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Procedural Fairness in Business and Human Rights Arbitration

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Abstract

In this paper, I examine the question of procedural fairness in business and human rights (BHR) arbitration. I begin by remarking on the growth in the popularity of such a form of arbitration and presenting a brief overview of the recent initiatives in the field. Next, I acknowledge the challenges in defining fairness in the arbitration's context. As BHR arbitration is intended to complement other grievance mechanisms available to victims of business-related human rights abuses, pertinent guidance can be derived from the fundamental instrument in that area — the United Nations Guiding Principles on Business and Human Rights. Based on them, I choose to focus on procedural fairness and highlight its link with the arbitration's legitimacy. The main thesis I present in the paper is that the assessment of procedural fairness of BHR arbitration requires an examination of how arbitration is perceived by its users as well as, considering the public interest implicated in BHR disputes, external stakeholders. Those two categories of actors will look into distinct aspects of arbitral procedure when evaluating its fairness. Parties to disputes will be interested in particular in the guarantees of impartiality of arbitrators and they will want the arbitral tribunal to ensure a level playing field and allow them to present their case on equal terms. Meanwhile, the external stakeholders' perception of fairness will be shaped predominantly by the transparency of proceedings and opportunities for third party participation. I analyze the key initiative in BHR arbitration, the Hague Rules, demonstrating that while this project is relatively more successful in responding to the parties' demands of fairness, it fails to accommodate properly the public interest. At the same time, I emphasize that in some instances reconciling the expectations of parties and external stakeholders will not be possible, especially when it comes to finding the right balance between transparency and confidentiality. I also warn against transformations in the arbitral procedure so far-reaching that it might start to resemble litigation, thus, losing qualities that have made it appealing to users in the first place.

Keywords

Business and human rights, arbitration, fairness, Hague Rules

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Arbitration as a grievance mechanism in business and human rights-related disputes has been consistently attracting the attention of scholarship in the last decade.[1] Multiple initiatives have emerged in that period: from an arbitration mechanism in the landmark Bangladesh Accord in 2013,[2] to such innovative projects as the Human Rights at Sea Arbitration Rules[3] and the International Labor Arbitration and Conciliation Rules.[4] At the same time, human rights issues are also increasingly being arbitrated within the realm of investor-state arbitration (human rights counterclaims).[5] Arguably, the most important development has been the adoption of the Draft Hague Rules on Business Arbitration (hereinafter: the Hague Rules)[6] which are based on the UNCITRAL Arbitration Rules 2013[7] but introduce amendments in certain key aspects recognizing the specificity of the business and human rights (BHR) context.[8] The Rules, a fruit of an interactive process between the Drafting Team and various stakeholders, were officially

[1] See: e.g., Judith Levine and Ashwita Ambast, 'Responsibility Rising from the Rubble: Lessons from the Bangladesh Accord for Arbitration of Business and Human Rights Disputes' (2018) *Australian International Law Journal* 25: 1-24; Ema Vidak-Gojkovic Cherie Blair, Marie-Anaïs Meudic-Role, 'The Medium Is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration' (2018) *Journal of International Arbitration* 35(4): 379-412.

[2] Accord on Fire and Building Safety in Bangladesh (24 April 2013) <https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf> (accessed: 29 September 2023). Subsequently replaced by the 2018 Accord on Fire and Building Safety in Bangladesh (21 June 2017) <https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf> (accessed: 29 September 2023), and, most recently, by the International Accord for Health and Safety in the Textile and Garment Industry (1 September 2021) <https://img1.wsimg.com/blobby/go/7b3bb7ce-48dc-42c3-8e58-e961b9604003/downloads/1%20September%20-%20International%20Accord%20on%20Health%20a.pdf?ver=1649319549122>
(accessed: 29 September 2023). It should, however, be noted that it is possible to identify an instance of arbitrating BHR disputes preceding the Accord, i.e., the arbitration mechanism of the Baku-Tbilisi-Ceyhan Project of 1999 (See: Agreement Among The Azerbaijan Republic, Georgia and The Republic of Turkey Relating to the Transportation of Petroleum Via the Territories of The Azerbaijan Republic, Georgia and The Republic of Turkey Through the Baku-Tbilisi-Ceyhan Main Export Pipeline (18 November 1999), <https://www.bp.com/content/dam/bp/country-sites/en_ge/georgia/home/legalagreements/btcagmt4.pdf> (accessed: 29 September 2023); The Baku-Tbili-Ceyhan Company 2003, BTC Human Rights Undertaking (22 September 2003) <https://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf> (accessed: 29 September 2023)

[3] Human Rights at Sea (Sherman & Sterling), 'Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea' (White Paper) (2020) <https://hrasarb.com> (accessed: 15 October 2023).

[4] Referenced in the International Accord for Health and Safety in the Textile and Garment Industry, the successor to the Bangladesh Accord (supra note 2)

[5] See: ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa (Claimants) and The Argentine Republic (Respondent),* award of 8 December 2016; ICSID, *David Aven et al. (Claimants) and The Republic of Costa Rica (Respondent),* final award of 18 September 2018.

[6] The Drafting Team of the Hague Rules on Business and Human Rights Arbitration, The Hague Rules on Business and Human Rights Arbitration (The Hague: CILC 2019) ('Hague Rules').

[7] UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) (16 December 2013), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> (accessed: 29 September 2023).

[8] See: Preamble to the Hague Rules para. 6 (Hague Rules (supra note 6) 13-14).

launched on 12 December 2019.[9] So far, there has not been a pilot case, but they have visibly dominated the narrative in the field.[10]

In this paper, I would like to address the question of procedural fairness in BHR arbitration. I begin by characterizing such arbitration and explaining an increase in its popularity as a means for settlement of BHR-related disputes. Next, I discuss how fairness can be understood in the context of such arbitration, distinguishing between the perspective of parties to a dispute and external stakeholders. I examine the expectations of parties and the broader audience in order and evaluate whether they are satisfied by the key initiative in the area, the project of the Hague Rules. My goal is also to highlight the challenge of reconciling the demands for fairness of parties and external stakeholders and demonstrate that the procedural framework designed in the Hague Rules might be incapable of rising to it.

