

23 January 2020

Re: Consultation response to *OHCHR Accountability and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse (Discussion Paper, 19 November 2019)*

Dear Sir / Madam,

1. The International Bar Association (“IBA”), founded in 1947, is the world’s leading organisation of international legal practitioners, bar associations, law firms and law societies. The Association now has over 80,000 members, over 200 of the top legal firms in the world and corporate members from a diverse range of international companies. Bar membership presently spans over 170 countries with 195 individual associations. The work undertaken covers all areas of substantive law in addition to broader legal issues and ethics.
2. We are submitting our comments on behalf of the IBA's Legal Policy and Research Unit (“LPRU”), the Business Human Rights Committee, and the Arbitration Committee. These, the LPRU and the two committees, formed a Working Group to respond to this consultation [and those Working Group members are named at the end of this document].
3. The LPRU undertakes research projects and develops initiatives that are relevant to the rule of law, the legal profession and the broader global community. The LPRU engages with legal professionals, law firms, law societies and bar associations, governments, non-governmental organisations and international institutions to ensure innovative, collaborative and effective outcomes.
4. The Business Human Rights Committee aims to create awareness amongst lawyers in all fields of practice, of business and human rights, corporate sustainability, and more broadly ESG (environmental, social and governance, e.g., conflict minerals and modern slavery transparency) principles. It works to promote the development of legal skills required to advise clients and to support law firm management in the emerging area of law relating to business and human rights, and to facilitate education and dialogue among lawyers who practice business and human rights.
5. The Arbitration Committee focuses on laws, practice and procedures relating to the arbitration of transnational disputes. Through its conferences, publications and projects, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness.
6. The comments made in this submission are the personal opinions of the Working Group members and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA's Business Human Rights Committee, Arbitration Committee and LPRU of which they are a member.

I. The IBA and Business and Human Rights

7. The UN Guiding Principles on Business and Human Rights (“UNGPs”)¹, unanimously endorsed by the UN Human Rights Council in 2011, represent a landmark contribution to the global debate on business and human rights.
8. Since 2013, the IBA has supported lawyers and bar associations in their knowledge and understanding of the UNGPs and their impact for lawyers’ and business associations’ activity as business entities, as well as providers of legal services to other businesses. In particular, the LPRU has developed guidance documents and training tools to bridge the knowledge gap and build the capacity of lawyers to advise businesses on business and human rights related issues, including through building understanding of the UNGPs ².
9. On 6 July 2018, the Human Rights Council adopted resolution 38/13³ by consensus, welcoming the work of OHCHR on improving accountability and access to remedy for victims of business-related human rights abuse, and requesting OHCHR to continue its work in this area. The aim of the Accountability and Remedy Project is to gather and share “good practice” information which can help State and non-State actors to identify ways to strengthen implementation of the 'Access to Remedy Pillar' (or the “Third Pillar”) of the UNGPs.
10. The Accountability and Remedy Project has, so far, considered State-based judicial mechanisms and State-based non-judicial grievance mechanisms. The third phase of the Accountability and Remedy Project (“ARP III”) focuses on non-State-based grievance mechanisms and, in particular, on the following: company-based grievance mechanisms (“CGMs”)⁴; mechanisms developed by industry, multi-stakeholder or other collaborative initiatives and mechanisms associated with development finance institutions.⁵
11. The IBA has actively engaged with OHCHR in this consultation process and, among other things, through the organization of two different workshops in London in May 2019 and in Seoul, during the IBA Annual Conference in September 2019.⁶
12. Turning to the OHCHR Discussion Paper of 19 November 2019 (“Discussion Paper”)⁷, the Working Group’s suggestions and thoughts are set out below. We have addressed the issues raised in the Discussion Paper thematically, and do not seek to

¹ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy Framework”*, 2011.

² These include the IBA Practical Guide on Business and Human Rights for Business Lawyers, the Reference Annex (28 May 2016) and the IBA Business and Human Rights Guidance for Bar Associations (8 October 2015). The IBA’s publications and activities on business and human rights are available [here](#).

³ Human Rights Council, *Business and Human Rights: Improving accountability and access to remedy*, 6 July 2018.

⁴ Notice that “*These mechanisms can be at the operational level where workers and communities interface with a company, as well as at the corporate level, more removed from those impacted by business activities*”. See OHCHR Accountability and Remedy Project, *Improving accountability and access to remedy in cases of business involvement in human rights abuses, Phase III: Enhancing the effectiveness of non-State-based grievance mechanisms - Scope and Programme of Work*, 1 November 2018.

⁵ Id., p. 13. Even though UNGP 28 on non-State-based grievance mechanisms, additionally, refers to regional or international human rights bodies, this category has not been subject to ARP III.

⁶ The events were organized in London in May 2019 and in Seoul in September 2019. See https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx.

⁷ Accountability and Remedy Project, *Part III: Non-State-based grievance mechanisms – Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse – Discussion Paper*, 19 November 2019.

address each and every question listed under the four headings identified by the Discussion Paper.

