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ON THE PATH TO JUSTICE: EXPLORING THE PROMISE AND PITFALLS OF THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION

by Iris Ng Li Shan

I. INTRODUCTION

Around the world, transnational corporations are being called upon to bear responsibility for human rights violations. Realization is dawning that it is both appropriate and effective to target such corporations, because they are often the ones who profit from exploiting human rights and who possess the power to make a concrete difference by changing their practices.[1] In the past two years alone, a class action lawsuit has been filed in Thailand against Asia's largest sugar producer, Mitr Phol, by 3,000 Cambodian plaintiffs demanding compensation for alleged land grabs;[2] Eritrean refugees have attempted to sue British Columbia-based mining company Nevsun Resources in Canada for alleged complicity in forced labor, slavery and torture of workers at a precious metals mine;[3] and Google, Apple, Microsoft, Tesla and Dell are alleged to have aided, abetted and profited from child labor in a class action lawsuit in the US filed on behalf of families of Congolese children killed or

[1] Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 844-45 (2018) [hereinafter Ganguly].

[2] Rina Chandran, *Cambodian Farmers Battle in Landmark Lawsuit Against Thai Sugar Firm*, Reuters (June 11, 2019, 7:13 PM), https://www.reuters.com/article/us-cambodia-landrights-court/cambodian-farmers-battle-in-landmark-lawsuit-against-thai-sugar-firm-idUSKCN1TD00P.

[3] Kathleen Harris, *Top Court Weighs Precedent-setting Case of Human Rights Breaches at Canadian Mine in Eritrea*, CBC News (Jan. 23, 2019, 5:28 PM), https://www.cbc.ca/news/politics/supreme-court-nevsun-eritrea-mine-human-rights-1.4990064.

injured while working in cobalt mines in the Democratic Republic of Congo.[1] Yet, for many alleged victims of human rights violations by transnational corporations, the road to vindicating their rights before national courts is a long and winding one. They may face legal impediments in the form of jurisdictional hurdles, forum non conveniens arguments, and separate legal entity issues, as well as practical obstacles such as backlog in, or corruption or politicization of, the courts, just to name a few. Considering these downsides, international commercial arbitration has been held out as a promising model for resolving business and human rights ("BHR") disputes.[2] In this vein, the final text of the Hague Rules on Business and Human Rights Arbitration ("BHR Rules") was unveiled on December 12, 2019. First conceptualized in 2013 by the Working Group of the Business and Human Rights Arbitration project, the BHR Rules then went through multiple rounds of consultation and stakeholder engagement before being distilled into their final form. The BHR Rules are the first set of arbitration rules tailored for use in arbitrating BHR disputes.

In this article, I argue that BHR arbitration has great potential for resolving BHR disputes. Part I provides an overview of the key features of the BHR Rules. Part II discusses and offers solutions to four potential challenges to the widespread adoption of the BHR Rules—getting parties to arbitrate, identifying the content of corporations' human rights obligations, enforcing BHR awards, and overcoming the trust deficit. Finally, Part III sketches a vision for BHR arbitration to truly come into its own as a democratic institution alongside court-based dispute resolution, as a means of strengthening human rights protection through upholding the rule of law.

II. RAISON D'ÊTRE AND KEY FEATURES OF THE BHR RULES

Because BHR disputes often occur in regions where national courts are

[1] Annie Kelly, *Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths*, The Guardian (Dec. 16, 2019, 5:28 AM), https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths.

[2] Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 Oxford J. Legal Stud. 841, 844-45 (2018) [hereinafter Ganguly].

"dysfunctional, corrupt, politically influenced or simply unqualified," parties need a private mode of dispute resolution to ensure timely and fair access to justice.[3] Even where an acceptable court system is available, arbitration may be preferred because of factors such as procedural and substantive flexibility, possibility of selecting arbitrators who have expertise, and reaching parent companies that might otherwise be insulated from liability for their subsidiaries' actions due to jurisdictional or legal doctrinal obstacles.

To facilitate the use of international arbitration in BHR disputes, the BHR Rules were created based on the UNCITRAL Arbitration Rules, with modifications to address issues that are likely to arise in BHR disputes. [4] The key features of the BHR rules are as follows:

(a) Expert arbitration panels. Recognizing that the legitimacy of the arbitral proceeding is closely tied to the selection of suitable arbitrators,[5] the BHR Rules provide that the PCA will serve as appointing authority unless parties agree otherwise.[6] The drafters noted that in view of the need for access to arbitrators with expertise in BHR, including expertise in the cultural context in which the violations occurred, "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."

(b) Extensive transparency provisions. Section IV of the BHR Rules is dedicated to transparency provisions that parallel the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Transparency Rules"). Information regarding the name of the disputing parties, the economic sector involved and the legal instrument under which the claim is brought is to be made

[3] *Id.*

[4] CILC The Hague Rules on Business and Human Rights Arbitration, Introductory Note 3 [hereinafter "BHR Rules"], https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

[5] *Id.* at Art. 6, Commentary ¶ 1.

[6] *Id.* at Art. 6(1).

available to the public by default.[7] The same applies to documents such as the notice of arbitration and response, the statements of claim and defense, and table of exhibits.[8] Hearings will generally be public.[9] The transparency provisions are subject to exceptions for confidential or protected information[10] and safety considerations,[11] amongst others.

(c) Witness protection. The BHR Rules account for the possible need for the tribunal to create special mechanisms for the gathering of evidence and protection of witnesses.[12] The tribunal may adopt specific measures such as non-disclosure of witness identity or location, giving of testimony through image- or voice- altering device, and pseudonymization.[13]

(d) Correcting inequality of arms. The tribunal is exhorted to "ensure that [each] party is given an effective opportunity to present its case in fair and efficient proceeding," such as by adopting more "proactive and inquisitorial" (as opposed to adversarial) procedures to ensure that an unrepresented party can present its case in a fair and efficient way.[14]

Like the UNCITRAL Arbitration Rules, the scope of the BHR Rules is "not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the [BHR Rules]". Parties potentially include "business entities, individuals, labor unions and organizations, states, state entities, international organizations and civil society organizations, as well as any other parties of any kind."[15] That said, it is envisioned that in practice the BHR Rules will likely

[7] *Id.* at Art. 39.

