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The Medium Is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration

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This article seeks to paint a picture of an emerging system of business and human rights (BHR) law by following certain developmental trends across normative, substantive and procedural realms. These trends show that there is acknowledgment for the concept of corporate responsibility for BHR, and that the lines between 'soft' and 'hard' law are becoming blurred. Through contractual and arbitral mechanisms, a binding system of law is taking shape.

At the forefront of recent trends, international arbitration is increasingly becoming a procedural venue of choice for BHR disputes. Furthermore, arbitration promises to offer an environment that will both kindle the evolution of substantive rights and permit their enforcement and effective redress. The medium, indeed, is the message.

1 INTRODUCTION: THE EMERGING SYSTEM OF BUSINESS AND HUMAN RIGHTS LAW

Corporate responsibility for BHR (1) may be one of the most important developments in contemporary international law.

Until relatively recently, the concept of corporate social responsibility was unknown to international law. Historically, the lens of international law focused on states as its only subjects, with no place for holding private parties to account. Accordingly, in embryonic form, BHR norms were reflected solely in national laws. However, as the needs of the global economy developed, so did the concept of corporate social responsibility.

This article seeks to describe the emerging system of BHR law by observing the trends (2) that have quickened momentum, including (1) the increased recognition of private parties as subjects of international law (section 2); (2) the expansion of the normative 'soft law' environment (section 3); (3) the 'hardening' of soft law through private contracting (section 4); and (4) the emergence of arbitration as a procedural venue for BHR disputes (sections 5 and 6).

The developments outlined in sections 2–6 continue to unfold at different speeds and with varying rates of success. The question therefore arises at what moment will a tipping point be reached such that a recognizably new system of law can be christened? Are we any closer to an emergence of a system of law – a system imbued by interests that are equally public and private (section 7)?

2 CORPORATE SOCIAL RESPONSIBILITY IN INTERNATIONAL LAW

2.1 Initial conceptual reservations about corporations as subjects of international law

Public international law includes a strong human rights component. However, this has not always been the case. Although some historic documents such as Magna Carta (1215) and the Bill of Rights (1689) in England, the Declaration on the Rights of Man and Citizen (1789) in France, and the Constitution and Bill of Rights (1791) in the United States (US) included what are still considered some of the core elements of human rights law, it was not until after World War II that states became willing to recognize human rights as generally applicable. The years between 1945 and 1948 witnessed states, as members of the international community, join together to sign the United Nations' (UN) Charter as well as the Universal Declaration of Human Rights (UDHR), thereby establishing the two cornerstones of the contemporary international human rights system. (3) Many of the UDHR's principles have since been incorporated into regional instruments as well as the constitutions of most UN Member States.

In the decades after World War II, the international human rights system did not meaningfully extend to include businesses. The UDHR Preamble calls on 'every individual and every organ of society' to promote and respect human rights, and as L. Henkin famously noted, 'every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all'. (4) Yet the traditional assumption that only states are subjects of international law remained dominant. (5) This conception led to an understanding that corporations as private parties had no rights or obligations under international law for much of the second half of the twentieth century. International human rights obligations applied to governments, but not to the private sector. (6)

The reach of international law has, however, expanded and it is difficult to deny today that

some treaties confer rights, and sometimes impose obligations, on individuals as subjects of international law. One needs look no further than the thriving world of investor-state arbitration. Other examples illustrating the imposition of international law obligations on private parties include: the Rome Statute of the International Criminal Court, (7) the Convention on Civil Liability for Oil Pollution Damage, (8) the UN Convention on the Law of the Sea, (9) and the Maritime Labour Convention. (10)

2.2 Attempted negotiation of a binding business and human rights treaty

^P As conceptual resistance to acknowledging private parties as subjects of international obligations has diminished, a next step would be to enshrine the new notion of corporate responsibility for BHR in a binding instrument of international law.

This progression is yet to happen. There is no general BHR treaty to impose binding obligations on corporations, and equally no unequivocal indication that BHR obligations would be recognized as either customary international law or a general principle of international law. (11)

However, the situation may be changing. In 2014, the UN Human Rights Council adopted two noteworthy resolutions. One established an Intergovernmental Working Group (12) with a mandate to 'elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights' (13) (the 'Intergovernmental Working Group'), while the other requested the existing UN Working Group on Business and Human Rights to prepare a report considering, among other things, the benefits of adopting a legally binding instrument in this field. (14)

Four years later, discussions about the legally binding treaty are still underway. During the most recent (third) round of negotiations in October 2017, the members of the Intergovernmental Working Group published and started discussing the 'Elements for the Draft Legally Binding Instrument on Transnational Companies and Other Business Enterprises with Respect to Human Rights' (the 'Draft Instrument'). (15) Three ideas expressed in the Draft Instrument seem particularly striking.

First, the instrument explicitly recognizes that legally binding BHR obligations would be imposed directly on corporations. (16) This, however, does not in any way minimize the responsibility of states for human rights abuses. This is in line with the main 'soft law' instrument in the field, the Guiding Principles on Business and Human Rights (the 'Guiding Principles'), (17) which require that states maintain a duty to protect human rights. (18)

Second, the instrument covers only 'transnational activities', exempting corporations with purely domestic activities. (19) However if a corporation is covered because its activities are cross-border, the instrument envisages jurisdiction over activities carried out and injuries caused not only in the host state of the investment in question, but also in the corporation's home state, as well as any other countries where the business has 'substantial presence'. (20)

Third, in provisions relating to investments, the instrument recognizes 'the primacy of human rights obligations over trade and investment agreements', (21) and confirms the duty of states 'to prepare human rights impact assessments prior to the conclusion of trade and investment agreements'. (22)

Regardless of the efforts of the Working Group, the Draft Instrument's future remains uncertain. The fourth round of discussions will take place in October 2018. It is expected that Ecuador, as Chair of the Intergovernmental Working Group, will publish a draft treaty before the session begins. It is, however, unclear whether there is sufficient political will among Member States to take the marked step of universally recognizing BHR obligations.

2.3 Business and human rights obligations in investment treaties

While the universe of BHR may need to wait a bit longer for the adoption of a general multilateral treaty to codify the law at an international level, the concept of corporate responsibility for binding BHR has been increasingly present in various *specialis* treaty instruments, including the investment treaties.

Investment treaties which include recognition of BHR responsibilities can generally be classified into (1) treaties with BHR wording contained in Preambles only; and (2) treaties with BHR wording in both Preambles and operative clauses.

^P Noteworthy examples of bilateral investment treaties (BITs) which contain Preamble clauses underlining the importance of human rights, corporate social responsibility, and sustainable development in the investment system include the 2012 U.S. Model BIT (the 'U.S. Model BIT'), the 1996 Treaty between the United States and the Republic of Belarus (the 'United States-Belarus BIT'), the 2013 Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, the 2015 Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, and the 2014 Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments.

The Preamble to the U.S. Model BIT is a good example of the employment of descriptive, but non-mandatory, language, which provides that the treaty is concluded '[d]esiring to achieve the ... objectives in a manner consistent with the protection of health, safety and environment, and promotion of internationally recognized labor rights'. (23) Similarly, the United States-

Belarus BIT provides that the parties are signing the treaty while '[r]ecognizing that the development of economic and business ties can contribute to the well-being of peoples in both Parties and promote respect for internationally recognized worker rights.' (24)

These clauses may be helpful in flagging the spirit and general orientation of the BIT, especially in so far as interpretation of the operative clauses. Nevertheless, a plain reference to human rights in the Preamble to a BIT is not enough to create any enforceable substantive obligations and therefore falls short of creating a binding obligation upon an investor that may serve as a basis for state claims or counterclaims.

The same can be said of clauses authorizing the Parties to:

encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and their internal policies, including statements of principle that are endorsed or supported by the Parties (25)

which serve as an incentive, but do not create a binding obligation.

^P The situation is different for treaties which define an investor's obligations in the operative part of the treaty. (26) For example, the 1981 Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (the 'OIC Investment Agreement') includes operative treaty clauses that touch upon what can be defined as an example of a binding BHR commitment.

The OIC Investment Agreement recognizes that:

The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means. (27)

The OIC Investment Agreement is not the only example of an agreement which outlines an investor's duty to participate in the sustainable development of a host state.

The 2016 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (the 'Morocco-Nigeria BIT') is another example of a more 'reciprocal' treaty. In Article 24, the treaty sets out a positive obligation of investors to 'strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices'. In addition, investors have to comply with:

environmental assessment, environmental screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment, or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question. (28)

^P They must also conduct a social impact assessment of the potential investment, based on standards that will be adopted by the parties at a later date. (29)

These treaty examples serve to illustrate the 'patchwork' developmental tendencies of BHR penetration into the arena of binding public international law. While it is interesting to observe the increase in reciprocity and mutuality of international investment obligations, it seems clear that the development of BHR law cannot rely solely on binding bilateral and multilateral treaties. In fact, one may go as far as to say that the existing BHR system of law has been characterized as much by the absence of any comprehensive hard law instrument, as by the proliferation of various soft law initiatives that sought to supplant it.

3 EXPANSION OF NORMATIVE 'SOFT LAW' ENVIRONMENT

Over the last two decades, UN actors, joined by a number of international organizations, have successfully established a dialogue about the impact of corporate operations on human rights through a variety of non-binding instruments.

Momentum was catalysed by the UN's launch of the voluntary Global Compact in 2000 (30) and appointment of a Special Representative on Business and Human Rights in 2005. (31) Building on those foundations, the UN Guiding Principles as the main soft law instrument in the field were endorsed by the Human Rights Council in June 2011. The Guiding Principles recognize three pillars of BHR: (1) the state's duty to protect against human rights abuses; (2) corporate responsibility to respect human rights; and (3) access by victims to effective remedies against human rights abuses.

