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International Arbitration: The New Frontier of Business and Human Rights Dispute Resolution?

The question of redress for corporate human rights violations remains daunting. Access to justice challenges faced by rights holders before domestic courts have placed this issue at the forefront of international discourse, and many initiatives have attempted to improve rights holders' access to effective remedies. This article examines one such initiative, namely international arbitration. The article focuses on the use of international arbitration in the business and human rights context pursuant to the 2013 Accord on Fire and Building Safety in Bangladesh and the recently launched Hague Rules on Business and Human Rights Arbitration. It evaluates the extent to which these developments may alleviate lingering concerns surrounding the use of international arbitration in the business and human rights context. The article concluded that while no single mechanism, including international arbitration, can guarantee complete redress for rights holders' human rights claims, international arbitration may provide a valuable non-judicial alternative that supplements other domestic and international initiatives.

La question de la réparation des violations des droits de l'homme commises par les entreprises demeure épineuse. Les difficultés d'accès à la justice rencontrées par les ayants droit devant les tribunaux nationaux ont placé cette question au premier plan du discours international, et de nombreuses initiatives ont tenté d'améliorer l'accès de ces derniers à des recours efficaces. Cet article examine l'une de ces initiatives, à savoir l'arbitrage international. L'article se concentre sur l'utilisation de l'arbitrage international dans le contexte des affaires et des droits de l'homme, conformément à l'Accord de 2013 sur la sécurité des incendies et des bâtiments au Bangladesh et aux règles de La Haye sur l'arbitrage des affaires et des droits de l'homme récemment lancées. Il évalue dans quelle mesure ces développements peuvent atténuer les préoccupations persistantes entourant le recours à l'arbitrage international dans le contexte des affaires et des droits de l'homme. L'article conclut que si aucun mécanisme, y compris l'arbitrage international, ne peut garantir une réparation complète des torts causés aux ayants droit, l'arbitrage international peut constituer une alternative non judiciaire précieuse qui s'ajoute à d'autres initiatives nationales et internationales.

* Assistant Professor, University of Alberta Faculty of Law. The author thanks the organizers and participants of the 2018 and 2019 Purdy Crawford Business Law Workshops at the Schulich School of Law, Dalhousie University, for their helpful comments on earlier drafts of this article.

Introduction

The United Nations Guiding Principles on Business and Human Rights (UNGPs) constitute the leading international instrument on the accountability of businesses for human rights violations.[1] The UNGPs are founded on three pillars: (1) states' obligation to protect against human rights abuse, (2) businesses' responsibility to respect human rights, and (3) the need for states and businesses to take appropriate steps to ensure that, when such abuses occur, those affected have access to effective grievance mechanisms and remedies.[2] The third "remedy" pillar reflects the need to supplement rights and obligations with effective remedies for their breach.[3] Nonetheless, for individuals and communities whose human rights have been infringed by transnational business-related activities, the question of redress remains daunting.

Until recently, these individual and community rights holders[4] sought remedy mostly from domestic courts. Indeed, effective judicial mechanisms are crucial for ensuring access to remedy.[5] Although this avenue remains

1. For a recent detailed discussion of the UNGPs see, John Gerard Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights" in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar, 2020) at 63-86.
2. United Nations, Guiding Principles on Business and Human Rights, 2011, HR/PUB/11/04, endorsed by the United Nations Human Rights Council in Resolution 17/4 of 16 June 2011 [UNGPs].
3. *Ibid* at 2; the UNGPs define "remedy" for this purpose to include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions," as well as "the prevention of harm through, for example, injunctions or guarantees of non-repetition." *Ibid* at 27.
4. The term "rights holder" has been increasingly used in the business and human rights literature. See e.g. Rajiv Maher, "De-contextualized Corporate Human Rights Benchmarks: Whose Perspective Counts?" (2020) 5 Bus Human Rights J 156 at 163; Naomi Carrard et al, "Designing Human Rights for Duty Bearers: Making the Human Rights to Water and Sanitation Part of Everyday Practice at the Local Government Level" (2020) 12 Water 378 at 388.
5. Human Rights Council, "Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms," Report of the United Nations High Commissioner for Human Rights (14 May 2018) UN Doc A/HRC/38/20 at para 5.

open, litigants in some of the host states where transnational business activities take place experience numerous challenges. For instance, these states may lack due process guarantees, their courts may be politically influenced, corrupt or mistrusted, and claimants may not have access to funding or to experienced counsel.[6] Litigation in the business's home state also has its theoretical and practical challenges, including limited liability of parent companies, *forum non conveniens*, statutes of limitations, difficulties gathering evidence, and high litigation costs.[7]

In Canada, for instance, lawsuits alleging human rights abuses by Canadian businesses operating abroad have yet to succeed on their merits. Several cases have been dismissed at a preliminary stage of the proceedings, either because they disclosed no reasonable cause of action[8] or for lack of jurisdiction.[9] Most recently, the Supreme Court of Canada rendered its ground-breaking decision in *Nevsun v Araya*.[10] This case involved human rights and tort claims filed by Eritrean mine workers against a Canadian mining company whose subsidiary operated the mine. The majority of the Supreme Court found that "reliance on existing domestic torts may not 'do justice to the specific principles that already are, or should be, in place with respect to human rights.'"[11] The majority held, for the first time, that claims based on the violation of international human rights norms may be allowed pursuant to "a direct approach" that recognizes customary international law as part of Canadian common law.[12] The majority also

6. Claes Cronstedt & Robert C Thompson, "A Proposal for an International Arbitration Tribunal on Business and Human Rights" (2016) 57 Harv Int'l L J Online Symposium 66 at 66; Marilyn Croser et al, "Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability" (2020) 5:1 Bus & Human Rights J 130 at 130.

7. Gwynne L Skinner, "Beyond *Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World" (2014) 46 Colum Hum Rts L Rev 158 at 163.

8. *Piedra v Copper Mesa Mining Corporation*, 2010 ONSC 2421, aff'd 2011 ONCA 191.

9. *Recherches internationales Québec v Cambior Inc*, [1998 QJ No 2554, 1998 CanLII 9780; *Yassin v Green Park International Inc*, 2009 QCCS 4151, aff'd 2010 QCCA 1455; *Association canadienne contre l'impunité (ACCI) c Anvil Mining Ltd,* 2011 QCCS 1966, rev'd 2012 QCCA 117); one case is still pending before the courts (*Choc v Hudbay Minerals*, 2013 ONSC 1414); two other cases settled (*Garcia v Tahoe,* 2015 BCSC 2045, rev'd 2017 BCCA 39; *Nevsun Resources Ltd v Araya*, 2020 SCC 5) [*Nevsun*]; for a discussion of these cases, see, eg Joost Blom, "Canada," in Catherine Kessedjian & Humberto Cantú Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Springer, 2020) at 183-224; Above Ground, "Transnational Law Suits in Canada Against Extractive Companies: Developments in Civil Litigation" (5 August 2019), <aboveground.ngo/wp-content/uploads/2019/08/Cases_5Aug2019-4-1.pdf> [perma.cc/NM95-GKZ9].

10. *Nevsun*, *supra* note 9. A detailed discussion of this decision is beyond the scope of this article; see e.g. Malcolm Rogge, "*Nevsun* puts Canada's Corporate Decision Makers in the Human Rights Zone," Corporate Responsibility Initiative (CRI) Working Paper No 70 (19 March 2020), <papers.ssrn.com/sol3/papers.cfm?abstract_id=3557902> [perma.cc/3DFE-GWYW].

11. *Nevsun*, *supra* note 10 at para 126.

12. *Ibid* at para 127.

rejected the notion that "corporations today enjoy a blanket exclusion under customary international law from direct liability for abuses of 'obligatory, definable, and universal norms of international law.'"[13] However, since the Supreme Court's decision concerned a preliminary stage of the case, the plaintiffs' ability to succeed on the merits of their claims and to obtain a remedy from Nevsun remained to be determined at trial.[14] A few months after the Supreme Court rendered its judgment, Nevsun settled with the claimants.[15]

In the U.K., the English Supreme Court in its 2019 decision in *Vedanta v Lungowe*[16] accepted jurisdiction over negligence claims brought by residents of Zambia against an English parent company and its Zambian subsidiary. The claimants alleged damages suffered in Zambia in connection with the subsidiary's operation of a mine. While the court recognized that Zambia "would plainly be the proper place" for the litigation,[17] it concluded that "there was a real risk that the claimants would not obtain substantial justice in the Zambian jurisdiction."[18] The ultimate outcome of the case on its merits, however, remains to be seen.[19] In 2020, the U.K. Court of Appeal, in *Kadie Kalma v African Minerals Ltd And Ors*,[20] declined to find that the corporate owner of a mine in Sierra Leone was negligent in partaking in the local police's violent response to

13. *Ibid* at para 113.