[8] *Id.* at Art. 40.

[9] *Id.* at Art. 41.

[10] *Id.* at Art. 42.

[11] *Id.* at, Art. 38.

[12] *Id.*, Preamble ¶ 6(f).

[13] *Id.* at Art. 33(3), Commentary ¶ 3.

[14] *Id.* at Art. 5(2), Commentary ¶ 1.

[15] BHR Rules, *supra* note 7, Introductory Note 3.

involve claims by human rights violations claimants against businesses, or proceedings between business partners.[16]

III. FOUR CHALLENGES

A. *Challenge One: Getting Parties to Arbitrate.*

Looking at the BHR Rules, one cannot help but feel a certain sense of déjà vu. Nearly two decades ago, the arbitration world was introduced to the PCA Optional Rules for Arbitration of Disputes Relating To Natural Resources and/or the Environment ("PCA Rules"). Adopted in 2001, the PCA rules were drafted by a working group and committee of experts in environmental law and arbitration to address the principal gaps in environmental dispute resolution.[17] Like the BHR Rules, the PCA Rules are also based on the UNCITRAL Arbitration Rules, and allow for arbitration between any combination of states, intergovernmental organizations, non-governmental organizations, multinational corporations, and individuals.[18] Unfortunately, reception to the PCA Rules was lukewarm. These rules have been "scarcely employed," with only six cases commenced under the PCA Rules as of 2016.[19] The lack of compulsory jurisdiction has been identified as a significant problem.[20] The BHR Rules, like all arbitration rules, potentially face the same issue due to the

[16] Bruno Simma et al., International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process, Ctr. for Int'l Legal Cooperation (Nov., 2018), at 8-9 [hereinafter Elements Paper], https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf.

[17] *Environmental Dispute Resolution*, PERMANENT CT. ARBITRATION, https://pca-cpa.org/en/services/ arbitration-services/environmental-dispute-resolution/.

[18] Article 1(1) refers to any agreements, contracts, conventions, treaties or constituent instruments of an international organisation or agency). See Charles Qiong Wu, A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration, 3 CHI. J. INT'L L. 263, 263-264 (2002) [hereinafter Wu].

[19] In half the cases, both parties were private entities, while the other three cases involved a public limited company, a public-owned private company, or a government agency as respondent. Tamar Meshel, The Permanent Court of Arbitration and the Peaceful Resolution of Transboundary Freshwater Disputes, ESIL REFLECTIONS, Jan. 15, 2016) at 1, 2, https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2721249.

[20] Wu, *supra* note 21, at 266.

consensual nature of arbitration. Therefore, one critical issue is: How can parties be persuaded to arbitrate under the BHR Rules in the first place?

The BHR Rules do not prescribe how and when the prospective parties may consent. There are two main permutations, intra-supply chain disputes versus disputes brought by claimants of human rights violations, each of which raises different challenges.

1. Intra-supply Chain Disputes.

The paradigm fact pattern for intra-supply chain disputes is where there is a supply chain agreement between a company and its manufacturer, and the latter allegedly violates human rights obligations to its employees or other third parties in breach of the supply agreement.[21] The company can sue the manufacturer based on an arbitration clause in the contract that both are parties to. This scenario has existed long before the BHR Rules were promulgated,[22] and does not pose a particular legal challenge in obtaining consent. Rather, the problem appears to involve more of practical willingness to arbitrate.[23] One commentator has argued:

> While the BHR Arbitration proposal envisions that the BHR Arbitration Rules could be used in international or multilateral agreements, it is largely assumed that MNEs will simply incorporate BHR arbitration clauses into supply-chain contractual agreements. There are, however, normative and

[21] *Business and Human Rights Arbitration project report: Draft Team Meeting*, CTR. FOR INT'L LEGAL COOPERATION (Jan. 26, 2018), at 3 [hereinafter Draft Team Meeting], https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf.

[22] *See, e.g.*, the example of the ICC arbitration cited in Julianne Huges-Jennett & Alison Berthet, *Arbitrating Business and Human Rights Disputes: Uncharted Territory*, PRACTICAL LAW ARBITRATION BLOG (Aug. 30, 2018) http://arbitrationblog.practicallaw.com/arbitrating-business-and-human-rights-disputes-uncharted-territory/ (Providing as example an ICC arbitration where the buyer had terminated a contract for the manufacture of branded products because the seller had sourced certain items via a subcontractor which used prison labour, in breach of the agreement's incorporated code of conduct. The tribunal upheld the termination as lawful.).

[23] Rumbidzai Maweni, Arbitrating Human Rights Disputes: The Proposal for Business and Human Rights Arbitration Rules and Lessons Learned from the Bangladesh Accord Arbitrations, COLUM. CTR. ON SUSTAINABLE INV. (July 10, 2018), http://ccsi.columbia.edu/2019/07/10/arbitrating-human-rights-disputes-the-proposal-for-business-and-human-rights-arbitration-rules-and-lessons-learned-from-the-bangladesh-accord-arbitrations/.

> practical difficulties to this application of BHR norms. First, whether and in what circumstances an inter-corporate dispute, likely also based in contractual obligations, would raise sufficient human rights issues that it should be arbitrated under rules designed for this purpose. Second, global brands often do not even know the extent of their own supply chain as supply chains are often not fully traceable.[24]

I suggest that these problems are not true impediments to the use of the BHR Rules in intra-supply chain dispute. The first problem—the "normative" difficulty with the circumstances when an inter-corporate dispute may be arbitrated—needs some unpacking.

If what this means is that it is unclear when a BHR tribunal will have jurisdiction given the nebulous scope of what constitutes human rights, this problem is actually averted by the language of Art 1(1) of the BHR rules, which provides that "[t]he characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules." This gels perfectly with the common formulation in arbitration clauses to include all disputes rising "out of or in connection with" a contract, such that there is no need to separate particular parts of the dispute as concerning exclusively BHR issues before they may be decided before a tribunal constituted under the BHR Rules.