1. The growing interest in arbitrating BHR disputes

The observable spike in the interest in arbitration is understandable, considering existing legal and practical barriers in access to justice faced by rights-holders in the scenarios of business-related human rights abuses.[11] One of the main challenges in that regard is related to the structural and managerial complexity of business enterprises — multinational corporations operate through networks of subsidiaries and suppliers.[12] Meanwhile, the territorial regulation of corporations does not match the extra-territorial scope of corporate activities. The recognition of the separate corporate personality does not allow for piercing a corporate veil except for certain particular purposes or under narrowly defined circumstances.[13] Suing companies is often impossible: host states can often be characterized by a lax regulatory environment,[14] while the absence of extraterritorial regulation by home states constitutes "the major stumbling block and a major incentive for poor corporate practices".[15] The existing alternatives to non-judicial mechanisms have also been characterized as flawed and ineffective. National Contact Points established on the basis of the OECD Guidelines for Multinational Enterprises[16] were criticized for, i.a., the lack of accessibility and transparency;[17]

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[9] Andi Baaij, 'The Potential of Arbitration as Effective Remedy in Business and Human Rights: Will the Hague Rules be Enough?' (2022) *Business and Human Rights Journal* 7: 272.

[10] For instance, they have provided the basis for the development of a new Sport and Human Rights Dispute Resolution Mechanism (UNI Global Union, 'The new 'Sport and Human Rights Dispute Resolution Mechanism'

Essentials at a glance' (n.d.) <https://uniglobalunion.org/wp-content/uploads/WPA-Sport-and-Human-Rights-Dispute-Resolution-Mechanism-Essentials-2022.pdf> (accessed: 2 October 2023).

[11] See, e.g., European Union Agency for Fundamental Rights, 'Business and Human Rights — Access to Remedy' (Luxembourg: 2020).

[12] OHCHR, Report of the United Nations High Commissioner for Human Rights 'Improving accountability and access to remedy for victims of business-related human rights abuse' A/HRC/32/19 (10 May 2016) 9-10.

[13] ICJ, *Barcelona Traction, Light and Power Company, Limited,* Judgment, I.C.J. Reports 1970 3, para. 56.

[14] Ilias Bantekas, 'Business and Human Rights. Foundations and Linkages' in Ilias Bantekas and Michael Ashley Stein (eds), *Cambridge Companion on Business and Human Rights* (Cambridge: Cambridge University Press 2021) 10.

[15] Ibid, 11.

[16] See: OECD, 'Guidelines for Multinational Enterprises' (2011) <https://www.oecd.org/daf/inv/mne/48004323.pd> (accessed: 10 October 2023)

[17] OECD Watch, 'Remedy Remains Rare. An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct' (2015)

whereas national human rights institutions often lack explicit mandates with respect to BHR issues and remain under-resourced.[18]

The assessment of the grievance mechanisms cannot be detached from the context of the UN Guiding Principles on BHR (UNGPs) — a resolution of the UN Human Rights Council that (however non-binding) constitutes "the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights".[19] The UNGPs are based on three pillars: the state duty to protect human rights (Pillar One), the business responsibility to respect human rights (Pillar Two), and the access to remedy (Pillar Three).[20] Tellingly, Pillar Three is famously called "the forgotten pillar".[21] Against this background, BHR arbitration would assist both states in discharging their obligations regarding remedies, as well as business enterprises in meeting their responsibilities under the UNGPs.[22] The Working Group on Business and Human Rights report calls on states to adopt the "all roads to remedy" approach, which would allow victims to seek remedies in different settings where distinct mechanisms complement each other.[23] The use of arbitration is, thus, intended to compensate for some of the deficiencies of mechanisms already in use, both judicial and non-judicial.

Arbitration clearly displays certain features that make it appealing to users. First, it offers considerable flexibility of procedure along with party autonomy.[24] In particular, parties can choose arbitrators who are neutral and possess relevant expertise in a given field.[25] A key advantage of arbitration is that proceedings are held in a neutral place, which alleviates the concerns about the alleged bias of domestic judiciaries.[26] Significantly, awards are binding and enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the New York Convention), which is almost universal in scope: at this moment, it has 172 state parties.[27]

<https://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf> (accessed: 27 November 2022) 21-49.

[18] Veronika Haász, 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review* 14:183.

[19] Zeid Ra'ad Al Hussein, 'Ethical pursuit of prosperity' *The Law Society Gazette* (23 March 2015) <https://www.lawgazette.co.uk/commentary-and-opinion/ethical-pursuit-of-prosperity/5047796.article> (accessed: 10 October 2023).

[20] United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect,

Respect and Remedy" Framework', UN Doc A/HRC/17/31 (21 March 2011) ('Guiding Principles on Business and Human Rights').

[21] Lorna McGregor, 'Activating the Third Pillar of the UNGPs on Access to an Effective Remedy' *EJIL: Talk!* (23 November 2018) <https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy/> (accessed: 1 October 2023).

[22] See: The Drafting Team of the Hague Rules on Business and Human Rights Arbitration, 'International Arbitration of Business and Human Rights Disputes. Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspect of the Arbitral Process' (The Hague: CILC 2018) 4.

[23] OHCHR (supra note 12) para. 56.

[24] Judith Levine and Sarah Castles, 'The Use of International Arbitration Tribunals for Business and Human Rights Disputes" in Ilias Bantekas and Michael Ashley Stein (eds), *Cambridge Companion on Business and Human Rights* (Cambridge: Cambridge University Press 2021) 434-435.

[25] Ibid.

[26] Ibid, 435.

[27] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) <https://www.newyorkconvention.org/english> (accessed: 1 October 2023).

However, arbitration comes also with its own risks, in particular, of privileging the stronger, well-resourced parties.[28] Moreover, one of the main challenges for BHR arbitration — and the lack of a pilot case under the Hague Rules attests to that — involves securing companies' consent.[29] Their determination to oppose the jurisdiction of domestic courts does not suggest that they would be eager to embrace another form of dispute settlement unless it offers some concrete advantages to them.[30] It remains to be seen whether some new interesting propositions on how to incentivize companies to agree to BHR arbitration — e.g., favoring in public procurement companies that have BHR arbitration clauses in their supplier agreements[31] — will be effective.

The question that needs to be examined, specifically with respect to the Hague Rules, is: how is it possible to ensure fairness of such arbitration, how departing from the model of international commercial arbitration (hereinafter: ICA), could it be adapted to the specificity of BHR disputes?

2. Defining fairness in the context of BHR arbitration

While the term "fairness" is frequently used in the international legal discourse and most of its participants seem to have certain ideas and intuitions about the meaning of this term, fairness eludes attempts to be defined in any categorical manner. Most likely, the starting point for the discussion on its meaning would be the proposal by Thomas Franck who characterized fairness as "a composite of two independent variables: legitimacy and distributive justice;" in his interpretation, it constitutes "the process by which the law, and those who make law, seek to integrate these variables, recognizing the tension between the community's desire for both order (legitimacy) and change (justice)".[32] Importantly, Franck has underscored the relative and subjective nature of fairness,[33] which will be crucial for subsequent considerations. Another essential point of reference in any reflection on fairness is, of course, John Rawls' theory of justice as fairness which characterized the process of conclusion of social contracts through two principles of liberty and differentiation.[34] Nevertheless, embedding the concept of fairness in the context of arbitration necessitates some further clarification.