14. *Ibid* at para 131. In *Chevron Corp v Yaiguaje*, for instance, plaintiffs sought to enforce a judgment rendered in Ecuador against an American petroleum corporation and its seventh-level Canadian subsidiary for alleged environmental damage; the Ontario Superior Court of Justice (2013 ONSC 2527), Court of Appeal (2013 ONCA 758), and the Supreme Court of Canada (2015 SCC 42) all found jurisdiction to hear the case; the question of whether the assets of the Canadian subsidiary were available to satisfy a judgment against its parent company, however, was answered in the negative by the Ontario Court of Appeal (2018 ONCA 472), leave to appeal to the Supreme Court of Canada was refused.

15. Niall McGee, "Canadian Miner Nevsun Resources Settles with African Workers Over Case Alleging Human-rights Abuses," *The Globe and Mail* (28 October 2020), online: <theglobeandmail.com/business/article-canadian-miner-nevsun-resources-settles-with-african-workers-over-case/?s=03> [perma.cc/GEE7-BZMA] <https://www.theglobeandmail.com/business/article-canadian-miner-nevsun-resources-settles-with-african-workers-over-case/?s=03>.

16. *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20 [*Vendanta*]; for a detailed discussion of this case see e.g. Tara Van Ho, "Vedanta Resources PLC and another v Lungowe and others" (2020) 114:1 Am J Int'l L 110; Carrie Bradshaw, "Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court" (2020) 32 J Env'l L 139.

17. *Vendanta*, *supra* note 16 at para 40.

18. *Ibid* at paras 22, 88-101. The English Supreme Court applied its reasoning in *Vendanta* in its recent decision in *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3. It held that the English courts have jurisdiction to hear the case.

19. Since the Supreme Court's judgment was rendered, the parties have attempted to settle the case, but so far unsuccessfully: *Vedanta Resources PLC and another v Lungowe and others*, [2020] EWHC 749 (TCC), at para 13.

20. *Kadie Kalma & Ors v African Minerals Ltd And Ors*, [2020] EWCA Civ 144.

unrest in the community, although jurisdiction was accepted. The Court of Appeal noted that "whilst companies operating abroad may properly help to facilitate the law and order expected to be provided by host countries, it is the governments of those countries (and not the companies) who have 'the primary responsibility to promote and protect human rights.'"[21] Therefore, even when the English courts accept jurisdiction over cases involving U.K.-based parent corporations, their willingness to find liability remains uncertain.

In the U.S., the *Alien Tort Claims Act* (*ATS*) equips U.S. District Courts with original jurisdiction over civil actions brought by foreigners for torts "committed in violation of the law of nations or a treaty of the United States."[22] However, in *Kiobel v Royal Dutch Petroleum Co*.[23] the U.S. Supreme Court limited the reach of the *ATS* for alleged human rights violations by foreign businesses by holding that the presumption against extraterritoriality applies to claims for violations of customary international law occurring abroad.[24] The U.S. Supreme Court has also recently ruled, in *Jesner v Arab Bank*, that federal courts are not available to aliens in actions against foreign corporations.[25] The case prompted one observer to state that "[t]he exclusion of transnational human rights litigation from U.S. federal courts is, for most practical purposes, now complete."[26] The litigation avenue in the U.S. is thus effectively closed to foreign individual and community rights holders seeking redress against human rights violations committed by foreign corporations.

This uncertain jurisprudential environment demonstrates the challenges surrounding rights holders' access to remedies in national courts and warrants the development of alternative dispute resolution avenues to supplement domestic litigation. Principle 31 of the UNGPs sets out the following "effectiveness criteria" for non-judicial grievance mechanisms: legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.[27] Many initiatives have emerged in recent years to facilitate the implementation of the third

21. *Ibid* at para 151.
22. *Alien Tort Claims Act*, 28 USC § 1350.
23. *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013).
24. For commentary on the case, see e.g. Roger P Alford, "The Future of Human Rights Litigation after *Kiobel*" (2014) 89 Notre Dame L Rev 1749 at 1772; Anna Grear & Burns H Weston, "The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Lawscape" (2015) 15 Human Rights L Rev 21.
25. *Jesner v Arab Bank, PLC*, 138 USSCC 1386 (2018).
26. Rebecca J Hamilton, "*Jesner v Arab Bank*" (2018) 112 Am J Int L 720.
27. UNGPs, *supra* note 2 at 33.

pillar of the UNGPs in accordance with these criteria.[28] Such initiatives range from company or industry-level mechanisms to national and international mechanisms.[29]

At the corporate or industry level, multinational companies and industry organizations have developed "operational-level grievance mechanisms," which are administered internally by the corporation in cooperation with relevant stakeholders.[30] These include, for instance, information facilitation, investigation, negotiation, mediation, and conciliation.[31] At the national level, governments have developed non-judicial mechanisms designed to reinforce their ability to monitor, regulate, and discipline transnational businesses for human rights violations, such as human rights ombudsperson institutions[32] and legislation.[33] At the international level, initiatives have sought to improve domestic legislation and rights holders' access to domestic courts, such as the proposed United Nations Treaty

28. For a detailed review of non-judicial grievance mechanisms see e.g. Mariëtte van Huijstee & Joseph Wilde-Ramsing, "Remedy is the reason: non-judicial grievance mechanisms and access to remedy" in Surya Deva & David Birchall, eds, *Research Handbook on Human Rights and Business* (Edward Elgar, 2020) at 471-491.

29. Caroline Rees & David Vermijs, "Mapping Grievance Mechanisms in the Business and Human Rights Arena" (2008) Corporate Social Responsibility Initiative Report No 28, John F Kennedy School of Government, Harvard University, at 1; Penelope Simons & Audrey Macklin, *The Governance Gap : Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) at 93-150.

30. Yousuf Aftab & Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy"* (LexisNexis, 2019) at 142-143.

31. Rees & Vermijs, *supra* note 29 at 8-40.

32. For instance, the Canadian Ombudsperson for Responsible Enterprise (CORE) launched by the federal government in January 2018. See Government of Canada, "Office of the Canadian Ombudsperson for Responsible Enterprise," online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse-ombudsperson.aspx?lang=eng> [perma.cc/6C2R-2P7E]; Global Affairs Canada News Release (17 January 2018), online: <www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html> [perma.cc/6GCL-439C]**;** the government appointed Ms Sheri Meyerhoffer as the CORE in April 2019, Global Affairs Canada News Release (8 April 2018), online: <www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html> [perma.cc/QK7N-UR9S]; on ombudsperson institutions generally see e.g. Trevor Buck, Richard Kirkham & Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Routledge, 2011); Linda C Reif, *Ombuds Institutions, Good Governance and the International Huma Rights System*, 2nd ed (Brill Nijhoff, 2020); Meg Brodie, "Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalising the 'Protect, Respect and Remedy' Framework," in R Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Brill Nijhoff, 2012); The Canadian Press, "Ottawa to create new ombudsperson to keep tabs on corporate behaviour abroad" (17 January 2018), online: <www.cbc.ca/news/politics/corporate-ombudsman-abroad-1.4491388> [perma.cc/7RLC-SYQ7].

33. Simons & Macklin, *supra* note 29 at 187-241.

for Business and Human Rights,[34] or to facilitate non-judicial domestic redress, such as the OECD Guidelines for Multinational Enterprises.[35]

A survey of these mechanisms and initiatives is beyond the scope of the present article.[36] This article focuses on international arbitration as a non-judicial grievance mechanism that could provide an effective alternative to domestic litigation in the business and human rights context. Rather than evaluating international arbitration in this context on the basis of the effectiveness criteria set out in Principle 31 of the UNGPs, which has been done elsewhere,[37] this article examines recent developments in international arbitration that aim to adapt it for the resolution of business and human rights disputes.

Arbitration in this context may be defined as a dispute resolution process in which objective decision-makers chosen by the disputing parties apply a procedure chosen by the parties and render a binding

34. *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*, OEIGWG Chairmanship Revised Draft (16 July 2019), online (pdf): <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> [perma.cc/383Z-Q4WU]; for commentary on the draft treaty see, eg, Nicolás Carrillo-Santarelli, "Some Observations and Opinions on the 'Zero' Version of the Draft Treaty on Business and Human Rights (Part II)", *OpinioJuris* (24 September 2018), online: <opiniojuris.org/2018/09/24/33668/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29> [perma.cc/9BXE-T6NK]; Frédéric Mégret, "Traditions of Human Rights: Who Needs Universal Human Rights?," McGill Department and University Information Centre for Human Rights and Legal Pluralism (7 October 2019), online: <mcgill.ca/humanrights/article/universal-human-rights/traditions-human-rights-who-needs-universal-human-rights> [perma.cc/EMC9-3FME]; Carlos Lopez, "Towards an International Convention on Business and Human Rights (Part I)", *OpinioJuris* (25 July 2018), online: <opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29> [perma.cc/2QE2-7CM4]; Pierre Thielborger & Timeela Manandhar, "Bending the Knee or Extending the Hand to Industrial Nations? A Comment on the New Draft Treaty on Business and Human Rights," *EJIL: Talk!* (23 August 2019), online: <www.ejiltalk.org/bending-the-knee-or-extending-the-hand-to-industrial-nations-a-comment-on-the-new-draft-treaty-on-business-and-human-rights/> [perma.cc/J3DE-86GR]; Marija Jovanovic, "Modern Slavery in the Global Food Market: A Litmus Test for the Proposed Business and Human Rights Treaty," *EJIL: Talk!* (12 August 2019), online: <www.ejiltalk.org/modern-slavery-in-the-global-food-market-a-litmus-test-for-the-proposed-business-and-human-rights-treaty/> [perma.cc/K84Q-AKUA]; Julia Bialek, "Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?" (2019) 9:3 Goettingen J Int'l L 501.