On the other hand, if the first problem is understood as querying when an intra-supply chain dispute warrants recourse to arbitration, whether to commence arbitration in any given case involves balancing various pragmatic considerations. If a supplier violates human rights norms, a company's options include terminating the contract, litigating the dispute, working with a supplier, or even mediating.[25] Arbitration is not always the best solution, and it is beyond the remit of any set of arbitration rules to deal with this issue.

Turning then to the second problem of global brands not knowing the extent of their own supply chains, this is increasingly being mitigated by technological

[24] *Id.*

[25] Draft Team Meeting, *supra* note 24, at 3.

advances that make possible real-time monitoring and tracking. Besides the employment of standard communications technology, one notable development is the use of blockchain paired with smartphone applications or the Internet of Things (this being the extension of Internet connectivity to electronic devices so they may "communicate" with each other), for tracking and verification purposes. Blockchain is a type of distributed ledger technology that comprises a virtual database of records shared across a network of devices, which apply the same ground rules to maintain an accurate and updated ledger. Blockchain records are known for being relatively immutable and hence tamper-proof. This technology is already been applied to revamp the logistics and shipping sectors.[26] Once the arrival of goods at customs is logged into the smart contract, approval is automatically generated for quicker customs clearance.[27] In the same way, blockchain has potential for use by transnational corporations to track where exactly their supply chains lead. Of course, this is not a perfect solution. The technology alone will not tell you when or whether a human rights violation is occurring. I raise this example only to illustrate how technological advances are now giving corporations the capability to monitor the extent of the supply chain, undermining the invidious argument of escaping liability by disclaiming knowledge.

2. Disputes Brought by Claimants of Human Rights Violations.

Turning then to the trickier issue of obtaining consent to arbitrate in disputes brought by alleged victims, generally speaking, consent may be established pre-dispute (such as through contractual clauses), or post-dispute (by way of a submission agreement). I consider these in turn.

Claimants of human rights violations are not generally parties to pre-dispute arbitration clauses, since their claims arise due to the conduct of corporations, which happens after-the-fact. The drafters of the BHR Rules proposed an innovative

[26] Guido Perboli et al., Blockchain in Logistics and Supply Chain: A Lean Approach for Designing Real-World Use Cases, IEEE Access (Oct 16, 2018), https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=8493157.

[27] How Blockchain Is Revolutionizing the World of Transportation and Logistics, WINNESOTA, https://www.winnesota.com/blockchain.

solution: A pre-dispute arbitration clause (which can exist in intra-supply chain contracts) can grant arbitration rights to third party beneficiaries, including claimants of human rights violations as a defined class.[28] The model clause to grant third party arbitration rights provides:

> Defined class of third party beneficiaries entitled to arbitrate:
> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to the obligations undertaken by the parties under this[contract] [agreement] [treaty] [instrument] [rule] [decision] [relationship] for the benefit of:
> [insert defined class of third party beneficiaries]
> may be submitted by any such third person to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.
> Defined scope of third party claims entitled to be arbitrated:
> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to:
> [insert defined subject matter, which may include:
> (a) selected national laws;
> (b) selected international instruments;
> (c) other industry or supply chain codes of conduct, statutory commitments or regulations from sports governing bodies, or any other relevant business and human rights norms or instruments]
> may be submitted by any third party beneficiary of such [law(s)] [instrument(s)] to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.[29]

The above model clause is a significant innovation that was absent from the PCA Rules. It provides an elegant and relatively fuss-free way of opening the door to arbitration for alleged victims.

First, the structure of the BHR Rules averts a ubiquitous thorny problem with third party beneficiary clauses, which is that while third party beneficiaries may be granted the right to commence arbitration it is unclear in what circumstances they will also be obliged to do so.[30] This problem would not arise under the BHR Rules because the

[28] BHR Rules, *supra* note 7, Annex – Model Clauses at 106.

[29] *Id.*

[30] Some commentators have argued that if the third party has the right to invoke an arbitration clause, it is also under an obligation to do so. Andrea Meier & Anna Lea Setz, Arbitration Clauses in Third Party Beneficiary Contracts – Who May and Who Must Arbitrate?, 34 ASA BULL. 62, 77 (2016).

rules are not meant to be exclusive; alleged victims will still be able to go to court. Paragraph 3 of the Preamble to the BHR Rules provides that "[a]rbitration under the Rules is not meant as a general substitute for State-based judicial or non-judicial mechanisms." The Working Group Paper also affirms that unlike consumer arbitration, which extracts 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 alleged victims might have to go to court instead of to arbitration."[31]

Secondly, the model third party beneficiary clause encourages buy-in by corporations because it demonstrates how corporations can take control of the parameters of the dispute as a risk management strategy (at least in the first instance before interpretation of the clause by the tribunal). Corporations get to define not only the subject matter and scope of obligations, but also the class of beneficiary. The possibilities are legion, as the following two possible classes illustrate:

a) Employees. Would an "employee" class include employees of that corporation only, or also the employees of a subsidiary a sub-contractor? Should this group be limited to current employees, bearing in mind (i) the danger of corporations firing their employees to preclude claims, and (ii) the possibility of certain human rights violations (especially environmental claims) manifesting only over time?

b) Affected communities. Various ways of characterizing a community have been suggested, included geography, interaction, and identity.[32] The most appropriate way to define a "community" for purpose of an arbitration clause may well depend on the type of corporation involved. To illustrate, for corporations involved in the extractive industry a geographically bounded (spatially defined) community may be the most appropriate (such as for purposes of prosecuting the environmental consequences of its activities).

c) Claimant representatives. In view of the potential cost of mounting a claim, it

[31] Working Group Paper, *supra* note 5, at 27.

[32] Ciprian N Radovi, Community-Investor Environmental Conflicts: Should and Could They Be Arbitrated, 12 S.C. J. OF INT'L L. & BUS. 117,133 (2016).

is worth considering whether beneficiary classes should include non-governmental organizations, labor unions or even industry groups.[33]

There is cause for optimism that corporations will find it in their interest to draft decently-scoped BHR arbitration clauses, in view of the need to strike a balance between giving in to the corporation's self-preservation tendencies (to restrict the groups of beneficiaries as narrowly as possible, to avoid opening the floodgates of liability), and the truism that an extremely narrow clause will simply channel some cases to litigation or even draw public condemnation.