The UN's leadership in the area of soft law of BHR has been supplemented by various initiatives and guidelines from the International Labour Organization (ILO) and the Organisation for Economic Co-operation and Development (OECD), including the 2011 OECD Guidelines for Multinational Enterprises, (32) a comprehensive corporate code of conduct

^P which includes, among other things, standards on labour, environment, bribery, consumer interests, and competition. All OECD countries, alongside eleven others, have subscribed to the Guidelines, and committed to encouraging their national corporations to respect them. (33) Equally important is the ILO's Tripartite Declaration of principles concerning Multinational Enterprises and Social Policy, (34) which seeks to ensure that foreign direct investment leads to the social and economic progress of the host state.

The proliferation of 'soft law' initiatives has changed the understanding of what constitutes 'good corporate citizenship', which naturally led to a new wave of BHR law developments: the hardening of soft law through private contracting between international corporations.

4 'HARDENING' OF THE 'SOFT LAW' OF BUSINESS AND HUMAN RIGHTS THROUGH CONTRACT

In today's globalized economy, where business practices transcend geographic boundaries, multinational corporations are increasingly responsible not only for their direct actions, but also for the actions of their subsidiaries, partners and suppliers. For many market leaders, accountability has grown beyond an acceptance of responsibility for self-compliance with BHR norms, to include a recognition of the need to leverage negotiating power to promote compliance by global contractors and suppliers. (35)

In the words of M. Toral and T. Schultz:

[t]he onus on private parties to make certain their actions are in line with human rights norms is increasing, and it is becoming difficult to make the argument that corporate actors have no obligations to respect human rights in their current environment. (36)

Reflecting that shift of mind, the law of BHR has witnessed a remarkable 'hardening' of soft law with ever-increasing private contracting of binding BHR commitments.

^P Often, this has been achieved by market leaders imposing hard law contractual obligations on their business partners. Consequently, contractual demands are starting to transcend the minimal requirements of local laws. The idea that corporate actors would be the main impulse to positive change may have been considered wishful thinking by cynics, but it is an emerging reality of BHR law.

This chapter addresses three prominent examples of the hardening of soft law of BHR through contracting: (1) the Caspian Sea Pipeline Project (1999) and the Equator Principles (2003); (2) the Bangladesh Accord on Fire and Building Safety in Bangladesh (2013); and (3) the Dutch Agreement on Sustainable Garments and Textile (2016).

4.1 Caspian Sea Pipeline Project (1999) and the Equator Principles (2003)

Increased social pressure to conduct business in accordance with BHR norms has been felt across the project finance industry. A 'social licence to operate' is now widely accepted as a concept, embraced by business and political leaders alike. Financial institutions have taken a leading role inserting human rights obligations into project finance contracts in order to address and manage social and environmental risks.

One of the most important developments in this respect are the so-called 'Equator Principles' established in 2003 by a variety of private and public commercial banks, which demand compliance with human rights norms in project finance. As of January 2018, the Equator Principles have been adopted by ninety-two financial institutions in thirty-seven countries. They apply to all industry sectors and to four types of financial products: project finance advisory services; project finance; project-related corporate loans; and bridge loans. All financial institutions that have signed the Equator Principles are committed to:

implementing [the Equator Principles] in their internal environmental and social policies, procedures and standards for financing projects and will not provide project finance or project-related corporate loans to projects where the client will not, or is unable to, comply with the Equator Principles. (37)

^P The adoptive banks have therefore committed themselves to incorporate the Equator Principles in their finance agreements. Projects proposed for financing will be categorized by the Equator Principles financial institutions (EPFI) based on the magnitude of their potential environmental and social risks and impacts. (38) Moreover, the banks as signatories undertake to provide financing to projects only if the borrower has completed a social and environmental impact study and contracted to comply with certain social and environmental obligations. (39)

Other relevant provisions of the Equator Principles are: (1) an independent social and environmental rights expert review of projects to ensure compliance with the principles; (40) (2) a requirement to develop an action plan to ensure compliance with social and environmental laws of the state hosting the investment; (41) and (3) a right to exercise any 'appropriate' remedies to sanction failure to comply with the principles. (42) Moreover, if finance agreements incorporating the Equator Principles include a sufficiently wide arbitration clause, it would likely be possible to arbitrate any BHR issues arising between the contracting parties.

In many ways, the Equator Principles mimic the developments undertaken by various commercial market leaders worldwide, aiming at promoting top-to-bottom influence along their supply chains to ensure respect for BHR by business partners and suppliers. Even though the banks do not have direct control over the borrowers, through contractual means the banks have secured commitments to address major social and environmental concerns. Therefore, in order to enshrine their own compliance with the financing agreements, it is possible that borrower corporations will perpetuate the positive commitments to human rights by demanding compliance from their subcontractors and suppliers.

The main differentiating feature of the Equator Principles, compared, for example, to the

^P Bangladesh Accords or the Dutch Agreement (described *infra*), is that the Equator Principles open a large space for public-private partnerships in securing respect for BHR. Many project contracts which incorporate the Equator Principles will typically include states parties as signatories as well. In effect, contracting for BHR principles has therefore been extended to include both private and public actors.

A good illustration of this partnership is seen in the USD 3.6 billion Baku-Tbilisi-Ceyhan Caspian Sea pipeline project (the 'Caspian Sea Pipeline Project'), inaugurated in 2005, which carries oil from Azerbaijan through Georgia to Turkey's Mediterranean coast.

The Caspian Sea Pipeline Project was financed by public and private banks that had adopted the Equator Principles. Throughout the life of the project, there was a strong emphasis on social and environmental impact assessment, albeit with varying rates of success. (43)

Interestingly, a dedication to social and environmental norms seems to have defined the project from inception, predating the Equator Principles. The founding project agreements for the Caspian Sea Pipeline Project are the Host Government Agreement signed on 16 October 1999 between the Government of Turkey and a number of oil companies (the 'Host Government Agreement') (44) and the Intergovernmental Agreement of 18 November 1999 signed between the Governments of Turkey, Azerbaijan, and Georgia (the 'Intergovernmental Agreement'). (45)

The Host Government Agreement includes a chapter on 'Environment, Health, Safety and Social Impact' which stipulates that projects will be conducted in accordance with environmental, health and safety standards and practices as set forth in Appendix 5 to the Agreement. (46)

Appendix 5 sets out various standards, such as the protection of life and the environment over property, (47) conducting a 'general review of environmental conditions and the risks to the environment associated with pipeline activities' prior to the selection of the pipeline facilities, (48) 'minimis[ing] potential disturbances to surrounding communities and the property of the inhabitants thereof', (49) and 'confer[ing] with the State Authorities as to the impact of ongoing Project Activities'. (50) The Appendix also lists some precise requirements for actions to be taken at every step of the Pipeline Project in order to minimize environmental damage. (51)

In addition to substantive BHR protections, the Caspian Sea Pipeline Project is characterized by a recourse to mandatory international arbitration, should the participating multinational corporations fail to comply with the social responsibility clauses.

The arbitration clause located at Article 18 of the Intergovernmental Agreement specifies that a party may submit any disputes arising out of the agreement to ICSID arbitration, which would arguably include BHR claims:

Any dispute arising under this Agreement, or in any way connected with this Agreement (including its formation and any questions regarding arbitrability or the existence, validity or termination of this Agreement), between (i) the Government, the State, any State Entity and/or the Local Authorities, on the one hand, and (ii) one or more of the MEP Participants, on the other hand, may be submitted to arbitral hand, may be submitted to arbitration pursuant to this Article 18. ...

Except as otherwise expressly provided in the State's reservation to the ICSID Convention, the Government and all other Parties hereby consent to arbitrate any such dispute pursuant to the ICSID Convention and the ICSID Arbitration Rules. ...

^P An arbitral tribunal constituted pursuant to this Agreement shall consist of three (3) arbitrators, one of which shall be appointed by the Arbitrating Party or Arbitrating Parties first requesting arbitration, and one of which shall be appointed by the opposing Arbitrating Party or Arbitrating Parties. The third arbitrator, who shall be the presiding arbitrator of the arbitral tribunal, shall be appointed by agreement of the first two arbitrators appointed. (52)

Since access to arbitration encompasses 'all' disputes arising out of the provisions set out in Appendix 5, the scope of protected rights allows for arbitration of business human rights disputes. Moreover, the recourse to arbitration for BHR disputes was explicitly confirmed in the text of Appendix 5 in following terms:

any dispute as to implementation of the environmental strategy reflected in the Environmental Strategy Product shall be resolved in accordance with the provisions of Article 18 of the Agreement. (53)

In addition, each state entity participating in the project has expressly waived its claims to sovereign immunity for breaches of the agreement. (54)

4.2 Bangladesh Accord on Fire and Building Safety in Bangladesh (2013)

Regrettably, some of the most significant improvements to the BHR framework have not emerged organically but as a direct response to the most regrettable disasters. A notable example is the Bangladesh Accord on Fire and Building Safety in Bangladesh (the 'Bangladesh Accord'), signed on 15 May 2013 in the aftermath of the tragic Rana Plaza building collapse. (55)

On 24 April 2013, a five-storey industrial building in the Savar Upazila of Dhaka District, Bangladesh, collapsed in the middle of a busy workday. The building was used as a manufacturing facility by a number of global textile companies and international retailers. The devastating collapse killed 1,129 people and injured 2,515 more. Yet, this was a catastrophe

which might have been avoided had those involved invested in maintaining minimal health and safety measures. The collapse led to an international scandal, exposing how consumer demand in Western countries for low and moderately priced clothing could create risks to human health and life down the product supply chain.