35. OECD Guidelines for Multinational Enterprises, 2011 Edition, online (pdf): <http://www.oecd.org/daf/inv/mne/48004323.pdf> [https://perma.cc/L49R-4MFW].

36. For a review of international business and human rights initiatives, both past and present, see e.g. Barnali Choudhury, "Balancing Soft and Hard Law for Business and Human Rights" (2018) 67:4 Int'l & Comp L Quarterly 961; Simons & Macklin, *supra* note 29.

37. Katharina Häusler et al, "Non-judicial remedies: Company-based grievance mechanisms and international arbitration" in Juan José Álvarez Rubio & Katerina Yiannibas, eds, *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge, New York: 2017) 108-113.

decision.[38] The unique features of arbitration can be advantageous for both rights holders and businesses.[39] For rights holders, it can offer an accessible, neutral, flexible, and effective dispute resolution forum, while for businesses it can provide a "risk-management strategy" to assist them in meeting the corporate social responsibility expectations of investors, consumers, and stakeholders.[40] Indeed, international arbitration has been employed by both multilateral corporations[41] and industry organizations[42] to resolve business-related human rights claims. Moreover, as will be discussed in this article, international arbitration has been included in human rights-related agreements concluded by transnational businesses, international NGOs, and states. At the same time, concerns remain about the use of an essentially private mechanism for the resolution of disputes with strong public dimensions, for instance with regard to transparency[43] and power inequality.[44] This article sets out to evaluate the extent to which recent developments in the international arbitration field alleviate these concerns and enable arbitration to fill the "governance gap" that has been created by states' inability or unwillingness to regulate the behaviour of multinational businesses.[45]

Part I of the article briefly introduces international arbitration and its main features in the commercial and investor-state context. While business and human rights arbitration differs from both the commercial and investment contexts, it also presents many similar advantages and concerns. Part II turns to the use of international arbitration in the business

38. Rees & Vermijs, *supra* note 29 at 3.

39. Judith Levine & Kasphee Wahid, "Business and Human Rights: A 'New Frontier' for International Arbitration?" 5(2) The ACICA Review 37, online (pdf): <acica.org.au/wp-content/uploads/2017/12/ACICA-Review-Dec-2017-final-002.pdf> [https://perma.cc/2FVC-4KH4], republished in TDM 1 (2018), <www.transnational-dispute-management.com> [perma.cc/6C6X-YXKX]; Isabelle Glimcher, "Arbitration of Human and Labor Rights: The Bangladesh Experience" (2019) 52:1 NYU J Int'l L & Pol 231.

40. Michiel Coenraads et al, "UK: The Hague Rules On Business And Human Rights Arbitration", DLA Piper (20 February 2020), online: <www.mondaq.com/uk/arbitration-dispute-resolution/895886/the-hague-rules-on-business-and-human-rights-arbitration> [perma.cc/AX8H-T9XV]; see also Roger P Alford, "Arbitrating Human Rights" 83:2 Notre Dame LR 505, 507 (2008) (arguing that, for corporations, "arbitration procedures create opportunities to impose human rights obligations on contractors, vendors, and suppliers…such provisions may be included out of genuine reflection of concern for such human rights, or to minimize bad publicity or accusations of legal complicity in human rights violations").

41. Eg, by British Petroleum and Xstrata, Rees & Vermijs, *supra* note 29 at 8-10, 19-21.

42. Eg, by the fair Labor Association, *ibid* at 28.

43. See e.g. Kishanthi Parella, "Reputational Regulation" (2018) 67:5 Duke LJ 907, 955-956; Roy Shapira, "Mandatory Arbitration and the Market for Reputation" (2019) 99:3 BUL Rev 873.

44. See e.g. Katerina Yiannibas, "The Adaptability of International Arbitration: Reforming the Arbitration Mechanism to Provide Effective Remedy for Business-related Human Rights Abuses" (2018) 36:3 Netherlands Quarterly of Human Rights 214 at 222.

45. Cronstedt & Thompson, *supra* note 6 at 66.

and human rights context, focusing on the 2013 Accord on Fire and Building Safety in Bangladesh,[46] and analyzes the arbitration proceedings commenced pursuant to it. It concludes that this experience demonstrates the potential of arbitration in this context, although it did not resolve all the concerns surrounding its use. Part III evaluates the extent to which the recently concluded Hague Rules on Business and Human Rights Arbitration[47] can alleviate these concerns, arguing that they indeed go a long way in doing so. The article highlights several unique features of the Hague Rules and analyzes how they could make international arbitration an effective grievance mechanism in the business and human rights context. Part IV concludes that international arbitration does not, on its own, guarantee complete redress for rights holders' human rights claims, which continues to require the good faith and political will of businesses as well as states. However, it does provide a valuable alternative grievance mechanism that supplements domestic litigation and other existing and developing initiatives.

I. *International arbitration: A brief introduction*[48]

International arbitration has risen to prominence in both the commercial and investment dispute resolution contexts. Its main purpose is to provide an impartial and reliable mechanism for the resolution of disputes between foreign entities[49]—be they individuals, corporations, or states—arising either from investment treaties or commercial contracts.[50]

International commercial arbitration is generally considered by the international business community as an efficient and effective mechanism

46. 2013 Accord on Fire and Safety in Bangladesh, <bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf> [perma.cc/79G8-ZE23]; the 2013 Accord expired on 15 May 2018 and was replaced by the 2018 Accord on Fire and Building Safety in Bangladesh, which expires on 31 May 2021, <bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf >. There are indications that the term of the Accord will be extended and that its scope will be expanded to cover factory safety programs in other countries in South Asia. Worker Rights Consortium, "Bangladesh Accord," online: <www.workersrights.org/our-work/bangladesh-accord/>.

47. "Hague Rules on Business and Human Rights Arbitration" (December 2019), online (pdf): *Center for International Legal Cooperation* <www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> [perma.cc/YP7P-SXW7].

48. For a detailed review of international commercial and investment arbitration see e.g. Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (OUP, 2015); Gary B Born, *International Commercial Arbitration*, 2nd ed (Wolters Kluwer, 2014); Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Wolters Kluwer, 1999).

49. R Doak Bishop, James Crawford & W Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International, 2005) at 318.

50. Hilmar Raeschke-Kessler & Dorothee Gottwald, "Corruption," in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of Investment Law* (OUP, 2008) at 590-591.

for resolving cross-border disputes between commercial entities. Indeed, international commercial arbitration is viewed as "the normal means of settling disputes arising from international transactions."[51] It offers disputing business parties an accessible, neutral, and private mechanism that is distinct from any specific national legal system;[52] a "kind of social jurisdiction, opposed to State jurisdiction."[53] Moreover, enforcement of both international arbitration agreements and arbitral awards is facilitated through the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention),[54] which currently has 162 state parties.[55] Hence, such agreements and awards are enforceable practically worldwide and have preclusive effects unless very narrow grounds for non-recognition are satisfied.[56] The NY Convention therefore offers an additional comparative advantage to arbitration over court litigation in the international enforcement of judgments.

In the international investment context, the inclusion of provisions for the direct invocation of claims by individual investors against host states in investment protection agreements[57] has been transformational in the

51. Clive Maximilian Schmitthoff, *"The Jurisdiction of the Arbitrator,"* in Jan C Schultsz & Albert Jan van den Berg, eds, *The Art of Arbitration: essays on international arbitration: liber amicorum Pieter Sanders*, *12 Sept 1912–1982* (ICCA, 1982) at 287.

52. Hans Smit, "Substance and Procedure in International Arbitration: The Development of a New Legal Order" (1991) 65 Tul L Rev 1309.

53. Jerzy Jakubowski, "Arbitration in International Trade," in Jan C Schultsz & Albert Jan van den Berg, eds, *The Art of Arbitration: essays on international arbitration: liber amicorum Pieter Sanders, 12 Sept 1912–1982* (ICCA, 1982) at 178.

54. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38.

55. "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," online: *United Nations Treaty Collection* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en> [perma.cc/T36B-TMD7].