2.1. Fairness is about perception

A lot can be learned about the possible understanding of fairness in the context of arbitration from the critiques of its alleged *unfairness*. Four strands of such critique are recognized in the literature by Diane Desierto.[35] First, she mentions fairness with respect to due process

[28] Lisa Sachs, Lise Johnson, Kaitlin Cordes, Jesse Coleman, and Brooke Guven, 'The Business and Human Rights Arbitration Rule Project: Falling short of its access to justice objectives' (2019) CCSI Briefing Note 5.

[29] Ibid, 3.

[30] Ibid, 3-4.

[31] Antoine Duval and Jan Eijsbouts, 'Asser Institute Expert Meeting on Business and Human Rights Arbitration' (2020) Meeting Report & Recommendation Policy Brief 2022-01 8.

[32] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press 1998) 25.

[33] Ibid, 22-24.

[34] John Rawls, *A Theory Of Justice* (Revised Edition by Belknap Press: Cambridge 1999 of the original edition published by Harvard University Presss: Cambridge 1971) 11-13.

[35] Diane Desierto, 'Rawlsian Fairness and International Arbitration' (2015) *University of Pennsylvania Journal of International Law* 36(4): 939-993.

guarantees — the critique challenging prohibitive costs, policies of confidentiality, and principles of evidentiary fact-finding.[36] Second, fairness of substantial outcomes: the author explains that this strand of critique could be understood as related to a methodology of arbitration (the lack of precedent and the ensuing unpredictability), but also has to do with the alleged biases of tribunals that are considered to affect the outcomes.[37] The question of impartiality can be, however also framed as one of due process guarantees, thus, it fits both types of critique. Third, Desierto indicates the lack of a sufficient appeal mechanism — she notes that critics of a tradeoff between the finality of awards and very limited recourse to appeal mechanisms have been particularly vocal in the field of investor-state arbitration rather than ICA.[38] The fourth and final strand of critique centers on the question of the legitimacy of decision-making by arbitrators vis-à-vis limited rights of third party participation.[39]

Another relevant insight has been provided by the results of a study carried out by Richard W. Naimark and Stephanie E. Keer, the objective of which was to identify attributes of ICA sought by its users.[40] A significant percentage of 81% of surveyed participants ranked a fair and just result as the most important attribute of arbitration.[41] In that regard, Naimark and Keer have distinguished between substantive justice and procedural justice; the former being about getting the "right" result, while the latter — about "getting the result in the 'right way'".[42] Based on that, it is reasonable to identify fairness with the procedural dimension of justice. Such an approach seems the most pragmatic and appropriate for the purpose of this analysis — by focusing on procedural fairness, we are able to distill this elusive concept to the most concrete, measurable parameters.

Those particular parameters for BHR arbitration could be further specified in the light of an instrument that occupies the central position in the relevant field, i.e., the UNGPs. As BHR arbitration is expected to perform the function of a grievance mechanism, it is reasonable to refer to the effectiveness criteria listed in Principle 31 of the UNGPs, which lays down the authoritative standard that such mechanisms are expected to meet. Fairness does not feature as an autonomous criterion of effectiveness, but it is mentioned twice. First, in the context of legitimacy: legitimate mechanisms are those "enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes".[43] Also, fairness is invoked with respect to the criterion of equitability: mechanisms should provide parties with "reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms".[44] It would be difficult to derive any complete vision of fairness from those scattered references; moreover, it can be said that other criteria reflect implicitly other important aspects of fairness as well, for instance, transparency which will be addressed in greater detail below.[45] What is essential is

[36] Ibid, 952.
[37] Ibid, 974.
[38] Ibid, 981-982.
[39] Ibid, 986-987.
[40] Richard W. Naimark and Stephanie E. Keer, 'What do parties really want from international commercial arbitration?' (2002/2003) *Dispute Resolution Journal* 80.
[41] Ibid.
[42] Ibid, 81.
[43] United Nations Guiding Principles on Business and Human Rights (supra note 20) 33.
[44] Ibid.
[45] See: Section 4.1.

that the UNGPs focus predominantly on procedural fairness,[46] while drawing a manifest link between fairness and legitimacy.

This link should not be surprising. Legitimacy, the component of fairness in Franck's definition,[47] is most often defined as "the justification of the exercise of public authority".[48] Stephen Schill characterizes legitimacy as "a concept that everybody shares as a desirable goal for international arbitration to live up to;" where legitimacy requires "some sort of social acceptance of the institution of international arbitration, of the procedures it follows, and the results it produces".[49] Legitimacy raises, therefore, the question of how arbitration is viewed by its users and broader audiences. In that sense, it cannot be separated from fairness, thus, the UNGPs merely confirm what is obvious: that fairness is a critical factor in the overall perception of BHR arbitration. As rightly observed by E.D.D. Tavender, "it is fairness that imbues the judicial system with its moral force and acceptability in civilized society;"[50] It seems safe to conclude that the same can be applied to international arbitration — the results of the study by Naimark and Keer lend strong support to that argument.[51] Similarly, Youseph Farah remarks that the assessment of legitimacy is predominantly based on procedural justice.[52] It can be concluded, therefore, that procedural fairness has a fundamental role to play in inspiring the trust of stakeholders.

2.2. Whose perception?

This begs the question who are the stakeholders whose perception is relevant? Considering the specificity of BHR disputes, we can distinguish two categories of such stakeholders: first, parties, and second, the broader public — external stakeholders including employees, workers in the supply chain, consumers, end-users, members of the community around a business facility; representatives of the affected stakeholders: NGOs, international trade unions, local civil society, and human rights experts.[53] Those groups look into different aspects of arbitration

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[46] It should be noted that the criterion of "rights-compatibility" could tie into a substantive dimension of fairness.

[47] Thomas Franck (supra note 32).

[48] Rüdiger Wolfrum, 'Legitimacy in International Law' (2011) in *Max Planck Encyclopedias of International Law*
<https://opil-ouplaw-com.proxy.uba.uva.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e1960>, (accessed: 2 October 2023) para. 1.

[49] Stephan W. Schill, 'Conceptions of Legitimacy of International Arbitration' (2017) Amsterdam Law School Legal Studies Research Paper No. 2017-17 Amsterdam Center for International Law No. 2017-14 4.

