

**INTERNATIONAL ARBITRATION OF BUSINESS  
AND  
HUMAN RIGHTS DISPUTES  
  
QUESTIONS AND ANSWERS**

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Human Rights:**

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“Justice, once there is a procedure for its delivery, is prone to have its own momentum.”

Geoffrey Robertson, QC - *Crimes Against Humanity, The Struggle for Global Justice*

## **Introduction**

Human rights abuse involving business (BHR Abuse) is a subject of widespread international concern. Multinational business enterprises (MNEs) are under pressure to avoid BHR Abuse in their own operations and those of their business partners. Governments are often not able to assume their responsibility for protecting their citizens. We are experiencing a highly globalized economy with an efficient corporate sector overrunning weak national legal systems. Civil and criminal courts in many parts of the world are often seen as inadequate to deal with BHR Abuse. One consequence is that countless victims of BHR Abuse are left to suffer.

The Working Group on International Arbitration of Business and Human Rights<sup>1</sup> is proposing the use of international arbitration (BHR Arbitration) to resolve disputes arising from BHR Abuse (BHR Disputes). This paper addresses the principal questions that have been raised about the proposal during a three-year consultation involving a wide range of stakeholders.<sup>2</sup>

### **Question 1. What does the Working Group propose?**

The Working Group proposes that BHR Arbitration, a private civil law mechanism focusing on victims-to-business and business-to-business issues, should be recognized and used by parties to resolve their BHR Disputes. BHR Arbitration would be available to MNEs and victims of BHR Abuse to adjudicate disputes arising out of the MNEs’ own activities. It would also be available to MNEs to hold their business partners accountable for BHR

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<sup>1</sup> Biographical sketches of the authors may be found in Appendix A, below.

<sup>2</sup> A report based upon that consultation is Cronstedt, Eijsbouts and Thompson, “International Arbitration of Business and Human Rights” (Version Six, February 13, 2017), available at <http://www.l4bb.org/news/TribunalV6.pdf>.

Abuse and to remediate and prevent such abuse. These partners could include business entities in their supply chains and contractors involved in development projects. Further, it would provide a way for MNEs to empower victims, be they individuals, communities, employees, indigenous peoples or others, to hold such business partners accountable for BHR Abuse.

Unlike court litigation, which is unilaterally commenced by plaintiffs, BHR Arbitration requires, in principle, the consent of all disputants to have their BHR Disputes resolved by arbitrators chosen by them. BHR Arbitration, being civil in nature, would not result in criminal penalties. It would provide damages, injunctions and rulings that declare the legal rights and responsibilities of the parties. It would not impose new rights or responsibilities.

## **Question 2. The UN Guiding Principles: How do they relate to BHR Arbitration?**

Pillar One of the United Nations Guiding Principles on Business and Human Rights (UNGPs) affirms that states have a duty to protect international human rights. Under Pillar Two, business enterprises have a responsibility to respect human rights, which involves avoiding, mitigating and remediating abuse that they cause and to which they contribute. They should also use their “leverage” to persuade their business partners to curtail “directly linked” abuse, irrespective of whether the laws or the courts of the host country allow or tolerate such abuse. Under Pillar Three, both states and businesses are urged to provide effective access to remedy for victims of BHR Abuse through judicial and non-judicial remedies.

BHR Arbitration would serve each of the three pillars of the UNGPs. States could augment their efforts to fulfill their responsibilities under Pillars One and Three by encouraging, facilitating or even requiring the use of BHR Arbitration as a way to provide access to justice and protect human rights. And businesses would be helped in meeting their responsibilities under Pillars Two and Three.

### **Question 3. Private vs. public decision-makers: Is this a serious issue?**

The public interest in human rights suggests that BHR Disputes should be resolved in national courts. But for this to happen, court reforms, new national laws and a far greater ability of national courts to address BHR Disputes are needed. All of this, when and if successful, might provide for universal, fair and impartial resolution of BHR Disputes in national courts. But, unless and until these steps are successful, much BHR Abuse will need to be addressed using alternative routes to access to justice—such as BHR Arbitration, which will be conducted with due respect for any applicable international or national laws.