56. For a court of a signatory state to refuse to recognize an international arbitration agreement the agreement must be "null and void, inoperative or incapable of being performed." A court may refuse to recognize an international arbitral award falling under the Convention only on narrow due process, inappropriate conduct of the arbitrator, or public policy grounds; see NY Convention, arts II and V; see also e.g. May Lu, "The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England" (2006) 23 Ariz J Int'l & Comp L 747 at 749; Nathan Yaffe, "Transnational Arbitral Res Judicata" (2017) 34:5 J of Int'l Arbitration 795 at 796.

57. See e.g. *Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria*, 8 April 2013 at Preamble (referring to "the international obligations and commitments concerning respect for human rights"), online (pdf): <pca-cpa.org/wp-content/uploads/sites/6/2016/11/Agreement-for-the-Promotion-and-Protection-of-Investment-between-the-Republic-of-Austria-and-the-Federal-Republic-of-Nigeria_2013.pdf> [perma.cc/4RYT-GQEZ]; *Agreement Between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan on the Promotion and Reciprocal Protection of Investments*, 21 December 2012 at Preamble ("acknowledging that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of

field of investment protection[58] and has been said to promote the rule of law.[59] One of the main differences between international commercial and investment arbitration, which is also relevant to the human rights context, is that international commercial arbitration presumes purely private interests and an equality of arms between the parties. In contrast, investor-state arbitration operates in an inherently unequal environment and aims to balance the economic interests of individual investors with the sovereign sphere of operation and public interests of host states.[60]

As such, issues of a public nature that could affect business and human rights dispute resolution have not gone unappreciated by investor-State arbitral tribunals.[61] In fact, claims of human rights violations have been raised in investment arbitrations by both investors[62] and states.[63] There

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standards of protection"), online(pdf): <pca-cpa.org/wp-content/uploads/sites/6/2016/01/Austria-Kazakhstan-BIT-2010.pdf> [perma.cc/WHC5-VR6T]; *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*, 12 May 2014, art 16 ("Corporate Social Responsibility: Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties; these principles address issues such as labour, the environment, human rights, community relations and anti-corruption"), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/benin/fipa-apie/index.aspx?lang=eng> [perma.cc/X7K7-3CJT].

58. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2008) at 5.

59. Stephan Wilske & Martin Raible, "The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?" in Catherine A Rogers & Roger P Alford, eds, *The Future of Investment Arbitration* (OUP, 2009) at 250-251.

60. McLachlan, Shore & Weiniger, *supra* note 58 at 20.

61. On the role of human rights in investor-State arbitration see e.g. Filip Balcerzak, "Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights" (2014) 29:1 ICSID Rev 216; Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law," in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (OUP, 2009) at 46; Tamar Meshel, "Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond" (2015) 6:2 J Int'l Dispute Settlement 277; Fabio Giuseppe Santacroce, "The Applicability of Human Rights Law in International Investment Disputes" (2019) 34:1 ICSID Rev 136.

62. See e.g. *Hulley Enterprises v Russia*, PCA Case No AA 226, Final Award (18 July 2014); *Yukos Universal v Russia*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Veteran Petroleum v Russia*, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008); *Bernardus Henricus Funnekotter and others v Republic of Zim*babwe, ICSID Case No ARB/05/6, Award (22 April 2009).

63. See e.g. *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005); *EDF International SA, SAUR International SA, and Leo'n Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012); *Sempra v Argentina*, ICSID Case No ARB/02/16, Award (28 September 2007); *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016); *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA*

are long-standing criticisms directed at the investor-State arbitration system, including that it permits individual foreign investors to impact domestic laws with important public policy objectives in an undemocratic and confidential process.[64] However, this system is continuously being reformed[65] and remains a commonly used mechanism for the resolution of this type of disputes.[66]

Since international arbitration is already called upon not only to consider individual economic interests, but also to balance "private rights against public goods,"[67] it should be considered also in the context of business and human rights disputes characterized by strong political dimensions,[68] "questions of public interest or policy,"[69] and an uneven playing field.[70] If the concerns noted above are addressed, international arbitration could prove advantageous for both rights holders and businesses. Rights holders stand to benefit from an accessible, neutral, and enforceable mechanism that largely eliminates the jurisdictional and domestic law hurdles they

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v Argentine Republic, ICSID Case No ARB/03/19 (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Re), Decision on Argentina's Application for Annulment (5 May 2017).

64. Anthony J VanDuzer, "Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation" (2007) 52:4 McGill LJ 681 at 681; a discussion of such criticisms is beyond the scope of the present article, in this regard see e.g. Armand de Mestral, ed, *Second Thoughts: Investor-State Arbitration between Developed Democracies* (CIGI, 2017); Gloria Maria Alvarez et al, "Response to the Criticism against ISDS by EFILA" (2016) 33 J Int'l Arbitration 1; Michael Nolan, "Challenges to the Credibility of the Investor-State Arbitration System" (2015–2016) 5 Am U Bus L Rev 429; Jesse Coleman, Kaitlin Y Cordes & Lise Johnson, "Human rights law and the investment treaty regime" in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar, 2020) at 292; while legitimate, some of these criticisms, such as those relating to the tensions between the human rights obligations of states and the rights of investors, are not directly applicable in the context of the business and human rights arbitration mechanism discussed in this article.

65. For a discussion, and critique, of the various changes introduced to the investor-State arbitration system in recent years see e.g. Vera Korzun, "Corporate Interest and the Right to Regulate in Investor-State Arbitration" in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Brill, 2015) at 226-240.

66. For instance, the International Centre for Settlement of Investment Disputes (ICSID), considered the preeminent global institution for the resolution of investment disputes, had 154 member states as of 2019 and administered 306 cases in 2019 alone, "2019 ICSID Annual Report" at 19, online (pdf): *World Bank* <icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR19_CRA_Web_Low_DD.pdf> [perma.cc/ZPT9-N7TY]; according to another source, as of December 31, 2019 there were a total of 1,023 known treaty-based investor-State cases, UNCTAD, "Investment Dispute Settlement Navigator," online: <investmentpolicy.unctad.org/investment-dispute-settlement> [perma.cc/7WBU-73B6].

67. McLachlan, Shore & Weiniger, *supra* note 58 at 21-22; Alex Mills, "The Public-Private Dualities of International Investment Law and Arbitration," in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011) at 108-109.

68. Wilske & Raible, *supra* note 59 at 252.

69. Mills, *supra* note 67 at 104.

70. Cronstedt & Thompson, *supra* note 6 at 66.

face in national courts. Businesses faced with the threat of domestic litigation, at times in states with unstable judicial institutions, may also prefer a more predictable dispute resolution process over which they can exercise some degree of procedural control.[71] Arbitrating a human rights related dispute would also be in line with businesses' corporate social responsibility, thereby generating positive public opinion, reducing reputational costs, and strengthening their ability to compete for public procurement or financing.[72]

II. *International arbitration in the business and human rights context*

International arbitration is already included in agreements related to business and human rights. For instance, the Caspian Sea Pipeline Project, governed by an agreement signed between Turkey, Azerbaijan, and Georgia, provides for mandatory arbitration administered by the International Centre for Settlement of Investment Disputes in the event that the participating multinational corporations fail to comply with its social responsibility clauses.[73] The Dutch Agreement on Sustainable Garments and Textile, an initiative of Dutch textile companies and NGOs, envisages the resolution of disputes through a two-step process involving, first, a Disputes Committee, and, second, binding arbitration before the Netherlands Arbitration Institute.[74] Most recently, a legal project has been launched to facilitate the resolution of disputes concerning human rights abuses at sea using international arbitration.[75] The project envisions

71. Rachel Nicolson, Emily Turnbull & Hamish McAvaney, "The new Hague Rules on Business and Human Rights Arbitration—effective remedy or strange chimera?" (10 February 2020), online (blog): *Allens-Linklaters* <www.allens.com.au/insights-news/insights/2020/02/the-new-hague-rules-on-business-and-human-rights-arbitration-effective-remedy-or-strange-chimera/> [perma.cc/3A94-PJ3L].

72. Cronstedt & Thompson, *supra* note 6 at 68; see also Massimo V Benedettelli, "Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience" (2015) 31 Arbitration International 631 at 637; Alyssa Hussein, "Addressing the Remedy Gap Business and Human Rights Arbitration" (2020) Michigan Bar Journal 36 at 36; Alford, *supra* note 40 at 530-533 (discussing corporations' "numerous incentives to engage in socially responsible behavior."); Shin Imai & Sarah Colgrove, "Investors are increasingly shunning mining companies that violate human rights," *The Conversation* (22 February 2021), online: <theconversation.com/investors-are-increasingly-shunning-mining-companies-that-violate-human-rights-154702> [perma.cc/ZC8R-97ZG].