B. *Challenge Two: Populating the Content of Corporations' Human Rights Obligations.*

Article 46 of the BHR Rules provides that the tribunal shall apply "the law, rules of law or standards designated by the parties as applicable to the substance of the dispute," a formulation intended to grant maximal autonomy and flexibility to the parties, allowing recourse to provisions of different nature (hard law/soft law; public/private) and origin (international/national).[34] Failing party agreement, the tribunal shall apply the law or rules of law it determines to be appropriate. These may include international human rights obligations.[35] In all cases, the tribunal is required under Art 46(4) to take into account "any usage of trade applicable to the transaction, including any business and human rights standards or instruments that may have become usages of trade."

The operative question here essentially concerns the finding of an anchor for enforceable BHR obligations. What would the applicable sources of law, and the applicable norms, be?[36]

1. International "Soft Law" Instruments.

The first way is for parties to prescribe for the application of international human

[33] *See, e.g.*, Michael Hirsh, *How Private Lawsuits Could Save the Climate*, FOREIGN POL'Y (Nov. 21, 2018, 3:03 PM) (reporting commercial fishermen suing oil, gas and coal companies), https://foreignpolicy.com/2018/11/21/how-private-lawsuits-could-save-the-climate/.

[34] BHR Rules, *supra* note 7, Art. 46(1), Art. 46 Commentary ¶¶ 1-2.

[35] BHR Rules, *supra* note 7, Art. 46 Commentary ¶ 3.

[36] Alison Berthet, *Arbitration: New Forum for Business and Human Rights Disputes?*, PRACTICAL L. ARB. BLOG (Oct. 16, 2017), http://arbitrationblog.practicallaw.com/arbitration-a-new-forum-for-business-and-human-rights-disputes/.

rights "obligations" intended for businesses. These include the UN Guiding Principles on Business and Human Rights ("UNGPs"), and the OECD Guidelines for Multinational Enterprises ("OECD Guidelines"). This has been done in practice, albeit outside the arbitration context, by FIFA in deciding to make the UNGPs compulsory for its contractual partners and suppliers.[37]

The problem is that such instruments are "soft law", drafted in an open-ended manner and not designed to be enforced.[38] For instance, Principle 13 of the UNGPs provides that:

> The responsibility to respect human rights requires that business enterprises:
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Principle 22 provides that "[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." But what does it entail for businesses to "prevent or mitigate" adverse human rights impacts, or to "provide for or cooperate" in remediation? The vagueness of these principles makes it difficult to determine what compliance requires and whether there has been a breach. Moreover, the applicable domestic law may not recognize corporate liability for human rights violations in the first place.[39] One example is how in the US context, *Kiobel v. Shell* and *Jesner v. Arab Bank* hold that foreign corporations may not be sued under the Alien Tort Statute for violations of the law of nations.[40] In view of the

[37] Stéphane Brabant, Partner, Herbert Smith Freehills, Setting Human Rights Standards Through International Contracts, Address at the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) Trade Law Forum (May, 2016) *in* HERBERT SMITH FREEHILLS, June 24, 2016, https://www.herbertsmithfreehills.com/latest-thinking/setting-human-rights-standards-through-international-contracts.

[38] Berthet, *supra* note 39.

[39] Id.

[40] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013); Jesner v. Arab Bank, 138 S. Ct.

foregoing, applying international "soft law" instruments does not look promising.

2. Specific Rights and Obligations Under National Law.

The second option is for the tribunal to try to look to the law the parties have chosen to apply as the source of human rights norms. The applicable governing law can contain two main sources of norms: (a) constitutional law, or (b) particular human rights obligations imposed on businesses.

Basic rights such as the right to life and liberty, the prohibition of torture, and the right to a fair trial are often constitutionally guaranteed. Other human rights are also gaining traction (consider how 148 out of the 196 countries with constitutions have enshrined some form of environmental constitutionalism).[41] The problem, however, with relying on constitutions (and legislation like the UK Human Rights Act 1998) is that these deal fundamentally with vertical relationships between states and individuals, making it incongruous to try and apply these protections to the conduct of corporations.

Another way forward is to look at the human rights obligations imposed on businesses specifically. If French law is chosen to apply, one might invoke the 2017 "Duty of Vigilance" law that requires companies of a certain size to annually assess and address the risks of serious human rights and environmental violations resulting from their activities. The same goes for English law and the Modern Slavery Act 2015, section 54 which requires businesses that exceed a minimum turnover to report annually on steps taken to ensure that slavery and human trafficking are not taking place in their own business or in their supply chains. While these provisions undoubtedly impose obligations on businesses, given their "due diligence" nature, it is questionable how far they can be meaningful in BHR arbitration involving victims (as opposed to intra-supply chain disputes), in which the gravamen of the complaint is the violation of the right and not merely the policing of whether that right has been upheld. National law, therefore, does not provide a sufficient basis for grounding corporations' BHR obligations.

1386, 1407-1408 (2018).

[41] Ganguly, *supra* note 1, at 863.

3. Contractual Standards that Parties Choose to Incorporate.

The best solution to the problem of populating the content of corporations' BHR obligations may well be the most direct: Relying on contractual provisions that explicitly refer to human rights guarantees. Through their contractual provisions, corporations could require their business partners to observe particular human rights norms (e.g., the right to a safe workplace) by specifying the particular practices to implement or be avoided (e.g., provisions on working conditions, working hours or minimum age).[42]

To streamline the unwieldy process of inserting human rights norms into a contract, the American Bar Association, in its 2018 Report on Human Rights Protections for Workers in International Supply Chains, has attempted to provide model contract clauses for buyer companies to include in agreements with their suppliers.[43] The key component of the model clauses is a human rights appendix, the content of which the ABA does not prescribe, into which a buyer will insert all the proposed human rights obligations. This appendix is referred to as "Schedule P" ("P" stands for "Principles" or "Policies"). Schedule P is then given "teeth" by tying it to contractual provisions such as representations and warranties. For instance, model clause Article 1 provides that "Each shipment and delivery of Goods shall constitute a representation by Supplier and Representatives of compliance with Schedule P", and Article 2 goes on to say that "Buyer shall have the right to reject any Goods produced by or associated with Supplier … that Buyer has reason to believe has violated Schedule P … regardless of whether such Goods were produced under this or other contracts."