Within weeks of the Rana Plaza tragedy, over 200 apparel brands, retailers and importers from over twenty countries, (56) two global and eight Bangladeshi trade unions, as well as four non-governmental organizations (NGOs) (acting as witnesses), mobilized to sign the Bangladesh Accord on Fire and Building Safety in Bangladesh, promising the surviving workers and their families 'a safe and sustainable Bangladeshi Ready-Made Garment (RMG) industry in which no worker need fear fire, building collapse, or other accidents'. (57)

The initial term of the Bangladesh Accord was for five years, however a second term was agreed in June 2017, (58) extending the application of the regime until 2021 (the '2018 Bangladesh Accord' or the 'Transition Accord'). The Transition Accord not only builds upon the existing provisions of the Bangladesh Accord, but it adds several new provisions that remediate the weaknesses of the previous instrument. To date, the Transition Accord has had over a hundred signatories. (59) However, some of the main retailer brands like Marks and Spencer, Sainsbury's and Next have not yet signed it, stating that they need more time to review the Transition Accord. (60)

Since the Bangladesh Accord's entry into force in May 2013, 85% of workplace dangers discovered in the original round of inspections have been remedied, and over 90% of the remediation work has been completed in 749 factories. (61)

A remarkable feature of the Bangladesh Accord is that in addition to substantive BHR commitments, it includes a procedural guarantee of binding international arbitration. The full text of the arbitration *compromis*, found at Article 5 of the Bangladesh Accord, reads as follows:

Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the [Steering Committee], which shall decide the dispute by majority vote of the [Steering Committee] within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the [Steering Committee] may be appealed to a final and binding arbitration process.

Any 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006). (62)

The clause is characterized by some notable features.

First, on its face, the clause appears strikingly incomplete. While the clause clearly points towards an ad hoc 'final and binding arbitration process', not much more is defined. The clause does not contain a choice of governing law or arbitral seat, and instead includes an unusual choice of applicable arbitral rules ('UNCITRAL Model Law'). The authors are not familiar with any other arbitration clause which recognizes the UNCITRAL Model Law as a framework for arbitration.

Due to this incomplete choice of law, it is unclear which national courts would have jurisdiction to compel arbitration or assist with tribunal appointment, should that be necessary. However, as noted by some commentators, whilst the clause is not ideal it is unlikely to be 'pathological', as concerned parties may always enter into a subsequent arbitration agreement to specify the missing elements of the arbitration clause, or leave such a gap-filling exercise to a tribunal. (63)

This was exactly the case in the two arbitrations that were commenced pursuant to the Bangladesh Accord by IndustriALL Global Union and UNI Global Union (two global labour unions that are signatories of the Bangladesh Accord) as claimants against two unnamed fashion brands as respondents before the Permanent Court of Arbitration (PCA) (the 'PCA Arbitrations'). (64) A few months into the PCA Arbitrations, the parties chose The Hague as the seat of arbitration, and UNCITRAL Arbitration Rules of 2010 instead of the UNCITRAL Model Law.

Significantly, the 2018 Bangladesh Accord brought about certain improvements to the original language of the arbitration clause. The new *compromis* is found at Article 3 of the 2018 Bangladesh Accord, and reads as follows:

Any dispute between the parties to, and arising under the terms of, this Agreement shall be presented to and decided by the SC [Steering Committee]. The Steering Committee shall adopt a revised Dispute Resolution Process (DRP) to specify the timelines and procedures involved when disputes are presented to the SC, with the aim to establish a fair and efficient process. The decision making process of the Steering Committee shall be supported by a member of Accord secretariat who will perform an initial investigation for the parties and present facts and their recommendations.

The DRP will also incorporate the opportunity for parties to participate in a mediation process in order to make arbitration unnecessary where there is no resolution of the dispute by the SC. Upon request of either party, the decision of the SC may be appealed to a final and binding

arbitration process. Any 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Arbitration Rules (as in its last revision) unless otherwise agreed by the parties. The arbitration shall be seated in The Hague and administered by the Permanent Court of Arbitration.

The new arbitration clause therefore replaces the old commitment to ad hoc arbitration with a new commitment to institutional PCA arbitration under the UNCITRAL Arbitration Rules (in their latest version) instead of the UNCITRAL Model Law. The new clause also explicitly mentions The Hague as the seat of arbitration. It still remains regrettably imprecise, which could lead to various procedural issues down the road, but it is an improvement on the first iteration.

Second, another striking feature of the Bangladesh Accord arbitration clause is the role of the Steering Committee's 'final decision' as the procedural gateway to instituting binding arbitration proceedings. The Bangladesh Accord provides that the signatories shall appoint a 'Steering Committee' composed of trade union signatories and company signatories (maximum three seats each) as well as a representative chosen by the ILO as 'a neutral chair and independent advisory member'. (65) The Bangladesh Accord further introduces a pre-arbitration procedural requirement, by stipulating that only final decisions of the Steering Committee 'may be appealed to a final and binding arbitration process'.

Pre-arbitration procedural requirements themselves are not a novelty and may in fact be regaining popularity. In recent years, several states have reintroduced a mandatory requirement in their investment treaties to pursue or exhaust local remedies for the settlement of investment disputes. (66) In international human rights law, the exhaustion of the local remedies rule is present in all major global and regional international human rights regimes. (67) These mechanisms have several purposes, including allowing the state where the violation occurred 'an opportunity to redress it by its own means, within the framework of its own domestic system', 'before its international responsibility can be called into question'. (68)

However, in this case, the purpose of the Steering Committee seems to be different. (69) It intends a serious examination of a complaint in the first instance by actors with knowledge of, and a stake in, the success of the Bangladesh Accord. The process also allows specialized international organizations such as the ILO to take part in discussions about the application of BHR standards and related corporate accountability. Although the value of such mechanism seems fairly obvious, the text of the clause offers little to explain whether the existence of the Steering Committee in some way also limits the jurisdiction of the arbitral tribunal.

Moreover, the wording of the clause, which seems to focus on appealing 'the decision of the [Steering Committee]' as the only way to reach 'a final and binding arbitration process', has raised some practical questions. What would happen in a situation where a Steering Committee reaches a deadlock, and no decision can be approved by a majority and validly issued? Would that mean that no valid arbitration proceedings could be brought in the context of such deadlock?

This very question was brought before the Tribunal in the two PCA Arbitrations mentioned above. The respondents argued that not all of the steps of the pre-procedural requirement had been satisfied, and thus, the claims were inadmissible. The ILO representative on the Steering Committee had repeatedly refused to cast a vote, which, the respondents claimed, meant that the deadlocked Steering Committee did not produce a 'majority decision'. (70) In their opinion, this did not constitute a decision which could be appealed via a 'final and binding arbitration process'. (71)

On 4 September 2017, the Tribunal released a Decision on Admissibility Objection (72) in which it analysed the role and meaning of the 'Steering Committee' requirement, as well as its impact on jurisdiction and admissibility. The Tribunal rejected the respondent's objections. It explained that the requirement that the Steering Committee come to a decision within twenty-one days meant that the parties did not intend that the procedure before the Steering Committee be extensive, and that, in any case, the Steering Committee had gone through a thorough process to assess the claimants' case. (73) Even though the Steering Committee did not come to a conclusion as to the merits of the charges, it agreed on certain aspects of each charge. In the Tribunal's view, this meant that the Steering Committee went through the necessary process and arrived at a decision capable of being submitted to arbitration. (74) The Tribunal concluded that the dispute resolution clause did not require a majority vote to submit the decision to arbitration.

Third, due to a wide array of signatories, some of which are labour unions and NGOs, arbitration as a procedural mechanism is available to a wide set of non-corporate third parties who freely acceded to the agreement. Such third parties would also have the procedural right to arbitrate the BHR issues against those contracting parties that violated their commitments.

This kind of expansion of the scope of potential claimants was applauded by many BHR enthusiasts, and remains an important consideration for future BHR arbitrations. (75) This is in part because, with the expanded pool of potential arbitration claimants, the Bangladesh

Accord made it likelier that both public and private interests would be addressed in the process, sometimes, for example, through claims brought by the NGO signatories.

In fact, in the two PCA Arbitrations, it was precisely the two global labour unions – IndustriALL Global and UNI Global – that brought the claims against the unnamed fashion brands, claiming that the fashion brands failed to compel suppliers to remediate facilities within the Bangladesh Accord’s deadline and to negotiate commercial terms to make it financially feasible for their suppliers to cover the costs of remediation.

In the course of the case, the Tribunal acknowledged the unique nature of the arbitration proceedings, which stand on the crossroads of public and private interests:

In the Tribunal’s view, 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.

A number of features distinguish the Accord from such characterizations, including (1) the creation of the Accord in the wake of the Rana Plaza tragedy; (2) the number of signatories to the Accord (over 200 as at the date the arbitrations commenced); (3) the number of supplier factories affected by the Accord (over 1,600); (4) the number of workers in the Ready-Made Garment industry protected by the Accord (over 2 million); (5) the involvement of international organizations in the negotiation and governance of the Accord (including the ILO); (6) the involvement of States and State entities in the negotiation and oversight of the Accord (including the government of Bangladesh); (7) the involvement of Bangladeshi and NGOs as witnesses to the Accord and in an advisory capacity; and (8) the public nature of the Accord itself and many associated documents, as well as detailed information about factory remediation under the Accord.

These factors give rise to a genuine public interest in the Accord, including on the part of other stakeholders who would have a direct interest in its interpretation. (76)

Building upon the recognition of ‘a genuine public interest’, the Tribunal proceeded to analyse the conflicting demands of confidentiality and transparency pertaining to the cases at hand. One key factor behind the attraction of international arbitration has been confidentiality, and often, it is the reason why business parties resort to arbitration over domestic litigation. However, for arbitrations dealing with BHR issues, arbitral confidentiality will often be weighed against public interest concern for transparency and access to information. Debate surrounding this area of tension is likely to be revisited after the Hague Rules are unveiled.

In the PCA Arbitrations, relying on sources highlighting the expectation of confidentiality in commercial arbitration cases, the respondents asked the Tribunal to ‘issue an order preserving the confidentiality of the proceedings, including the existence of the arbitrations and all submissions, hearing, orders and awards thereunder’. (77) In contrast, the claimants preferred to follow the ‘trend towards greater transparency, particularly in the context of investor state arbitration’. (78)

The Tribunal considered ‘such practice or trend’ to be much less important than the demands of fairness and efficiency. Emphasizing the hybrid nature of the case, the Tribunal expressed that there is a ‘genuine public interest in the Accord, including on the part of other stakeholders who would have a direct interest in its interpretation’. The Tribunal also noted that the Steering Committee itself publicly acknowledged the need for ‘transparency and public communication’ so as to build ‘trust and confidence among the workers and the wide community of those who are affected by the implementation of the commitments set forth in the Accord’. (79)

At the same time, the Tribunal observed that the language of the Accord and ‘the practice under it’ require it to protect certain information about the participating brand companies. (80) It pointed to the Steering Committee’s Governance Regulation, which explains that the need for transparency should be ‘balanced with the need of Company Signatories for confidentiality of certain information for legal and business reasons’. (81)

Faced with competing interests, the Tribunal struck a balance by agreeing to disclose ‘certain basic information about the existence and progress of the arbitration proceedings’ but to keep the respondents’ identity confidential. (82) It relied on Article 17 of the UNCITRAL Arbitration Rules 2010 to ‘conduct the arbitration in such manner as it considers appropriate’, and in a way that avoids unnecessary delays and expenses (83) to set some guidelines for confidentiality and transparency.

