generally the case with international arbitration, the parties would participate in the selection of the arbitrators. Parties to business and human rights arbitration will need to have access to arbitrators who have expertise

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[10] See Section XV, below.

[11] One arbitration institution that would be highly suited for such a role is the Permanent Court of Arbitration (PCA), with headquarters in the Peace Palace at The Hague. The PCA, founded in 1899, has a distinguished history, a skilled professional staff, high credibility, deep political and financial backing and cooperative arrangements with states and other institutions throughout the world. It has considerable experience in crafting international arbitration rules in multiple specialized areas. The PCA maintains a Financial Assistance Fund that provides a means for donor states to fund the arbitration costs of less wealthy states. This Fund could serve as a model for a victims' assistance fund.

Our thoughts about the PCA have recently been shared in a set of recommendations to the European Union. See "Removal Of Barriers To Access To Justice In The European Union, Executive Summary," p. 19 (Project coordinators: Juan José Álvarez Rubio and Katerina Yiannibas, Globernance Institute for Democratic Governance), which states:

> EU Member States should give a mandate to the PCA to adopt a set of arbitration rules in disputes relating to corporate related human rights abuses. Such rules should provide for transparency, *amicus curiae* participation, collective redress, site visits, specialized arbitrators, financial assistance, and oversight of the implementation of the award. . . . EU Member States should give a mandate to the PCA to adapt the Financial Assistance Fund to provide financial assistance to non-state parties when the subject matter of the dispute involves corporate related human rights abuses.

Available at http://www.HumanRightsinBusiness.eu.

in business and human rights, including expertise in the cultural context in which the violations occurred.[12] In order to ensure this, it may be necessary for professional arbitrators who seek to serve on BHR Arbitration Panels to augment their skill sets, for new specialists to be trained and for parties to be able to appoint qualified arbitrators to a BHR Arbitration Panel who are not on the formal roster of an involved arbitration institution.

Arbitration proceedings could occur virtually anywhere in the world, either in person or via the Internet. Arbitration awards may be enforced in any of the 156 states that are parties to the New York Convention.[13] We are also proposing ways to provide practical and legal assistance to victims to reduce the "inequality of arms" that they generally face in their pursuit of justice.[14]

They key interests of all stakeholders in business-related human rights disputes would be served by BHR Arbitration Panels. MNEs and their business partners would have an effective tool to control abuse with which they would otherwise be associated and to resolve disputes in which they and/or parties in their supply chains are involved. Victims would benefit from the greater access to remedy. The international human rights community – NGOs and individual human rights advocates – would benefit from having a mechanism to ensure business compliance with international human rights norms. States would also see greater access to justice and a consequent diminution in abuse.

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[12] We acknowledge that currently the number of arbitrators and mediators with the requisite expertise in business and human rights is limited. Training and the accumulation of relevant experience may be necessary to fully staff those institutions' rosters to meet the needs of human rights arbitration.

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UN 1958). To date, it has been ratified by 156 states. Several exceptions to enforcement of arbitration awards may apply in individual cases. In order to be enforced in some states, the award must be based on a "commercial" contract. In all states, it must not be a "domestic" award and the enforcement of such award must not be contrary to the "public policy." Because these exceptions are to be interpreted by the courts of each state, prospective parties to arbitration should examine the interpretations of these exceptions by the courts in which enforcement may eventually be sought. Available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[14] See Section XIII, below.

BHR Arbitration Panels could contribute to the implementation of all three pillars of the UNGPs – the state duty to protect human rights (Pillar One), the corporate responsibility to respect human rights (Pillar Two) and access to remedy (Pillar Three).

III. MNEs could use arbitration to prevent abuse

MNEs are recognising that good corporate governance requires them to avoid abuse in their own operations and also to avoid being linked to abuse attributed to their business partners. This relatively new development is due to a variety of factors. National and international organizations are paying far greater attention to human rights abuse associated with business.[15] New laws are being enacted,[16] such as corporate governance codes that increasingly place a duty on directors to avoid risks associated with human rights abuse.[17] Lawsuits are being brought that seek to hold MNEs accountable under a variety of theories. Shareholders are increasingly demanding that MNEs avoid human rights abuses.

The voices of labour unions, human rights NGOs, human rights advocates, bar associations, religious organizations, colleges and universities and

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[15] See, for example, UN Office of the High Commissioner for Human Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide" UN Doc. HR/PUB/12/02 (2012). This document sets out guidance for implementing the UNGPs, available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

[16] See, for example, the adoption on 29 November 2016 by the French Assemblée Nationale of the bill to regulate a parent company's responsibility to conduct human rights due diligence in the operations of their global group and their global supply chains: PROPOSITION DE LOI *relative au* devoir *de* vigilance *des* sociétés mères *et des* entreprises donneuses d'ordre. Note that the French Senate will also have to adopt the bill. Available (in French) at http://www.assemblee-nationale.fr/14/ta/ta0843.asp.