### **Question 4. Why use BHR Arbitration instead of existing judicial systems?**

Courts in many countries are either not available or not suitable to hear cases relating to BHR Abuses due to armed conflicts, corruption, political influence or lack of competence. Even in fair, independent and competent courts, the parties may experience delays, high costs, language problems, time-consuming appeals, a host of legal/jurisdictional and practical obstacles and difficulties in enforcing orders.

In contrast, BHR Arbitration would be available worldwide, regardless of the nationalities of the parties or the place where the BHR Abuse occurs. Other features contrast favorably with court litigation: the use of expert arbitrators selected by the parties, flexible procedures, the potential to save time and money, the potential for being less adversarial and the almost universal enforceability of rulings from international arbitration.

### **Question 5. International human rights: How can they become subject to BHR Arbitration?**

International human rights norms could become subject to BHR Arbitration by being incorporated into contracts associated with arbitration clauses. Where no pre-existing arbitration clause is in place, an MNE facing a claim involving BHR Abuse could enter into an agreement with the victims to submit the matter to BHR Arbitration (BHR Submittal Agreement). The

BHR Submittal Agreement would describe the particular human rights that the parties agree to arbitrate.

MNEs could also require their business partners to enter into contracts that contain binding commitments to respect international human rights. These contracts could be supply contracts or development contracts for projects such as mines and pipelines. In order to give effect to its supply chain responsibility, an MNE might include a “perpetual clause” that requires the business partner to insert similar provisions in its own contracts with others, and so on through the supply chain or development program (as far as realistically possible). Any future breach of such a commitment would subject the offender to binding BHR Arbitration initiated by the MNE and/or another supplier in the chain and/or any third party that has been authorized to do so, as discussed below.

#### **Question 6. Victims of BHR Abuse: How can they be brought into BHR Arbitration?**

There are two principal routes by which victims of BHR Abuse could become involved in BHR Arbitration. The first is where victims claim that an MNE is involved in BHR Abuse and no pre-existing arbitration agreement is in place. Rather than engage in a lengthy court battle or a prolonged adversarial exchange in the media, the MNE could enter into a BHR Submittal Agreement with the alleged victims to use BHR Arbitration.

The second route is where MNEs, in their various contracts, could state how specifically identified classes of victims could participate in any future BHR Arbitration. Victims could be granted rights as third party beneficiaries so that they, assisted by representatives, such as trade unions, international human rights NGOs, state agencies or others, could initiate BHR Arbitration or join proceedings initiated by others. In situations where they are not allowed to be parties, they could nonetheless provide information during the investigation phase, serve as witnesses, be present during the arbitration proceedings and submit amicus briefs.

Victims need not agree to waive their rights to other forms of redress until they actually agree to become involved in a specific BHR Arbitration proceeding.

**Question 7. Supply chains: How would they become involved?**

In giving effect to their supply chain responsibility, MNEs could use BHR Arbitration to control their immediate business partners. This would simply involve including BHR commitments in their supply contract, along with a BHR Arbitration clause. As discussed above in Questions 5 and 6, any defaulting supplier would be subject to BHR Arbitration brought by any party that was empowered by the contract to invoke arbitration.

**Question 8. Development projects: How would they become involved?**

MNEs could specify that BHR Arbitration would be used to resolve BHR Disputes arising out of projects that they are constructing and operating, such as dams, highways, power plants and plantations.

As discussed above, where there is no pre-existing arbitration agreement, an MNE that is involved in a BHR Dispute arising out of an ongoing development project could enter into a BHR Submittal Agreement allowing the BHR Dispute to be arbitrated.

**Question 9. Where would BHR Arbitration take place?**

BHR Arbitration may be held at any location that the parties select, irrespective of where the BHR Abuse took place. It is important that parties in this selection process realize that the law of the place of arbitration determines the procedural law applicable to the proceedings. Parties using an international institution may choose to arbitrate at its headquarters, at its other facilities in different locations, or at specially selected locations that the institution could accommodate. Fact gathering could take place in remote locations, sometimes using neutral examiners, with the results then brought to the site of the arbitration.