While submissions on the public/private divide and transparency were part of the initial case procedure, the cases never reached a more mature phase, as they both settled, the first one in December 2017, and the second one in January 2018. (84)

4.3 Dutch Agreement on Sustainable Garments and Textile (2016)

The third noteworthy agreement on BHR is the Dutch Agreement on Sustainable Garments and Textile (the ‘Dutch Agreement’), an initiative by Dutch textile companies and NGOs. Of all the contracts analysed, the Dutch Agreement encompasses the widest scope of BHR commitments:

fighting discrimination, child labour and forced labour ... , support[ing] a living wage, health and safety standards for workers, and the right of independent trade unions to negotiate [and doing their best to] reduce the negative impact of their activities on the

environment, ... prevent animal abuse, ... reduce the amount of water, energy and chemicals that they use, and ... produce less chemical waste and waste water. (85)

As of March 2018, the Dutch Agreement has over sixty signatories, and enjoys the support of the Dutch Government.

Like the Bangladesh Accord, the Dutch Agreement envisages the resolution of disputes through a two-step process involving, first, a Disputes Committee, followed by a binding arbitration. (86) The Disputes Committee comprises:

an independent chair appointed unanimously by all the Parties to the Agreement, a member with entrepreneurial expertise in the garment and textile industry appointed by the industry organisations, and a member with expertise in the garment and textile chain appointed by all the trade unions and civil-society organisations involved in the Agreement. (87)

This Disputes Committee will assess, 'after hearing both sides of the argument, whether an enterprise participating in the Agreement is acting in accordance with the Agreement'. (88) It then has six months to issue a ruling with reasons given in writing which will be binding on the enterprise concerned. (89)

As with the Bangladesh Accord, the arbitration rights of the parties to the Dutch Agreement are also limited to the Disputes Committee's issuance of a binding decision:

^P If a dispute then arises between the enterprise concerned and one or more Parties to the Agreement with regard to failure to comply with the binding advice of the Complaints and Disputes Committee in a timely manner or at all, that dispute can be submitted to the Netherlands Arbitration Institute (NAI) by the enterprise concerned or one or more Parties to the Agreement within six months after the elapse of the time limit set by the Complaints and Disputes Committee.

To this end, signatory enterprises will ratify a declaration containing an arbitration clause which states that:

All disputes arising between one or more Parties to the Agreement and the enterprise concerned with regard to the failure by the enterprise concerned to comply, in a timely manner or at all, with the binding advice of the Complaints and Disputes Committee concerning a dispute shall be settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute.

When settling disputes, the Netherlands Arbitration Institute shall review marginally whether the enterprise concerned has complied with the binding advice of the Complaints and Disputes Committee in a timely manner or at all.

The parties in arbitration proceedings as specified above shall be the enterprise concerned and one or more Parties to the Agreement. Either party may appear as the claimant or the defendant.

The arbitration tribunal shall in principle be composed of three arbitrators. The parties in the dispute may also agree that one arbitrator will suffice.

The arbitration tribunal shall be appointed according to the list procedure.

The place of arbitration shall be The Hague, the Netherlands.

The arbitrator(s) shall decide as amiable compositeur.

Any Party or Parties to the Agreement who is (are) party to the dispute shall inform the Steering Group of the ruling given by the arbitrator(s).

The striking difference between the Bangladesh Accord and the Dutch Agreement, lies in the nature of arbitration.

^P The Dutch Agreement arbitration is institutional, and points to the rules of the NAI (90) with The Hague as the seat of arbitration. Interestingly, however, the arbitrator is empowered to decide the dispute as 'amiable compositeur'. This would generally give the tribunal a significant amount of flexibility. 'Amiable compositeur' (or 'ex aequo et bono') arbitrator(s) have the power to depart from the strict application of rules of law and decide the dispute according to general principles of fairness. (91) There are several advantages to such an approach, including predominantly legal flexibility. By allowing a departure from the mandatory principles of national law, it may be possible for a tribunal to decide that the parties intended to apply BHR standards.

However, one additional feature of the arbitration clause seems particularly eye-catching, and to a large extent limits the typical 'ex aequo et bono' flexibility of the tribunal. The jurisdiction of the tribunal constituted pursuant to the Dutch Agreement seems to be quite narrow. It includes only disputes 'with regard to the failure by the enterprise concerned to comply, in a timely manner or at all, with the binding advice of the Complaints and Disputes Committee'. (92) Moreover, the clause stipulates that the NAI will review this question only 'marginally'. Based on this, it would appear that the Tribunal under the Dutch Agreement would not be in charge of revisiting any questions of fact or law that were raised before the Disputes Committee.

At the time of this article, the authors are not aware of any arbitration disputes brought under the Dutch Agreement, which would undoubtedly be helpful to interpret the conditions and the

effect of the clause. However, due to its limited *ratione materiae* scope, it remains to be seen how much, and if at all, the clause will be useful in practice for promoting the development of the law surrounding BHR.

5 ARBITRATION AS A PROCEDURAL TOOL TO FURTHER THE BUSINESS AND HUMAN RIGHTS FRAMEWORK

The three BHR agreements examined in section 4 *supra* illustrate the role that multinational corporations play in the process of ‘hardening’ soft law through the medium of contract law and international arbitration.

As seen *supra* in the example of the PCA Arbitrations, the system of BHR has already witnessed BHR arbitrations commenced pursuant to a contractual arbitration *compromis*. Unfortunately, the PCA Arbitrations did not result in extensive jurisprudence in respect of BHR because they were compromised at an early stage. Nevertheless, the authors predict that future cases will follow as the contractual ‘hardening’ of soft law continues to open the gates to the arbitration of BHR disputes.

International arbitration may therefore become an important tool not only for enforcing businesses’ human rights obligations, but also for further elevating the substance of such commitments. The ‘process’ can in that sense be seen as an invaluable component in the development of the ‘substance’, and a trend that quickens the momentum of establishing BHR as a fully integrated system of law.

^P This section describes some noteworthy examples of procedural advancements in BHR arbitration, including (1) the development of specialized BHR arbitration rules; and (2) the recognition of BHR counterclaims in the practice of investor-state tribunals.

5.1 Specialized rules for business and human rights arbitrations

A striking procedural development of the past year is the UN Working Group’s Proposal on International Business and Human Rights Arbitration (the ‘Proposal’) of February 2017, which suggests that BHR disputes should be resolved through arbitration as the preferred procedural tool: (93)

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 favourably 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. (94)

To that end, a drafting group chaired by Judge Bruno Simma (the ‘Drafting Group’) was established to create specialized arbitration rules for BHR arbitration. Somewhat surprisingly, the Proposal did not call for the creation of a new arbitration court and institution. Instead, the Working Group considered the existing arbitration institutions well-placed to facilitate the resolution of BHR disputes, although ideally under a set of adapted arbitration rules.

^P The Drafting Group is currently working on preparing such specialized rules, which will be called the Hague International Business and Human Rights Arbitration Rules (the ‘Hague Rules’). (95) While no deadline has been imposed on the Working Group for the finalization and publication of the Hague Rules, it seems likely that we will see the first full draft just before 2019.

In the meantime, some information about the Hague Rules has been made available through the publication of an August 2017 ‘Questions and Answers’ document, (96) which answered inquiries from multiple stakeholders raised in the course of the three years preceding the Proposal.

The Working Group identified three main areas of focus in drafting the Hague Rules: (1) greater transparency of proceedings and awards; (2) the possibility for a class of victims to bring a mass claim or consolidate claims; and (3) availability of arbitrators specializing in BHR matters. (97)

In terms of transparency, the Working Group suggested that the arbitration rules should take on the UNCITRAL Rules on Transparency, (98) and that consequently, ‘pleadings, evidence, hearings and rulings, would be open to the public and *amicus* pleadings could be allowed’. (99) The Proposal recognized the importance, but does not answer the question, of ‘how to accommodate any confidentiality concerns that either side might have’. (100)

The Working Group also briefly identified a need to help victims file and fund their cases. According to the Proposal, ‘efforts need to be made to deal with the “inequality of arms” that victims face when attempting to assert their rights’. (101) This could include ‘permitting representation of victims by human rights NGOs and labour unions, legal aid, pro bono services by lawyers, third-party funding and the establishment of trust funds that could accept both private and public contributions’. (102) The Working Group further recognized the possibility

that victims who get financial assistance through grants or an advance of funds, could have them repaid out of the final settlement or award, (103) a clear example being the Financial Assistance Fund put in place by the PCA, which provides support for less wealthy states. (104)

P On the availability of knowledgeable and impartial arbitrators, the Working Group recognized that parties to human rights arbitration must have access to arbitrators who are experts in BHR matters. (105) However, this is a challenging issue at the moment, because there are only a limited number of arbitrators and mediators with the necessary knowledge of the topic. (106) It may therefore be necessary for arbitrators who are keen to serve on future BHR arbitration tribunals to increase their knowledge of the subject and obtain additional training. (107)

The authors consider the development of specialized rules for BHR disputes an extremely important component of BHR as a system of law. As noted *supra*, the existence of an efficient procedural mechanism typically helps not only to enforce, but also to establish and evolve the content of substantive rights and obligations.

