January 31, 2019

Drafting Team of the Hague Rules on Business and Human Rights Arbitration

Re: Elements for consideration in draft arbitral rules, model clauses, and other aspects of the arbitral process

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide input to the Drafting Team of the Hague Rules on Business and Human Rights Arbitration.

CCSI, as a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment and the impacts that such investment, and the international legal frameworks governing such investment, can have on inclusive, human rights-compliant sustainable development. Our work also focuses on the impacts that cross-border investment, and the legal regimes that govern it, can have on the ability of project-impacted individuals and groups to access justice.

Our comments below seek to support the Drafting Team by, in Section I, responding to certain issues discussed in the Elements Paper, and, in Section II, flagging some additional issues beyond those raised in the specific questions and elements. Not all of our comments were written to respond explicitly to the specific questions set forth in the Elements Paper; some rather to respond to the ideas generally set forth in the paper. We appreciate your consideration of our comments in this format.

We recognize and support the need for effective redress mechanisms that address human rights abuses linked to businesses and their activities. We share these comments from that perspective, and would welcome opportunities to further discuss them as useful.

Sincerely,

Columbia Center on Sustainable Investment

I. COMMENTS ON THE ELEMENTS PAPER

Element I: Parties to the dispute

The Elements Paper considers three categories of litigants: (i) victims and corporations; (ii) a corporation and one of its business partners; and (iii) victims of human rights violations acting as third-party beneficiaries and corporations.

The first section of the Elements Paper (*The Challenge: Addressing the Gap in the Methods of Resolving Disputes over BHR Issues*) refers to victims as individuals and corporate entities affected by corporate activities.[1] It would be relevant for the Drafting Team to define the scope of victim and establish how corporate entities may be affected by corporate activities, and why specific arbitration rules are needed for company-company disputes.

We are skeptical of the need for such rules to address company-company disputes, assume the likelihood of use by companies might be low, and worry that use by companies could have some unintended consequences. Even amongst the most progressive of companies, there are presumably few that would be incentivized to proactively argue for robust corporate human rights obligations. Companies' use of BHR arbitration to bring claims against other companies might thus lead to arguments seeking to narrow the applicability of human rights law vis-à-vis companies, considered by arbitrators who have been selected solely by companies. Even without a system of precedent, over time such scenarios might do more to undermine business and human rights than promote it.

Regardless, *our comments below focus only on disputes between victims and companies* (presumably the first and third categories in the Elements Paper). Given the significant differences between that scenario and disputes solely between companies—including the nature of the parties and their relationships, and other underlying factual dynamics—we have not considered how our comments would or would not need to be adapted for company-company disputes.

Element II: Law to be applied

Q1. In order to ensure that an award that fails to comply with human rights can be set aside, should only jurisdictions where human rights are considered to be part of the public policy be eligible as seat for a BHR arbitration?

The choice of seat is clearly important. Yet as a practical matter, such an approach might be difficult to apply in practice. Setting aside questions of how to determine non-compliance with human rights (see below for our thoughts on the role for human rights law), there are also questions about which jurisdictions would meet this standard. Who determines which jurisdictions consider human rights to be part of the public policy? Must the country have an explicit law or judicial interpretation that recognizes human rights as part of the public policy? How does one weigh a country's professed adherence to human rights (given that all governments have some legally binding human rights obligations) versus its track record on human rights (given that most if not all governments have some areas in which they could improve their compliance with such obligations)?

[1] Elements Paper, The Challenge: Addressing the Gap in the Methods of Resolving Disputes over BHR Issues, p. 4.

Moreover, the benefits of such an approach may be hard to realize (if the victims prevail, would this prevent the company from arguing for vacatur? If the victims lose and seek to set aside the award on the ground that it is not consistent with the human rights dimensions of public policy, would a domestic court, even in a jurisdiction valuing human rights, really be more likely to set it aside on this ground?). At the same time, an approach requiring the seat to be in such jurisdictions, however defined, could have the effect of requiring many victims to litigate outside of their host states—thereby making it more onerous and expensive for them to do so.