[50] E.D.D. Tavender, Q.C., 'Considerations of Fairness in the Context of International Commercial Arbitrations' (1996) *Alberta Law Review* Vol. XXXIV(3) 509-556.

[51] Richard W. Naimark and Stephanie E. Keer (supra note 40).

[52] Youseph Farah, 'Unpacking the Potential for Unilaterally Binding Arbitration: Improving access to an effective remedy, and business-related human rights violations'(2020) SSRN.
<https://deliverypdf.ssrn.com/delivery.php?ID=827006111117103079127121097089006111103049014093061025126072006126025095004066014067098030052002015017013094029069076018126007052019045093022030031095098096031076119051084044090003119114067091080084004091098115089012011005125028004114006067119124006093&EXT=pdf&INDEX=TRUE> (accessed: 3 October 2023) 11.

[53] Gwendolyn Remmert, Madeleine Koalick, and Luke Wilde, 'Stakeholder Engagement in Human Rights Due Diligence. A Business Guide' (2014) Global Compact Network Germany twentyfifty Ltd. 12-14.

when evaluating it as legitimate, and in consequence, they have different expectations regarding procedural fairness.

In that regard, it is inherent to BHR disputes that they affect both the private and the public interest. When deciding on the transparency regime in cases brought before the PCA by two global unions — signatories of the Bangladesh Accord against two unnamed fashion brands, the arbitral tribunal addressed a hybrid nature of the disputes before it.[54] It highlighted a number of specific features of the Accord that distinguished arbitration under it from either a classic public law arbitration or an ICA between private parties.[55] Those features were, i.a., the context in which the Accord was created (after the Rana Plaza tragedy), the number of signatories, the number of workers and factories in the industry affected; the involvement of international organizations and states in its negotiation and governance, and public nature of the Accord itself and many associated documents.[56]

The tension between public and private arises on multiple levels: first, the appropriateness of a private arbitral tribunal addressing human rights issues that belong to the public sphere is a matter of controversy.[57] Another conflict that needs to be addressed is the one that "is present between the nature of corporate conduct, which is considered responsible predominantly to market forces in the private sector, and the public nature of human rights law, which imposes obligations for protection and promotion of human rights exclusively on states".[58] Importantly, such coexistence of the private and the public interest has to translate into concrete requirements of procedural fairness. Different elements of the arbitral procedure will communicate fairness to different audiences.

3. The parties' demand for fairness

Whenever the Hague Rules explicitly refer to fairness, it is the fairness viewed from the perspective of parties in arbitral proceedings (the issue of power imbalance and conducting proceedings in a fair and efficient manner). In this Section I examine those aspects of the procedure that produce the most significant impact on the parties' perception of fairness: how the tribunal addresses the inequality of arms, how the impartiality of arbitrators is ensured, and how fairness is reconciled with effectiveness.

3.1. Addressing power imbalance

First, the parties will not view arbitration as fair as long as certain specific measures aimed at ensuring the equality of arms are not undertaken. In BHR disputes we will be dealing most often with a David versus Goliath scenario: an individual or a group of rights-holders would confront a business enterprise that would most likely have incomparable financial resources, better access to information, legal representation, etc.[59] In order to compensate for such a

[54] PCA, Procedural Order No. 2, Decision on Admissibility Objection and Directions on Confidentiality and Transparency, PCA Cases No. 2016-36 and No. 2016-37, 4 September 2017.

[55] Ibid, para. 93.

[56] Para. 93. Those factors, as the tribunal has held, "[gave] rise to genuine public interest in the Accord, including on the part of other stakeholders who would have a direct interest in its interpretation" (para. 94).

[57] Judith Levine and Sarah Castles (supra note 24) 438.

[58] Ibid.

[59] The potential power imbalance between parties of BHR disputes is addressed already in the Preamble of the Hague Rules, p. 13. At the same time, it is necessary to remember that the Hague Rules can

power imbalance, the arbitral tribunal shall take a more proactive and inquisitorial approach, oriented towards leveling the playing field — as recognized in Art. 5(2) of the Hague Rules.[60] According to the provision in question, "[where] a party faces barriers to access to remedy, including a lack of awareness of the mechanism, lack of adequate representation, language, literacy, costs, physical location or fears of reprisal, the arbitral tribunal shall, without compromising its independence and impartiality, ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings".[61] In the commentary one can come across an express recognition that the inequality of arms among the parties "may have a negative impact on the overall fairness of the arbitral proceedings".[62] It is regrettable that the guidance offered to the tribunal on measures it should undertake in that respect lacks more specificity.

Considering said power imbalance, the issue of costs remains largely problematic. While arbitration is lauded as less expensive compared to litigation,[63] in fact, the costs of legal representation and the likely expenses of an institution that administers proceedings will render it not as affordable option as its users might hope.[64] The Hague Rules adopt with respect to costs the "looser pays" principle (Art. 53), which is based on a sound justification: it is supposed to serve as "both an incentive to arbitrate for the economically weaker party that has a strong case and a safety shield for respondents from unfounded actions".[65] The tribunal is equipped in that regard with a competence that might be important for the considerations of fairness: namely, it "may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, including the conduct of the parties in the arbitration, the financial burden on each party and the public interest, if any".[66] The Columbia Center on Sustainable Investment experts claim, however, that rules on costs prejudice rights-holders claimants, considering the lack of "ex ante certainty regarding whether and how such discretion would be applied, nor a clear mechanism for effectively challenging those decisions".[67] These provisions are capable of alleviating only some concerns in that respect and not to a full extent. This demonstrates the limits to what an arbitral tribunal can achieve on its own with respect to addressing the inequalities. For example, the financing barriers could be effectively tackled by setting up a special fund that companies and states could jointly contribute to and that would enable rights-holders to initiate

apply not only to the victim-to-business (V2B) but also business-to-business (B2B) disputes (See: Andi Baaij (supra note 9) 272). The inequality of arms might be less prominent in the case of the latter but might still occur, e.g., where a conflict arises between a well-resourced MNC and one of its small-scale suppliers.

[60] Hague Rules (supra note 6) 24.

[61] Ibid.

[62] Ibid.

[63] See: Ibid, 15.

[64] Florencia Villagii and Benjamin Guthrie, 'Arbitration, Business, and Human Rights' *Herbert Smith Freehills* (21 July 2021) <https://hsfnotes.com/publicinternationallaw/2021/07/21/arbitration-business-and-human-rights/> (accessed: 17 October 2023)

[65] Hague Rules (supra note 6) 87.

[66] Ibid.