II. ARP III Discussion Paper November 2019: Comments

A.1 Non-State-based grievance mechanisms are generally regarded by stakeholders as a welcome addition to the options available to remedy-seekers

13. The IBA Working Group agrees with this statement and, consistently with the UNGPs⁸, considers non-State-based grievance mechanisms particularly beneficial to addressing business-related human rights harms. Compared to alternative mechanisms, these instruments may lead to speedier, more flexible and less costly remedies for victims of business-related human rights harms. In particular, CGMs operating at the local level (e.g. operational-level grievance mechanisms or “OGMs”), can facilitate the engagement of workers and local communities. However, globally designed instruments entail inherent challenges (e.g. they are removed from rights-holders and more limited in the types of grievances addressed) and appear less effective in providing culturally appropriate solutions.
14. In addition, CGMs contribute to the due diligence exercise carried out by business entities and prevent human rights harms from occurring, thereby having a dual function.⁹ This is consistent with UNGP 31 (g), according to which non-judicial mechanisms (both State-based and non-State-based) should be “[a] source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms”.
15. Notwithstanding the important role played by corporate counsel and law firms in the identification and management of human rights risks for their business clients¹⁰, their involvement in the design and implementation of CGMs is often limited¹¹.
16. The IBA Working Group considers that greater participation of the legal profession in the design and implementation of CGMs could improve their effectiveness, both in their role as remedial mechanisms and in their utility as a component of the overall risk management that companies can engage in, through the implementation of human rights due diligence.
17. In addition, the involvement of the legal profession is pivotal to promote independent, legitimate¹² and rights-compatible¹³ non-State-based grievance mechanisms (UNGP 31). These conditions are necessary to ensure stakeholders’ trust and the compliance of non-State-based grievance mechanisms with internationally recognized human rights (additional benefits associated with the involvement of the legal profession in the design and implementation of non-State-based grievance mechanisms will be discussed in the sections below).

⁸ UNGPs 28, 29 and 30 and their Commentaries.

⁹ UNGP 29 Commentary.

¹⁰ International Bar Association, IBA Practical Guide on Business and Human Rights for Business Lawyers, Adopted by a Resolution of the IBA Council, 28 May 2016. Available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUId=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

¹¹ As emerged during the workshop on ARP III, convened by the IBA in London in May 2019.

¹² UNGP 31 (a).

¹³ UNGP 31 (f).

C.2 Private grievance mechanisms in a public law setting: Understanding and appreciating the value and role of wider regulatory regimes

18. A more prevalent engagement of the legal profession in the design and implementation of non-State-based grievance mechanisms (and, in particular, of CGMs) would not only ensure their effectiveness (UNGP 31) but would, additionally, facilitate the appreciation of wider regulatory regimes. This would support States' efforts to achieve greater policy coherence, both nationally and internationally and would benefit rights-holders, as well as the private sector.¹⁴ An unpredictable regulatory framework could, in fact, “*undermine the effectiveness of a stated expectation that business enterprises should respect human rights*”.¹⁵
19. However, as highlighted in the Discussion Paper, the intersection between private and public remedial processes is yet to be understood and only a limited number of respondents consider “domestic legal regimes”, when establishing these mechanisms. This interaction would not only be desirable, but necessary in cases in which crimes are alleged¹⁶. For instance, the most severe forms of violations of labour standards are often associated with criminal activities, such as human trafficking and money laundering¹⁷.
20. In this context, cooperation between all relevant agencies (from law enforcement to financial institutions), both within and between jurisdictions, is a necessary element to tackle these phenomena.¹⁸ The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime¹⁹ and the Liechtenstein Initiative for a Financial Sector Commission on Modern Slavery and Human Trafficking²⁰ represent important examples of multi-stakeholder initiatives in which private parties cooperate with law enforcement agencies and use the existing legal framework to prevent, reduce risk and remediate business-related human rights harms.²¹
21. Finally, a greater appreciation of the wider regulatory and policy context is particularly necessary to address human rights violations whose pull factors are systemic.²² Non-State-based grievance mechanisms can provide effective remedies, especially in the longer-run, but only if they take into account these factors. For

¹⁴ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (A/HRC/17/31, annex).

¹⁵ Working Group on the issue of human rights and transnational corporations and other business enterprises, note by the Secretary General on *Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, A_74_198_E (004).

¹⁶ UNGP 22 Commentary.

¹⁷ Financial Action Task Force (FATF) Report, *Financial Flows from Human Trafficking*, July 2018. Available at: <https://www.fatf-gafi.org/media/fatf/content/images/Human-Trafficking-2018.pdf>.

¹⁸ Financial Action Task Force (FATF) Report, *Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants*, July 2011. Available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Trafficking%20in%20Human%20Beings%20and%20Smuggling%20of%20Migrants.pdf>.

¹⁹ Bali Process, *Policy Guide on Following the Money in Trafficking in Persons Cases*, 2018.