Nevertheless, the Hague Rules will have only a limited impact if they are not met with buy-in from the business community. In that respect, it is crucial that the drafting and consultation process considers all relevant perspectives, and both public and private interests. Fortunately, for now, it seems that the Working Group recognizes the importance of inclusivity and diversity, which may help achieve the success in practice of the Hague Rules. (108)

5.2 Business and human rights counterclaims in investor-state arbitration

There are at least three procedural gateways in investor-state arbitration (109) which a state may use to bring BHR issues before an investment tribunal: (1) as claimant, a state may bring a claim against an investor for businesses' human rights breaches; (2) as respondent, a state may raise a human rights defence against an investor's claim; (110) and (3) as respondent, a state may bring a counterclaim for an investor's BHR abuses.

P The first hypothetical, to the best of authors' knowledge, has never been tested. There is not a single case where a state, acting as claimant, has brought a claim against an investor for human rights breaches by its businesses. This is hardly surprising. To a large extent due to consent issues, investor-state arbitrations almost always involve an investor acting as claimant with the host state acting as respondent. (111)

Indeed, to date, there are very few instances on record (112) where a state has acted as claimant, including: *Gabon v. Société Serete S.A.*, (113) for the breach of construction contract; *East Kalimantan v. KPC*, (114) involving the breach of a coal mining contract; and *Nicaragua v. Grupo Barcelo Montelimar*, (115) reportedly related to the breach of resort purchase agreement.

The second gateway has been used much more frequently, including in cases (116) such as *Metalclad v. Mexico*, (117) *Philip Morris v. Uruguay*, (118) and *Philip v. Australia*. (119)

The third gateway, following on from a series of interesting cases, (120) was employed in the landmark proceedings of *Urbaser v. Argentina*. (121) This case represents a significant development of the procedural BHR framework for three reasons.

P First, this was the first time that an investor-state tribunal accepted jurisdiction and analysed the merits of a counterclaim grounded in human rights principles. Second, the human rights counterclaim was directed against a private party (and not a state) as the subject of human rights obligations. Third, *Urbaser* provides a rare instance where the Tribunal referenced 'soft' law provisions, namely the Guiding Principles.

The following section provides a closer look at the significance of *Urbaser* for the development of BHR law.

6 BUSINESS AND HUMAN RIGHTS COUNTERCLAIMS

In *Urbaser*, the claimant was a shareholder in a concession that provided water and sewerage services in Buenos Aires, Argentina. The service obligation was granted to the claimant's subsidiary, Aguas Del Gran Buenos Aires S.A. (AGBA), in the early 2000s. In January 2002, the state took emergency measures in response to Argentina's 2002 financial crisis. The emergency measures resulted in the claimant's concession being terminated in 2006, which in turn led to the claimant's financial loss and insolvency. The claimant filed for arbitration with ICSID, alleging that Argentina had violated the Spain–Argentina BIT due to its obstruction and persistent neglect of AGBA's shareholders' interests.

Argentina counterclaimed that the concessionaire's failure to provide the necessary level of investment in the concession breached the human right to water. The claimant argued that this was impossible, as human rights principles bind states but not private parties. Argentina opposed this line of argument and stated that the claimant's most important obligation during the Concession term was to guarantee the access to water and thus to 'comply with a fundamental human right'.

The Tribunal took an interesting approach in relation to counterclaims.

First, relying on Article X of the Spain–Argentina BIT, the Tribunal found that the parties had consented to the use of counterclaims. Indeed, the relevant provision was neutral enough to allow Argentina to bring a counterclaim, (122) and that the terms in which the claimant agreed to arbitration did not rule out counterclaims. (123) It also indicated that it is not possible for a

claimant to unilaterally delimit the competence of a tribunal through the terms of its consent. (124) Even more interestingly, the Tribunal explained that the claimant's categorical understanding that the asymmetrical nature of investment arbitration prevents a host state from invoking any right based on a BIT was simply inaccurate. (125)

Second, adopting an opposite view to the one discussed in *Saluka v. Czech Republic*, the Tribunal accepted that there was a sufficient connection between the originating claim and the counterclaim. Certainly, the claims were 'based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession'. (126)

Third, the Tribunal found that the claim was within its competence as provided by Article 25 of the ICSID Convention, as human rights claims may imply a dispute relating to an investment. (127)

Therefore, in light of *Urbaser*, if the terms of an arbitration agreement are wide enough, a counterclaim based on human rights principles can be within the Centre's jurisdiction as provided for by Article 46 of the ICSID Convention. Moreover, in this case, the Tribunal only required that the respondent present a prima facie case to establish jurisdiction, a relatively low burden of proof to meet.

Some commentators have, however, rightly observed (128) that obstacles to jurisdiction over the counterclaims typically derive from the specific terms of the underlying investment treaties. Many treaties do not include specific treaty obligations for investors, while providing that applicable law includes the treaty and international law, but not host state law. In practice, this has led many tribunals to decline jurisdiction over counterclaims for breaches of host state law. (129)

As the key point is the scope of consent, using broad and inclusive terms when defining jurisdiction to address related claims (including ancillary claims and counterclaims) will grant tribunals' authority over any counterclaim, including BHR counterclaims. It remains to be seen how the more reciprocal investment treaties, (130) which typically include bolder statements concerning investor obligations and jurisdiction to enforce them through arbitration, may influence future development.

7 BUSINESS AND HUMAN RIGHTS OBLIGATIONS OF INVESTORS

In cases preceding *Urbaser*, investment tribunals have typically refused to consider whether investors have human rights obligations. To a large extent, this refusal was due to a failure by relevant respondents to sufficiently particularize their claims. (131)

In *SAUR v. Argentina*, (132) the Tribunal recognized a place for human rights in investor-state arbitration, however by relying on the Argentinian Constitution instead of international law:

Human rights generally, and the right to water in particular constitute some of the various sources that the Tribunal will have to take into account in order to solve the dispute, as these rights are considered to be constitutional in the Argentinian legal system. (133)

Urbaser is the first case where a tribunal considered more systematically an investor's BHR obligations. Notably, the Tribunal rejected the claimant's suggestion that, as a private party, it had 'no commitment or obligation for compliance in relation to human rights' (134) and instead established that, because corporations are subject to international law, they can also bear obligations.

Moreover, the BIT is 'not [to] be interpreted and applied in a vacuum' but instead to be 'construed in harmony with other rules of international law of which it forms part, including those relating to human rights'. (135) In other words, the Tribunal acknowledged that sources of human rights obligations (including soft law obligations) may be sources for resolving BIT disputes. (136)

The Tribunal explained that:

International law accepts *corporate social responsibility as a standard of crucial importance* for companies operating in the field of international commerce. This standard includes *commitments to comply with human rights in the framework of those entities' operations* conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. (137) (Emphasis added)

However, the Tribunal agreed that these obligations were to be analysed on a case-by-case basis, and stated that:

On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations' human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual. (138)

The Tribunal thus went on to describe the difference between an 'obligation not to engage in activities aimed at destroying certain human rights', (139) an 'obligation to perform', (140) an 'obligation of compliance', (141) and an 'obligation to abstain'. (142) In *Urbaser*, the

enforcement of the right to water was an ‘obligation of compliance’ on the part of the state, which ‘imposes a duty on each state party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible’. (143) However, it is not an ‘obligation to perform’ for the investor. In other words, ‘the Concessionaire [does not have] an obligation to perform services complying with the residents’ human right to access to water and sewage services’. (144) For an ‘obligation to perform’ to exist and be taken into account in the framework of the BIT, ‘it should either be part of another treaty ... or it should represent a general principle of international law’. (145) For the Tribunal, ‘the necessary step is therefore that a host state accepting investments in the domain of the provision of water relies on the BIT to have the investor participating to its obligation under international law’. (146) To the contrary, an ‘obligation to abstain’, i.e. a prohibition to commit acts violating human rights, can be of ‘immediate application’ upon states, individuals, and other private parties. (147) Likewise, the ‘obligation not to engage in activities aimed at destroying human rights’ is recognized by several international instruments. (148)

Therefore, *Urbaser* contains an important limitation: although it establishes the idea that corporations may be bound by human rights, it does not come with an absolute positive duty to protect and strengthen human rights. This is limited to situations where such obligation is provided for in an instrument to which the corporation is beholden, either because it signed such instrument, or because it is a ‘general principle of international law’. Some commentators have argued that the ‘obligation not to engage in activities aimed at destroying human rights’ and the ‘obligation to abstain’ have a very limited scope. (149)

The authors of this article believe that, after *Urbaser*, it is likely that investment tribunals will feel more encouraged to address questions of BHR issues. Arguments of structural irreconcilability of investment law and human rights law are also likely to fade away. (150)

After all, there is nothing to suggest that the functional specialization of regulatory regimes annuls the overall unity of the ‘system’ of international law, a system which benefits from rules designated precisely for resolving such normative conflicts. In the words of the International Law Commission (ILC), ‘[i]n international law, there is a strong presumption against normative conflict’, (151) so that while:

[i]t is sometimes suggested that international tribunals or law applying (treaty) bodies are not entitled to apply the law that goes beyond the four corners of the constituting instruments or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromis*. But if all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction endowing instrument in its normative environment. (152)

Tools of interpretation (153) will undoubtedly be precious in facilitating greater inclusion of diverse values to strengthen the cohesion of the normative environment.

In light of *Urbaser*, it may also be concluded that, while the arbitral tribunals are certainly more open to considering BHR counterclaims, a need for a binding obligation in the BHR sphere remains. However, the more ‘reciprocal’ treaties exemplified in Chapter II(c) of this article inspire hope that we may be closer to that outcome than we think.

8 CONCLUSION: THE MEDIUM IS THE MESSAGE

International law is not immune from the effects of globalization. It can and must respond to the new challenges and opportunities that globalization brings. The recent developments in BHR, together with the UNs’ ambitious Sustainable Development Goals reflect the imperative that everyone is included in the benefits of globalization. The numerous normative, substantive, and procedural initiatives reflected in this article carry these values. They are maturing on parallel planes and at different paces, making it difficult to identify a tipping point and to close a circle in the creation of the system of law.