Q2. Should specific human rights instruments be mentioned in the applicable law provision of the BHR Arbitration Rules as, to date, international treaties have yet to deal comprehensively with BHR disputes?

Probably. We take this opportunity to comment further on the role for human rights law, as well as the application of hard and soft law instruments.

Choice of law and role for human rights law:

While the Elements Paper suggests that parties should have full autonomy to select the applicable law or rules of law, we urge the Drafting Team to consider options that would ensure that the rules support, and do not undermine, the norms and principles of international human rights law (IHRL) when the rules are interpreted and applied in the context of particular disputes. Options could include:

- Applicable law provisions ensuring that [relevant] international human rights law [which could be set forth with greater specificity in the rules][2] could form part of the applicable law of the dispute and in any event shall be consulted to inform interpretations of relevant domestic law and contractual rights and obligations;
- Provisions on conflict indicating that, in the event of conflict between applicable law (e.g., the contract and host state law) and IHRL (and its objectives), the latter shall prevail. Moreover, the Drafting Team should consider a requirement that, when drafting the award, the tribunal declare that (and potentially explain how) it duly considered the award's intersection with IHRL and ensured that the award supports, and does not undermine, IHRL. (See below subsection on hard and soft law instruments for further elaboration on what might be meant by "international human rights law".);
- Provisions clarifying that, when the rules provide for the tribunal to exercise discretion, the tribunal, in exercising its discretion, shall take into account the principles, aims, and obligations of IHRL; and
- Provisions directing that in conducting the arbitration, the arbitral tribunal shall have the power and the duty, besides its discretionary authority under certain provisions of the rules, to adapt the requirements of any specific provision of the rules to the particular

[2] Per the UN Guiding Principles on Business and Human Rights, "[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work." UNGP 12. It would be important that any reference to IHRL in the BHR Rules does not undermine this approach, for example, by allowing parties to selectively choose only a subset of those human rights standards that they deem relevant.

> circumstances of the case to ensure that the arbitral proceedings are conducted in accordance with principles of human rights, including regarding access to justice and equality before the law.

We suggest this because a failure to acknowledge the applicability of IHRL could result in processes and outcomes that are far removed from relevant human rights norms and standards. Without requiring application of IHRL, for example, the party with more power (*i.e.*, the company) could simply pick a body of law that is most favorable to it, or that has the fewest human rights-related protections. Or the parties might end up with applicable law that does not rise to the standards of international human rights law—for example, weak domestic rules on free, prior and informed consent (FPIC) that are not aligned with international human rights law, or laws on compulsory acquisition that lack adequate due process protections and are likely to result in human rights violations. A claim adjudicated under such law might then find that no harm occurred giving rise to remedy—even if a harm could clearly be found under international human right law. Think, for example, of an investor-state contract for a project that contemplates mass resettlement of indigenous land users. Such a contract and provision might be perfectly legal under the domestic law where the project will be implemented, but would be extremely likely to result in violations of those indigenous peoples' rights under international human rights law.

Our suggestions are not grounded in any belief that it's generally problematic for parties deciding to arbitrate a dispute to pick the applicable law. Rather, we suggest these options simply because, if business and human rights arbitration is to be created as a specific mechanism to remedy human rights harms, it would be appropriate to ensure that the parties' choice of law does not inherently subvert the mechanism's goals.

In addition, to the extent that the options above could help ensure that IHRL is considered and not undermined, the options would also help ensure that any third-party beneficiaries (under the Element Paper's third scenario for parties) who may later bring a claim under such an arbitration clause—but who may not have had an opportunity to participate in the negotiation of the choice of law provision—are not disenfranchised and are afforded an effective form of remedy.

We recognize that a governing law other than IHRL may provide effective access to remedy in specific cases. For this reason, we would not insist that parties be limited to IHRL when choosing applicable law. Yet we do urge that the BHR Arbitration Rules seek to ensure that flexibility in choice of law can be controlled to prevent outcomes that are not human rights-compatible; at the very least, IHRL should be used to inform interpretations of the applicable law.