[67] Lisa Sachs et al. (supra note 28) 7.

any action in the first place, but it is rather a matter situated outside the design of the arbitral procedure.[68]

3.2 Impartiality of arbitrators

The impartiality of arbitrators is central to the parties' perception of the process — it is commonly agreed that "the fairness of the process and the outcome that results from it depend in large part upon the conduct and the state of mind of the appointed arbitrators".[69] The Hague Rules lay down a number of relevant guarantees in Art. 11.[70] While the UNCITRAL Arbitration Rules allow for challenging an arbitrator if there exists justifiable doubts as to his or her impartiality or independence (Art. 12-13), the Hague Rules' provisions on that matter deserve praise as much better developed.

At the outset, the Rules provide that the arbitrator cannot be a person who has previously been involved in the dispute in any capacity (Art. 11(1)(a)); moreover, "[persons] appointed to serve as arbitrators under these Rules shall be persons of high moral character, who may be relied upon to exercise independent and impartial judgment" (Art. 11(1)(b).[71] While the parties can exercise their autonomy in the selection of arbitrators, the Rules lay down additional requirements with respect to the expertise of the presiding or sole arbitrator: the arbitrator "shall have demonstrated expertise in international dispute resolution and in areas relevant to the dispute, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field or industry" (Art. 11(1)(c)).[72] While the UNCITRAL Rules do not lay down any specific requirement of nationality, the Hague Rules provide that "[the] presiding or sole arbitrator shall not be a national of States whose nationals are parties or of any State that is a party" (Art. 11(1)(d)).[73]

Furthermore, arbitrators shall comply with the Code of Conduct which has been incorporated into the Hague Rules (Art. 11(2)).[74] Arbitrators can be challenged in case of a failure to discharge their duties under the Code (Art. 12).[75] The Code of Conduct, elaborated on the basis of international best practices, offers ethical guidelines,[76] and also lays down a broad duty of disclosure.[77]

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[68] Antoine Duval and Jan Eijsbouts (supra note 31) 7. In many cases, initiating cases might not be financially viable for victims without the support of civil society organizations, third-party funders, or lawyers working pro bono (See: Andi Baaij (supra note 9) 282)

[69] Ronán Feehily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest For Arbitral Justice' (2019) *Penn State Journal of Law & International Affairs* 7(1): 114.

[70] Hague Rules (supra note 6) 30-31.

[71] Ibid, 30.

[72] Ibid.

[73] It is further stipulated in that provision that "[the] nationality of a party shall be understood to include those of its controlling shareholders or interests" (Ibid, 30-31).

[74] Ibid, 31.

[75] Ibid, 32.

[76] Pursuant to the Code of Conduct, the arbitrator shall be, and reasonably appear to be, independent and impartial, avoid impropriety as well as any reasonable perception of impropriety, avoid direct and indirect conflicts of interests, respect the confidentiality of the proceedings, etc. (Ibid, 95).

[77] Before the appointment, a person approached as a candidate "shall disclose any interest, relationship or matter that could reasonably be considered as affecting their independence or impartiality, or that might otherwise give rise to a reasonable perception of impropriety". Also, once the appointment is

3.3. Fairness and effectiveness of the procedure

Fairness is addressed in a number of more detailed procedural provisions of the Hague Rules that follow. Art. 18 instructs the tribunal to exercise its discretion in such a manner as to "provide a fair, efficient, culturally appropriate, and rights-compatible process for resolving the parties' dispute".[78] The commentary explains that the tribunal has "the general procedural power to organize the proceeding in the most fair and efficient way based on the circumstances of the case," which "is limited only by the agreement of the parties and the mandatory law applicable to the arbitration".[79] This finds further expression in the tribunal's obligation to strive to ensure fair and efficient process when setting requirements concerning the length and form of written statements (Art. 27).[80] Furthermore, the tribunal shall organize the taking of evidence and ordering the production of evidence "taking into account relevant best practices (…) in international dispute resolution and the circumstances of the case, including considerations of fairness, efficiency, cultural appropriateness and rights-compatibility" (Art. 32 paras 2 and 4).[81] The same considerations apply to the organization of hearings (Art. 33 para. 2).[82] The question of evidence might be especially sensitive — some critics of arbitration bring up the latitude in evidence-taking as one of the factors generating its unfairness.[83] It should be appreciated that under the Hague Rules the arbitral tribunal is provided with certain tools intended to compensate for the inequality of access to evidence among parties: it can order document production, limit the scope of evidence produced, and sanction non-compliance with orders to produce evidence through a reversal of the burden of proof or adverse inferences (Art. 32 para. 4).[84] In case of all those procedural provisions, it is essential that each party is enabled to effectively present their case, although the imprecision and generality of the guidance that Hague Rules offer regarding those specific issues might be somewhat problematic.

It could have been noticed that in many of those provisions fairness is mentioned next to efficiency — the relationship between those two qualities is interesting. While they might be presented in the opposition to each other (fair procedure might be more lengthy and costly than the unfair one), I agree in that regard with authors who argue that it is not a matter of a choice between the two or any sort of compromise.[85] Rather, arbitration has to be fair to be efficient — if an award can later be set aside on the grounds specified in the New York Convention then it has little to do with efficiency. Such a sanction can indeed occur: Art. V(1)(b)

made, the arbitrator "shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by them of these circumstances". This requires him or her to "make all reasonable efforts to become aware of such interests, relationships and matters" (Ibid, 96). While the duty of disclosure is also laid down in Art. 11 of the UNCITRAL Arbitration Rules, the Hague Rules follow up on it with a detailed catalogue of interests, relationships, and matters that candidates shall disclose at minimum (Ibid, 96-97).

[78] Ibid, 37.

[79] Ibid, 38.

[80] Ibid, 49-50.

[81] Ibid, 60.

[82] Ibid, 63.

[83] Diane Desierto (supra note 35) 948.

[84] Ibid, 60-63.

[85] "Efficiency is often assimilated with only cost and time efficiency, but the other side of the same coin is to gain the efficient proceedings without risking either the correct outcome or the due process" (Fabricio Fortes and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) *Groningen Journal of International Law* 3(1) *International Arbitration and Procedure:* 116).

of the Convention specifies that recognition and enforcement of the award may be refused if it is proven that "[the] party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". Certainly, this basis of the refusal might be invoked in the scenarios of procedural unfairness.[86] The due process standard applicable in the review is the one of the enforcing state, however, it is necessary to take into account "the specificity and international character of arbitration," in particular the flexibility of the procedure.[87] Alternatively, unfairness of the procedure might justify the refusal to recognize and enforce the award based on Art. V of the convention (as "contrary to the public policy").[88]

4. The external stakeholders' demand for fairness

Human rights issues that will be a subject of the arbitral tribunal's considerations, will have a continued existence beyond the relationship between individual parties and generate the third parties' interest in the arbitral procedure. When analyzing fairness from the external stakeholders' point of view, it is crucial to zoom in on the aspects of the arbitral procedure that serve the public interest in BHR disputes: transparency and third party participation.[89] In the following subsections, I intend to explore what is the offer of the Hague Rules in that respect.