[17] See, Organisation for Economic Co-operation and Development, "G20/OECD Principles of Corporate Governance," at 10 (Sept. 2015), available at http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf. See also Prof. Mervyn E. King, SC, "Foreword to A Corporate Governance Model: Building Responsible Boards and Sustainable Businesses," Issue 17 of the Global Corporate Governance Forum (IFC Corporation), for a discussion of the inclusive model of corporate governance and its embrace of corporate social responsibility, available at http://www.ifc.org/wps/wcm/connect/1ff2c18048a7e72daa5fef6060ad5911/GCGF+PSO+issue+17+3-4-10.pdf?MOD=AJPERES.

investigative journalists are getting louder by the day. Banks,[18] other lenders, investors and many other concerned entities are demanding that MNEs respect human rights.[19] As a result, MNEs are realizing that the risks of legal liability and reputational damage jeopardise their social license to operate not just in countries where abuses occur. Customers may avoid buying their brands, or they may lose the right to participate in government procurement programs, etc. The consequences of being associated with systemic human rights abuse can no longer be ignored by MNEs.[20] Society is developing a new form of sustainable "transnational governance" that requires action.[21]

Many MNEs are taking steps to reduce the risk of abuse. A recent survey conducted by *Legal Business* revealed that 84% of corporations with more than $10 billion in asset value have adopted a human rights policy.[22] This is a good start, but far more needs to be done. There is a need for MNEs to conduct human rights due diligence throughout their supply chains. Legal

[18] The Equator Principles, currently applicable to 89 financial institutions in 37 countries covering over 70 percent of international project finance debt in emerging markets, set out comprehensive guidelines to ensure responsible lending. Available at http://www.equator-principles.com.

[19] For investors and lenders, the UN-affiliated Principles for Responsible Investment (UNPRI) urge action to curtail abuse. Website at https://www.unpri.org/. There is a growing body of "socially conscious investors," such as endowment funds of colleges and universities, the California Public Employees Retirement Fund (CalPers) and the Norwegian Government Pension Fund Global (the Norwegian Oil Fund).

[20] Leading examples of reputational risk in connection with human rights abuse are Apple's problems following the revelations of abuse at its Chinese supplier's facilities, the uproar that followed the discovery that many large Western clothing retailers were selling clothing made at the ill-fated Rana Plaza factory and the widespread movement to stop the trade in "blood diamonds," leading to the Kimberley Process.

[21] For a discussion of the influences at work aimed at improving the human rights performance of today's business world, see Milton C. Regan, Jr. and Kath Hall, "Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights," 84 Fordham Law Review 84, Issue 5 (2016), available at https://perma.cc/CA5X-UUBQ.

[22] Legal Business, "The New Risk Front for GCs – Nearly Half of Contracts Have Human Rights Clauses, LB Research Finds," online: Legal Business (September 8, 2016), available at http://www.legalbusiness.co.uk/ (search for "human rights").

safeguards should then be put in place.[23] According to the UNGPs, wherever an MNE discovers that there is a risk of abuse, it should either deal with it internally or use its "leverage" over any responsible party to cause it to "prevent, mitigate and remediate" the abuse.[24]

International arbitration is not a solution to all human rights problems; it would become one tool among others that an MNE can use to prevent, mitigate and remediate abuse that it causes, that it contributes to or that it is directly linked to. In implementing its human rights policy, an MNE should focus on the most salient risks and make maximum use of its leverage to address them.[25] An MNE can make clear, through consistent efforts, that it is serious about its policy and that it will, for example, take suppliers' and host countries' human rights practices into account when entering into new or renewed contracts. It can engage in educational efforts through workshops and the distribution of written materials. It can engage with the host country and a supplier's management to identify the root causes of abusive practices (some of which may stem from the MNE's own practices and demands).

The first MNEs to employ the suggested contractual clauses would serve as the thought leaders, providing examples of how international arbitration and mediation can be used as management tools to foster good corporate governance within a human rights compliance program. Through their influence, and the efforts of civil society throughout the world, it is to be hoped that a BHR Arbitration Panel's special rules and the expertise of its arbitrators and mediators would ultimately encourage a widespread use of these tools.

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[23] See Global Compact Network Netherlands, Oxfam and Shift, "Doing Business with Respect for Human Rights" (2016), for a practical guide on the implementation of the UNGPs' Pillar Two corporate responsibility to respect human rights, available at https://www.businessrespecthumanrights.org.

[24] The UNGPs, Principle 15.

[25] "Salient risks," within the meaning of the UNGPs, are those that pose the greatest risk of harm to potential victims, not necessarily harm to the MNE, although the two may be the same. See "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide," n. 15, at 8.

At some future date, when arbitration and mediation to resolve human rights disputes involving business have become widely accepted among many MNEs, those MNEs could seek the support of international lenders and investors, or regulatory assistance, to encourage or require nonsubscribers to adopt these practices. This would ensure a level playing field among competitors.[26]

IV. MNEs and their opponents could use arbitration to resolve *ad hoc* business and human rights disputes

Arbitration can be preferred by both parties to resolve a dispute when a human rights abuse gives rise to a cause of action under national law.[27] Torture, for example, amounts to battery or intentional infliction of bodily harm. Slavery is generally actionable under laws pertaining to false imprisonment or failure to pay required wages. Breaches of other international norms could lead to claims for bodily injury. For the purpose of this discussion, such tortious disputes can be divided into two categories: those where an acceptable court is not available and those where such a court is available.