73. *Intergovernmental Agreement Among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum Via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey Through the Baku-Tbilisi-Ceyhan Main Export Pipeline*, 18 November 1999, online (pdf): British Petroleum <www.bp.com/content/dam/bp/country-sites/en_ge/georgia/home/legalagreements/btcagmt4.pdf> [perma.cc/93F8-G6QX]; Cherie Blair, Ema Vidak-Gojkovic & Marie-Anaïs Meudic-Role, "The Medium Is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration" (2018) 35:4 J Int'l Arbitration 379 at 390-391.

74. Agreement on Sustainable Garment and Textile, 9 March 2016, *ibid* at 400-402.

75. The project is a joint initiative of the UK-based charity Human Rights at Sea and the global law

a neutral, efficient, accessible, specialized, and binding arbitration mechanism for the resolution of human rights issues concerning "seafarers, fishers, migrants, refugees and others working, or living in the littoral and maritime space."[76]

International arbitration has also been referenced in relation to human rights and construction activity undertaken in the lead up to the 2024 Olympic Games. The International Olympic Committee in its Host City Contract has obligated the Host City and National Olympic Committee to submit any dispute concerning performance of the Contract to arbitration, including with regard to their obligations to "protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and regulations applicable in the Host Country and in a manner consistent with all internationally-recognized human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights, applicable in the Host Country."[77]

The most prominent example of the use of international arbitrations in the context of business and human rights is the 2013 Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord or Accord). The Accord is a legally binding agreement that was concluded in the immediate aftermath of the Rana Plaza building collapse in Bangladesh that resulted in the death of more than 1,100 people.[78] Since its conclusion, the Bangladesh Accord has been signed by over 200 apparel brands, retailers, and importers from over 20 countries in Europe, North America, Asia, and Australia; two global trade unions; eight Bangladesh trade unions; and four NGO witnesses.[79]

The Bangladesh Accord provides an innovative two-stage dispute resolution process. At the first stage, any dispute between the parties to

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firm Shearman & Sterling LLP, online: <www.humanrightsatsea.org/2020/03/24/white-paper-issued-for-innovative-use-of-arbitration-and-human-rights-on-un-international-day/> [perma.cc/Q8PU-56CJ].

76. *Ibid*; see also a White Paper describing the proposed arbitration mechanism, online (pdf): <www.humanrightsatsea.org/wp-content/uploads/2020/03/20200324-HRAS_ShearmanLLP_Arbitration_Human_Rights_White_Paper-UPDATED_20200505-ORIGINAL-SECURED.pdf> [perma.cc/9JYU-ZXGW].

77. "International Olympic Committee Host City Contract Principles," art 51.2, online (pdf): <stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf> [perma.cc/38ZD-M7YL], cited in Levine & Wahid, *supra* note 39 at 39.

78. Accord on Fire and Building Safety in Bangladesh, <bangladeshaccord.org/about> [perma.cc/H6RR-35N7].

79. Accord on Fire and Building Safety in Bangladesh, "Accord Signatories," <bangladeshaccord.org/signatories/> [perma.cc/M8E9-FVXQ]; for background information on the garment industry in Bangladesh and the Accord see e.g. Glimcher, *supra* note 39 at 254-261.

the Accord shall be presented to and decided by a Steering Committee (SC), which is composed of an equal number of representatives chosen by the trade union signatories and company signatories, and a representative from and chosen by the International Labour Organization as a neutral chair.[80] At the second stage, and upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. Any resulting arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to the NY Convention, where applicable. The arbitration process is governed by the UNCITRAL Arbitration Rules unless otherwise agreed by the parties.[81] The arbitration shall be seated in The Hague and administered by the Permanent Court of Arbitration (PCA).[82] Finally, the arbitrator presiding over the three-member tribunal is to have experience in business and human rights, or at least human rights law, and be willing to be paid reduced rates.[83]

In 2017 and 2018, four arbitrations were commenced before the PCA by two non-governmental labor union federations based in Switzerland against two global fashion brands pursuant to the Bangladesh Accord. All arbitrations have now been settled. While the names of the brands were kept confidential, under the settlement agreement in the first pair of arbitrations, one of the brands agreed to pay $2 million toward safety remediation of 150 factories.[84]

The second pair of arbitrations was settled after an arbitral tribunal had already been constituted and had issued several procedural orders.[85]

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80. 2018 Accord, *supra* note 46 at art 3.

81. Arbitration Rules of the United Nations Commission on International Trade Law (with new article 1, paragraph 4, as adopted in 2013), online (pdf): <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> [perma.cc/9XDG-R7UZ], these Arbitration Rules "provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations"; United Nations Commission on International Trade Law, "UNCITRAL Arbitration Rules," online: <uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> [perma.cc/6QSF-7CRG].

82. *Ibid*.

83. Judith Levine & Ashwita Ambast, "Responsibility Rising from the Rubble: Lessons from the Bangladesh Accord for Arbitration of Business and Human Rights Disputes" (2018) 25 Austl Int'l LJ 1 at 14.

84. Paul M Barrett, Dorothée Baumann-Pauly & April Gu, "Five Years After Rana Plaza: The Way Forward," NYU Stern Center for Business and Human Rights (April 2018) at 28, n 19, online (pdf): <static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/5ac9514eaa4a998f3f30ae13/1523143088805/NYU+Bangladesh+Rana+Plaza+Report.pdf>; Safety remediation may address fire, electric, or structural dangers, *ibid* at 12.

85. In the Matter of Arbitrations Commenced Pursuant To The Accord On Fire And Building Safety In Bangladesh And The United Nations Commission on International Trade Law Arbitration Rules 2010 Between IndustriALL Global Union And UNI Global Union And Two Global Fashion Brands,

These orders demonstrate how the private nature of arbitration can be balanced with the public nature of business and human rights disputes. Notwithstanding the preliminary nature of these orders—and the lack of a final award—they illustrate the potential for arbitral tribunals to operate as effective and viable vehicles for resolving business and human rights claims for both rights holders and businesses.[86]

In its procedural orders, the arbitral tribunal first found that the pre-conditions to arbitration under the Bangladesh Accord had been met and that the claims were admissible and within the tribunal's jurisdiction.[87] This is an important decision since the Accord has been accused of offering "little to explain whether the existence of the [SC] in some way also limits the jurisdiction of the arbitral tribunal."[88] The tribunal then proceeded to address the law applicable to the dispute pursuant to Article 35 of the UNCITRAL Arbitration Rules since the parties had not agreed upon the applicable law in the Accord.[89] The respondents claimed that Bangladeshi law applied, and the claimants argued that Dutch law applied. However, the tribunal did not have the opportunity to make this determination since the parties settled the case.[90]

More illustrative of arbitration's utility in the human right context are the tribunal's directions on confidentiality and transparency,[91] which take into account provisions of the UNCITRAL Arbitration Rules and the Bangladesh Accord. As noted by the tribunal, the UNCITRAL Arbitration Rules require hearings to be held *in camera* unless the parties

PCA Case No 2016-36 and 2016-37, Procedural Orders No 1, Procedural Order No 2 (Decision on Admissibility Objection and Directions on Confidentiality and Transparency), Procedural Order No 3 (Scope of the "Liability-Plus Phase"), Procedural Order No 4 (Protocol on Confidentiality and Transparency), online: <pca-cpa.org/en/cases/152/> [perma.cc/WHU3-GDE2].

86. For further analysis of the proceedings see Glimcher, *supra* note 39 at 262-267.

87. The respondents had argued that the claims were inadmissible because the deadlocked Steering Committee did not produce a "majority decision", which, in their view, is the only Steering Committee decision that can be "appealed to a final and binding arbitration process," the tribunal rejected this interpretation through a textual and structural reading of the Accord, finding in the cases before it that the Steering Committee nevertheless went through the required "deliberative process(es) and arrived at a 'decision' for each charge within the meaning of Article 5 [of the Accord]," Procedural Order No 2, *supra* note 85 at para 57.

88. Blair, Vidak-Gojkovic & Meudic-Role, *supra* note 73 at 396.

89. Procedural Order No 1, *supra* note 85.

90. Permanent Court of Arbitration, PCA Press Release, "Settlement of Bangladesh Accord Arbitrations" (17 July 2018), online: <pca-cpa.org/en/news/pca-press-release-settlement-of-bangladesh-accord-arbitrations/> [perma.cc/3FN9-D2HT].