4.1. Transparency regime

The demand for transparency is less prominent in ICA than in investor-state arbitration.[90] It should not come as a surprise that in the Hague Rules, even though they are based on the rules designed for ICA, the relevant section in that regard is modeled on the UNCITRAL Transparency Rules for investor-state arbitration.[91] Transparency, however subject to far-reaching limitations that are discussed below, is thus made a default option.[92] Adopting the model developed for investment arbitration in that case seems the right choice: the fact that

[86] See: Sharina Petit and Ewelina Kajkowska, 'Grounds to Refuse Enforcement' *Global Arbitration Review* (8 June 2021) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/grounds-refuse-enforcement> (accessed: 12 October 2023).

[87] Ibid.

[88] Such a view is expressed, for instance, in: Francisco Blavi and Gonzalo Vial, 'The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales' (2016) *Hastings International and Comparative Law* 39(1): 57.

[89] In the Preamble to the Hague Rules, it is indicated that the inherent public interest in such disputes "may require, among other things, a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and States" (Hague Rules (supra note 6) 14).

[90] See: Anthea Roberts, 'Divergence Between Investment and Commercial Arbitration' (2012) Proceedings of the Annual Meeting (American Society of International Law) 106: 298

[91] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (1 April 2014) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> (accessed: 2 October 2023)

[92] Still, it should be noted that in ICA proceedings, confidentiality is wrongly presumed to constitute an inherent attribute — UNCITRAL Arbitration Rules, for that matter, do not contain any explicit provision that would make it so and comparative law reveals different approaches in individual states (See: Marlon Meza-Salas 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' *Kluwer Arbitration Blog* (23 September 2018) <https://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> (accessed: 14 October 2023).

both investment disputes and BHR disputes concern the public interest, results in a similar demand for openness and scrutiny. The advocates of transparency of international investment arbitration underscore that it could allow for, i.a., improving quality of decision-making, in particular achieving greater consistency of awards, furthering good governance and raising the individuals' awareness of their rights and possibilities for their realization.[93] Such objectives shall be treated as valid in the context of BHR disputes as well.

Nevertheless, we can see how challenging it may be to provide for greater transparency in the setting of arbitral procedure, if we consider an existing precedent of the arbitration tailored to a different type of dispute involving public interest: Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.[94] While environmental disputes naturally touch upon the public interest and one would expect it to be reflected in a transparency regime, the Optional Rules do not incorporate any substantial guarantees of transparency: the award is to be confidential (Art. 32(6)), proceedings are to be held *in camera* (Art. 25(4)). Parties can apply to have any information submitted in the proceedings classified as confidential (Art. 15(4)). Moreover, the tribunal may, at the request of a party or on its own initiative, appoint a confidentiality advisor, to report to it "on specific issues designated by the arbitral tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal" (Art. 15(6)). While Katerina Yiannibas invokes the Optional Rules as illustrative of arbitration's adaptability to specific contexts,[95] it is clear that they fall short of truly addressing public interest: "this strict presumption in favour of confidentiality goes against the prevailing trend in environmental law to open decision-making processes to public scrutiny and participation".[96]

The Hague Rules certainly should get credit for providing for more transparency than Optional Rules, nevertheless, they still require relatively fewer guarantees in that respect than the UNCITRAL Transparency Rules. For instance, the catalogue of documents that are to be made available to the public (Art. 40) is limited, which is justified by costs of access and publication as well as reputational costs for the parties.[97] Compared to the UNCITRAL Transparency Rules, the following documents are not made public: the response to the notice of arbitration, any further written statements or written submissions by disputing parties, any written submissions by the non-disputing Party (or Parties) to the treaties and by third persons, and

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[93] Daniel Barstow Magraw Jr. And Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) *ILSA Journal of International & Comparative Law* 15(2): 352.

[94] PCA, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment: Permanent Court of Arbitration (2001) <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> (accessed: 8 October 2023).

[95] Katerina Yiannibas, 'The adaptability of international arbitration: Reforming the arbitration mechanism to
provide effective remedy for business-related human rights abuses' (2018) *Netherlands Quarterly of Human Rights* 36(3): 220.

[96] Tamar Mehsel 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment: Permanent Court of Arbitration (PCA)' (last updated: 2016) in *Max Planck Encyclopedia of International Procedural Law* <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjf2dCN1pGCAxXngf0HHaalBP4QFnoECAkQAQ&url=https%3A%2F%2Fpapers.ssrn.com%2Fsol3%2Fpapers.cfm%3Fabstract_id%3D3426459&usg=AOvVaw0zjjKnt81IUAmScoUHk7QX&opi=89978449> (accessed 15 October 2023) para. 10.

[97] Hague Rules (supra note 6) 72.

transcripts of hearings, where available.[98] The lack of publicity of submissions by third persons should not be assessed favorably: the contributions by human rights experts and advocates as *amicus curiae* might offer particularly valuable contributions, in terms of both a given case, as well as the development of BHR norms and practice in general.[99]

On the other hand, the list of confidential information has been expanded. It includes, absent from the UNCITRAL Transparency Rules, information that should not be disclosed in order to protect the safety, physical and psychological well-being, and privacy of parties, witnesses, and others involved in the proceedings, also a broad category of "any other information deemed confidential under any other grounds of confidentiality that the arbitral tribunal determines to be compelling" (Art. 42).[100] Of course, the protection of victims and witnesses from retaliation is a valid concern and most likely such measures will be required especially from the parties' perspective of fairness,[101] but it only reveals that the expectations of parties and external stakeholders might to a certain extent be in conflict, which is addressed in greater detail in Section 5.

It appears that the Hague Rules establish a transparency model that could be characterized as the UNCITRAL Transparency Rules Minus: in principle, they repeat relevant provisions from the UNCITRAL Transparency Rules but include certain amendments that, the validity of their justification notwithstanding, result in lowering slightly the standard. Evaluating it strictly from the demands of public interest, it seems doubtful whether such a model is sufficient: where human rights are implicated, the external stakeholders would be especially interested in the publicity of arbitration.[102] While not all investor-state disputes might concern the public interest, its implication will be, by definition, a feature of BHR disputes.