There is, of course, the concern that a BHR mechanism that incorrectly or poorly interpreted and applied IHRL would delegitimize the regime as a whole, or would result in fragmentation of legal interpretations that could eventually be used as loopholes or excuses by governments and businesses. But a regime that is not compliant with IHRL frameworks equally risks delegitimization. Concerns about potential inappropriate application of IHRL highlight the importance of getting right several other elements flagged in the paper, such as appointment of arbitrators (e.g., to ensure they are well placed to address IHRL, etc.) and questions of financing (e.g., to avoid incentives that might affect how IHRL is interpreted, etc.).

Finally, it is important that IHRL informs not only decisions regarding law applicable to the substance of the dispute, but also decisions regarding the arbitral proceedings themselves. Thus, the rules, and their instructions to the tribunal to seek guidance from and align the conduct of the

arbitration with the procedural aspects of IHRL, would prevail over any other rule of procedure in the underlying agreement to arbitrate and any non-mandatory rules of the seat.

Considerations in the application of hard and soft law instruments:

While the Elements Paper suggests a default rule that would only include hard law instruments "applicable to the relationship between disputing parties", we urge a more expansive default rule that would include some soft law instruments as well. Limiting the applicable law as suggested in the default rule would in practice almost completely ignore the relevance of IHRL, with the attendant concerns described above, given that ratified human rights instruments to date fail to address the role and responsibilities of business.

At a minimum, we suggest that the following sets of soft law instruments could credibly be included in the default rule: treaty body comments, which serve as authoritative interpretations of hard law instruments, and the UN Guiding Principles on Business and Human Rights (UNGPs), with which these BHR Arbitration Rules profess to align.[3] Indeed, resort to the UNGPs would help immeasurably in understanding how hard law human rights instruments would be applicable and could be interpreted in BHR arbitration.[4]

The question of hard law versus soft law also points at the overarching question of whether companies would have to allow claims arising from all human rights standards and norms, or just some subset to which they have committed. Either case raises questions of desirability, which should be weighed with the impact on access to remedy for beneficiaries. Ideally all human rights would be considered and applied—companies have responsibilities to respect human rights, and human rights are interdependent and thus cannot be selectively respected.[5] Yet if access to BHR arbitration arises, for example, from supply chain contracts, then it is perhaps only the commitments within responsible sourcing policies (such as no forced labor, no child labor, no violation of land rights) or other applicable guidelines or standards that would give rise to claims. Even if the mechanism worked in this more restrictive way, the applicable law, used to understand and interpret the claim, should still include IHRL, including at least some relevant soft law instruments that could help in interpreting applicability of hard law instruments to relations between business and rights-holders.

Q3. Should an annex/commentary to the BHR Arbitration Rules contain some model choice of law clauses?

This might be useful. As a general matter, to the extent the Drafting Team proposes to include an annex of models, we suggest that it could be helpful to potential users of the BHR Arbitration Rules to set forth different models, and clearly articulate the advantages and disadvantages of each. These advantages and disadvantages would usefully focus primarily, although not exclusively, on advantages and disadvantages from the perspective of claimants, since it is more

[3] The *Principles for Responsible Contracts*, which were appended to the UN Guiding Principles on Business and Human Rights when they endorsed by the UN Human Rights Council, could presumably be included as well.

[4] Indeed, "soft law norms, which generally stem from non-binding instruments, (…) can help in interpreting human rights law, including regarding the responsibilities of non-governmental actors, such as companies." Kaitlin Cordes, "Investment and human rights in the agricultural sector" (December 2018) in *Research handbook on human rights and investment*, p. 422.

[5] See also UNGP 12, *supra* FN 2, which states that business responsibility to respect human rights refers at a minimum to those enshrined in the International Bill of Human Rights and the ILO Fundamental Principles and Rights at Work.

likely that it will be difficult for such claimants to have access to legal advice (e.g., a company might want/not want this type of provision because …; a claimant might want/not want this type of provision because …).