Proposals such as the ABA model clauses are a creative solution to the problem of making BHR obligations relevant to, and at home in, the business context. When considered in relation to BHR arbitration, however, it quickly becomes apparent that

[42] Working Group Paper, *supra* note 5, at 3.

[43] David V Snyder & Susan A Maslow, Human Rights Protections in International Supply Chains-Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Business Law Section, 73 BUS. LAW. 1093 (2018) at 1096–1099.

the model clauses are more relevant to intra-supply chain disputes than disputes brought by human rights claimants.

The solution I propose is for Schedule P to be reimagined as a "charter of rights" of sorts for the class of third-party beneficiary referred to in the BHR Rules' model arbitration clause. This can be achieved by way of a clause like the one below:

> [Buyer] and [Seller] acknowledge that [Schedule P, or specific provisions of Schedule P] of this agreement was entered into for the benefit of [Buyer] and [each member of the class(es) of persons referred to in the clause granting arbitration rights to third parties], who are each entitled to bring a claim [for damages or other specified relief] for violation of the rights in [Schedule P].

Such clauses are likely to be upheld as they are unexceptional, being based loosely on similar provisions in the Contracts (Rights of Third Parties) Acts common to several jurisdictions. These generally provide that third party to a contract may in its own right enforce a term of the contract if the contract expressly provides that it may; or the term purports to confer a benefit on it. Considering the above, I suggest that there is a workable solution to the challenge of subjecting businesses to enforceable human rights obligations.

C. *Challenge Three: Obtaining Recognition and Enforcement of BHR Awards.*

The 2018 Queen Mary University of London (QMUL) International Arbitration Survey identified the enforceability of an award as the most attractive feature of arbitration.[44] Clearly then, BHR arbitration is unlikely to take off if the awards rendered pursuant to this procedure are not widely recognized and enforceable. The drafters of the BHR Rules were cognizant of this, and sought to better the chances of enforceability under the New York Convention ("NYC") by including Art 1(2). Under this provision, any dispute submitted for arbitration under the Rules is "deemed to have arisen out of a commercial relationship or transaction" for purposes of Art I of the NYC. This gets around the fact that nearly fifty states have made declarations

[44] Queen Mary Univ. of London & White & Case, 2018 *International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY U. LONDON, at 7, http://www.arbitration.qmul. ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).pdf.

under Art I(3) of the NYC for the convention to apply "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial," and the restriction under many national arbitration statutes to "commercial" matters or "transactions involving commerce."[45] That said, there exists two further hurdles to enforceability under the NYC—the non-arbitrability ground for non-enforcement under Art V(2)(a), and the public policy ground in Art V(2)(b).

1. Non-arbitrability Under Art V(2)(a).

The issue here is whether BHR disputes are legally allowed to be settled by arbitration. There are three potential arguments for the non-arbitrability of BHR disputes—all of which I argue are unpersuasive.

First, it has been suggested that "issues regarding human rights and fundamental freedoms guaranteed by international agreements may not be subject to arbitration … due to divergent ideological underpinnings of commercial sphere and human rights' approach … [H]uman rights are based on human dignity as such, whereas trade-related relationship are [sic] construed for instrumentalist reasons."[46] This criticism misunderstands the nature of the non-arbitrability defense. The non-arbitrability doctrine "rests on the notion that some matters so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect."[47] Properly understood, non-arbitrability is determined not by reference to whether human right are compatible with commercial considerations, but rather, whether they involve "public" rights and concerns or the interests of third parties.

Secondly, it may be argued that BHR issues are non-arbitrable because they involve rights that are the courts' prerogative to resolve. While this argument might

[45] Elements Paper, *supra* note 19, at 19.

[46] Natalja Freimane, Arbitrability: Problematic Issues of the Legal Term 17 (2012) (unpublished Master's Thesis, Riga Graduate School of Law), *available at* https://sccinstitute.com/media/56097/ arbitrability-problematic-issues.pdf.

[47] Gary Born, International Commercial Arbitration 945 (Kluwer Law Int'l, 2d ed. 2014).

conceivably apply to constitutional rights, which are of a public law nature, it loses its force once it is recalled that the most likely sources for enforceable BHR obligations are contractual standards that the parties have chosen to incorporate. As argued above, human rights obligations that arise under constitutional law are unlikely to be the ones that are subject to BHR arbitration. Even if similar obligations are incorporated into a contract, the basis for their application would be the parties' agreement. The court arguably has no special claim to adjudicating this kind of dispute.

Thirdly, BHR disputes might be said to be non-arbitrable because the range of remedies in arbitration is more limited. Similar arguments were accepted in Young JA's dissenting opinion in Rinehart v Welker in respect of the non-arbitrability of trustee misconduct. This version of the non-arbitrability argument rests on a double fallacy. Non-arbitrability should not depend on the precise alignment of remedies, given that there are other remedies and enforcement mechanisms available to an arbitrator.[48] In any case, it is worth pointing out that under the BHR Rules a conscious move was made to steer clear of the approach in investor-state arbitration where damages are the predominant remedy. Art 45(2) of the BHR Rules provides that an award may order "monetary compensation and non-monetary relief, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantee of non-repetition." Accordingly, there are strong counterarguments to the non-arbitrability of BHR disputes.