Where an acceptable court is not available, the parties would be given a choice: they could either engage in a potentially prolonged media and Internet campaign or, alternatively, enter into a submittal agreement calling for arbitration before a BHR Arbitration Panel, if for no other purpose than to get the matter resolved once and for all. Companies are increasingly complaining about allegedly unfounded allegations that are amplified around the world through the media and the Internet. Such widespread allegations may be difficult for an MNE to rebut without a fair and prompt hearing. Even in cases where the allegations have merit, an MNE may prefer to

[26] The experience of environmental programs in the United States can be seen as an historical precedent. It shows that the "first adopters" would not only provide a living example, but they would also likely become strong advocates for the use of such tools, even urging regulatory agencies to make them mandatory for all others in their business sectors.

[27] The foremost example of this might be the U.S. Alien Tort Statute, which is unique among national laws. See Thompson, Ramasastry and Taylor, Translating Unocal, n. 5. The article discusses the incorporation of international humanitarian law into the jurisprudence of sixteen countries and how tort/delict laws of those countries may lead to causes of action for breaches of international norms.

mediate or arbitrate to dispose of the matter.[28] Both victims and the MNE have an incentive to voluntarily agree to submit the dispute to international arbitration. The victims would have an effective forum in which to seek justice; the MNE would have a way of resolving a matter that, if allowed to fester, could have deleterious consequences for its risk profile, reputation and social license.

Where an acceptable court is available, BHR Arbitration Panels would nonetheless offer the disputants a preferred alternative to a civil lawsuit. The defendant and the victims could enter into a submittal agreement leading to mediation and *ad hoc* arbitration rather than engage in court litigation.[29] Some of the factors that would favour use of such arbitration over court litigation are:

- Proceedings are based upon mutual agreement between the parties and can be held in many places throughout the world, to suit their convenience.

- By agreeing to arbitration, the parties could avoid complex cross-border legal issues.

- Instead of the five to ten years that court proceedings often entail, arbitrators could issue a final award in a much shorter time frame.

- Instead of submitting cases to judges chosen by "the luck of the draw," parties would participate in choosing arbitrators who have expertise directly related to business and human rights issues.[30]

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[28] When Warren Buffet took over as an interim chairman of Salomon Brothers after the Treasury auction scandal in New York in 1991, he told the assembled personnel: "Lose money for the firm, I will be very understanding; lose a shred of reputation for the firm, I will be ruthless."

[29] *Ad hoc* arbitration proceedings are those that are based on an agreement, referred to as a "submittal agreement," entered into by the parties after a dispute has arisen, as opposed to arbitration pursuant to an arbitration clause in a contract.

[30] Three arbitrators are commonly used, but the parties may select a single arbitrator. If three are used, each side selects one arbitrator and the two then jointly agree upon a third, who chairs the panel. The parties would be free to name arbitrators not on the roster of an international arbitration institution, provided that they meet the institution's own standards. Arbitration clauses and/or rules generally provide that an outside "appointing

- There is continuity of decision makers throughout the arbitration process.[31]

- The parties have greater latitude in specifying the substantive and procedural laws that govern the dispute, with due respect for any applicable international or national laws.

- The parties are able to craft individual discovery plans; procedures for interim relief and annulment proceedings would be considerably limited in scope, all of which would tend to keep the duration of the proceedings short and the costs down.[32]

- Proceedings can be less adversarial than in-court litigation, thus preserving working relationships.

- Awards are potentially enforceable throughout the world, including under the New York Convention. In contrast, there is no international covenant that provides for the widespread recognition of court judgments.

V. Managing supply chains and development projects

BHR Arbitration Panels could assist MNEs in keeping their supply chains in compliance. They would provide an alternative to simply ceasing doing business with those who breach human rights provisions. Cutting off an abusive supplier might prevent future taint to the MNE, but is likely to do

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authority" may select arbitrators where the parties, or the selected arbitrators, are unable to make a selection. As is the case with international arbitral courts generally, the arbitrators would be bound by a duty of independence and impartiality, and the failure to maintain such a duty would be grounds for challenge and their replacement.

[31] This assumes that the BHR Arbitration Rules would not provide for a substantive annulment/appeal process.

[32] For a set of widely accepted international rules on the taking of evidence in arbitration, see IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010), available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC.

little to eliminate a supplier's continuing abuse. There may also be practical considerations that can militate against such a step, as the commentary to UNGP Principle 19 has recognized. The supplier may be an important business partner with unique capabilities or products that have been developed over years of close affiliation. Termination could result in negative economic consequences to the MNE itself, could cause inhumane impacts on employees who were to be laid off and could disrupt the local economy. It might be best to try to work with suppliers to stop their abuse, using management tools such as those discussed here.