Q4. Should the applicable law clause included in the instrument of consent provide that the Tribunal "shall take into account any usage of trade applicable to the transaction" as under UNCITRAL Rules article 35(3)? (An example could be a human rights provision included in a code of conduct of the kind used in the supply chain of a particular sector).

For scenarios in which the claimant is not a company, but rather a victim/survivor of human rights abuses, this language would seem to disadvantage the claimant as it requires specialized commercial knowledge to understand the meaning. We suggest it is not necessary in this context.

Other issues relevant to Element II

As indicated above, it is important to consider not just the law applicable for the issue of breach, but also that for the issue of damages (which could potentially be different), and the applicable procedural law of the seat (which fills gaps in arbitration rules and may override them in some circumstances). The rules can provide some mandatory and non-derogable provisions on relevant issues, and can also provide guidance on the factors tribunals should consider when exercising authorized discretion.

Element III: Election Criteria and Process of Nomination and Appointment of Arbitrators

Q8. Who should be the appointing authority?

We believe that consideration of the appointing authority is critically important.[6] In order to be attentive to the objectives of potential users of a system of BHR Arbitration, and to ensure that the appointing authority confers legitimacy on both the process and outcome, we believe it critical to consider an appointing authority that may have a broader range of experience in the substantive areas that may be adjudicated, such as the Office of the High Commissioner for Human Rights.

Q9. What specific qualifications should be required to serve as BHR arbitrator, and how should these qualifications be ensured?

We agree with the Elements Paper that in all cases arbitrators should possess recognizable expertise in human rights (particularly given our position on IHRL as applicable law set forth above) and relevant corporate law. We note that to the extent there is not a critical mass of arbitrators currently equipped and cloaked with the legitimacy to decide business and human rights disputes, arbitrators should be re-trained to reach such competency. Additionally, experts in areas of international human rights law should receive training and support to arbitrate disputes. It will be critical for the BHR Arbitration mechanism to look beyond current arbitrators to human rights lawyers who are knowledgeable with regards to business and human rights and who could be trained and supported in arbitration practice.

[6] David Gaukrodger, "Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview," OECD Consultation Paper (March 2018) (surveying appointing authority practices and discussing the critical role that they play in shaping the arbitral tribunal).

Q10. To ensure the appropriate expertise, should appointments be restricted to lists of duly qualified arbitrators?

Given the myriad substantive issues that may form the factual basis of a dispute, a roster (as opposed to an entirely party-controlled appointment process or an open-list) may limit the ability of the parties to appoint an individual with specific, highly relevant expertise. Moreover, consideration should be given as to who would create the roster, and who would have influence, formal or informal, over the persons appointed to that roster. Typical BHR Arbitration claimants would likely be "one-shotters," whereas corporations (or industry groups composed of corporations) would be more typical "repeat players"; the latter would thus have a stronger interest in, and more resources available to put towards, seeking to ensure that specific individuals do, or do not, appear on the roster. Any outside influence would have negative implications for the legitimacy of BHR Arbitration and risks creating yet another system where corporate power can be used to benefit corporations at the expense of the ability of others to access justice.

Q11. Who should bear the authority to resolve challenges relating to the qualifications and ethical behavior of arbitrators?

With respect to arbitrator challenges and ability to remove arbitrators, we note that the current system of challenges to arbitrators in the related investor-state context has been subject to great criticism, based not only on concerns about increased costs and time, but also more fundamental concerns about the legitimacy of a small "club" of arbitrators being responsible for removing one of their own from a particular tribunal. Whomever might be designated to resolve challenges to arbitrators, it should not be other arbitrators.