2. Public Policy Under Art V(2)(b).

In the 2018 Elements Paper, the drafters of the BHR Rules observed that the "public policy" exception to the enforceability of awards might allay concerns that using international arbitration to resolve BHR disputes has the potential to result in awards that contradict internationally-recognized human rights norms, i.e., awards that are not "rights-compatible." In other words, an award might be refused

[48] Matthew Conaglen, *The Enforceability of Arbitration Clauses in Trusts*, 74 Cambridge L. J. 450, 456- 74 CAMBRIDGE L. J. 450, 456-57 (2015).

enforcement if the award is assessed by the court to violate human rights.[49]

But what, precisely, does it mean for an award to not be "rights-compatible"? Consider this hypothetical. A BHR tribunal determines that the respondent corporation did not violate the claimants' right to water due to its acts of pollution. The enforcement court, applying its own interpretation of the right to water, would have concluded that it did. Are there grounds for refusing recognition of the award for being contrary to public policy? On one hand, it could be argued that the tribunal merely made an error of law in concluding that there was no rights violation when the correct view is that there was. Errors of law per se do not necessarily engage the public policy of a jurisdiction; the situation is similar to, say, the tribunal making a mistake about what is the applicable law of the contract.[50] On the other, it might also be said that a wrong interpretation of a fundamental human right is so clearly injurious to the public good that recognition (or enforcement) should be refused. On balance, it is suggested that the better view should generally be the former one. While human rights are sacrosanct and their value incalculable, this is not a ground for saying that all human rights violations in all circumstances must serve as a trump card. Courts should adopt a fact-sensitive approach, to consider if the particular misinterpretation of human rights obligations is such an extensive violation of the most basic notions of morality and justice that recognition or enforcement would be repugnant. All things considered, the public policy ground ought not be an easy one to invoke, and BHR arbitration awards are likely to face no particular hurdles to recognition and enforcement.

D. *Challenge Four: Overcoming the Trust Deficit and "Guilt by Association" with Investor-State Arbitration.*

Investor-state dispute settlement by way of investor-state arbitration has

[49] BHR Rules, *supra* note 7, Art. 20 Commentary ¶ 3.

[50] See the Singapore approach in PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR(R) 597 (Sing.) at [56]–[57] (errors of fact or law made in an arbitral decision, per se, are final and binding on parties). Cf., Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629 (India) (award that was inconsistent with provisions of Indian statute was wrong in law, hence liable to be set aside on public policy grounds). See however Shri Lal Mahal Ltd v. Progetto Grano Spa (2014) 2 SCC 433 (India) (departing from the former view).

increasingly come under fire for being complicit in trampling on human rights. Bilateral investment treaties have been described as perpetrating environmental injustice and "undermin[ing] the right to a healthy environment."[51] Humanity has allegedly become "collateral damage."[52] In view of this perceived incompatibility between investor state arbitration and human rights, it might then be a hard sell to say that the way to resolve BHR disputes is yet more arbitration. To evaluate whether BHR arbitration is likely to be able to overcome "guilt by association" with investor state arbitration, I will consider two questions: (a) What is the root of the discontent with investor state arbitration as far as human rights are concerned? (b) Considering the similarities and differences between BHR arbitration and investor state arbitration, is the same fate likely to befall BHR arbitration?

1. The Human Rights Factor in the Backlash Against Investor-State Arbitration – Relevance, Roles, and Repercussions.

In investor state arbitration, human rights have been invoked at various junctures.

(a) As a "sword" by investors. In Hesham Talaat M Al-Warraq v Indonesia,[53] the tribunal found that Indonesia had breached the fair and equitable treatment obligation when that obligation was read in the light of the International Covenant on Civil and Political Rights ("ICCPR"), to which Indonesia was a party. The tribunal stated that "the rights enshrined within [the ICCPR] represent the basic minimum set of civil and political rights recognized by the world community" and held that "the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR".

(b) As a "shield" by the host state to rebuff investors' claims. Host states have argued that human rights obligations afford a defense to breach of the investment treaty. For example, in Suez v Argentina, Argentina argued that the right to water

[51] Lisa Sachs et al., *Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment*, KLUWER ARB. BLOG, Nov. 13, 2019, http://arbitrationblog.kluwerarbitration.com/2019/11/13/environmental-injustice-how-treaties-undermine-the-right-to-a-healthy-environment/.

[52] Henok Gabisa, The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?, 48 INT'L LAW.153 (2014).

[53] Hesham Talaat M Al-Warraq v. Republic of Indon., UNCITRAL, Final Award, ¶ 559 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

supported its imposition of a price freeze and so any breaches of contractual obligations were necessary.[54]

(c) As a "counterattack" by the host state in bringing a counterclaim. More rarely, the host state may seek to counterclaim against the foreign investor for human rights violations if counterclaims are envisioned under the BIT. In Urbaser v Argentina, the tribunal interpreted Art 10(1) of the Spain-Argentina BIT "in good faith" to include state counterclaims and investors' obligations towards the state (though the counterclaim was eventually dismissed on the merits).[55]

On one level, the unhappiness with investor state arbitration is traceable to the perception of bias in favor of investors in deciding human rights disputes—the disillusionment of being stuck in a rigged system where you can never win, which seeps into each stage mentioned above. Tribunals have been criticized for adopting jurisprudence in favor of investors but, in the same breath, declining to apply the same approach to states. In *Azurix Corp v Argentine Republic*,[56] the tribunal considered a reference to an European Court of Human Rights judgment as "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation." Yet this reliance on human rights jurisprudence was confined to interpreting the investor's property rights, and not extended to Argentina's defense of the human right to water.[57] Tribunals have sometimes also refused to engage with human rights arguments, preferring instead to sweep them under the carpet. In *EDF v Argentina*, the tribunal acknowledged that it "should be sensitive to international jus cogens norms, including basic principles of human rights." Yet, it cursorily dismissed Argentina's human rights arguments by

[54] *Suez, Sociedad General de Aguas de Barcelona, v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 252 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

[55] *Urbaser* SA,*v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1143-55 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

[56] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 312 (July 14, 2006), https://www.italaw.com/ sites/default/files/case-documents/ita0061.pdf.

[57] Tamar Meshal, Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond, 6 J. Int'l Disp. Settlement 277, 289 (2015).

stating that Argentina's violation of the concession agreement was not "necessary to guarantee human rights."[58] Finally, the bringing of a counterclaim against an investor tends to be fraught with jurisdictional hurdles.[59] And even if jurisdiction is established, there is still difficulty populating the content of the norm allegedly breached by the foreign investor, since older-generation BITs tended to be "asymmetric" in imposing obligations on the state but rights on the investor.