It may not be possible for an MNE to monitor and apply corrective measures to all of the suppliers in a chain that could consist of thousands of suppliers. Many goods and resources are procured by simple purchase orders, on the Internet or in the open market. But in cases where a chain of written agreements runs from the MNE to the originator of goods or services, the MNE should examine its contractual options.

Wherever practicable, MNEs should incorporate human rights protections into their supply contracts and development agreements.[33] These should be coupled with effective "escalation clauses" that allow them to enforce those protections, beginning with negotiations, then, if that step fails, entering into mediation and, finally, to binding arbitration. An arbitration institution that has agreed to use the BHR Arbitration Rules could be named as the provider of arbitration and possibly mediation services.[34] Further, MNEs could include so-called "perpetual clauses" in their contracts with immediate ("first tier") suppliers that require them to insert similar provisions in

[33] MNEs could incorporate descriptions of the human rights norms directly from international covenants, but a preferable approach, one that would aid enforcement, would be to describe the type of prohibited conduct using specific legal language. A system of representations and warranties could be one method of clarifying a supplier's responsibilities. Model arbitration clauses and other model contractual language adopted by national and international bar associations, leading law schools or industry associations could provide thoroughness, clarity and uniformity.

[34] For a leading example of the use of arbitration as a dispute resolution mechanism in an agreement between MNEs and global labour unions, see the recent Accord on Fire and Building Safety in Bangladesh, available at http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf.

contracts with their own suppliers, and so on through the supply chain.[35] A perpetual clause could hold all members of a supply chain accountable to an MNE for a breach.

VI. The empowerment of victims

MNEs may initially decide to be the only parties who can instigate arbitration against defaulting suppliers or contractors. But the effectiveness of their contractual arrangements can be greatly enhanced by empowering potential victims to join as party in an arbitral procedure or to act on their own behalf.[36] Giving rights to victims can be a highly effective compliance

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[35] For comprehensive legal comparative and empirical research on supply chain contracting practices of multinationals in The Netherlands, including references to "perpetual clauses," see A.L. Vytopil, "Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices", 8 Utrecht L. Rev. 122 (January 2012), available at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1424536. For a more extensive comparative empirical study, including The Netherlands, England and California, readers are referred to Dr. Vytopil's doctoral thesis, A.L. Vytopil, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing, The Hague, 2015), ISBN 978-94-6236-591-9. See also Fabrizio Cafaggi, "The Regulatory Functions Of Transnational Commercial Contracts: New Architectures," (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2136632.

[36] See Roger P. Alford, *Arbitrating Human Rights*, 83 Notre Dame L. Rev. 505, 507 (2008):

> [T]he tools of contract law and arbitration are . . . tools available to the vast majority of corporations that are good corporate citizens and wish to contract for compliance with basic human rights. For these corporations, contract law and arbitration procedures create opportunities to impose human rights obligations on contractors, vendors, and suppliers. Human rights obligations can be internalized by contract and subjected to effective dispute resolution procedures, including international arbitration. . . . *Finally, some corporations may wish to go even further and create opportunities for noncontracting parties - such as employees or nongovernmental organizations - to invoke third-party beneficiary rights to facilitate compliance with human rights embedded in the contract*." (emphasis added)

Available at: http://scholarship.law.nd.edu/ndlr/vol83/iss2/2 and, in another publication, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978305.

tool, as shown in environmental programs where statutes provide for so-called "citizen suits."[37] This is also true of sex discrimination statutes, of consumer fraud programs, antitrust acts and many others, all indisputably workable as means of implementing important public policies.

Allowing persons who are not signatory parties to an arrangement that provides for arbitration the right to invoke arbitration rights is an accepted feature of international arbitration that has given rise to the phrase "arbitration without privity."[38]

MNEs and other originators of contracts could insert provisions into their contracts allowing the victims themselves to take actions to assist in the enforcement of human rights provisions, ranging from being given observer status in arbitration and mediation proceedings, to having the right to intervene as parties or the right to initiate arbitration and mediation proceedings of their own.[39] An offender could face potential enforcement

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[37] See, e.g., Section 304 of the U.S. Federal Clean Air Act, 42 U.S.C. §7604, available at https://www.gpo.gov/fdsys/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapIII-sec7604.htm. These citizen suit provisions have allowed NGOs to initiate litigation on behalf of the environment. Similar provisions in contracts could allow NGOs to initiate litigation on behalf of actual or prospective victims or affected communities.

[38] See Jan Paulson, "Arbitration Without Privity," 10(2) ICSID Review - Foreign Investment Law Journal, p. 247 (Fall 1995). Bilateral investment treaties (BITs), where states are the parties, provide that MNEs that consider that they may be adversely affected by an action of the host state are granted the right to binding arbitration with such state.