Other Issues Relevant to Element III

There are also other issues that arise in arbitration that must be guarded against. Many of these issues could be particularly problematic for BHR disputes, which are designed to help provide access to justice for those who, due to limited resources, are too often unable to bring claims to secure relief. These include:

- **Arbitrator obligations:** over-commitments by arbitrators can result in significant (and costly) delays in proceedings; the rules could seek to protect against this;
- **High fees:** high fees charged by arbitrators. Relatedly, requiring litigants to arbitrate disputes may mean requiring them to procure legal services in an international market where prices are exceedingly high as compared to average rates charged by domestic providers. The cost of specialized legal counsel and experts is a serious one that must be addressed. We therefore suggest caps on the fees and/or hourly rate arbitrators may be paid. Moreover, it is particularly important in ad hoc arbitration that arbitrators are not able to present proposed fees to the parties at the beginning of the process in a context and with such a dynamic in which parties perceive no real option but to accept proposed fees. Finally, accrued fees, along with other costs of the tribunal, should be at all times available to the parties upon request; and
- **Access to information:** information asymmetries can prevent litigants, especially non-well resourced litigants, or litigants not represented by well-networked and well-resourced counsel, from accessing information that is relevant and necessary for making informed decisions on arbitrator appointments and challenges.

As a general matter, we note that delays (resulting in delayed justice, increased costs, and increased damages (in the form of interest)) in different phases of the process can be particularly problematic for victims seeking to access justice, especially those who, through arbitration as opposed to domestic litigation, might face increased costs of participation (e.g., in terms of travel, the need for expert specialized legal advice, etc.). Thus, the rules will need to ensure the independence, impartiality, quality, and legitimacy of arbitrators and the availability of effective challenge mechanisms, while also ensuring that arbitrator challenges are not used to unduly delay proceedings. Clear rules on norms of professional conduct and on the grounds, processes, and timing for challenge decisions must be established.

The ad hoc appointment of arbitrators is a critical issue that is now a central focus of the legitimacy concerns facing related areas of arbitration that apply public international law, notably investor-state arbitration. Appropriate attention to who arbitrators are and how they are selected, what qualifications and rules must govern them, and how they may be removed is thus, as recognized by the Drafting Team, of fundamental importance. Such issues will likely influence whether BHR Arbitration will be perceived as legitimate by potential users, by states and the courts that will ultimately be asked to enforce awards, and by other institutions and stakeholders.

Element IV: Transparency

Q12. Should transparency be the default position in the BHR Arbitration Rules? / Q13. Should one or both parties be able to waive transparency provisions? / Q14. Should there be minimum transparency requirements that parties cannot decide to waive? If so, what should they cover?

Transparency should be a guiding principle and a default rule in BHR Arbitration Rules. As the Elements Paper highlights, there is a general trend, rooted in human rights and other legal principles, towards transparency in arbitration as a general matter. The trend is embodied to greater or lesser degrees in instruments such as the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). Moreover, transparency helps to foster the generation of a public good through the creation of accessible and understandable law, and it helps to prevent persons or entities who violate those norms from going undetected and continuing to inflict harms.

We wish to stress the very critical issue of the impact that virtually all dispute settlement mechanisms have on non-parties' rights.[7] BHR Arbitration, while seeking to facilitate access to justice of certain parties, will arguably be no different than other forms of dispute settlement in its potential impact on the rights or access to justice of others. Moreover, to the extent that other individuals or groups are similarly situated to any claimant, transparency would be the first step to joinder or other participation in the dispute at hand (discussed further below in this submission).

Nevertheless, any party should be able to request certain levels of confidentiality of all or part of the proceeding based on criteria that should be set forth in the BHR Arbitration Rules. This

[7] *See e.g.* Columbia Center on Sustainable Development and United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, "Impacts of the International Investment Regime on Access to Justice" Roundtable Outcome Document (Sept. 2018) *available at* http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Document-Final.pdf.

should be limited to areas of critical concern, such as security, rules to avoid retaliation, and confidentiality under the law of the host state. In any case, the decision to uphold confidentiality should be subject to the decision of the tribunal, after hearing the position of both parties, and should be reviewable by public courts (e.g., on grounds that orders of confidentiality are inconsistent with rights of free speech).

Although participation in arbitration to resolve alleged business-related human rights abuses may be attractive to corporations if such proceedings were non-transparent, BHR Arbitration would lose legitimacy if the procedural mechanisms themselves undermined human rights norms related to transparency and enabled firms to shield themselves further from the consequences of their wrongdoing.