Digging deeper, we might realize that the human rights debate is simply the canary in the coalmine for a deeper discontent with investor-state dispute settlement ("ISDS"): the perception of a pervasive loss of control, or the loss of maneuvering space, on the part of states which then feel they are being boxed in. In that sense the discontent surrounding human rights may only be symptomatic of a broader protest against the balance of power in ISDS, implicating concerns over whether ISDS is equitable or disproportionately impacts certain respondent states. The backlash against investor state arbitration is evident from a string of high-profile exits from the ICSID Convention (Bolivia in 2007, Venezuela in 2009, and Ecuador in 2012)[60] and the calls for a shift towards a multilateral investment court system.

2. Will BHR Arbitration be Different?

In view of the concerns underpinning the backlash against investor state arbitration, it is safe to say that the answer to the above is an emphatic "yes"—BHR arbitration will likely face a different reception from investor state arbitration. BHR arbitration would primarily involve private parties (corporations or claimants) as opposed to state actors. Correspondingly, the rulings arrived at are unlikely to have the far-reaching implications for states that have become such a major bugbear to ISDS. Even where the corporations involved in BHR arbitration are state-owned,

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[58] *EDF International SA v. Argentine Republic*, ICSID Case No ARB/03/23, Award, ¶ 914 (June 11, 2012), https://www.italaw .com/ sites/default/files/case-documents/ita1069.pdf.

[59] Maria Fanou, *Environmental Considerations in Investment Arbitration: A Report of a 'Topical Issues in ISDS' Seminar*, Kluwer Arb. Blog, May 22, 2019, http://arbitrationblog.kluwerarbitration.com /2019/05/22/environmental-considerations-in-investment-arbitration-a-report-of-a-topical-issues-in-isds-seminar/.

[60] Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?* 29 European J. Int'l L. 551, 556 (2018).

state-controlled or otherwise closely linked to a state (for which attribution arguments might be fruitful under international law), the legal framework and context of BHR arbitration ill support contentions that a state has attracted responsibility under international law because breaches of contract have been elevated to treaty breaches.[61]

Nevertheless, there is a cautionary tale for BHR arbitration to be derived from the investor state arbitration experience—the paramount importance of transparency. Significant disquiet came about due to the initially closed nature of ISDS. That sentiment is vividly captured in this quote:

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned, and environmental regulations challenged.[62]

These sentiments eventually led to a sea change towards transparency, with the promulgation of instruments such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (better known as the Mauritius Convention) and the UNCITRAL Transparency Rules, as well as the reforms to the ICSID system (most notably, the move towards even further transparency in the August 2019 proposals). Considering this general sentiment, corporations would do well to adopt the transparency provisions in the BHR Rules as they are rather than

[61] In particular, consider the applicable law provisions. Article 46 of the BHR Rules empowers the tribunal to "apply the law, rules of law or standards designated by the parties as applicable to the substance of the dispute". BHR Rules, Art. 46(1). This conceivably includes direct importation of human rights standards under treaty law (though questions may arise over whether an *ad hoc* tribunal may adjudicate upon such standards, and whether the relevant treaty confers a cause of action upon the individual claimant(s)). But if the above analysis on sources of norms reflects the mainstream approach adopted by contracting parties, international law is unlikely to be the applicable law in BHR proceedings. Nor does BHR arbitration run the risk of claimants arguing that breaches of contract are transformed into treaty breaches under umbrella clauses. For an expansive approach towards umbrella clauses, see *SGS Société Générale de Surveillance S.A v. Republic of the Phil.*, ICSID Case No Arb/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), https://www.italaw .com/sites /default/files/case-documents/ita0782.pdf.

[62] Won Kindane, The China-Africa Factor in the Contemporary ICSID Legitimacy Debate, 35 U. Pa. J. Int'l L. 559, 564–65 (2014).

try to contract out too extensively; one simple way to overcome the trust deficit is to show that you have nothing to hide.

IV. REIMAGINING BHR ARBITRATION AS A DEMOCRATIC INSTITUTION

This final section deals with a question inextricably connected with the future of BHR arbitration, which is also perhaps the elephant in the room—the appropriateness of BHR arbitration as a means of resolving BHR disputes in the first place. The argument is that the very channeling of disputes away from the courts is undemocratic, because courts "promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, as well as by allowing, or requiring, the citizenry to administer the law through jury service."[63] The channeling of disputes to arbitration might then be perceived to be undemocratic, because this deprives a party of its day in court and also its opportunities for civic participation.

But this objection suffers from two fundamental mistaken assumption. First, that the disputes diverted to arbitration are necessarily those that would have been heard in court. As alluded to above, the greatest need for BHR arbitration is envisioned to arise precisely where there are deficits in the court system. In other words, in certain cases the appropriate comparator is not "better" justice in the courts, but no satisfactory recourse at all.

Second, the assumption that arbitration inevitably falls short when measured against the court system, which is perceived as the "baseline endowment for dispute resolution" that shapes obligations and expectations regarding the democratic character of other dispute resolution mechanisms.[64] Several core democratic values have been identified as criteria to assess the democratic character of a method of dispute resolution.[65] These include the political values of participation, accountability and transparency, and rationality; the legal values of due process and

[63] Richard C Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 293 (2004) [hereinafter Reuben].

[64] *Id.* at 293.

[65] *Id.* at 285–86.

equality; and the social capital values of public trust and social connection. Considering these in turn, BHR arbitration in the form proposed under the BHR Rules fares rather well, such that arbitration can properly be regarded as a democratic institution (alongside the courts) to enhance access to justice—both directly as a mode of dispute resolution, and indirectly by achieving efficiency gains for the public justice system when disputes are funneled away from over-taxed courts.