The World Intellectual Property Organization (WIPO) uses a similar approach to allow owners of trade names to invoke mandatory arbitration against so-called "cybersquatters" (those who register other peoples' trade names as Internet domain names in the hope of extracting payment to allow the trade name owner the right to use that name on the Internet). One who registers a domain name must agree to arbitrate its right to register that name if another person claims ownership of the name and seeks arbitration. Apple recently won an arbitration award against someone who had registered "iPod" as a domain name. Apple Inc. v. Private Whois Service, Case No. D2011-0929 (July 21, 2011), available at http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0058.

[39] The exercise of such a right would be voluntary. A third party could forego its contractual rights and still have all other available remedies at its disposal.

from both MNEs and victims.[40] This could greatly increase the incentives for compliance.

It would be unrealistic to rely upon the victims themselves to have the wherewithal to assert their rights. Therefore contract clauses should be made known to labour unions, human rights NGOs, human rights advocates and others so as to inform them of victims' rights and enable them to act on the victims' behalf.

VII. Mediation

Generally speaking, the longer a dispute drags on, the more the positions of the parties can become entrenched, resulting in mounting legal and administrative costs to both sides. Thus, before resorting to binding arbitration, the parties to a dispute would do well to consider the use of mediation, which could enable them to maintain control of their dispute and its resolution, and potentially arrive at a settlement quickly and at a low cost.[41] Mediation offers another advantage for parties wanting to preserve a valuable commercial relationship in that it is collaborative, whereas arbitration and litigation as legal remedies are more adversarial.

International arbitration institutions that apply the BHR Arbitration Rules and offer mediation services could make these services available to BHR Arbitration Panels formed under their auspices. BHR Arbitration Panels could refer also parties to outside mediation services, such as the roster of mediators associated with ACCESS Facility, a global non-profit organization based in The Hague.[42] ACCESS Facility supports rights-

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[40] It has been suggested that some form of arrangement for mediation and arbitration of even small claims by individual victims could be developed at a later point, building on the success of international arbitration. This would provide a forum that would be responsive to the UNGPs' Third Pillar and would also enhance an MNE's social license to operate.

[41] For these reasons mediation is considered a valuable tool in corporate governance. See, for example, the King Code of Governance for South Africa, p. 13 (2009) on the importance of mediation and arbitration as management tools in good governance, available at http://www.ecgi.org/codes/documents/king3.pdf.

[42] Information about ACCESS Facility may be found at http://accessfacility.org/.

compatible, interest-based problem solving to prevent and resolve conflicts between companies, communities and governments through mediation/facilitation.

As discussed in Section XI, both the mediation and arbitration functions of BHR Arbitration Panels could serve a complementary role to the mediation role of the OECD National Contact Points.

In addition to resolving bilateral disputes that have already occurred between business enterprises and victims of abuse, the mediators could help managers of development projects and potentially impacted communities work out agreements for mitigation of expected impacts and for acceptable offsets. This would prevent difficulties that could affect not only the human rights of the community members but also the projects' economic viability. As part of any final agreement, the parties could specify a BHR Arbitration Panel as the forum to resolve any future disputes that might arise.

VIII. Arbitrators and mediators

Arbitrators and mediators selected to work with BHR Arbitration Panels must be acceptable to both sides. We are aware that there is concern in some quarters that arbitrators who serve existing commercial international arbitration institutions may have close ties to the business community and thus would be viewed by the victim side as favouring the business side. This may require some changes. The shortage of expert professionals may be less acute in the case of mediators, as witness the ACCESS Facility.

IX. How international human rights norms come before BHR Arbitration Panels

The UNGPs state:

> The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles

> concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[43]

Such rights would come before BHR Arbitration Panels indirectly, for example, as a contract dispute between business partners involving the human rights provisions of a supply chain agreement. As discussed earlier, a dispute could arise when an MNE is accused of tortiously breaching an international norm that has been incorporated into national law. An additional example of this might be an accusation of complicity in war crimes through a sale of arms to a group that is perpetuating such crimes in a conflict zone.[44]

Although enforcement of human rights norms in courts is often thwarted by the lack of extraterritorial jurisdiction of courts over torts/delicts committed abroad, a BHR Arbitration Panel faces no such barrier. It would operate anywhere in the world on the basis of public procedural and contract law and substantively on contract and/or tort/delict law. Also, corporations and other legal persons not directly subject to international law would become so through contracts. The BHR Arbitration Panels would thus cut through some of the thorniest obstacles to justice for victims.

X. Characteristics of arbitration awards

BHR Arbitration Panels would have authority to grant extensive relief, including restitution and other damages, and to order injunctive relief, such as specific enforcement of contracts, remedial measures and measures to prevent prospective abuse. They could fashion or give effect to the prior agreements of the parties involving such matters as creative remedies for situations involving numerous victims, complicated health problems, the need to search for victims or the need to widely distribute the proceeds of settlements and awards. As mentioned earlier, awards could be enforceable in many domestic courts around the world pursuant to the New York Convention.

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[43] The UNGPs, Principle 12.

[44] The potential for this type of cases underscores the need for every BHR Arbitration Panel's arbitrators to have a high level of expertise in international human rights law.