4.2. Third party participation regime

The external stakeholders might be interested not only in having access to information regarding arbitral proceedings, but they might also be seeking more active forms of engagement: especially through *amicus curiae (*but possibly also other forms of participation). A number of benefits of *amicus curiae* that have been recognized in the literature on international investment arbitration can easily be extrapolated to the context of BHR arbitration: from promoting procedural openness (which refers us back to the question of transparency) and thus, increasing procedural legitimacy to improving the legal quality of awards and assisting the development of the relevant branch of international law.[103]

In the Hague Rules, submissions by third parties are governed by Art. 28.[104] In principle, a written submission regarding a matter within the scope of the dispute might be allowed or invited by the arbitral tribunal after the consultation with parties. The tribunal exercises considerable discretion in that regard and in its decision it is only obliged to take into consideration two factors: the significance of the third person's interest in the proceedings; and "the extent to which the submission would assist the arbitral tribunal in the determination of a

[98] Ibid 71-72. Compare to Art. 3 of the UNCITRAL Transparency Rules.
[99] More on that in the following subsection.
[100] Hague Rules (supra note 6) 74-76 (Art. 42). Compare to Art. 7 of the UNCITRAL Transparency Rules.
[101] See: Katerina Yiannibas (supra note 95) 226.
[102] Ibid, 225.
[103] Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third- Party Participation' (2011) *Berkeley Journal of International Law* 29(1): 217-219.
[104] Hague Rules (supra note 6) 50-51.

factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the parties" (Art. 28(3)).[105]

Third party submissions are not a norm in ICA but belong rather to the realm of investment arbitration. Art. 28 in the Hague Rules is based on Art. 4 of the UNCITRAL Transparency Rules and includes only a minor modification regarding the recognition of the admissibility of submissions of the State(s) of nationality of the parties, the State(s) on whose territory the conduct that gave rise to the dispute occurred and the State(s) parties to any treaties applicable to the arbitration.[106] Nevertheless, the opportunities for third party participation remain limited. In particular, no forms of participation other than written statements are covered. Such forms could possibly encompass "attendance and participation at oral hearings, access to the disputing parties' documents and even cross-examination of witnesses".[107] In light of the public interest in the BHR disputes, it seems regrettable that the Hague Rules do not make any of those forms of participation available to external stakeholders.

5. Conflicting demands for fairness

The expectations of parties to disputes and external stakeholders with respect to fairness will not always be aligned. While analyzing the increased demand for transparency, one cannot turn a blind eye to the fact that confidentiality, as one of the attributes of arbitration, remains "expected and desired".[108] As was indicated above, this is not only a matter of companies' preference for avoiding adverse publicity.[109] From the perspective of victims and witnesses, limits to confidentiality might be predominantly viewed as a security concern; Yiannibas mentions "an increasing number of cases of intimidations, attacks and reprisals against human rights defenders".[110]

The conflict between opposing demands for transparency and confidentiality has arisen in the cases under the Bangladesh Accord.[111] Whereas the respondents asked the tribunal to issue a broad confidentiality order, pointing to a general expectation of confidentiality among users of ICA,[112] the claimants argued that the tribunal should follow the existing trend towards greater transparency.[113] The tribunal, taking expressly into account demands of fairness and efficiency, and acknowledging the hybrid nature of the dispute, sought a compromise.[114] It agreed to disclose certain basic information about the existence and progress of the arbitration

[105] Ibid, 51.
[106] Ibid, 51-52.
[107] Eugenia Levine (supra note 103) 207-208.
[108] Nina Japaridze, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) Hofstra Law Review 36(4): 1423.
[109] For instance, global fashion brands who were respondents in the cases under the Bangladesh Accord administered by the PCA expressed "the concern that mere disclosure of the existence of the arbitrations would draw media attention and risk irreparable reputational damage that would outstrip any actual damages that could be awarded" (PCA (supra note 54) para. 76).
[110] Katerina Yiannibas (supra note 95) 226.
[111] PCA (supra note 54).
[112] Ibid, paras 72 and 77.
[113] Ibid, paras 81-88, especially para. 86.
[114] Ibid, para. 92. The Tribunal responded to the arguments made by respondents and claimants that "no such practice or trend could substitute for the Tribunal's careful consideration of the correct balance to be struck in light of the parties, their dispute, and the underlying arbitration agreement".

proceedings, including redacted awards,[115] but decided against making the identity of respondents public.[116]

Two cases under the Bangladesh Accord ended with settlements the content of which has not been disclosed.[117] This illustrates another palpable tension between the expectations of parties and external stakeholders. Neither the Hague Rules nor the UNCITRAL Transparency Rules address the publication of settlements, which might harm the public interest. The parties to a particular dispute culminating in a settlement might be satisfied with a given outcome — it has been revealed that in the case of arbitration under the Bangladesh Accord the respondents agreed to pay a compensation amounting to US$2.3 million.[118] Nevertheless, from the perspective of external stakeholders, such a solution might appear a wasted opportunity. The other signatories to the Accord did not get to find out how the tribunal would interpret the provisions of the agreement, and based on that, how they could improve their compliance. Yet on the other hand, imposing a requirement to make a settlement public, as rightly noted by Yiannibas, "would likely affect the negotiation of its content,"[119] and ultimately might even preclude its conclusion.

Similarly, third party submissions might not always be coveted by parties to disputes. In the Hague Rules, it is stipulated, just like in the UNCITRAL Transparency Rules, that third party submissions "shall not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any party" (Art. 28(6)).[120] We encounter, therefore, an express acknowledgment of the risk of third party submissions generating unfair prejudice. In the context of investor-state arbitration, it has been argued that "*amicus* briefs could lead to procedural unfairness between the parties since most briefs are filed in favor of the respondent states,"[121] however, as indicated by

[115] Each party shall identify within 21 days after receipt of any award, decision, or order all redactions that the Party proposes to be made; the other party is notified about the redaction and can oppose it within 14 days by submitting a reasoned application to the Tribunal. Next, the party that sought the redaction has 14 days to respond. Finally, the Tribunal makes an order in relation to the proposed redaction (PCA PCA, Procedural Order No. 4, Protocol on Confidentiality and Transparency, PCA Cases No. 2016-36 and No. 2016-37, 9 October 2017 Annex I).

[116] Besides the identity of respondents, the following were confidential: correspondence between parties, the Tribunal, third parties, all documents filed in the arbitrations, all awards, decisions, and orders and directions of the Tribunal that have not been subject to reduction, all minutes, records, transcripts of hearings, meetings, and conferences (Ibid).

[117] See: PCA Case No. 2016-36, Termination Order, 17 July 2018 and PCA Case No. 2016-37, Termination Order, 17 July 2018.