91. For further analysis on the debate concerning transparency in international arbitration see e.g. Mark Feldman, "International Arbitration and Transparency," in A Bjorklund, F Ferrar & S Kröll, eds, *Cambridge Compendium of International Commercial and Investment Arbitration* (forthcoming), <papers.ssrn.com/sol3/papers.cfm?abstract_id=2843140> [perma.cc/T4LJ-ATYE]; Marc Bungenberg & Andrés E Alvarado Garzón, "One Size Fits All? Transparency in Investment and Commercial Arbitration," in Zlatan Meškić, ed, *Balkan Yearbook of European and International Law* 2019.

agree otherwise and allow for publication of the award if all parties agree. The Bangladesh Accord requires the SC to publish information on key aspects while excluding information linking specific companies to specific factories.[92]

Recognizing the unique nature of business and human rights disputes, the tribunal noted that "this case cannot be characterized either as a classic 'public law' arbitration (involving a State as a party) or as a traditional commercial arbitration (involving private parties and interests), or even as a typical labor dispute."[93] With a view to striking a balance between the public and private interests involved in the dispute, the tribunal allowed disclosure of "certain basic information about the existence and progress of the arbitration proceedings, while at the same time keeping confidential the identity of the Respondents."[94] The tribunal also noted that the parties were willing to develop a "limited confidentiality protocol" or a "comprehensive confidentiality order," and provided them with draft texts to serve as a starting point for discussions.[95]

This cooperation between the disputing parties, with the support of the tribunal, ultimately led them to agree on a revised Protocol on Confidentiality and Transparency and a model confidentiality undertaking for third parties.[96] The Protocol provided for the publication of redacted versions of the tribunal's awards, decisions, and orders,[97] while "[a]ll hearings, meetings and conferences shall be held *in camera*, and the transcripts shall be kept confidential."[98] It then set out quite a broad list of additional "materials" and "information" that were to be considered confidential.[99]

92. Procedural Order No 2, *supra* note 85 at paras 89, 95.
93. *Ibid* at para 93.
94. *Ibid* at para 97, the Tribunal also noted that "whether the issues of confidentiality are governed by the law of the arbitration agreement or the law of the arbitral procedure, and whether that be Dutch law, Bangladeshi law, or transnational principles, the tribunal's latitude to determine the extent of confidentiality is constrained only by the UNCITRAL Rules that the parties have agreed will govern the proceedings," *ibid* at para 91, Annex I.
95. *Ibid* at para 97.
96. Procedural Order No 4, *supra* note 85 at Annex I and Annex II.
97. *Ibid* Annex I at para 4.
98. *Ibid* Annex I at para 9.
99. *Ibid* Annex I at para 1 provides:
"'Confidential Materials' are all documents produced, filed or exchanged in the present arbitrations, including:
    a. all correspondence between or among the Parties, the Tribunal and/or any third parties in relation to the arbitrations;
    b. all documents filed in the arbitrations, including all pleadings, memorials, submissions, witness statements, annexures, and other evidence, and all documents produced (whether by a Party or a third party);
    c. all awards, decisions and orders and directions of the Tribunal that have not been subject to redaction to remove all Confidential Information pursuant to Section B.5 below.

The Protocol also allowed the tribunal to permit further disclosure of confidential material and information "where there is a demonstrated need to disclose that outweighs any Party's legitimate interest in preserving confidentiality."[100] The tribunal was to retain "full authority to determine all issues concerning confidentiality and transparency…including the disclosure of any information about the arbitrations, the content of the website or any press releases, and the publication of decisions and awards, as well as redactions thereto."[101]

While the arbitration process did not culminate in a final award on the merits, the parties' settlement in itself suggests that the mere existence of binding arbitration as an option can lead businesses to settle claims when they otherwise might not.[102] The procedural order issued by the tribunal regarding transparency and confidentiality further illustrates that balancing the private nature of arbitration and the public nature of business and human rights claims is possible. The tribunal achieved such a balance by providing for redacted publication of orders, decisions, and awards, while protecting the identity of respondents and keeping the parties' correspondence and pleadings confidential.[103]

The example set by the Accord arbitrations is limited, however, since the proceedings did not proceed to the merits stage. For instance, the challenge of deciding which law is appropriate in a transnational arbitration that potentially engages more than one domestic jurisdiction as well as international human rights law was not fully addressed. Concerns therefore remain that human rights laws and norms, whether domestic or international, may not have featured sufficiently in the decision-making of the arbitral tribunals. Other concerns surrounding the use of arbitration, such as the inequality of resources between rights holders and businesses and the vulnerability of witnesses, were also not addressed in the Accord arbitrations.[104] Attending to these concerns remains critical if arbitration

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d. all minutes, records (including recordings), and transcripts of hearings, meetings and conferences; and,
e. information contained in or derived from any such documents."

Procedural Order No 4, Annex I, at para 4 provides:

"'Confidential Information' shall include (i) information that discloses (directly or indirectly) the identity of the Respondents or their representatives, or enables their specific identities or that of their representatives to be inferred; and (ii) any information not in the public domain that is designated as such by a Party for legal and business reasons (for example, if it connects the identity of a specific signatory brand to information about factories)."

100. Procedural Order No 4, *supra* note 85 at Annex I, para 8.
101. *Ibid* Annex I, at para 7
102. Blair, Vidak-Gojkovic & Meudic-Role, *supra* note 73 at 402.
103. Procedural Order No 2, *supra* note 85 at para 98.
104. For a discussion of some of these and other concerns see e.g. Yiannibas, *supra* note 44.

is to become an acceptable alternative for rights holders to obtain redress outside of domestic courts. The 2019 Hague Rules on Business and Human Rights Arbitration (Hague Rules or Rules)[105]—examined in the next section—set out to address these concerns.

III. *Business and human rights arbitration: The new frontier?*

The Hague Rules are a voluntary set of procedural arbitration rules available for businesses, individuals, communities, NGOs, and states to use as they see fit in the resolution of business and human rights disputes.[106] They were devised over a 5-year period by a private group of international lawyers and academics. Their development process included a small Working Group on Business and Human Rights Arbitration, a larger Drafting Team, and a Sounding Board of over 220 individuals from different stakeholder groups.[107] The Rules refer explicitly to the third pillar and Principle 31 of the UNGPs,[108] and advocate for "a one-stop contractually-selected forum for businesses to have their [business and human rights] disputes solved in a fair, transparent, and unbiased manner, rather than being drawn into multiple protracted litigations in various national and international fora."[109] Building on the widely used UNCITRAL Arbitration Rules,[110] the Hague Rules aim to adapt existing international arbitration rules to the unique needs of business and human rights disputes.[111]

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105. *Supra* note 47.

106. For more on the Hague Rules see e.g. Lisa E. Sachs et al, "The Business and Human Rights Arbitration Rule Project: Falling Short of its Access to Justice Objectives" (September 2019), online: *Columbia Law School Scholarship Repository* <scholarship.law.columbia.edu/sustainable_investment_staffpubs/152> [perma.cc/5PDB-92CU]; Keon-Hyung Ahn & Hee-Cheol Moon, "An Introductory Study on the Draft Hague Rules on Business and Human Rights Arbitration" (2019) 29:3 J Arbitration Studies 3. On the compatibility of the Hague Rules with the UNGPs see e.g. Kayla Winarsky Green & Timothy McKenzie, "'Culturally Appropriate and Rights-Compatible': The Esprit De Corps Of the United Nations Guiding Principles on Business and Human Rights & the Hague Rules on Business and Human Rights Arbitration," (4 February 2020), online (blog): *EJIL:Talk!* <www.ejiltalk.org/culturally-appropriate-and-rights-compatible-the-esprit-de-corps-of-the-united-nations-guiding-principles-on-business-and-human-rights-the-hague-rules-on-business-and-human-rights/> [perma.cc//X54R-PFZ4]; Kelsey Berndt, "The Hague Rules on Business and Human Rights Arbitration: What the Drafters Got Right and Wrong" (2020) 12 Arbitration L Rev 139.

107. Hague Rules, *supra* note 47. The author was a member of the Sounding Board.

108. *Ibid* at art 2: "arbitration under the Rules can provide: (a) For the possibility of a remedy for those affected by the human rights impacts of business activities, as set forth in Pillar III of the… [UNGPs], serving as a grievance mechanism consistent with Principle 31."

109. The Drafting Team of the Hague Rules on Business and Human Rights Arbitration, "Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process" (November 2018), online (pdf): *Center for International Legal Cooperation* <www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf> [perma.cc/8KPA-RN93].

110. *Supra* note 1.