²⁰ www.financialsectorcommission.org.

²¹ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Urmila Bhoola. *Thematic report on current and emerging forms of slavery*, A/HRC/42/44, 25 July 2019.

²² ILO, OECD, IOM and UNICEF, *Ending child labour, forced labour and human trafficking in global supply chains*, 12 November 2019. Available at: <http://www.oecd.org/fr/corruption/ending-child-labour-forced-labour-and-human-trafficking-in-global-supply-chains.htm>.

instance, when looking at migrant workers, it is important to consider recruitment fees²³, labour standards in the importing country²⁴ and migration issues²⁵. Similarly, when removing children from child labour, it is important to enter into dialogue with their primary caregivers and to work, with the competent authorities, on the transition from work to school.²⁶

A.4 Non-State-based grievance mechanisms tend to be limited in the types of remedies they can provide

22. Non-state-based grievance mechanisms should be used to “prevent harms from compounding and grievances from escalating” (UNGP 29) and may not be appropriate to handle all types of remedies (e.g. criminal remedies). This limited remedial action is consistent with the “Protect, Respect and Remedy” framework, according to which corporate duties and State duties “form a complementary whole in that each supports the others in achieving sustainable progress”.²⁷
23. According to UNGP 29, non-State-based grievance mechanisms (and, in particular, CGMs) should not preclude “access to judicial and other non-judicial grievance mechanisms”. This principle is consistent with international human rights standards²⁸ and is at the core the rule of law. The engagement of the legal profession in the design and implementation of these mechanisms would lead to a more adequate interaction among the different remedial solutions identified under Pillar III and would lead to a more legitimate and coherent regulatory landscape (see C.2 above on the regulatory coherence).
24. In order not to compromise this principle, we agree that the use of waivers of legal rights should not be sought as a condition to access non-State-based grievance mechanisms (see Discussion Paper, A.2) and should never be used to preclude criminal proceedings²⁹. However, where legal waivers are necessary to achieve legal certainty, it is essential to address the power imbalance between rights-holders and transnational corporations. The legal profession, could play a fundamental role in reducing this inequality of legal arms³⁰ and achieving legitimate and rights-compatible solutions. The IBA supports this function through training activities on business and human rights for lawyers in different regions with the aim of promoting local legal expertise.³¹ These initiatives have targeted corporate counsel and

²³ International Organization for Migration, *Remediation Guidelines for Victims of Exploitation in Extended Mineral Supply Chains*, 2018.

²⁴ See, for instance, the recently announced landmark labour reform of the kafala system in Qatar: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_724052/lang--en/index.htm.

²⁵ See, for instance, the Colombo process on “the management of overseas employment and contractual labour for countries of origins in Asia”: <https://www.colomboprocess.org/about-the-colombo-process>.

²⁶ ILO – IOE, *Child Labour Guidance Tool for Business: How to do business with respect for children’s rights to be free from child labour*, 2015. Available at: https://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_27555/lang--en/index.htm.

²⁷ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008.

²⁸ Universal Declaration of Human Rights, art. 8.

²⁹ Consistently with the opinion issued by OHCHR on the Porgera remediation framework, pp. 7-9, 2013.

³⁰ *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the sixth session of the Forum on Business and Human Rights*, A/HRC/38/49.

³¹ IBA, *Training Lawyers on Business and Human Rights*. Available at: <https://www.ibanet.org/LPRU/Business-and-Human-Rights-Training-Tools.aspx>.

commercial lawyers³², as well as human rights defenders (see our comments under C.5 below) and aim to improve the accessibility and performance of remedies for business-related human rights harms.

25. Finally, lawyers can play an important role in bridging the gap between stakeholders' expectations and what non-State-based grievance mechanisms can provide in practice. In particular, their involvement in the definition and drafting of policy commitments; in the human rights due diligence process and in the design and implementation of CGMs could ensure internal policy coherence, as well as a greater coordination with the general national and international legal and policy framework (see, on the latter, our comments to C.2 above).

B.4 Increasing use of binding approaches

26. Broadly we agree with the comments made in Section B.4 so far as the use of arbitration and other binding instruments (e.g. multi-stakeholder initiatives; legally enforceable agreements) to resolve business and human rights disputes is concerned.
27. International arbitration is a consent-based mechanism that was initially developed to facilitate the determination of disputes between commercial parties in private, by individuals appointed by the parties vested with the power to make decisions analogous to those of a court judgment³³.
28. The independent report prepared for OHCHR in advance of the first limb of the Accountability and Remedy Report summarised the legal, procedural, practical and financial issues that can arise when seeking a remedy through national courts³⁴. While in principle, key barriers to accessing a judicial remedy can be avoided through the use of international arbitration, it is important to recognise that arbitration will not be the most suitable mechanism for the resolution of some business and human rights disputes. For example, it cannot replicate OGMs and there will be issues, such as criminal law issues, that cannot be addressed via arbitration and must be litigated through national court mechanisms or otherwise. That said, arbitration has the potential to provide a binding dispute resolution process driven and shaped by the needs of the parties, with a flexible procedure and the ability to hand-pick decision-makers appropriate to the issues in the case and sensitive to the issues which arise in business and human rights disputes. In particular, given that arbitration is a binding process, it could be used alone or in conjunction with other grievance mechanisms to ensure accountability for business and human rights.
29. There are broadly **four categories of disputes** where arbitration may be of particular use to address business-related human rights harms.
30. The first category is claims by **victims of human rights violations** (or their representatives) against business.