[118] Uni Global Union, 'Bangladesh Accord Arbitration Cases — Resulting in Millions-of-Dollars in Settlements — Officially Closed' (2018) <https://uniglobalunion.org/news/bangladesh-accord-arbitration-cases-resulting-in-millions-of-dollars-in-settlements-officially-closed/> (accessed: 10 October 2023)

[119] Katerine Yiannibas (supra note 95) 226.

[120] The tribunal is entitled to "condition the participation of the third person or entity to the deposit of a reasonable sum to cover the costs of such participation". It is further instructed to "ensure that the parties are given a reasonable opportunity to present their observations on any submission by the third person or entity" (Art. 28(7)).

[121] Lukas Brunner, 'Can Amicus Curiae Lead Investor-State Arbitration out of its Legitimacy Crisis and Towards More Efficient Dispute Resolution?' *Kluwer Arbitration Blog* (15 July 2022) <https://arbitrationblog.kluwerarbitration.com/2022/07/15/can-amicus-curiae-lead-investor-state-arbitration-out-of-its-legitimacy-crisis-and-towards-more-efficient-dispute-resolution/> (accessed: 10 October 2023).

Christian Schliemann, that is not always the case.[122] Still, the parties' perception of fairness of the process might be affected by the tribunal's decision to allow third party submissions. In the case of *Methanex Corporation v. The United States of America*, the claimant opposed the admission of submissions by the International Institute for Sustainable Development and Earth Justice, arguing that "unlike judicial proceedings the admission of non-parties to a privately contracted arbitral agreement is a substantive interference with the rights of the parties".[123] This captures the sentiment that might be experienced by a party when the tribunal allows an *amicus curiae* submission that favors their opponent: the feeling of being treated unequally.

Such a risk could be compensated, however, through the implementation of proper procedural safeguards.[124] Schliemann points to the decision in *United Parcel Service of America Inc. v. Canada* as an example of how a tribunal could respond to those concerns: in that case, the tribunal placed limits on the submissions in terms of, i.a., their length, it prohibited third parties from calling witnesses, and guaranteed the parties an opportunity to respond to such submissions.[125] The tribunal that allows *amicus curiae* in BHR arbitration would similarly have to stipulate certain procedural precautions that would restore the parties' confidence that their right to effectively present their case is not adversely affected by the third party participation.

Moreover, the Hague Rules offer another important safeguard in that respect that merits mentioning: in case a third party that makes submissions in accordance with Art. 28 "benefits from any form of funding or financial the participation in the proceedings," they are obliged to disclose the source of such funding or financial assistance (Art. 55).[126] The commentary to that provision emphasizes that "[the] legitimacy of arbitration under (…) Rules depends on transparency of the interests underlying the proceedings".[127] Such a disclosure duty would predominantly serve the parties' perception of fairness. Especially, the party feeling "disfavored" by the *amicus* submission might be reassured about the impartiality of proceedings if they can have full access to information regarding the circumstances in which the third party has joined the proceedings.[128]

In all instances, designing an appropriate procedural framework and conducting proceedings in a manner that satisfies the parties' and external stakeholders' demands for fairness, will involve a balancing exercise. Most likely reconciling the discrepancies between the expectations of all interested actors will not be achievable *in abstracto.* In general, arbitral tribunals would have to weigh competing concerns and optimal solutions should be determined on a case-by-case basis. Still, not always such optimal solutions will be available: accommodating the parties' needs regarding fairness might lead to less desirable procedural arrangements from the external stakeholders' point of view, and vice versa.

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[122] Christian Schliemann, 'Requirements for *Amicus Curiae* Participation in International Investment Arbitration, A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15', (2013) *The Law and Practice of International Courts and Tribunals* 12: 380.

[123] Investor's First Submission on Amicus Application, *Methanex Corporation v. United States of America*, UNCITRAL, 27 October 2000, para. 3.

[124] Christian Schliemann (supra note 122) 381.

[125] Ibid, see: ICSID, *United Parcel Service of America Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae, 17 October 2001, para. 69.

[126] Hague Rules (supra note 6) 90.

[127] Ibid.

[128] Although, full access is not warranted — if the funded party so requests, "the arbitral tribunal may determine that such information shall not be disclosed to the other parties or made available to the public" (Art. 55(2)).

6. Conclusion

Summing up, an effective, meaning among others *legitimate*, BHR arbitration procedural framework would have to incorporate guarantees of fairness responding both to the needs of parties to particular disputes and a broader circle of external stakeholders. This is a consequence of the hybrid nature of BHR disputes which concern both the private and the public interest. The Hague Rules as the major initiative in the field seem relatively better attuned to responding to the needs of parties, considering the inclusion of explicit provisions on, i.a., the equality of arms and the impartiality of arbitrators. However, they do not do so in an entirely satisfying manner — the guidance offered to tribunals on how to exercise discretion with respect to the issues that are most sensitive for parties (e.g., the distribution of costs or evidence-taking) remains limited. The weaknesses of the Hague Rules come into an even sharper focus when we take into account their failure to recognize in a meaningful way the public interest. The transparency and third party participation regime remain insufficient in light of the non-private nature of human rights that are being arbitrated. Making procedural arrangements that would satisfy the expectations of both parties and external stakeholders requires a delicate balancing exercise, where compromises must be sought. To some extent, one kind of fairness would only be achievable to the detriment of the other — as manifested in the challenge of devising a transparency regime that would legitimize BHR arbitration in the eyes of the broader public, while retaining the guarantees of confidentiality that would appeal to corporations and make victims feel safe.

At the same time, another question remains to what extent can we implement those solutions and not throw the proverbial baby out with bathwater? Nina Japaridze makes a valid argument that "the quest for fairness and justice should not come at the expense of compromising the advantages and integral characteristics of international arbitration"[129] — and while this opinion is expressed in the context of ICA, a similar risk arises in the BHR as well. The push for further due process guarantees combined with calls for more transparency, might imply transforming arbitration into something that resembles rather international adjudication and, thus, deprive it of the features that have been attractive to parties in the first place. This might bring us back to square one — after all, BHR arbitration has been designed to supplement judicial mechanisms, the access to which remains limited. The marriage between the private nature of arbitration and the public characteristics of human rights may not be the perfect solution, nonetheless, taking into account the victims' limited access to remedy, as Desierto argues persuasively, "we cannot afford to close off the arbitral option".[130]

[129] Nina Japaridze (supra note 108) 1416.

[130] Diane Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' *EJIL Talk!* (12 July 2019) <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/>, (accessed: 10 October 2023)