111. According to art 6 of the Hague Rules, *supra* note 47, these revisions are intended to reflect:

> "(a) The particular characteristics of disputes related to the human rights impacts of business

Unlimited in type of claimant(s), respondent(s), legal relationship(s), and the subject-matter of the dispute,[112] the Hague Rules may be used by "business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations" to resolve any dispute between them.[113] As with any arbitration, the parties must agree to apply the Hague Rules either before a dispute arises, eg, in a contractual clause, or after a dispute arises, eg, in a submission agreement.[114] Any arbitral award rendered pursuant to the Rules would in most cases be enforceable under the NY Convention.[115] The Rules address many of the outstanding concerns relating to the use of arbitration in the business and human rights context, including the qualifications of arbitrators, the transparency of the proceedings and awards, the disparate resources of businesses and rights holders, consolidation or multi-party arbitrations, procedural provisions for particularly vulnerable witnesses, and the applicable law(s).[116]

With respect to arbitrators, the Hague Rules set out the number and method of appointment of arbitrators,[117] as well as the process and authority for the resolution of challenges to arbitrators.[118] In appointing arbitrators, "the advisability of forming a diverse tribunal" should be taken into account.[119] The Rules contain several features that reflect the "importance of impartiality, independence and expertise to the legitimacy of business and human rights arbitration"[120]: no person previously involved

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activities;

(b) The possible need for special measures to address the circumstances of those affected by the human rights impacts of business activities;

(c) The potential imbalance of power that may arise in disputes under these Rules;

(d) The public interest in the resolution of such disputes, which requires among other things a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and States;

(e) The importance of having arbitrators with expertise appropriate to such disputes and bound by high standards of conduct; and

(f) The possible need for the arbitral tribunal to create special mechanisms for the gathering of evidence and protection of witnesses."

112. Hague Rules, *supra* note 47 at 3.

113. *Ibid*.

114. *Ibid;* the Rules provide examples of model clauses that parties may use to this end, *ibid* at 101-108.

115. *Ibid* at 4.

116. Claes Cronstedt, Jan Eijsbouts & Robert C Thompson, "International Business and Human Rights Arbitration" (13 February 2017) at 34, Appendix B, online (pdf): <www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf> [perma.cc/9BWR-BSTR].

117. Hague Rules, *supra* note 47, arts 7-11.

118. *Ibid*, arts 12-16.

119. *Ibid*, art 11(3).

120. *Ibid* at 31, commentary to art 11.

in the dispute may be appointed as arbitrator, arbitrators must be of "high moral character," and they shall not be a national of states whose nationals are parties or of any state that is a party to the dispute.[121] In terms of arbitrators' expertise, the Rules provide that a presiding or sole arbitrator must have demonstrated expertise in international dispute resolution and in areas relevant to the dispute, which may include business and human rights law and practice.[122]

Finally, a Code of Conduct annexed to the Rules[123] further sets out arbitrators' duties, including duties of disclosure, independence and impartiality, confidentiality, and duties of former arbitrators.[124] There have been recent debates surrounding the "revolving door"[125] phenomena in international arbitration, also known as "double-hatting,"[126] ie, individuals who act sequentially and even simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary.[127] Therefore, particularly noteworthy are the Code's broad provisions requiring arbitrators to disclose, prior to appointment, any "legal or other representation concerning issues closely related to the dispute in the proceeding or involving the same matters,"[128] as well as "[a]ll pending work as a party representative, expert or in any other role in any matter for or adverse to any of the parties involved in the arbitration, including the parties' representatives, law firms, expert companies and financial institutions, as well as any such work performed in the previous five years."[129]

Regarding the tension between transparency and confidentiality, the Hague Rules contain detailed provisions concerning transparency issues,[130] recognizing the public interest in the resolution of business and human rights disputes. This public interest requires "a high degree of transparency of the proceedings and an opportunity for participation by interested third

121. *Ibid,* art 11(1)(a), (b), (d).
122. *Ibid*, art 11(1)(c).
123. *Ibid*, 95-99.
124. *Ibid* at 95, in some respects, this Code of Conduct adopts "stricter requirements" than the IBA Guidelines on Conflicts of Interest in International Arbitration "due to the nature of business and human rights disputes."
125. Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 Journal of International Economic Law 301.
126. Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Ethics and Empirics of Double Hatting" (2017) 6(7) ESIL Reflections, online: <esil-sedi.eu/post_name-118/> [perma.cc/26RV-C3VW]; Joshua Tayar, "Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting" (2018-2019) 5:5 McGill Journal of Dispute Resolution 107.
127. Langford, Behn & Lie, *supra* note 125 at 301.
128. Hague Rules, *supra* note 47 at 96, art 2(d).
129. *Ibid* at 96, art 2(g).
130. *Ibid*, arts 38-43.

persons and States."[131] Transparency is enhanced, for instance, by allowing submissions by third parties regarding matters within the scope of the dispute,[132] similarly to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[133] In particular, the Rules instruct arbitral tribunals to allow written submissions from the state(s) of nationality of the parties, the state(s) on whose territory the conduct that gave rise to the dispute occurred, and the state(s) parties to any treaties applicable to the arbitration.[134] The Hague Rules also specify the documents that shall be made available to the public: "the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table was produced in the proceedings; the orders, decisions and awards of the arbitral tribunal."[135] In addition, hearings for the presentation of evidence or for oral argument are to be made public.[136]

Given the cost of access and publication and reputational costs for the parties, information to be made public is limited to documents "needed to make business and human rights arbitrations known to the public and to nurture a culture of protection of human rights by promoting awareness and legal certainty."[137] In contrast, "confidential or protected information" is exempted and shall not be made public.[138] Accordingly, further written submissions made by the parties, the transcripts of hearings, and submissions by third persons will generally not be publicly available.[139] The Rules therefore appropriately balance the public interest in transparent

131. *Ibid,*Preamble, art 6(d).
132. *Ibid*, art 28(1).
133. *Ibid*, 52, commentary to art 28.
134. *Ibid*, art 28(4).
135. *Ibid*, art 40(1).
136. *Ibid*, art 41(1).
137. Hague Rules, *supra* note 47 at 72, commentary to art 40.
138. *Ibid*, art 42, such information consists of:
    "(a) Names and addresses of the parties and their counsel protected by an order of the arbitral tribunal…as well as of witnesses protected by an order of the arbitral tribunal…;
    (b) Confidential business information, information that has been classified as secret by a Government or a public international institution and any other information deemed confidential under any other grounds of confidentiality that the arbitral tribunal determines to be compelling;
    (c) Information that is protected against being made available to the public under the arbitration agreement;
    (d) Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
    (e) Information the disclosure of which would impede law enforcement."
139. Hague Rules, *supra* note 47 at 72, commentary to art 40.

proceedings against businesses' private interest in confidentiality, which balance is, in turn, likely to increase the chance of businesses consenting to be bound by arbitration.

The unequal financial resources of businesses and rights holders is addressed in several provisions of the Hague Rules. In terms of representation, the Rules provide that the arbitral tribunal should ensure that an unrepresented party can present its case in "a fair and efficient way, including by adopting more proactive and inquisitorial, as opposed to adversarial, procedures."[140] In relation to language, which is perceived as "a significant factor in both access to justice and costs,"[141] the Rules provide that an arbitral tribunal should "pay particular attention to enhancing access and reducing costs through the judicious use of multiple languages, translation and interpretation, while at the same time resorting to such tools only where needed in order not to increase costs unduly."[142] With regard to the possible "inequality of arms"[143] and of access to evidence, the Rules provide that the statement of claim should, "as far as possible," be accompanied by all documents and other evidence relied upon by the claimant.[144] The qualifying expression "as far as possible" is important, since it allows the arbitral tribunal to "admit a statement of claim even if it is not accompanied by certain evidence that would otherwise be necessary."[145] This may be the case where there is an imbalance in access to evidence between the parties. Such imbalance may be economic, for instance "where the cost of obtaining the documents is prohibitive."[146] There may also be a power imbalance, for instance where a party is unable to obtain certain documents because they are in possession of the other party or of third parties.[147] Insistence on strict evidentiary rules or standards in such circumstances may make it practically impossible for rights holders to submit their claims to the arbitral process.

Arbitral tribunals can also address the possible inequality of arms and of access to evidence between the parties by way of document production procedures set out in the Rules. These provisions allow arbitral tribunals to limit the scope of evidence produced and to sanction non-compliance with orders to produce evidence through adverse inferences or a reversal of the

140. *Ibid* at 25, commentary to art 5.
141. *Ibid* at 43, commentary to art 21.
142. *Ibid*.
143. *Ibid* at 24.
144. *Ibid* at art 22(4).
145. *Ibid* at 44, commentary to art 22.
146. *Ibid*.
147. *Ibid*.

burden of proof.[148] Arbitral tribunals may, for instance, "encourage the use of electronic means of communication for the taking of witness evidence, direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, set limits to written and oral statements and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."[149]

Given the likelihood of multiparty claims, consolidation and multi-party arbitrations are expressly permitted under the Hague Rules for claims with significant common legal and factual issues.[150] Furthermore, the arbitral tribunal is authorized to determine whether "class, mass, collective or multi-party procedures are available and appropriate for the particular arbitration," considering "the particular facts and circumstances of the case, including the terms of the arbitration agreement and the context in which it was concluded."[151] The Rules also provide procedural protection to particularly vulnerable witnesses by allowing the arbitral tribunal to take into account "the legitimate interest of a witness based on a genuine demonstrated genuine fear" when determining the manner in which witnesses are to be heard and examined.[152] The concept of 'genuine fear' is understood as "a subjective fear of harm to the person or their livelihood. A witness may have a 'genuine fear' even if similarly placed witnesses have testified without retaliation against them."[153] Moreover, arbitral tribunals may adopt additional specific measures for the protection of witnesses, including non-disclosure to the public or the other party of the identity or whereabouts of a witness or of persons related to or associated with a witness. This may be done by removing names and identifying information from the public record, keeping such information confidential, allowing for testimony through image- or voice- altering devices or closed circuit television, assignment of a pseudonym, and close hearings.[154]

148. *Ibid* at 62, commentary to art 32.
149. *Ibid*.
150. *Ibid*, art 19(1).
151. *Ibid* at 40, commentary to art 19, nevertheless, it is noted that "given that in some jurisdictions consent to class arbitration will not be inferred and must be explicit, parties are advised to address this matter expressly in their arbitration agreement"; in doing so, arbitral tribunals should ensure due process measures are taken to protect non-named class members, including "that absent class members be afforded notice of the suit, an opportunity to be heard and participate in the [arbitration], and a chance to opt out, and…that the named plaintiff adequately represent at all times the interests of the absent class members," Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (2005) 274.
152. *Ibid*, art 33(3).
153. *Ibid* at 65 commentary to art 33.
154. *Ibid* at 65, commentary to art 33.