³² Id.

³³ For one definition of arbitration, see Poudret et al, *Comparative Law of International Arbitration*, 2nd Edition (2007), p.3.

³⁴ J. Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies*, Para. 4.1 et seq. Available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

31. There is precedent for the use of arbitration to resolve claims relating to human rights issues. These primarily involve agreements to arbitrate once a dispute has already arisen – once the issues, and the scope of affected person is a known entity.
32. For example an arbitration scheme has been proposed as a means for resolving media disputes³⁵ involving alleged breaches of the right to privacy and one was in fact set up by News Group Newspapers as a compensation scheme in order to deal with multiple claims arising out of the phone hacking scandal.³⁶
33. There may be drivers that encourage businesses to offer arbitration in advance to rights-holders to resolve human rights harms associated with their activities. For instance, there are an increasing number of cases across the world in which the courts have permitted litigants to bring tortious claims against parent companies for the human rights abuses of their subsidiary company. In 2019 the English Supreme Court confirmed that it was arguable that a parent company may owe a duty of care in negligence to multiple claimants affected by the operations of its subsidiaries, *Vedanta Resources PLC and anor v Lungowe v and ors*³⁷. The matter will now proceed to trial. A case on the same legal basis has also been brought in England against Royal Dutch Shell PLC in respect of its subsidiary's operations in the Niger Delta – a ruling that the court had no jurisdiction to hear the case is currently pending an appeal to the UK Supreme Court. The company recently faced proceedings in the Netherlands on a similar legal basis concerning similar issues related to the same subsidiary's operations in the Niger Delta³⁸.
34. If the claimants in these proceedings are ultimately successful before the courts or businesses were otherwise incentivised (for example as a result of reputational pressure), corporates may be inclined to use arbitration as a grievance mechanism in order to give access to a remedy for rights-holders of business-related human rights harms (in the same way as the News of the World did in relation to the hacking claims – see comments above).
35. The second category is the use of arbitration to address **disputes between commercial parties**. Such claims often arise out of commercial contracts (such as supply contracts) that incorporate obligations to comply with human rights standards. It is a growing trend driven by the global hardening of elements of the respect for human rights - as articulated in the UNGPs - into binding obligations on businesses to conduct human rights due diligence, not only within their direct operations, but also throughout their supply chains or other third party business relationships.
36. The third category is human rights-related claims in the context of **industry/multi-stakeholder initiatives**, such as the Dutch Agreement on Sustainable Garment and Textile³⁹ (“Dutch Agreement”) and the Bangladesh Accord on Fire and Building Safety in Bangladesh⁴⁰ (“Bangladesh Accord”). These are legally binding agreements, involving companies, trade unions and governments (in the case of the

35 <https://www.theguardian.com/law/2012/dec/19/leveson-arbitration-media-claims>.

36 <https://www.lexology.com/library/detail.aspx?g=610de238-60fb-4199-ad19-fe93de252e83>.

37 *Vedanta Resources PLC and anor v Lungowe v and ors* [2019] UKSC 20.

38 *Akpan v. Royal Dutch Shell, Rechtbank Den Haag* [District Court of The Hague], LJN BY9854, C/09/337050 HA ZA 09-1580 (30 January 2013).

39 https://www.invoconvenanten.nl/en/garments-textile?sc_lang=en.

40 <https://bangladeshaccord.org/>.

Dutch Agreement) in which signatory companies commit themselves to identifying and addressing human rights risks in their supply chain. In this context, arbitration can be used to address business-to-business disputes, as well as business-to-rights-holders disputes (or their representatives, like trade unions).