### **Question 10. Awards: How would they be enforced?**

Parties are expected to comply with arbitration awards and most do. If not, there are various routes for enforcement. National courts may recognize and either enforce or set aside a domestic award under the state's arbitration statute.

In the case of a foreign arbitral award, the New York Convention on the Enforcement of Foreign Arbitral Awards, to which 157 states are parties, provides for recognition and enforcement of such an award in the domestic courts of all states that are parties. There are limited grounds of denial of recognition and enforcement. For example, at the time it adopts the Convention, a state may reserve the right to deny recognition and enforcement of an award that is not "commercial." Domestic courts may also deny recognition and enforcement of a foreign arbitral award if it is contrary to the "public policy" of the forum state.

### **Question 11. Are revised rules needed to enable BHR Arbitration?**

Existing arbitration rules, as exemplified by the UNCITRAL Arbitration Rules (the most widely used set of arbitration rules worldwide), would need to be revised to accommodate certain special needs of BHR Arbitration. The Working Group is engaged in convening a high-level committee of experts (Drafting Committee), whose role will be to determine what changes are needed and to draft a revised version (BHR Arbitration Rules).

BHR Arbitration can work most effectively if certain prerequisites are met. Among these are: (a) the need for greater transparency, including open proceedings and the publication of awards; (b) the need to accommodate multiple victims in a single proceeding and to ensure the proper handling of their claims, including taking into account their cultural characteristics; (c) the need to protect vulnerable victims from retaliation for their participation in BHR Arbitration; (d) the need to ensure that arbitrators are experienced in business and human rights law; (e) the need to accommodate situations where the parties may wish to adjudicate non-BHR matters along with BHR matters in the same arbitration; and (f) the potential to dovetail mediation efforts with formal arbitration. The Drafting Committee should also

consider whether and under what conditions appeals of awards should be allowed.

Overall, the drafting of the BHR Arbitration Rules should involve close consultation with the stakeholders — victims’ groups, international human rights NGOs, business associations, government agencies, lenders, responsible investors, arbitration institutions and others. One or more international conferences could be held where stakeholders could provide input to the Drafting Committee prior to the publication of final BHR Arbitration Rules. This would contribute to a fuller understanding and acceptance of the new BHR Arbitration Rules.

The new BHR Arbitration Rules would have multiple applications. They could be adopted by existing international arbitration institutions such as the Permanent Court of Arbitration, the London Court of International Arbitration, the Singapore International Arbitration Centre, the Arbitration Institute of the Stockholm Chamber of Commerce and the International Chamber of Commerce International Court of Arbitration, allowing BHR Arbitration to take place under the auspices of such institutions. Alternatively, the parties could make their own arrangements for ad hoc arbitration.

### **Question 12. Arbitrators: Are new ones needed for BHR Disputes?**

International human rights NGOs consulted by the Working Group have indicated that BHR Arbitration may not be acceptable to the victims’ side unless a new cadre of arbitrators is formed. In their view, many of the arbitrators currently involved in international arbitration are business lawyers with little familiarity with BHR issues. NGOs say that BHR Arbitration requires arbitrators equipped to deal with complex novel BHR issues using an approach that is seen as fair by all sides.

Steps must be taken to assure all parties that the arbitrators will be impartial and that arbitrators chosen by both parties are sufficiently expert in BHR matters to make informed decisions.

One step might be for arbitration institutions to create special rosters of persons with credentials that qualify them to serve on BHR Arbitration

panels. For example, the Permanent Court of Arbitration has created a special roster of arbitrators to serve on its environmental panels.

The BHR Arbitration Rules could also provide that parties may appoint persons not on the official rosters of the arbitration institution administering the arbitration. This would enable the victims to name arbitrators whom they feel possess the requisite qualifications, such as human rights advocates, university professors or former judges.

The publication of BHR Arbitration awards would allow others to examine the reasoning of the arbitrators. This would demonstrate their expertise and qualifications, helping to establish confidence in BHR Arbitration.

### **Question 13. Limitations on corporate responsibility and complex business structures: Why aren't they problems?**

Complex corporate structures involving multiple tiers of subsidiaries or affiliates would not prevent accountability of violators. Contracts that provide for BHR Arbitration would identify the specific entity or entities subject to binding contractual commitments to respect human rights.