Moreover, the content of BHR law remains spread unevenly. It clumps and hoards in both ‘soft’ and ‘hard’ law centres, multiplying the public and private avenues through which legal norms can be made and contested. Because so much about the nature of BHR law eludes our grasp, it seems easy to miss the wood for the trees. And yet, as this article shows, we can already identify the outline of a new system of law – one that rests equally on elements that are public and private, substantive and procedural, all of which enrich the inherited maps of international law.

This article has sought to paint a picture of the emerging system of BHR law by following the developmental trends of some of its core elements. They show significant buy-in for the concept of corporate accountability for BHR principles, and that the lines between soft and hard law are blurring. As the normative environment expands, corporations remain important agents of the change to come, by contracting for both substantive commitments and procedural guarantees. International arbitration is emerging as a procedural venue of choice for BHR disputes, carrying with it a promise of enforcing, but also evolving the content of substantive rights and obligations. The procedural and substantive elements thereby continue to develop in tandem, leading inevitably to a more comprehensive legal system. The medium, indeed, is the message.

There is great value in understanding these patterns of development. They increase the ability

to see the way things will develop, as well as the way things should develop. The patchy and plodding growth of BHR law may have been exactly what was needed to imbue the system with both public and private values. If the system is to prosper, it must continue to reflect them both.

References

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- 1)** Many practitioners and academics consider the terms ‘business and human rights’ (BHR) and ‘corporate social responsibility’ (CSR) as interchangeable. The authors of this article have similarly decided to use both expressions interchangeably. It is worth noting, however, that some authors suggest that the two terms cover different concepts, and that BHR developed in response to CSR’s failures (see Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14(2) *IJHR* 237, 238 (2015)). CSR was born in the years following World War II and is most commonly used in the business community. It is directed at the private sector only, and recognizes that businesses may play a positive role in protecting and promoting human rights through voluntary measures in the field of sustainability. BHR emerged in the 1970s from the work of legal academics, and requires corporations to comply with some key universal human rights concepts embedded in a set of international treaties to mitigate, prevent and remediate the adverse effects of their activities on individuals and communities. It focuses on holding corporations accountable for harm caused, but also recognizes the legal role of states. For more on the distinction between BHR and CSR see *ibid.*, at 239.
- 2)** The authors credit Prof. Roger Alford for an excellent early analysis of the trends in business and human rights arbitration. See Roger Alford, *Arbitrating Human Rights*, 83(2) *Notre Dame L. Rev.* 158 (2008).
- 3)** A few years later, the U.N. Commission on Human Rights prepared two additional instruments: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, UDHR, ICCPR and ICESCR are commonly referred to as the International Bill of Human Rights. In addition, the United Nations adopted a number of thematic treaties, such as treaties on the rights of women, children, migrant workers and people with disabilities, as well as freedom from genocide, racial discrimination, and torture. The number and depth of human rights instruments continues to grow on both a regional and global level.
- 4)** See Louis Henkin, *The Universal Declaration at 50 and the Challenges of Global Markets*, 25 *Brook. J. Int’l L.* 17, 25 (1999).
- 5)** ‘As a rule, the subjects of the rights and duties arising from international law are States solely and exclusively and international law does not normally impose duties and confer rights directly upon an individual human being,’ Robert Jennings & Arthur Watts, *Oppenheim’s International Law* vol. 1, 16 (9th ed., OUP 1992). The state-centric concept of international law is commonly referred to as ‘Westphalian’ because it can be traced back to the Peace of Westphalia, a series of peace treaties signed between May and Oct. 1648, ending the Thirty Years’ War and the Eighty Years War. The Westphalian approach to international law was crucial for the nineteenth and twentieth centuries’ consolidations of nation-states and post-colonial statehood determinations.
- 6)** For some innovative early proposals on how to move further in the development of international law to cover corporate responsibility, see Alford, *supra* n. 2.
- 7)** Rome Statute of the International Criminal Court (17 July 1998), 2187 U.N.T.S. 90.
- 8)** International Convention on Civil Liability for Oil Pollution Damage (30 May 1996), www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf (accessed 9 Apr. 2018).
- 9)** Convention on the Law of the Sea (10 Dec. 1982), 1833 U.N.T.S. 397.
- 10)** Maritime Labour Convention (ILO, 23 Feb. 2006).
- 11)** The scope of this article does not include national law or litigation. For some interesting examples of business and human rights litigation, see *Dow Chemicals Co. v. Castro Alfaro*, 786 S.W. 2d 674 (S. Ct. Texas 1990); *Lubbe v. Cape Plc.* [2000] 4 All ER 268 (HL); *MC Mehta v. Union of India*, AIR 1987 SC 975; *Bowoto v. Chevron Texaco*, 2004 U.S. Dist. LEXIS 4603 (ND, Cal. 2004); *Emere Godwin Bebe Okpabi et al. v. Royal Dutch Shell PLC & Shell Petroleum Development Co. of Nigeria Ltd.* [2017] EWHC 89 (TCC); and *Jesner v. Arab Bank*, No. 13-3605 (2d Cir. 2015).

- 12) The full name of the Intergovernmental Working Group is ‘Open-Ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.’
- 13) Human Rights Council Resolution 26/9, U.N. Doc. A/HRC/RES/26/9 (14 July 2014).
- 14) Human Rights Council Resolution 26/ L.1, U.N. Doc. A/HRC/26/L.1 (23 June 2014).
- 15) Intergovernmental Working Group Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, para. 3.2 (29 Sept. 2017) (the ‘Draft Instrument’), www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.p... (accessed 5 Apr. 2018).
- 16) *Ibid.*, para. 3.2.
- 17) The full name of the instrument is the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework,’ endorsed by the U.N. Human Rights Council in June 2011.
- 18) John Ruggie, *Final Report on Guiding Principles on Business and Human Rights: Implementing the United Nations, ‘Protect, Respect and Remedy’ Framework*, Principle 9, U.N. Doc. A/HR/17/3 (21 Mar. 2011).
- 19) Draft Instrument, *supra* n. 15, para. 2.
- 20) *Ibid.*, para. 7.
- 21) *Ibid.*, para. 1.2.
- 22) *Ibid.*
- 23) U.S. Model BIT, *Preamble*, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (accessed 1 Apr. 2018).
- 24) United States–Belarus BIT, *Preamble*, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/324> (accessed 1 Apr. 2018).
- 25) Canada–Korea Free Trade Agreement (2015), Art. 8.16; Norwegian Model Agreement for the Promotion and Protection of Investments (2007) (‘Norwegian Model BIT’), Art. 32; Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (2016), Art. 12.
- 26) The most elaborate model treaty in terms of investor’s obligations is the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development (the ‘IISD Model’). The structure of the IISD Model includes not only a chapter on Standards of Treatment of Foreign Investors (Part 2), but also a chapter on Obligations and Duties of Investors and Investments (Part 3) and Host State Rights (Part 5), bringing a breeze of fresh air to all those who desperately sought for more textual reciprocity in the investor-state arena. Amongst the most interesting provisions of the IISD Model are those on corporate governance, duty of social and environmental impact assessment, anti-corruption, and post-establishment obligations which include the respect for human rights in the following words: ‘Investors and investments should uphold human rights in the workplace and in the state and community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors and investments shall not be complicit with, or assist in, the violation of the human rights by others in the host state, including public authorities or during civil strife. The Parties shall, at their first meeting, adopt a list of international human rights and human rights instruments to assist investors in complying with this Provision.’ (IISD Model, Art. 14). Unfortunately, to the authors’ best knowledge, no treaties signed to date incorporate the IISD Model.
- 27) See the 1981 Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (1981) (the ‘OIC Investment Agreement’), Art. 9. Notably, in *Al Warraq v. Indonesia*, the Tribunal analysed this language to conclude that it ‘raises [the obligation to obey the law of the host state] from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration.’ The Tribunal allowed a state’s counterclaim for investor’s breaches of host state law, which is, to the authors’ knowledge, the only decision in which a tribunal admitted a counterclaim for host state law breaches (*Hesham T.M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 Dec. 2014, para. 663).
- 28) Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016) (the ‘Morocco–Nigeria BIT’), Art. 14(1).
- 29) *Ibid.*, Art. 14(2).
- 30) The U.N. Global Compact is an initiative calling on all companies to align their strategies and operations with a series of principles on human rights, labour, and environment. A tenth principle on anti-corruption was added in 2004. Thousands of companies voluntarily decided to participate in the Global Compact and report publicly on steps taken to comply with the ten principles. See www.unglobalcompact.org/what-is-gc/mission/principles (accessed 8 Apr. 2018).