37. The Bangladesh Accord was agreed in the aftermath of the Rana Plaza disaster, which saw thousands of people killed and injured as a result of the collapse of a factory building in Dhaka. Its purpose was to improve and ensure a safe working environment for Bangladesh garment industry workers, by committing the signatory companies to require suppliers to accept safety inspections and implement remediation measures in their factories. This ad hoc agreement was signed in 2013 between a number of global brands/retailers and two global trade unions (IndustriALL Global Union and UNI Global Union) and provided for arbitration. Since its establishment, at least two arbitrations have been conducted. In particular, last year two global workers' unions petitioned the Steering Committee, alleging failure by two signatory fashion brands to comply with the Accord.
38. The fourth category is represented by the use of arbitration to **address disputes emerging in mega sporting events**. In 2017, international sports bodies like the International Olympic Committee (IOC) and FIFA started to incorporate human rights clauses into their statutes and future events' regulations.⁴¹ For instance, the new host city contracts for the 2024 Summer Olympics and the 2026 Winter Olympics make explicit reference to human rights standards and the non-performance of any contracting obligation (including human rights) could trigger the general jurisdiction of the Court of Arbitration for Sports (see principle 13 and 51.2 of the host city contracts). The Court of Arbitration for Sports was initially established to address private sports disputes and its arbitrators may lack human rights expertise. In addition, specific challenges regarding the accessibility (both financially and culturally), the lack of transparency and the length of the arbitration process need to be addressed, in order to improve access to remedies for rights-holders (see below).
39. Even if arbitration is an option for business and human rights disputes, there are certain issues which should be taken into account when considering the suitability of arbitration procedures.
40. Although arbitration was originally developed as a procedure for the confidential resolution of commercial disputes, in recent years it has evolved primarily in response to concerns about the use of arbitration to resolve investment treaty claims, which frequently concern non-commercial issues and matters of public interest and, in some instances, specifically human rights.
41. For example, the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration (the "UNCITRAL Rules on Transparency") adapted traditional arbitration procedures to provide for third party interventions, public hearings and publication of materials submitted in the arbitration as well as the award.⁴² Although it should be

⁴¹ Daniela Heerdt, *The Court of Arbitration for Sport: Where Do Human Rights Stand?*, Commentary May 10 2019. Available at: <https://www.ihrb.org/focus-areas/mega-sporting-events/the-court-of-arbitration-for-sport-where-do-human-rights-stand>.

⁴² *UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration*. Available at: <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency>.

noted that complete transparency is not always desirable in the context of business and human rights disputes. There will be occasions where confidentiality is required in order to protect rights-holders and other actors (e.g. witnesses) involved in the disputes.

42. Notwithstanding developments such as these, other issues remain that could make arbitration unsuitable for the resolution of human rights related disputes, including: (i) the need for consent to the arbitration process; (ii) potential inequality of arms; and (iii) certain limitations with respect to the enforceability of arbitral awards.

43. On 12 December 2019 The Hague Institute for Global Justice published a set of international arbitration rules ([The Hague International Business and Human Rights Arbitration Rules](#) or “[The Hague Arbitration Rules](#)”) for use in business and human rights disputes. The Hague Arbitration Rules are based predominantly on the UNCITRAL Arbitration Rules, including the UNCITRAL Rules on Transparency as adapted so that they are appropriate for disputes relating to human rights. The Hague Arbitration Rules go some way to addressing some of the concerns of using arbitration for human rights related disputes⁴³. Crucially, they also seek to address some of the issues identified above which hitherto remained unresolved:

- **Consent to arbitration:** arbitration is a consensual process and is therefore only binding where parties have agreed to their disputes being resolved in arbitration. While it is feasible to include binding arbitration agreements in contracts highly relevant to business and human rights, such as related supply chain agreements, it remains difficult to provide an enforceable arbitration agreement where there is no contractual relationship prior to the dispute arising. In those circumstances, arbitration will only be available after the dispute has arisen if the parties all agree to it. This is possible where all the parties can be easily identified. It is a particular challenge where there is no prior contractual relationship and the rights-holders are classes of individuals and/or are difficult to identify. One of the ways in which the Hague Arbitration Rules seek to address this is through Article 19 and proposed model arbitration clauses which extend the right to apply to join the arbitration to “*a third party beneficiary of the underlying legal instrument that includes the arbitration agreement*”. A joinder provision of this kind is novel and legally untested in many jurisdictions⁴⁴. It remains to be seen how tribunals will apply this provision in practice; whether a provision that allows a non-party non-signatory to join an arbitral reference is binding will likely depend on the law applicable to the arbitration agreement and the terms of the underlying legal

⁴³ These include embedding the overarching principle that arbitrations under the rules be conducted in a fair, efficient, culturally appropriate and rights-compatible manner (Article 18(1), witness protection provisions, encouraging the chairperson to have expertise in business and human rights law and practice (Article 11(1)(c), empowering the tribunal to order interim measures which prevent the infringement of human rights (Article 30(1), providing for emergency arbitrators (Article 31), providing for witness protection (Article 33(3), article 38(2)(c), Article 42(2)(f)), indicating that business and human rights standards or instruments should be taken into account (Article 46(4)) and requiring that tribunal-ordered settlements to be human rights compatible (Article 47(1)).