Q15. Are the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) sufficient for BHR arbitration or should other rules, such as the Rules of the International Criminal Court or other human rights bodies, also be resorted to procedure? If the UNCITRAL Transparency Rules were considered insufficient, what would you add or change?

The UNCITRAL Rules on Transparency usefully highlight that arbitration need not be confidential. They illustrate that, even in arbitration, the default rule can be that awards, and documents submitted to and issued by the tribunal, are to be made public. However, those UNCITRAL rules were negotiated by states (through a partially transparent and intense) years-long process aiming to meet the demands, needs, and interests of different stakeholders in the specific context of investor-state arbitration. A separate thorough examination of the proper rules should similarly guide this inquiry. While the UNCITRAL Rules on Transparency can be instructive, certain issues and approaches would likely need rethinking in the context of BHR Arbitration. For instance, the UNCITRAL approach to confidentiality may be both over-inclusive (potentially, for instance, with respect to protection of "confidential business information")[8] and under-inclusive (potentially, for instance, regarding protections for the identify of victims, and practices and religious sites of indigenous communities). Hence, the Drafting Team should consider launching a more open dialogue on this to further explore and debate rules on human rights-specific matter.

Element V: Participation of Non-Disputing Parties

Q18. Should the parties to a dispute be able to influence the BHR tribunal's discretion to allow participation of non-disputing parties? / Q19. Should the BHR Arbitration Rules specify the criteria that the tribunal should apply in allowing participation of non-disputing parties in the arbitral proceeding? / Q20. Should the BHR Arbitration Rules specify the forms of permissible participation by non-disputing parties in BHR arbitration?

In any context or dispute resolution forum, it is frequently the case that disputes between two litigating parties can affect the rights and interests of those not party to the litigation or arbitration. This will almost certainly be true for the factual scenarios that may lead to disputes applying BHR Arbitration rules. In recognition of the reality that the rights of parties beyond

[8] See, e.g., Dalindyebo Shabalala, Access to Trade Secret Environmental Information: Are TRIPS and TRIPS Plus Obligations a Hidden Landmine?, 55 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 648 (2017) (discussing implications of protecting some types of "confidential business information", which is subject to varying definitions).

those to a dispute may be impacted by a particular dispute, the procedural rules governing some systems of dispute resolution: (1) provide a mechanism for mandatory or permissive joinder by those interested or affected non-parties, and (2) require dismissal of cases when a non-party's rights will be affected by the dispute resolution proceedings but when that non-party cannot be joined.[9] Rules such as impleader[10] and interpleader[11] also ensure that parties desirable or essential for resolution of the dispute are included. Specific procedural rules and criteria should be included in the BHR Arbitration Rules to address these issues. The rules should aim to facilitate full relief for claimants and due process for all litigants, while ensuring respect for the rights of non-parties, and avoiding scenarios whereby non-parties may feel (or be) compelled to join an arbitral proceeding in order to effectively protect their rights.

The Elements Paper sets forth the position that the parties may confer on the tribunal the power to allow participation of non-disputing parties. It is our position that participation of *amici* should be included in the BHR Arbitration Rules, and moreover, that participation of *amicus* should be of right and not at the discretion of the tribunal. This is reasonable for BHR arbitration, as *amicus* participation as a matter of right could be important in contexts in which: public international law is being applied or being used as an interpretative device; the factual scenarios resulting in a dispute, or the reasoning or outcome of the award, may be used as a basis for interpretation of applicable law in future disputes; and/or the proceedings may have impacts beyond the parties to a dispute.

In addition, the BHR Arbitration Rules may usefully address requiring *amici* to affirm third-party funding of the *amicus* or any financial interest in the outcome of the dispute.

Q21. Should states be granted the unconditional right to file *amicus* briefs in a BHR dispute? Should they be granted any other participatory rights?

The Elements Paper tentatively refers to the role of States as non-disputing parties, either as *amici* or otherwise. Intervention of States in BHR Arbitration deserves special attention beyond that devoted in the Elements Paper, as States and corporations have interrelated and interdependent obligations and responsibilities under the human rights "protect, respect, remedy" framework. In many potential scenarios, a dispute that gives rise to BHR Arbitration against a corporation might also implicate a State, with the State's (in)actions amounting to a failure to comply with its obligations to protect and/or respect human rights.