- 31) In 2005, the U.N. Human Rights Commission requested the U.N. Secretary-General to appoint a Special Representative on Business and Human Rights. In response, the Secretary-General appointed Prof. John Ruggie of Harvard University. The UNGP, prepared by Ruggie in 2011, came as a result of his extensive research and consultations with experts and representatives of governments, business and civil society across the globe. For more information about the UNGP, see www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 1 Apr. 2018).
- 32) Available at www.oecd.org/daf/inv/mne/48004323.pdf (accessed 8 Apr. 2018).
- 33) Interestingly, the Norwegian Model BIT includes a provision requiring each state party to encourage investors to comply with the OECD Guidelines. Presumably, the provision is addressed primarily to the non-OECD countries. See Norwegian Model BIT, *supra* n. 25, Art. 32.
- 34) ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 9 (5th ed., Mar. 2017), www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcm_s_094386.pdf (accessed 31 Mar. 2018).
- 35) In words of Roger Alford: '[C]orporations are increasingly expected not only to abide by a code of conduct, but also to impose a set of ethical standards on their business partners. This requirement is reflected in "sourcing guidelines" in voluntary corporate codes of conduct, which are often coupled with outside "social auditors" confirming compliance with these guidelines' (see Alford, *supra* n. 2, at 532–533). See also: Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 Colum. J. Transnat'l L. 389, 402 (2005).
- 36) See Mehmet Toral & Thomas Schultz, *The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*, in *The Backlash against Investment Arbitration* 580 (Michael Waibel, Asha Kaushal et al. eds, Kluwer Law International 2010).
- 37) The Equator Principles, Preamble: 'the Equator Principles Financial Institutions (EPFIs) have consequently adopted these Principles in order to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices. By doing so, negative impacts on project affected ecosystems and communities should be avoided where possible, and if these impacts are unavoidable, they should be reduced, mitigated and/or compensated for appropriately.'
- 38) *Ibid.*, Principle 1: 'when a Project is proposed for financing, the EPFI will, as part of its internal environmental and social review and due diligence, categorise it based on the magnitude of its potential environmental and social risks and impacts. Such screening is based on the environmental and social categorisation process of the International Finance Corporation (IFC).'
- 39) *Ibid.*, Principle 2: 'for all Category A and Category B Projects, the EPFI will require the client to conduct an Assessment process to address, to the EPFI's satisfaction, the relevant environmental and social risks and impacts of the proposed Project.'
- 40) *Ibid.*, Principle 7: 'Project Finance For all Category A and, as appropriate, Category B Projects, an Independent Environmental and Social Consultant, not directly associated with the client, will carry out an Independent Review of the Assessment Documentation including the ESMPs, the ESMS, and the Stakeholder Engagement process documentation in order to assist the EPFI's due diligence, and assess Equator Principles compliance ... *Project-Related Corporate Loans* An Independent Review by an Independent Environmental and Social Consultant is required for Projects with potential high risk impacts.'
- 41) *Ibid.*, Principle 4: 'an Environmental and Social Management Plan (ESMP) will be prepared by the client to address issues raised in the Assessment process and incorporate actions required to comply with the applicable standards.'
- 42) *Ibid.*, Principle 8: 'where a client is not in compliance with its environmental and social covenants, the EPFI will work with the client on remedial actions to bring the Project back into compliance to the extent feasible. If the client fails to re-establish compliance within an agreed grace period, the EPFI reserves the right to exercise remedies, as considered appropriate'.

- 43) During the construction of the pipeline, BP's external monitoring body warned that Turkish contractors were rushing work and cutting corners over land acquisition and quality control in order to avoid incurring financial penalties. Experts who were working on the Turkish section of the pipeline expressed their concern that many fundamental safety features of the pipeline were missing, and were especially worried over BP's choice of an anti-corrosion coating which had never been used on a similar pipeline. It later appeared that the coated sections of the pipeline had been subject to extensive cracking, and that over one-quarter of the pipeline in Azerbaijan was later found to have been accepted. Although BP claimed to have resolved the problem, in 2007, following a complaint from Georgian environmentalist Manana Kochladze, the Office of Accountability (OA) of the US Overseas Private Investment Corporation (OPIC) published a Compliance Review of OPIC's Environmental Due Diligence and Monitoring of the Baku-Tbilisi-Ceyhan Oil Pipeline Project (www.opic.gov/sites/default/files/docs/Compliance-Review-OPIC-Environmental-Due-Diligence-Monitoring-... (accessed 9 Apr. 2018)). The Report highlighted some serious environmental issues associated with the pipeline, in which the OPIC had invested USD 141 million. The OA found that several crucial items of information about the pipeline had not been publicized, and held that the OPIC had failed to perform due diligence and monitoring. The report specifically mentioned that there had been concerns about the integrity of the anti-corrosion coating, and that OPIC apparently did not ensure that recommended measures for monitoring of pipeline coating integrity were subsequently carried out, contrary to what had been recommended by engineers and consultants.
- 44) The corporate signatories included: the State Oil Company of the Azerbaijan Republic, BP Exploration (Caspian Sea) Ltd., Statoil BTC Caspian A.S., Ramco Hazar Energy Ltd., Turkiye Petrolleri A.O., Unocal BTC Pipeline, Ltd., Itochu Oil Exploration (Azerbaijan) Inc., Delta Hess (Btc) Ltd. Host Government Agreement Between and Among the Government of the Republic of Turkey and [MEP Participants] (the 'Host Government Agreement'). The full text of the agreement is available at www.bp.com/content/dam/bp-country/en_az/pdf/legalagreements/BTC_eng_agmt3_agmt3.pdf (accessed 8 Apr. 2018).
- 45) 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 dated 18 Nov. 1999 (the 'Intergovernmental Agreement'), www.bp.com/content/dam/bp-country/en_az/pdf/legalagreements/BTC_eng_agmt4_agmt4.pdf (accessed 8 Apr. 2018).
- 46) *Ibid.*, Art. 13.
- 47) *Ibid.*, Appendix 5, Art. 3.1.
- 48) *Ibid.*, Appendix 5, Art. 3.4.
- 49) *Ibid.*, Appendix 5, Art. 4.1.
- 50) *Ibid.*, Appendix 5, Art. 4.4.
- 51) *Ibid.*, Appendix 5, Arts 3.4–3.11.
- 52) *Ibid.*, Art. 18.
- 53) *Ibid.*, Appendix 5, Art. 3.12.
- 54) *Ibid.*, Art. 18.11: '[each State entity hereby] waives any claim to immunity in regard to any proceedings to enforce this Agreement ... or any final award rendered by an arbitral tribunal constituted pursuant to this Agreement'. In the words of R. Alford, '[T]he Caspian Sea pipeline project illustrates [that] foreign sovereign immunity is a right that sovereigns have long been willing to forego in doing business with multinational corporations' (see Alford, *supra* n. 2, at 539).
- 55) Accord on Fire and Building Safety in Bangladesh (13 Mar. 2013) (the 'Bangladesh Accord'), http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf (accessed on 12 Mar. 2018).
- 56) The list of signatories includes leading retailers such as H&M, Nike, Benetton, Marks and Spencer, Hugo Boss, Calvin Klein, Tesco, Sainsbury's, and Lidl. A full list of signatories is available at <http://bangladeshaccord.org/signatories/> (accessed 30 Mar. 2018).
- 57) The Bangladesh Accord, *supra* n. 55, Preamble.
- 58) 2018 Accord on Fire and Building Safety in Bangladesh: May 2018 (21 June 2017) (the '2018 Bangladesh Accord'), <http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf> (accessed on 12 Mar. 2018).
- 59) IndustriALL Global Union, *More Than 100 Brands Sign 2018 Transition Accord in Bangladesh*, www.industriall-union.org/more-than-100-brands-sign-2018-transition-accord-in-bangladesh (accessed 20 Mar. 2018).
- 60) Francis Churchill, *British Brands Delay Signing Bangladesh Accord*, www.cips.org/supply-management/news/2018/january/british-brands-delaying-decision-on-bangladesh-work... (accessed 20 Mar. 2018).
- 61) Quarterly Aggregate Report on Remediation Progress at RMG Factories Covered by the Accord as of 1 Jan. 2018, 3 (24 Jan. 2018), <http://bangladeshaccord.org/wp-content/uploads/Quarterly-Aggregate-Report-January-2018.pdf> (accessed 9 Apr. 2018).
- 62) Bangladesh Accord, *supra* n. 55, Art. 5.
- 63) Roger Alford, *Arbitrating Bangladesh Labor Rights (Part II)*, <http://arbitrationblog.kluwerarbitration.com/2013/05/15/arbitrating-bangladesh-labor-rights-part-ii...> (accessed 25 Mar. 2018).
- 64) See *IndustriALL Global Union & UNI Global Union v. Certain Fashion Brands*, PCA Case No. 2016-36 and PCA Case No. 2016-37 (the 'PCA Arbitrations').
- 65) The Bangladesh Accord, *supra* n. 55, Art. 1.

- 66) See e.g. Agreement between the Government of the Republic of Korea and the Government of the Republic of Indonesia Concerning the Promotion and Protection of Investments (16 Feb. 1991), Art. 9, para. 2; Agreement between the United Arab Emirates and the Belgian–Luxemburg Economic Union on the Reciprocal Promotion and Protection of Investments (8 Mar. 2004), Art. 12, para. 2; Agreement between the Federal Republic of Germany and the United Arab Emirates for the Promotion and the Reciprocal Protection of Investments (21 June 1997), Art. 8, paras 2–3; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and the Protection of Investments (11 Dec. 1990), Art. 8, para. 1.
- 67) E.g. the ICCPR provides that the Human Rights Committee ‘shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law’ (United Nations Covenant on Civil and Political Rights, Art. 41, para. 1(c) (16 Dec. 1966) 999 U.N.T.S. 171). Likewise, the European Convention on Human Rights provides that the European Court of Human Rights ‘may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law’ (Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 35, para. 1 (4 Nov. 1950) 213 U.N.T.S. 221). Similarly, the American Convention on Human Rights requires pursuit and exhaustion of local remedies ‘in accordance with generally recognized principles of international law’ before the submission of petitions or communications to the Commission (American Convention on Human Rights, Art. 46, paras 1(a), (b) (18 July 1978) 1144 U.N.T.S. 123).
- 68) Antônio Augusto Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* 1 (Cambridge Studies in International and Comparative Law 1983).
- 69) The dispute resolution mechanism through a committee of representatives is not unique to the Bangladesh Accord. The new Morocco–Nigeria BIT similarly provides at Art. 4(d) that a ‘Joint Committee’, comprising representatives of both parties, will ‘[s]eek to resolve any issues or disputes concerning Parties’ investment in an amicable manner’.
- 70) *Ibid.*, para. 36.
- 71) *Ibid.*, para. 37.
- 72) PCA Case No. 2016-36 and PCA Case-No. 2016-37, Procedural Order No. 2 (Decision on Admissibility Objection and Directions on Confidentiality and Transparency) dated 4 Sept. 2017 (the ‘PCA Admissibility Decision’).
- 73) *Ibid.*, para. 51.
- 74) *Ibid.*, para. 57.
- 75) For an analysis of ‘third party beneficiary’ in business and human rights arbitrations, see Alford, *supra* n. 2, at 540–550.
- 76) See the PCA Admissibility Decision, *supra* n. 72, paras 93–94.
- 77) *Ibid.*, para. 72.
- 78) *Ibid.*, para. 92.
- 79) Accord on Fire and Building Safety in Bangladesh, Regulations, 4 (24 Sept. 2013) (the ‘Bangladesh Accord Regulations’).
- 80) See e.g. Bangladesh Accord, Art. 19, which requires the Steering Committee to ‘make publicly available and regularly update information on key aspects of the programme’ by publishing compliance data, safety inspector reports for all factories and a list of ‘all suppliers in Bangladesh (including sub-contractors) used by the signatory companies’, but also contains the express limitation that ‘volume data and information linking specific companies to specific factories will be kept confidential’.
- 81) See Bangladesh Accord Regulations, *supra* n. 79.
- 82) PCA Admissibility Decision, *supra* n. 72, para. 97.
- 83) *Ibid.*, para. 98.
- 84) IndustriALL, *Settlement Reached with Global Fashion Brand in Bangladesh Accord Arbitration*, www.industriall-union.org/settlement-reached-with-global-fashion-brand-in-bangladesh-accord-arbitrat... (accessed 2 Mar. 2018); IndustriALL, *Global Unions Reach US\$2.3 Million Bangladesh Accord Settlement with Multinational Brand*, www.industriall-union.org/global-unions-reach-us23-million-bangladesh-accord-settlement-with-multina... (accessed 2 Mar. 2018).
- 85) Agreement on Sustainable Garment and Textile (the ‘Dutch Agreement’), Art. 2 (9 Mar. 2016).
- 86) *Ibid.*, Art. 1.3.
- 87) *Ibid.*
- 88) *Ibid.*
- 89) *Ibid.*
- 90) The Netherlands Arbitration Institute was established in 1949 and today is the largest general arbitration institute in the Netherlands. It is located in Rotterdam. More information available at www.nai-nl.org/en/ (accessed 4 Apr. 2018).
- 91) Gary Born, *International Commercial Arbitration* 283 (2d ed., Wolters Kluwer 2014).
- 92) Dutch Agreement, *supra* n. 85, Art. 1.3.
- 93) The Working Group came to the conclusion that international arbitration has the ability to adjudicate human rights disputes where other court systems have failed, and can offer a speedier resolution and widely enforceable awards even when competent courts are available. See International Business and Human Rights Arbitration 1 (13 Feb. 2017), www.l4bb.org/news/TribunalV6.pdf (accessed 23 Feb. 2018) (the ‘Proposal’).