⁴⁴ The English court has recently held that a third party to a Partnership Deed was able to avail itself of the arbitration agreement in that deed (*Fortress Value Recovery v Blue Skye* [2013] EWCA Civ 367), but this was the result of a particular statutory provision which provided for (S 8 of the Contracts (Right of Third Parties) Act, 1999). The Hague Arbitration Rules seek to achieve what has been necessary to legislate for in England and Wales, and as the rules can only ever amount to an agreement between the parties who have agreed to adopt them, it is not clear whether this will be sufficient to extend that agreement to a third party. This is likely to depend on the applicable law and the terms of the underlying legal instrument.

instrument. Nevertheless, Article 19 the Hague Arbitration Rules represents an important step to tackle the consent issue. Finally, in this particular context it is relevant to note that for consent to be legitimately expressed, rights-holders should be meaningfully involved in the arbitration process.⁴⁵

- **Equality of arms:** Business and human rights disputes can pose particular problems for access to justice for several reasons. Some of the issues arising are easier to address than others. Ensuring a fair procedure is one of those. For example, the Hague Arbitration Rules are careful to ensure there is a duty on the arbitrators to ensure that the arbitration procedure is developed with this in mind,⁴⁶ and makes provision for suitable procedures to be adopted.⁴⁷ A particular challenge remains in relation to funding. It is important to facilitate access to litigants with limited financial resources as well as limited understanding of the legal process or language used for the proceedings. However, as arbitration is a private dispute resolution mechanism financed by the parties, it is less clear whether such proceedings will be financially viable without the financial support of a commercial party and/or third party funding.
- **Enforcement:** One of the key drivers to the success of arbitration as an international dispute resolution procedure is the enforcement regime of the New York Convention on Enforcement of Foreign Arbitral Awards (the “**New York Convention**”) which allows awards to be easily enforced by national courts of States party to the Convention. However, Article 1(3) of the New York Convention gives contracting States the ability when signing, ratifying or acceding to declare that it will only apply to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making the declaration (the so-called “commercial reservation”). The commercial reservation was added only very shortly before the Convention was agreed on the basis that some civil law jurisdictions distinguish between commercial and civil law⁴⁸. Approximately one third of State parties to the New York Convention have made this reservation⁴⁹. This could pose a difficulty for enforcement of awards resolving business and human rights disputes where there is no commercial relationship between the

⁴⁵ For example, particular attention should be paid to the gender dimension of business-related human rights harms. The participation of local facilitators, with experience on the ground would reduce the risks of discrimination and barriers in the provision of effective remedies. See the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Gender dimensions of the Guiding Principles on Business and Human Rights - Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/41/43.

⁴⁶ For example, Article 18 places a general obligation on the tribunal when exercising its discretion to determine the arbitration procedure so as to avoid unnecessary delay and expenses and to provide a fair, efficient, culturally appropriate and right-compatible process for resolving the parties’ dispute, including in particular by giving due regard to the urgency of addressing the alleged human rights impacts.

⁴⁷ Such as for the appropriate location for arbitration proceedings to be conducted (see Article 20) or indeed for proceedings to be conducted by video link (see Article 32.2 and Article 33), for translation of documents or evidence weighing costs and access to justice (see Article 21), take into account possible inequality of arms when making orders with respect to evidence as well as any security or confidentiality requirements of rightsholders for business-related human rights harms (see Articles 32 and 33).

⁴⁸ See para 84 of the *Travaux Préparatoires*. Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

⁴⁹ According to publicly available information, 45 of 166 State Parties to the New York Convention have made the commercial reservation. A full list is available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

parties; in particular while many States appear to have taken a broad approach to the interpretation of the commercial reservations, there are examples going the other way⁵⁰. Moreover, the legal basis of business and human rights claims is currently evolving which further complicates matters in confidentially characterising all relevant relationships as commercial.

44. The Hague Arbitration Rules have sought to address commercial reservation issue by including a provision at Article 1(2) stating that the parties “agree that any dispute that is submitted to arbitration under these Rules shall be deemed to have arisen out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention...”. While this provision may assist an enforcing court as to what the intention of the parties to the arbitration process intended the subject matter of their dispute to be, the parties' agreement is not binding on an enforcing court – which is entitled to determine whether or not the award is one which is capable of recognition under the New York Convention. It follows that one meaningful way to facilitate the use of arbitration as a reliable means of providing a binding dispute resolution process for business and human rights disputes would be to either remove or caveat the commercial reservation to the New York Convention. This is a challenge that would benefit from specific further consideration by the ARP III team.

Summary/Recommendations:

45. We do not disagree with the observations made by the ARP III team in the Discussion Paper, Section C.2 (Private grievance mechanisms in a public law setting: Understanding and appreciating the value and role of wider regulatory regimes), and draw your attention to the comments made in respect of Section B. 4 above. Work has already begun in the arbitration community to draw on experiences of dealing with public interest issues in other dispute resolution procedures and adapt the arbitration process with these best practices in mind.
46. As set out above, arbitration may be of particular use to resolve four types of business and human rights disputes:
- (i) claims by victims of human rights violations (or their representatives) against business;
 - (ii) human rights-related claims between commercial parties;
 - (iii) human rights-related claims in multi-stakeholder initiatives (or certification schemes); and
 - (iv) human rights-related claims in the context of mega sporting events. Such disputes could arise out of commercial contracts (such as supply contracts), legally binding agreements in industry/multi-stakeholder initiatives and in mega sporting events (such as the Olympics).
47. In these contexts, arbitration could provide a flexible, transparent and specialized procedure to address business-related human rights harms. In addition, given the fragmented and uneven regulatory framework in this sphere, it could lead to more uniformed and predictable standards for businesses. The Hague Arbitration Rules

⁵⁰ See paras 85 to 86 of the *Travaux Préparatoires*. Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

represent arbitral rules specifically tailored to business and human rights disputes. However, certain issues still remain, which merit further consideration and debate which may be facilitated by the ARP III team such as: (i) the need for consent to the arbitration process; (ii) funding of the arbitration; and (iii) the commercial reservation of around a third of the State parties to the enforcement of arbitral awards.