While we note that it is not impossible to have an accountability mechanism that focuses only on corporate defendants even in situations in which State actors were involved, we would be remiss to not flag the concern that the absence of State participation in such situations may affect outcomes. Of particular concern is that without the State being present in the dispute, arbitrators may be reluctant to determine that corporate defendants are liable on human rights grounds—particularly if soft law instruments such as the UNGPs are not used to help interpret corporate responsibility vis-à-vis codified IHRL that traditionally has applied only to governments. (It may be easier to establish liability without State involvement for violations in tort or other areas of law.) The Drafting Team could consider whether there are ways in which the BHR Arbitration Rules could ensure that the mechanism works to provide effective accountability for human rights abuses even in scenarios in which State (in)action is implicated, yet the State does not participate as a party.

[9] *See, e.g.*, US Fed. R. Civ. Proc. R. 19(a) & (b).
[10] *See*, *e.g.* US Fed. R. Civ. Proc. R. 14.
[11] *See*, *e.g.* US Fed. R. Civ. Proc. R. 22.

One issue that might merit further consideration is whether there should be a more robust role for States in the new BHR Arbitration mechanism. This could be, for example, in the form of joinder of party rules allowing parties to bring States into the proceedings as third party defendants. This would enable arbitrators to determine what part of the harm can be properly attributed to the corporation and what part to the State, and assign damages, injunctive relief, or other remedy accordingly. Of course, this approach might not be practicable if there are no incentives for States to consent to participate.

Element XII: Costs and Financing

Q43: Should financial assistance be explicitly addressed in the BHR Arbitration Rules or in associated instruments?

As recognized by the Elements Paper, the ability of broad classes of victims, including labor organizations, NGOs, individuals, and legal aid organizations, to participate in the BHR arbitration mechanism may hinge on access to financial resources. This challenge raises the question of how the mechanism will remedy the inevitable issue of disparities in access to resources and the potentially resulting inequality of arms, particularly as between multinational corporations and such individuals or groups.

An independent financial or technical assistance fund would be in the interests of justice. An administering authority that is regarded by all stakeholders as being at an arm's length from the proceedings would be the most appropriate option to avoid conflicts of interest, whether perceived or actual. In general, industry-specific funds (with companies from each industry contributing funding) could be a potentially sustainable way to help open up capital from companies. A focus only on industry-specific funds, however, could result in situations where claimants that allege harms against corporations outside of those industries are unable to access sufficient funds. At a minimum, we advocate for a structure that avoids actual conflicts and that incorporates robust governance structures, and would encourage the exploration of pooled funds that include both corporate and non-corporate sources. We would be delighted to discuss this further, as it relates to our ongoing research on innovative financing solutions for legal support to communities affected by investment.[12]

Q45. Should BHR Arbitration Rules provide for explicit cost-saving guidance to arbitral tribunals, particularly setting limits to parties' written and oral submissions, as well as limits to other procedures that could unduly and unjustifiably delay the arbitration (such as requests for document production)?

As we note above under Element III, we suggest caps on the fees and/or hourly rate arbitrators may be paid. More generally, while cost-saving guidance to arbitral tribunals might not be inherently problematic, we urge careful reflection on how any specific guidance might affect the ability of victims to bring effective claims. Limits on their ability to request document production from companies, for example, could render it difficult to develop the evidence they need to support their claims.

Relatedly, as victims will be much less likely to have sufficient funds for arbitration, we suggest that guidance or rules on costs should similarly ensure that victims are able to participate effectively in the dispute. This would mean, for example, that victims should not be expected to

[12] http://ccsi.columbia.edu/work/projects/innovative-financing-solutions-for-legal-support-to-communities/

pay for services, such as translation, that are necessary for their effective participation.

Q47. Should the BHR Arbitration Rules address the allocation of costs?