Although a growing body of authoritative written rulings issued by BHR Arbitration Panels may not be accepted as binding precedents for national courts to follow, they would be available to other BHR Arbitration Panels as persuasive authority to guide them in arriving at decisions on like matters. And they would be important as guidance to business enterprises in clarifying their own responsibilities. Thus the rulings would serve to level the playing field within the business community.

XI. BHR Arbitration Panels and other institutions with human rights responsibilities

Questions have arisen as to whether BHR Arbitration Panels would either undercut or augment the role of existing international institutions that monitor and enforce human rights. BHR Arbitration Panels would complement such forums. For example, the OECD National Contact Points have a mandate to investigate**,** urge the parties to mediate the matter and make determinations and recommendations in a final statement, even if the matter remains unresolved. The latter will amount to possible naming and shaming by the NCP of the unwilling MNE. In this context it is important to note that the NCP resolution system is forward-looking and is, in principle, as a non-judicial mechanism not aimed at restitution. The final statement could recommend that parties to a dispute agree to submit an unresolved matter to a BHR Arbitration Panel for further mediation or formal arbitration that could lead to restitution.

The treaty-based international human rights courts, such as the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights, deal only with cases where one of their member states is accused of a human rights violation and thus would not be affected by a BHR Arbitration Panel's involvement in private contractual and civil tort/delict claims.

The current effort to negotiate a new UN treaty on business and human rights presents an opportunity for international arbitration to be recognized and adopted as an effective worldwide mechanism for access to remedy. Additionally, the prospective experience regarding the application of both substantive and procedural law generated by the use of BHR Arbitration Panels to resolve business-related human rights disputes could inform and contribute to the negotiations over the UN treaty.

XII. Benefits to the international human rights community

Some within the human rights community have expressed concerns about the use of international arbitration as a valid forum to vindicate human rights norms. We anticipate that the BHR Arbitration Rules would adequately address all of the concerns that have been raised, particularly those arising from past investor-state arbitrations. Thus we expect that many human rights NGOs will see that BHR Arbitration Panels serve the cause of human rights victims.

We invite the international human rights community to further identify the issues to be addressed by the team drafting the BHR Arbitration Rules and to refer experts for the drafting process and follow it closely.. The human rights community could support the adoption by MNEs and others of escalation clauses in contracts, including clauses that grant victims the type of third-party rights discussed earlier. NGOs and human rights lawyers could represent victims before BHR Arbitration Panels.

XIII. Overcoming "inequality of arms"

Victims who wish to utilize a BHR Arbitration Panel may need financial assistance to help defray their mediation and arbitration costs,[45] either through outright grants or an advance of funds to be repaid out of the proceeds from final settlements or awards. This would help to offset the financial advantages that business enterprises generally have over victims, i.e., to deal with the problem of "inequality of arms." One example of an aid mechanism is the Financial Assistance Fund maintained by the Permanent Court of Arbitration that provides for the needs of less wealthy states. This could be used as a model for any new fund to be set up within an international arbitration institution that accepts the use of the BHR Arbitration Rules. Alternately or additionally, an assistance fund that is separate from any existing arbitration institution could be made available to victims that use a BHR Arbitration Panel.

[45] In this context it is to be noted that one of the most cited advantages of mediation over arbitration is the cost-effectiveness of the former, next to speed and recourse to non-legal remedies and solutions.

"Inequality of arms" could also be addressed by the use of creative fee arrangements, pro bono services by private lawyers, legal aid, etc. It may be appropriate to examine whether fee-shifting arrangements (the loser pays the winner's legal fees and costs) might be altered to encourage victims to use arbitration.[46]

XIV. Arbitration before a BHR Arbitration Panel should not be equated with investor-state and consumer arbitration

We are keenly aware of criticism that the human rights community has directed towards several other types of arbitration, particularly investor-state dispute settlement (ISDS) and consumer arbitration. Arbitration before a BHR Arbitration Panel would be different from those forms of arbitration. Here is why.

Regarding investor-state arbitration: BHR Arbitration Panels would depart from those features of investor-state arbitration that have been most criticised. Whereas ISDS has historically been a closed process, we anticipate that under the BHR Arbitration Rules, which are likely to closely follow the UNCITRAL rules on transparency,[47] pleadings, evidence, hearings and rulings, would be open to the public and *amicus* pleadings could be allowed. Whereas ISDS provides MNEs with access to an international arbitration forum in which they sometimes challenge host state actions to protect human rights, BHR Arbitration Panels would exist for the purpose of *enforcing* human rights clauses in contracts and otherwise *protecting* victims from abuse by business. Hence, their mission and mode of operation are fundamentally different from those of ISDS.

[46] "Reverse fee shifting," whereby successful plaintiffs are awarded their fees and costs, but not defendants, as is the case with environmental programs in the U.S., may be appropriate.

[47] See n. 50, below.