B.5 Rapid growth in technologies with the potential to improve accessibility, efficiency, and user experiences of grievance mechanisms

48. The implementation of non-State-based grievance mechanisms is often associated with technological devices in order to facilitate the accessibility of these instruments (e.g. anonymous hotlines, encrypted and geo-located videos) to rights-holders. Additionally, emerging technologies can be deployed to analyse trends and deal with complaints in a more targeted and efficient manner. For instance, in the fight against modern slavery and human trafficking, private sector initiatives using big data and algorithmic systems are rapidly proliferating.⁵¹
49. However, the use of these technologies may have some drawbacks. In the first instance, the most vulnerable categories of rights-holders may fail to grapple with these instruments and, in order to avoid the exacerbation of inequalities, their involvement in the choice of the tools employed by private grievance mechanisms is desirable. Training activities and technical support for rights-holders (B.2) could be pivotal to reduce this “digital divide”. In addition, the use of algorithmic systems may be associated with the risk of human rights violations (e.g. biases, privacy concerns). In order to reduce the potential harm associated with these disruptive technologies, safeguarding measures should be adopted and the interaction between developers, suppliers and operators should be taken into account.
50. Finally, more guidance is necessary with reference to non-State-based grievance mechanisms for business-related human rights harms in the context of emerging technologies and algorithmic systems. Artificial intelligence (AI) is transforming societies and will drastically influence current and future generations. Machine learning can be deployed in diverse sectors, such as banking, human resources, risk management, law enforcement, medical diagnostic and autonomous systems such as self-driving cars and autonomous weapons systems. The diversity of its deployment means more businesses risk running into human rights infringements than ever before.
51. The pros and cons of AI are not distributed evenly across society; with the potential for an unprecedented scale of ‘algorithmic affirmative action’ comes the risk of perpetuating and amplifying existing social biases. In particular, these challenges are associated with the opacity, embedded bias in data and complexity of interaction between AI systems. These issues need to be addressed through traditional risk management but also through technical solutions. The Council of Europe has recently drafted a Recommendation on the human rights implications of algorithmic systems⁵²,

⁵¹ See, among other initiatives, Tech Against Trafficking (<https://www.bsr.org/en/collaboration/groups/tech-against-trafficking>) and IBM Traffik Analysis Hub (<https://www.ibm.com/blogs/think/2019/05/turning-to-intelligent-tech-to-fight-human-trafficking/>).

⁵² Addressing the impacts of Algorithms on Human Rights, *Draft Recommendation of the Committee of Ministers to member States on the human rights impacts of algorithmic systems*, Committee of experts on human rights dimensions of automated data processing and different forms of artificial intelligence, MSI-AUT, 2018. Available at: <https://rm.coe.int/draft-recommendation-of-the-committee-of-ministers-to-states-on-the-hu/168095eefc>.

highlighting the obligations of its Member States, as well as the responsibility of the private sector. The IBA has contributed to this consultation and, starting from 2020, will work on a project on human rights due diligence and CGMs for AI.

C. 5 Protection of people from retaliation and intimidation as a result of the actual or potential use of non-State-based grievance mechanisms: The distinct but complementary roles of State-based and non-State-based mechanisms

52. According to the Business and Human Rights Resource Centre, between May 2015 and May 2019, 1,628 attacks have been conducted against human rights defenders in the context of business and human rights.⁵³ 55% of the attacks are, directly or indirectly, linked to companies based in G20 countries and 25% of the victims are working to protect indigenous people. As highlighted by the UN Special Rapporteur on the situation of human rights defenders “[i]mpunity facilitates the recurrence of human rights violations, weakens people’s trust in the rule of law and leaves them defenceless when confronted with injustice”.⁵⁴
53. The issue of human rights defenders was one of the key items on the agenda of the 2019 UN Forum on Business and Human Rights (“UN Forum”). The discussion at the UN Forum led to a joint statement of the UN Working Group on Business and Human Rights, the UN Special Rapporteur on the situation of human rights defenders and a group of civil society organizations highlighting that “the international community must take concrete actions to prevent attacks against human rights and environmental defenders who put their lives at risk to protect those affected by business activities”.⁵⁵
54. Non-State actors, including business enterprises, should “respect, promote and strive for the protection of the human rights and fundamental freedoms of all persons, including human rights defenders”⁵⁶. These objectives have to be taken into account, when conducting their human rights due diligence, as well as designing and implementing CGMs. An important aspect for the effectiveness of these actions is represented by the ability to address risks as soon as they emerge. In particular, threats have been used historically and globally as a means of intimidation against individuals and groups involved in public interest activities. Threats have been used as tools to place pressure on members of the justice system, lawyers and human rights defenders, journalists, and social leaders and activists, among others. They can restrict the capacity to work, live freely, and interact with others, and can result in significant consequences for the life, integrity, and rights of those threatened. Without a doubt, threats are, in and of themselves, a grave violation to the integrity of these persons. Additionally, on multiple occasions threats precede acts of violence such as kidnapping, disappearance, murder, attacks, exile, and displacement.