Participation. Participation values are said to sometimes be compromised in arbitration because there is a lack of a place for public participation. I leave aside the form of public participation that is jury trials because not every judicial system still maintains separate institutions of judge and jury. This criticism has much less force under the BHR Rules, which contain provisions that allow for third-party participation through written submissions. Under Art 28, third persons (such as state(s) of the parties' nationality or on whose territory the conduct that gave rise to the dispute occurred, amicus curiae, or relevant NGOs) may apply to the tribunal to make submissions and the tribunal can decide to allow the filing of written submissions pertaining to the dispute. The tribunal is to have regard to whether the third person has a significant interest in the arbitral proceedings, and the extent to which the submission would assist the tribunal in by bringing a perspective, particular knowledge or insight different from that of the parties.[66] It is significant that parties to the arbitration do not have a veto over third party participation—the tribunal is only obliged to "consult" with the parties and retains the final say, subject to it ensuring that any submission does not disrupt or unduly burden the proceedings or unfairly prejudice any party. While third parties are not entitled to make oral submissions that should not be considered a bar or disadvantage to participation, bearing in mind how arbitral tribunals generally have discretion to decide whether hearings are to be heard orally or by way of submissions only.

Accountability. There are ways around the "problem" of there being no oversight over the merits of an arbitral award. First, it is open to the parties to opt for an appellate arbitration clause. Such clauses permit the parties, if dissatisfied with the

[66] BHR Rules, Art. 28(3).

decision of a first arbitral tribunal, to appeal to another tribunal.[67] Appellate arbitration clauses can take various forms, such as two-tier arbitration clauses in which parties assemble their own preferred appeal mechanism,[68] or clauses that incorporate an institutional arbitration procedure with an appellate mechanism (e.g., that offered by the International Institute for Conflict Prevention and Resolution, JAMS appeal procedure, or American Arbitration Association Appellate Arbitration Rules). Secondly, the seat court retains oversight in the form of being entitled to annul an award if the award contravenes public policy.

Transparency. As discussed above, the BHR Rules reverse the default position of closed hearings and require the publication of information at the commencement of proceedings, of documents, and of awards—subject to exceptions or confidential or protected information. There is also the option of restraining or delaying the publication of information. I suggest that these provisions, while a good start, are not enough. Beyond the formal enshrining of transparency in institutional rules, the missing piece of the puzzle is publicity in practice that would raise public awareness. Several national courts routinely issue case summaries or media briefings on significant cases. Some (such as the UK Supreme Court) even provide for live-streamed court proceedings to the public. While arbitration should not be benchmarked against the foregoing, these nonetheless provide ideas for how improved outreach efforts can serve a key legitimating function. I propose that institutions charged with administering BHR arbitration come together to set up a unified channel for disseminating information about key BHR proceedings. This need not be complex—a new Twitter handle or Facebook page, for instance, under which

[67] Prachi Aggarwal, *Multi-tier Arbitration Clauses*, RMLNLU L. REV. BLOG (Oct. 25, 2017), https://rmlnlulawreview.com/2017/10/25/multi-tier-arbitration-clauses/.

[68] See the sample clause in M/S Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd, Civil Appeal No 2562 of 2006 (Supreme Court of India) ("*Centrotrade*") at [3]: (Arbitration - All disputes or differences whatsoever arising between the parties … shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce . . . .).

updates to BHR proceedings can be posted. The key consideration is for this to serve as an easily available and consolidated entry point for both the media and the general public. This is necessary due to the disparate and "scattered" nature of BHR proceedings, which arise from how the BHR Rules are meant to be applicable under the auspices of any arbitral institution willing to administer these rules. Although public awareness does not guarantee public interest, this would bridge the critical last mile between BHR arbitration proceedings actually being transparent, and being perceived as "walking the talk" of transparency.

Rationality. The argument why arbitration does not embody rationality is that "arbitrators have substantial discretion to decide matters on grounds other than those that may be required by a rule of law, grounds that may appear arbitrary or capricious."[69] This argument may be strongly rebutted. Existing work on the use of precedent in arbitration suggests that while tribunals are not bound, as courts are, to take into account prior decisions as a matter of stare decisis, they do consider these precedents as a matter of fact.[70] Next, if the objection is with the possibility of the tribunal being empowered to decide as amiable compositeur or ex aequo et bono if the parties so decide (as is permissible under most institutional rules and also Art 46(3) of the BHR Rules), that objection erroneously equates rationality with a rules-based approach, when in truth rationality may also be achieved through grounding in reason and logic.

Equality and due process. Equality and due process rights are enshrined in Art 18(1) of the BHR Rules, which exhorts the tribunal to ensure that "parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." It also bears emphasis that equality and due process are cherished values for arbitration in general—consider the NYC ground for setting aside due to a party's inability to present its case.

Public trust and social connection. Public trust in institutions that form part of the

[69] Reuben, *supra* note 66, at 302.

[70] See e.g., Richard C Chen, Precedent and Dialogue in Investment Treaty Arbitration, 60 HARV. INT'L L. J. 47 (2019).

social fabric, a sense of social connection, as well as a spirit of reciprocity are amongst the "intangibles that constitute the foundation upon which a democracy must rest if it is to be sustained, consolidated, and effective."[71] BHR arbitration under the BHR arbitration rules arguably contributes to this. Even whilst BHR arbitration is sought as an alternative to purportedly inept or corrupt national courts, it reaffirms the need for trust in a domestic court (especially the seat court) given that arbitration proceedings must ultimately be anchored in a national law; in alleviating the burden on national courts arbitration also provides breathing space and offers an ideal for reform. Further, BHR arbitration encourages the rehabilitation of corporations as corporate citizens, given that the very availability of this option is contingent on businesses actually formalizing and incorporating human rights obligations in their contracts (as argued above). Finally, BHR arbitration enhances civic participation by empowering disenfranchised parties, who might otherwise face a long and rocky road to justice. In light of the above, there are persuasive reasons why BHR arbitration can come into its own as a democratic institution to enhance access to justice.

V. CONCLUSION

The BHR Rules are not a panacea. A lot still depends on the implementation of "access to justice" measures such as funding options under national law, the fidelity to the original BHR Rules shown by the parties in their implementation of these rules, and the approach taken by BHR tribunals in adjudication. Nevertheless, BHR arbitration offers a promising alternative route to justice, and the BHR Rules amount to a good starting point for all parties involved to operationalize and institutionalize this method of dispute resolution. Nelson Mandela once said that to deny people their human rights is to challenge their very humanity. Sending just one more case on the way to justice would mean one less travesty.

[71] Reuben, *supra* note 66, at 293.

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The paper is written in the author's personal capacity, and the opinions expressed in the paper are entirely the author's own views.

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