### **Question 14. "Inequality of arms": How can it be addressed?**

Victims of BHR Abuse are often poor and cannot be expected to compete on equal terms with well-resourced business opponents. The costs of the arbitration process, and its complexity, could place them at a disadvantage. This is the "inequality of arms" issue.

Victims are often determined to obtain justice and, as experience with some domestic litigation shows, they often receive support from international human rights NGOs, pro bono lawyers, labor unions and individual lawyers.

Given the widespread interest in access to justice for BHR victims, funding for victims may be possible. For example, corporations or others could establish funds dedicated to arbitration for BHR victims. A special fund at the Permanent Court of Arbitration that is used to pay the arbitration costs of poorer countries could be a model for international arbitration institutions in

the case of BHR victims. Also, a group of international lawyers has proposed establishing a private trust fund through which individuals, companies, foundations, states and others could promote better access to justice for victims.

Human rights provisions and arbitration clauses in contracts might mandate that a losing supplier or project contractor must pay the arbitration costs and legal fees of winning victims. The Drafting Committee should examine the potential for an arbitration panel to have the authority to allocate costs and legal fees among the parties based upon the degree of fault demonstrated.

### **Question 15. Suppliers that can't pay: A problem?**

Doubt has been expressed that suppliers, particularly those in the developing world, would have the means to compensate victims and otherwise remediate past abuses—so it would be pointless to subject them to BHR Arbitration. There are two main responses. First, many suppliers throughout the world, even in less developed regions, are financially sound.

Second, financial compensation may not be the only aim of BHR Arbitration. Both MNEs and victims may want future compliance with human rights norms. Victims have a strong interest in exposing abuse and obtaining a formal declaration that abusers are responsible for their harms and BHR Arbitration may be the only available means to do so.

### **Question 16. How would BHR Arbitration begin to function?**

Once the new BHR Arbitration Rules are available for use, MNEs and victims could enter into BHR Submittal Agreements and MNEs could begin to insert arbitration clauses into their contracts. Those MNEs that initially adopt BHR Arbitration would become role models. Over time, a standard business practice could emerge, endorsed at international and national levels by private and government entities. Bar associations and other institutions could facilitate the use of BHR Arbitration by providing standardized contract language, such as descriptions of international human rights norms.

Lenders, such as banks, insurance companies and government agencies that grant loans and/or loan guarantees, have considerable leverage to persuade MNEs to adopt the new standard. Other government agencies, involved in foreign aid, overseas development, government procurement and a host of other activities, could promote the use of BHR Arbitration.

**Question 17. Mediation and other informal dispute resolution means: How can they be used alongside BHR Arbitration?**

Parties to a BHR Dispute may consider other means to resolve those disputes before settling on BHR Arbitration. A contract may include an “escalation clause” that binds the parties to resolve BHR Disputes using a stepwise approach. Such a clause would provide that the parties would have a period of time in which to engage in good faith efforts to resolve the disputed issues informally, using whatever methods they choose, including mediation. If this fails to produce a resolution, they then must proceed to binding BHR Arbitration. The presence of a binding arbitration clause may add a strong incentive for the parties to settle, to avoid the cost and risk of arbitration.

The Working Group would like to hear from experts in international mediation as to whether tailored mediation rules are also needed.

**Question 18. Interactions with other human rights mechanisms?**

BHR Arbitration would neither undercut nor compete with other international mechanisms for protecting human rights. In many situations where BHR Arbitration might apply, such as conflict zones, no other judicial mechanism is available. International courts, including regional courts, deal mainly with claims against states and would be largely unaffected by a new system for private parties to resolve their disputes. Institutions that deal with private parties’ disputes would have another tool. For example, the OECD National Contact Points have a mandate to investigate, urge the parties to mediate and make determinations and recommendations in a final statement, even if the matter remains unresolved. The final statement could recommend that parties to a dispute agree to submit an unresolved matter to further mediation or formal BHR Arbitration.