- 94) International Arbitration of Business and Human Rights Disputes, Questions and Answers (the 'Questions and Answers'), 4 (17 Aug. 2017), www.l4bb.org/news/Q&A.pdf (accessed 9 Apr. 2018).
- 95) The Hague Institute for Global Justice, *Business and Human Rights International Arbitration Project Launched*, www.l4bb.org/news/ProjectPressRelease1711.pdf (accessed 4 Mar. 2018).
- 96) See Questions and Answers, *supra* n. 94.
- 97) See Proposal, *supra* n. 93.
- 98) *Ibid.*, s. XIV.
- 99) *Ibid.*
- 100) *Ibid.*, Appendix B.
- 101) *Ibid.*, at 4.
- 102) *Ibid.*
- 103) *Ibid.*, Art. XIII.
- 104) Proposal, *supra* n. 93, fn. 11: 'EU Member States should give a mandate to the PCA to adapt the Financial Assistance Fund to provide financial assistance to non-state parties when the subject matter of the dispute involves corporate related human rights abuses'.
- 105) *Ibid.*, at 2.
- 106) *Ibid.*, fn. 12.
- 107) *Ibid.*
- 108) *Ibid.*, Art. II.
- 109) For a detailed discussion of the arbitrability and procedural gateways for raising human rights issues in investor-state arena, including through (1) systemic integration approach on the assumption that all fields of international law exist in coherence; (2) harmonizing the fragmented pieces of international law; and (3) proportionality analysis. See Monica Feria-Tinta, *Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris vs. Uruguay*, 34(4) J. Int'l Arb. 601 (2017).
- 110) An interesting sub-species of this procedural gateway is the situation where fair and equitable treatment standard analysis was used to import liability of investors for business and human rights breaches and reflect such liability in the overall assessment of damages. See Peter Muchlinski, 'Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard', 55 ICLQ 527, 525 (2006).
- 111) Even though today's investor-state arbitration rests on such disparity in roles of investors and states, nothing in the text of the ICSID Convention or UNCITRAL Rules prevent the states from bringing claims as claimants. Moreover, the system was not originally envisaged as one-sided as it turned out to be. The original idea of ICSID arbitration was based on equality and reciprocity, and assumed that states would take a much more active role, see Jose Daniel Amado, Jackson Shaw Kern & Martin Doe Rodriguez, *Arbitrating the Conduct of International Investors 1* (Cambridge University Press 2018). The Report of the World Bank Executive Directors expressly confirmed that: 'the Convention permits the institution of proceedings by host States as well as by investors and Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases' (see International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States*, para. 13 (18 Mar. 1965). For an analysis on why is it that so few cases have been initiated by states, see Toral & Schultz, *supra* n. 36, and Ina Popova & Fiona Poon, *From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties*, 2(2) BCDR International Arbitration Review 223 (2015).
- 112) See Toral & Schultz, *supra* n. 36, at 588.
- 113) *Gabon v. Société Serete, S.A.*, ICSID Case No. ARB/76/1.
- 114) *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3.
- 115) Little is known about this case. However, its filing has been mentioned by reputable sources such as Investment Treaty News (see Fernando Cabrera Diaz, *South American Alternative to ICSID in the Works as Governments Create an Energy Treaty*, <https://www.iisd.org/itn/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-...> (accessed 9 Apr. 2018).
- 116) For an analysis of the cases and their repercussion for investor-state arbitrations, see Feria-Tinta, *supra* n. 109.
- 117) *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1.
- 118) *Philip Morris Brands Sarl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.
- 119) *Philip Morris Asia Ltd. v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.
- 120) See e.g. *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8; *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.
- 121) *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 Dec. 2016).
- 122) *Ibid.*, para. 1143.
- 123) *Ibid.*, paras 1146–1148.
- 124) *Ibid.*, para. 1147.
- 125) *Ibid.*, para. 1183.
- 126) *Ibid.*, para. 1151.

- 127) *Ibid.*, para. 1154.
- 128) See e.g. Toral & Schultz, *supra* n. 36, and Popova & Poon, *supra* n. 111.
- 129) See e.g. *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011). An exception would be if the Treaty itself imposes some obligations on the investor, e.g. the OIC Investment Agreement. See *Al Warraq v. Indonesia*, where the Tribunal allowed a counterclaim arising out of host state's law. The Tribunal relied on Art. 9 of the OIC Investment Agreement which imposes on the investor an obligation to act in accordance with the host state's laws and 'refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interests'. The Tribunal held that this article constitutes investor's treaty obligation to obey the host state's laws, over which the Tribunal has full jurisdiction (*Al Warraq v. Indonesia*, Award, para. 663).
- 130) See *supra*.
- 131) In *Azurix v. Argentine Republic*, the Tribunal dismissed the argument by noting that the matter had not been fully argued, and that in any event, it failed to understand the incompatibility in this case (see *Azurix*, Award of 14 July 2006, paras 254, 261). See also Vivian Kube & E. U. Petersmann, *Human Rights Law in International Investment Arbitration*, 11 Asian J. WTO & Int'l Health L & Pol'y 65 (2016), 82, citing Ursula Kriebaum, *Foreign Investments & Human Rights – The Actors and Their Different Roles*, Transnat'l L. Disp. Mgmt. 1, 7 (2013). In *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, the Tribunal declared that due to Argentina's failure to build its case, and 'without further elaboration' from the parties, human rights was not an argument that bore any relationship to the merits of the case (*Siemens v. Argentine Republic*, Award of 17 Jan. 2007, para. 79). In *Bernhard von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 and ARB/10/25, Procedural Order No. 2, 26 June 2012, the Tribunal noted that none of the parties (only *amicus* petitioners, who were ultimately not allowed to participate in the process) put in issue the question of indigenous communities' rights (*Von Pezold v. Zimbabwe*, Procedural Order No. 2, para. 59). For that reason, international human rights law was considered a matter outside of the scope of the dispute, as it was presently constituted (*Von Pezold v. Zimbabwe*, Procedural Order No. 2, para. 60). For a detailed analysis of that case, see Benjamin Aronson, Dietmar Prager, *Bernhard von Pezold et al. v. Republic of Zimbabwe, Border Timbers Ltd. et al. v. Republic of Zimbabwe, Procedural Order 2, ICSID Case Nos ARB/10/15 and ARB/10/25, 26 June 2012*, Kluwer Law International (26 June 2012).
- 132) *SAUR Int'l S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012).
- 133) *Ibid.*, para. 330.
- 134) *Urbaser*, *supra* n. 121, para. 1193.
- 135) *Ibid.* para. 1200.
- 136) See Feria-Tinta, *supra* n. 109.
- 137) *Urbaser*, *supra* n. 121, para. 1195.
- 138) *Ibid.*, para. 1195.
- 139) *Ibid.*, para. 1199.
- 140) *Ibid.*, para. 1207.
- 141) *Ibid.*, para. 1208.
- 142) *Ibid.*, para. 1210.
- 143) *Ibid.*, para. 1209.
- 144) *Ibid.*, para. 1207.
- 145) *Ibid.*, para. 1207.
- 146) *Ibid.*, para. 1209.
- 147) *Ibid.*, para. 1210.
- 148) *Ibid.*, paras 1196–1198.
- 149) See e.g. Kevin Crow & Lina Lorenzoni Escobar, *International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground*, 36 B.U. Int'l L.J. 87, 103–109 (2018).
- 150) See Feria-Tinta, *supra* n. 109, at 609, for a discussion on why limited jurisdiction does not imply a limitation of the scope of the applicable law.
- 151) ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law*, Report on the Study Group of the International Law Commission (prepared by Martti Koskeniemi), UN Doc. A/CN.4/L.682 (13 Apr. 2006) para. 37.
- 152) *Ibid.*, para. 423.
- 153) See Feria-Tinta, *supra* n. 109. For proportionality as a tool for resolving conflict or collisions between different rights and interests, see Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015).

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