Regarding consumer arbitration: BHR Arbitration Panels would operate in fundamentally different ways from the kind of consumer arbitration that has been strongly criticized in recent *New York Times* articles.[48] First, consumer arbitration is imposed by boilerplate language in sales agreements that extract a waiver of all other legal rights except arbitration. Arbitration before a BHR Arbitration Panel would be consensual in principle and would leave open any options that victims might have to go to court instead of to arbitration.[49] Second, whereas consumer arbitration bars injured victims from joining with others to file claims – thereby making it prohibitively expensive even to claim one's rights – BHR Arbitration Panels would allow joint action by groups of injured victims.

Third, BHR Arbitration Panels would offer victims the right to participate in the selection of the arbitrators – something that consumer arbitration has not allowed. Also, as mentioned earlier, BHR Arbitration Panels will offer arbitrators and mediators who have legal and cultural expertise to place a dispute in an appropriate cultural context. It can be expected that their decisions will be well informed.

Finally, whereas consumers must bear the costs of imposed arbitration, BHR Arbitration Panels, as discussed earlier, could allow victims to collect their fees and costs as part of any award. Other features would address the "inequality of arms" that exists between indigent victims and well-heeled businesses.

BHR Arbitration Panels would offer a way for human rights advocates and human rights NGOs to prevent human rights abuse by creating a powerful compliance incentive. They offer a way for victims to have access to justice on a meaningful scale.

We urge civil society to explore the features of the proposed BHR Arbitration Panels, and particularly to note the differences from other types

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[48] Numerous articles are available at https://query.nytimes.com/search/sitesearch/?action=click&contentCollection&region=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage - /consumer arbitration.

[49] It is customary for parties to arbitration to waive their legal rights at the time they engage in arbitration; up to that point, victims could choose to proceed in a civil court.

of arbitration just described. Further, as discussed below, we would expect civil society to become involved in the drafting of the BHR Arbitration Rules, to ensure that the legitimate needs of victims for fair and impartial hearing of their claims are met.

XV. Drafting the BHR Arbitration Rules

Our proposal for the use of international arbitration on business and human rights has undergone sufficient review by stakeholders to enable us to reach the conclusion that its basic approach is sound. The next step should be to draft the BHR Arbitration Rules, using as a starting point the rules of major international arbitration institutions.[50]

The Working Group has given thought to a process for drafting the BHR Arbitration Rules. Of foremost concern is that the drafting team (Drafting Team) should be made up of highly qualified experts who collectively bring the necessary skills to the process, together with regional diversity. The Drafting Team should be chaired by a prominent expert in international arbitration. It is important that all members are selected, in part, for their ability to represent the various categories of stakeholders. The Drafting Team should consult with the stakeholder representatives to identify all issues and potential routes to resolve them.

The Working Group has tentatively identified a number of issues that the Drafting Team should consider. These are set out in Appendix B.

Our preliminary views on the process for the drafting of the BHR Arbitration Rules are set out in Appendix C.[51] The Working Group invites

[50] The Drafting Team would likely draw initially upon the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective April 1, 2014) that make investor-state arbitration transparent to the public. The new rules authorize the arbitrators to protect confidential business information. Outside parties may submit *amicus* briefs. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

[51] The Working Group is not in a position at this time to recommend that new mediation rules are needed. Instead, the Working Group suggests that the Drafting Team first assess existing mediation rules in order to make a recommendation.

all interested stakeholders to identify additional issues that the Drafting Team should address and to send comments to us so that our recommendations to the Drafting Team can be as comprehensive as possible.[52]

XVI. Conclusion

It is time to look beyond existing court systems and regulatory mechanisms that have largely failed to provide the accountability that is urgently needed to protect human rights. There is every reason to believe that international arbitration will be as successful in resolving human rights disputes as it has been in resolving countless other disputes.

Since this project began, we have invited comments from the business community, the international human rights community, the academic community and governments. Thus far, nearly all of the responses we have received have been largely positive or have urged us to pursue the project. The case for international arbitration is holding up.

Business enterprises, victims, human rights advocates, international bodies, NGOs and states are all stakeholders in the effort to rid the world of human rights abuse. The proposed BHR Arbitration Panels would sit at the intersection where the interests of all these stakeholders converge. We are presented with a rare opportunity. The BHR Arbitration Panels, once established, could gather a momentum that would result in lasting achievements.

[52] Comments should be sent to Claes Cronstedt at claes@cronstedt.com, Jan Eijsbouts at a.eijsbouts@maastrichtuniversity.nl or Robert C. Thompson at thomps925@gmail.com.

APPENDIX A

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The other members of the International Arbitration Working Group who have contributed much insight and effort to the project:

Adrienne Margolis is founder and editor of Lawyers for Better Business (L4BB), a website and global network to keep lawyers one step ahead of developments in business and human rights. She is a journalist and consultant with a wealth of writing and project management experience, including editing magazines for the *Financial Times*, Thomson Reuters and UBS. She is currently convening groups of lawyers and other experts campaigning to reduce human rights harms caused by climate change. Adrienne is a senior advisor to the Tax Justice Network and a member of the UK Equality and Human Rights Commission Business and Human Rights Working Group.