BHR Arbitration will not detract from the current negotiations on a new UN treaty on business and human rights. Indeed, the treaty process itself might be strengthened if the potential availability of BHR Arbitration is taken into account. States could be urged to consider ways to promote this new means of access to justice. Nor will it detract from states' efforts to fulfill their duties to protect human rights. They should continue to explore legislative and regulatory options to correct deficiencies in their courts and otherwise protect human rights, while seeking ways to use BHR Arbitration.

**Question 19. Investor state arbitration (ISDS): How would BHR Arbitration be different?**

ISDS has been widely criticized for numerous reasons, including its opaque processes, potential conflicts of interest among its arbitrators, its history of excluding NGOs from participation and its rulings that deny legitimate state regulatory activities, including those aimed at protecting human rights.

There are many features of BHR Arbitration that distinguish it from ISDS arbitration. First, BHR Arbitration does not seek to curtail the regulatory role of the state in protecting the human rights of its people, but instead to add another layer of protection for them. Second, unlike ISDS, BHR Arbitration is about corporate accountability, not greater rights to companies against the host state. Third, victims who have historically been excluded as parties in ISDS proceedings could initiate or join in BHR Arbitration. Fourth, it would not be an opaque process but a transparent one. And finally, arbitrators could be selected for their familiarity with human rights norms, as discussed above. Its principal function would be to protect, not thwart, human rights.

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## APPENDIX A

### **Members of the Working Group on International Arbitration of Business and Human Rights**

*Claes Cronstedt* is a member of the Swedish bar and a former international partner of Baker & McKenzie. He has been involved in international human rights litigation, in particular the Raoul Wallenberg Case against the USSR. From 2001 to 2014 he was a member of the CSR (Corporate Social Responsibility) Committee of the Council of Bars and Law Societies of Europe (CCBE). He was a member of the Swedish Committee of the International Chamber of Commerce (ICC) Commission on Business in Society (2001-2004) and a trustee of International Alert, London, working with peaceful transformation of violent conflicts (1999-2006). In 2006-2008 he was a member of the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes. He is the founder of the Raoul Wallenberg Academy for Young Leaders. He is a member of the Gaemo Group, Corporate Responsibility International.

*Jan Eijsbouts* is the former General Counsel and Director of Legal Affairs of AkzoNobel. He is Professor of Corporate Social Responsibility and Professorial Fellow at the Institute for Corporate Law, Governance and Innovation Policies at the Faculty of Law, Maastricht University. He is a member of the Gaemo Group, Corporate Responsibility International, Chairman of the Board of the World Legal Forum Foundation and a former founding member of the Board of ACCESS Facility Foundation (the latter two located at The Hague). He is also a member of the International Advisory Boards of the Mentor Group (Boston) and the CEELI Institute (Prague) and a member of the Public Private Network of HiiL (The Hague Institute for the Internationalization of Law). He is an accredited mediator at CEDR, ACB and the PRIME Finance Foundation (The Hague).

*Adrienne Margolis* is founder and editor of Lawyers for Better Business (L4BB), a website and global network to keep lawyers one step ahead of developments in business and human rights. She is a journalist and consultant with a wealth of writing and project management experience, including editing magazines for the Financial Times, Thomson Reuters and UBS. She is a senior advisor to the Tax Justice Network and a member of

the UK Equality and Human Rights Commission Business and Human Rights Working Group. Her current work focuses on the human rights impact of climate change.

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

*Martijn Scheltema* is member of the Dutch Supreme Court Bar and partner of Pels Rijcken & Droogleever Fortuijn, where he chairs the business and human rights practice group. He has been involved in several international human rights landmark cases with the Dutch Supreme Court. He is also a professor at Erasmus University Rotterdam. His research responsibilities include the effectiveness of multi-stakeholder initiatives on business and human rights and the environment. He is a founding board member of ACCESS and currently is a special advisor. He holds a number of other key positions in the international business and human rights field, including Chair of the Corporate Social Responsibility Committee of the International Bar Association and of the Dutch Garment Sector Accord binding dispute resolution mechanism.

*Robert C. Thompson* is a member of the California bar, a former Associate General Counsel of the U.S. Environmental Protection Agency and a former partner of LeBoeuf, Lamb, Greene & MacRae LLP, where he was the chairman of the firm's international environment, health and safety practice. He is a co-author of four articles on business and human rights topics.