The Hague Rules Drafting Team also identified key concerns surrounding the substantive law applicable to the resolution of business and human rights disputes. Such concerns relate to party autonomy, default and mandatory rules, and the appropriate degree of arbitral discretion.[155] In this regard, the Hague Rules set out a three-step approach to the identification of the applicable law: (1) the arbitral tribunal is to apply the law, rules of law, or standards designated by the parties[156]; (2) in case the parties did not designate the applicable law, the arbitral tribunal is to apply the law or rules of law which it determines to be appropriate[157]—much like the arbitral tribunal in the Bangladesh Accord arbitration—including "international human rights obligations"[158]; and (3) upon express agreement of the parties, the arbitral tribunal may decide as *amiable compositeur* or *ex aequo et bono*.[159] Moreover, the arbitral tribunal "shall take into account… any business and human rights standards or instruments that may have become usages of trade."[160]

Two additional provisions of the Hague Rules are noteworthy as they reflect the adaptation of traditional international arbitration to the business and human rights context. The first provision concerns "claims or defences manifestly without merit," which allows the arbitral tribunal "to rule on an objection that a claim or defence, including a counterclaim…is manifestly without merit"[161] so long as the lack of merit is "clear and obvious upon a preliminary review."[162] This provision is procedurally important since it provides arbitrators with an expedited procedure for ridding of claims or defences manifestly without merit at a preliminary stage. Such a procedure is particularly useful in the business and human rights context, where unfounded claims could result in costly litigation and reputational consequences for respondent corporations and unfounded defences could be used to discourage a claim or intimidate claimants.[163] When ruling

155. Business and Human Rights Arbitration Project Report, Drafting Team Meeting, 25-26 January 2018, at 3, online (pdf): <www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf> [perma.cc/M4CN-HQDX].
156. Hague Rules, *supra* note 47 at art 46(1).
157. *Ibid*, art 46(2).
158. *Ibid* at 80, commentary to art 46.
159. *Ibid*, art 46(3). Amiable compositeur is "a procedure where the arbitrators are to make decisions according to the law and legal principles, but they are entitled to alter the effects of the application of specific legal norms." An arbitrator deciding ex aequo et bono is deciding "according to principles of equity." Alexander J. Bělohlávek, "Application of Law in Arbitration, Ex Aequo et Bono and Amiable Compositeur" (2013) III Czech (& Central European) Yearbook of Arbitration 25, at 28, 32.
160. Hague Rules, *supra* note 47*,* art 46(4).
161. *Ibid*, art 26.
162. *Ibid* at 48, commentary to art 26.
163. *Ibid*.

on an objection that a claim is without merit, arbitral tribunals are again required to "take account of the possible inequality of arms and of access to evidence among the parties, as well as a party's ability to request document production under these Rules."[164]

The second noteworthy provision relates to arbitral awards. Unlike commercial or investor-State arbitral awards, awards rendered under the Rules must be "human rights-compatible" in terms of procedure and form.[165] In addition, the arbitral tribunal must consider public policy issues when rendering an award, in particular those issues arising under the law of the legal place of the arbitration and likely place(s) of enforcement of the award.[166] The Rules also contain an illustrative list of remedies based on Principle 25 of the UNGPs, which is the "'Foundation Principle' of access to remedy under Pillar III."[167] These remedies include monetary and non-monetary relief, such as restitution, rehabilitation, satisfaction, specific performance, and guarantees of non-repetition. An award may also contain recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm, which shall be binding only if agreed by the parties.[168] Moreover, "the arbitral tribunal may, at the request of a party, stipulate any penalty, monetary or otherwise, it deems appropriate for non-compliance with any non-monetary relief contained in its award."[169] Finally, the Hague Rules include a novel provision concerning third-party funding, stipulating that "[w]here a party or a third person making submissions…benefits from any form of funding or financial assistance for the participation in the proceedings, such party or third person shall promptly disclose to all other parties and to the arbitral tribunal the name and contact details of the source of the funding or financial assistance."[170] This provision is important since the legitimacy of business and human rights arbitration depends not only on the transparency of the proceedings but also on the transparency of the interests underlying the proceedings.[171]

In sum, the Hague Rules aim to address many of the concerns surrounding the use of an essentially private dispute resolution mechanism such as arbitration to resolve business and human rights disputes that have important public aspects. The provisions of the Rules concerning

164. *Ibid* at 48-49, commentary to art 26.
165. *Ibid*, art 45(4) and commentary.
166. *Ibid* at 79, commentary to art 45.
167. *Ibid* at 78, commentary to art 45.
168. *Ibid*, art 45(2).
169. *Ibid*, art 55(1).
170. *Ibid* at 90, commentary to art 55.
171. *Ibid.*

the independence, impartiality, and expertise of arbitrators promote the legitimacy of arbitration proceedings, strengthen the parties' confidence in the process, and provide them with decision-makers who are versed in business and human rights issues. This serves the interests of both rights holders and businesses. The balance struck between transparency and confidentiality further makes arbitration an attractive process for businesses, while also ensuring that core documents are made public and allowing for third party submissions. The Rules also preserve the parties' autonomy to choose the applicable law. If this fails, however, the tribunal will designate the applicable law in order to avoid deadlocks. Finally, the procedural protection of vulnerable claimants and witnesses goes above and beyond what some domestic courts may be able to offer, while arbitral tribunals are granted similar powers to those of domestic courts to dismiss claims without merit. Overall, therefore, the Hague Rules should serve to calm many of the fears associated with the use of arbitration in the business and human rights context, for both rights holders and businesses.

Conclusion

There is likely no single mechanism that could, in and of itself, realize the third pillar of the UNGPs and guarantee complete redress for those individuals or communities whose human rights have been violated by transnational business-related activities. The use of traditional litigation in domestic courts remains the obvious choice in theory, notwithstanding the hurdles that make it increasingly difficult to pursue in practice. At the same time, the flurry of domestic and international activity aimed at providing rights holders with more accessible mechanisms to supplement national litigation continues. This article set out to evaluate the potential for one such mechanism—international arbitration—to operate as an alternative for rights holders where domestic litigation is impossible or ineffective.

International arbitration has offered disputing parties in the commercial and investment contexts an accessible, neutral, and effective mechanism that is distinct from any specific national legal system. Its potential to do the same for business and human rights disputes is evidenced in the arbitration commenced pursuant to the Bangladesh Accord. The tribunal's procedural orders illustrate how arbitrators can navigate the different interests at play in a business and human rights dispute. However, this arbitration remains limited in scope, having been settled mid-proceedings, and does not fully address the concerns surrounding the use of arbitration in this context.

The 2019 Hague Rules present a comprehensive set of procedural arbitration rules tailored for business and human rights disputes that aim to overcome these lingering concerns. The Rules specifically address

problematic issues such as the qualification of arbitrators, the balancing of transparency and confidentiality, the inequality of arms between the parties, the protection of vulnerable witnesses, and the governing law. For rights holders, arbitration pursuant to the Rules could provide an accessible, neutral, and effective alternative to domestic courts. For businesses, and especially those with extensive, multi-jurisdictional supply chains that expose them to significant human rights risks, such arbitration could be "particularly attractive."[172] All that said, these are early days for arbitration in the business and human rights context and it may face distrust and skepticism until proven effective in practice. Only time, and the good faith of parties choosing to use it, will tell whether arbitration will become the new frontier of business and human rights dispute resolution.

172. Annacker et al, "The Launch of the Hague Rules on Business and Human Rights Arbitration" (29 January 2020), online (pdf): *Cleary Gottlieb* <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/the-launch-of-the-hague-rules-on-business-and-human-rights-arbitration.pdf> [https://perma.cc/XSP8-RT53].