⁵³ www.business-humanrights.org/search-human-rights-defenders.

⁵⁴ UN Special Rapporteur Special Rapporteur on the situation of human rights defenders, *Impunity for human rights violations committed against human rights defenders*, 15 July 2019, A/74/159. Available at: <https://undocs.org/en/A/74/159>.

⁵⁵ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25416&LangID=E>.

⁵⁶ *Implementing Declaration of the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms through providing a safe and enabling environments for human rights defenders and ensuring their protection*, 12 November 2019, A/C.3/74/L.31/Rev.1.

55. The Center for Justice and International Law launched an initiative in 2016 to draft, approve, and validate an international protocol for the investigation of threats against human rights defenders. This initiative has led to the creation of The Esperanza Protocol, named after the town in which Berta Cáceres, an internationally recognized human rights defender from Honduras, was murdered.
56. The Esperanza Protocol aims to call attention to the need to investigate threats against human rights defenders, promote existing standards for the investigation of violations of national and international rights, further develop standards for investigating threats, adopt reparations and rehabilitation measures through individual or collective methods (where appropriate) and highlight the need to conduct investigations with an intersectional approach.
57. These results will work toward strengthening spaces where it is possible to defend rights, achieving greater access to justice when the rights of defenders, journalists, and activists have been violated and providing an increased level of protection, legal safeguards, and legitimisation by the State of groups in situations of vulnerability, such as indigenous leaders and social activists, women, rural communities, and unions. The IBA, through its Human Rights Institute, has been a supporter of this initiative since its inception and works on the issue of threats and in creating holistic protection mechanisms to support communities and lawyers who represent those communities.⁵⁷

III. Conclusions

The IBA Working Group would like to take this opportunity to highlight the role of the legal profession in promoting effective (UNGP 31) non-State-based grievance mechanisms to address business-related human rights harms. A greater engagement of lawyers in the design and implementation of these measures would strengthen their independence and legitimacy, in compliance with international human rights standards and with the rule of law. The legal profession plays an important role in reducing the power imbalance between rights-holders and the private sector and in supporting local communities in their access to remedies. This activity is particularly beneficial to the most vulnerable categories of rights-holders and further initiatives aimed at narrowing this gap should be supported, both from a financial and policy perspective.

Non-State-based grievance mechanisms for business-related human rights harms are an important dimension of the “Protect, Respect and Remedy” framework. However, these mechanisms do not work in isolation. Lawyers are often better suited at appreciating the wider regulatory context and their engagement in the design and implementation of CGMs could lead to a more coherent ecosystem of (State-based and non-State-based) remedies. Non-State-based grievance mechanisms, and in particular CGMs, serve the dual function of identifying and addressing the risk of business-related human rights harms. Consistently with UNGP 31 (g), it is therefore fundamental that lawyers involved in the due diligence exercise are engaged in the design and implementation of CGMs.

⁵⁷ Additional activities to support human rights defenders and lawyers at risk are undertaken by the IBA Human Rights Institute (https://www.ibanet.org/Human_Rights_Institute/IBAHRI-About.aspx) and by the ABA Justice Defenders Program (https://www.americanbar.org/groups/human_rights/justice_defenders/).

In addition, lawyers play an important role in supporting the activity of human rights defenders and can reduce the risks of violence and retaliation they are increasingly exposed to. They can advise companies to include human rights defenders in their business policies and can identify, reduce and address the risks of violence against these actors, when conducting human rights due diligence, designing and implementing non-State-based grievance mechanisms. Finally, lawyers can provide legal support to human rights defenders and local communities but, when doing so, it is important to recognise that they are often confronted with the same violence faced by the communities they represent.

Since 2013, the IBA has developed guidelines and implemented training programs to assist lawyers and bar associations worldwide in their knowledge and understanding of the UNGPs and their impact on their profession and their clients. In addition, the IBA (through the HRI) has supported human rights activists and lawyers at risk, among other initiatives, with its participation in the Esperanza Protocol. The IBA Working Group welcomes further opportunities to work with OHCHR, the private sector and civil society organizations to enhance grassroots awareness and understanding of the role of the legal profession in the promotion of more effective remedies for business-related human rights harms.

Sincerely yours,



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