Steven Ratner is a Professor of Law at the University of Michigan Law School. His teaching and research focus on public international law and a range of challenges facing governments and international institutions since the Cold War. He has taught both international human rights law and international law on foreign investment for over two decades and has published in both fields, including articles in the *American Journal of International Law* and the *Yale Law Journal.* He has been appointed by the UN Secretary-General to two panels of experts on accountability for atrocities during the Cambodia and Sri Lanka conflicts. He has also provided expert opinions in investment arbitrations. He is currently a member of the State Department's Advisory Committee on International Law and an Adviser to the American Law Institute's Restatement of the Foreign Relations Law of the United States.

The following individuals have provided many productive and informed comments on previous drafts of this proposal:

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The authors are solely responsible for the contents of this draft.

APPENDIX B

Issues to be considered in the drafting of the BHR Arbitration Rules

- The procedures for the selection of arbitrators by the parties or by an appointing authority, including the qualifications of arbitrators not on an official roster of a participating arbitration institution.

- How transparent the proceedings and awards should be and how to accommodate any confidentiality concerns that either side might have.

- How to ensure "equality of arms" between the parties, i.e., to account for the disparate financial and other resources of business and victims.

- Whether to allow for the annulment of awards on appeal and, if so, what the procedures for such annulments/appeals might be.

- How to accommodate an arrangement for the use of mediation and arbitration using the same person(s).

- How to facilitate the use in arbitration of information exchanged during a earlier mediation process.

- Whether to allow groups of victims to aggregate claims in common actions through consolidation or multi-party arbitration.

- How to manage cases that are integrally connected with claims and issues other than human rights.

- How to incorporate procedural provisions for particularly vulnerable witnesses.

- What roles states should play as potential parties.

- What roles third parties, such as NGOs, trade associations or others that represent victims, should have with respect to the arbitration.

APPENDIX C

The next steps in drafting the BHR Arbitration Rules

It is critical to the future of the BHR Arbitration Panels that the BHR Arbitration Rules (both arbitration rules and mediation rules, if required) meet all stakeholders needs for a fair and effective forum to provide access to justice. The following should be addressed in setting up the process for drafting the BHR Arbitration Rules:

1. An initial effort should be made to identify the issues that need to be addressed in order to ensure that the final Rules have taken all stakeholders' considerations into account.

2. The Drafting Team should determine what changes are needed in existing rules to make them suitable for use by BHR Arbitration Panels and to draft such rules. The first set of existing rules examined by the Drafting Team should be the UNCITRAL Arbitration Rules and its Transparency Rules (revised to 2014), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf?

3. New rules for mediation may not be needed. However, if the Drafting Team decides that new rules are required, should the new mediation rules be based on the UNCITRAL Conciliation Rules 2002 (https://www.google.nl/search?client=safari&rls=en&q=uncitral+conciliation+rules+2002&ie=UTF-8&oe=UTF-8&gfe_rd=cr&ei=2O8-WOjOA7So8weQwaOYBQ) or on the Optional Conciliation Rules of the Permanent Court of Arbitration? Available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Permanent-Court-of-Arbitration-Optional-Conciliation-Rules.pdf.

4. Who are the principal stakeholders in the drafting of the BHR Arbitration Rules? Some sectors that we have identified include:
    a. Multinational business enterprises.
    b. International and national human rights NGOs, including NGOs that represent victims of human rights abuses.
    c. Labour organizations.
    d. Public international organizations, such as the UN, OECD, EU, etc.

e. Interested states.
f. International arbitration institutions.
g. International and national bar associations.
h. Major lenders to and investors in MNEs.

5. How many members should the Drafting Team have? (Seven to nine would seem to be a manageable number.)

6. Should the Drafting Team have representation from the various legal cultures, e.g., civil law, common law?

7. Who should appoint the Drafting Team?

8. What should the qualifications of Drafting Team members be, such as:
    a. Expert knowledge of international human rights law.
    b. International arbitration expertise through service as arbitrators or in representing parties in international arbitral proceedings.
    c. Academic credentials in studying and teaching international arbitration.
    d. Expertise in human rights litigation/arbitration.
    e. Regional representation.
    f. Close affiliations with and support from principal stakeholders.

9. How should the Drafting Team consult with its "constituencies" throughout the drafting process? For example, should there be three to five persons drawn from each "constituency" who could act as sounding boards/advisors who would ensure that the interests of the principal stakeholders are heard, lending credibility to the final outcome?

10. How should the drafting process be structured? One scenario could be along the following lines:

    a. The chairman of the Drafting Team should be selected, followed by the selection of the members of the Drafting Team.

b. The members of the Drafting Team could hold their own in-person conference for the purposes of acquainting the members with the task, the issues and each other.

c. There should be a series of drafts exchanged among members, together with conference calls/Skype sessions designed to exchange ideas and resolve differences.

d. There should be a second in-person conference to enable the members of the Drafting Team to reach final resolutions of all issues, including decisions on the text of any proposed amendments and accompanying report.

e. There should be a final in-person conference to review the final BHR Arbitration Rules, to be held immediately prior to an international conference designed to launch the BHR Arbitration Rules.