Yes, the BHR Arbitration rules should address issues related to allocation of costs. In particular, we suggest that the rules ensure that, barring frivolous cases that would presumably be dismissed before arbitration begins, victims should never have to pay the costs of the actual arbitration, including payments to arbitrators. While it was unclear from the paper what form of legal fees are being contemplated by the BHR Arbitration rules,[13] we suggest that even unsuccessful victim claimants should never have to pay the legal costs of the company. Any payment by a third-party would of course be a form of third-party funding that should also be addressed in the rules (see below). Bearing in mind that it is arguably inappropriate to ask human rights victims to pay for the costs of the mechanism through which they seek justice, or for the costs of the alleged perpetrator, it is important to address these issues carefully in advance, because the answers to these questions can create incentives and disincentives to use of this system.

Other Issues Relevant to Element XII:

The BHR Arbitration Rules must include explicit rules on the issue of third party funding.[14] While it is desirable that financial means be available to facilitate greater access to justice, via BHR Arbitration or elsewhere, this emerging issue raises highly complex questions that should be considered by the Drafting Team. For example, if third-party funding can be justified based on its ability to "correct market inefficiencies" by allowing for greater equality of arms between "one-shotters" and "repeat players," what rules must be in place to ensure that this market correction is achieved and not abused? Should ethical requirements, such as fiduciary obligations, be imposed on the relationship between funder and funded party, and if so, how can this requirement be squared with a funder's obligation to its own shareholders, which is focused on maximizing profit? Should a cap on net percentage of claims in which the funder may have an interest be imposed? Does the ability of a funder to have any ability to control the decisions or outcome of a human rights claim (e.g. decisions to settle based on a valuation of the outcome from purely financial terms) comport with a rights-compliant procedural mechanism, particularly where human rights notions of access to justice are broader than simply monetary relief? What procedures and regulations should be put into place to ensure transparency and ensure the absence of conflicts of interest (both as between funder and arbitrators or experts, but also as between funder and defendant (i.e. collusion or other issues that may arise))? If third party funding is allowed, should security for costs be required? The issue of third-party funding is complex but critical. Any new set of arbitration rules would be incomplete without grappling with the emerging concerns surrounding this now largely unregulated but controversial practice and how they apply to future users of the BHR Arbitration Rules.

<u>Element XIII: Settlement by Mediation</u>

We welcome efforts to settle disputes in the most effective, rights-respecting way, and recognize

[13] E.g. (1) a "pay your own way" approach, suggesting that each party should bear its own costs and that tribunal and administrative costs should be split equally between the parties; (2) a "costs follow the event" approach suggesting that a successful party should ordinarily recover its reasonable costs; or (3) a "relative success" approach suggesting that tribunals should seek to apportion/adjust costs based on parties' relative success on different issues raised during the proceedings.

[14] For a discussion of policy concerns in a different but related context *see* Brooke Guven & Lise Johnson, "The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement" (*forthcoming*).

that in many cases mediation can lead to preferred outcomes while avoiding the time, expense, and antagonism of arbitration.

We do wish to raise some cautionary notes applicable to all forms of all settlements, whether through mediation or arbitration procedures. In all cases, it should be ensured that equality of arms, to the greatest extent possible, be maintained between the parties; this may require legal or technical assistance to claimants. Moreover, it should be ensured that settlements—and particularly those not submitted to a tribunal or court—do not negatively impact the rights and interests of non-parties to the dispute, nor allow defendants to avoid responsibility for norms that govern their behavior.[15]

II. ADDITIONAL COMMENTS

In addition to the above, we wish to also comment on the following issues for consideration by the Drafting Team.

Is this the right strategy for improving accountability of businesses for human rights violations?

The Elements Paper notes that the UNGPs, in particular, specifically address the obligations of states and business enterprises to ensure or cooperate in judicial and non-judicial remedy mechanisms, but that it has proven very difficult to enforce these obligations and commitments via existing dispute resolution mechanisms, particularly with respect to transnational disputes, because of legal and practical barriers that individuals face when trying to bring claims. It is true that many rights holders lack basic access to justice. Many lack access to functioning, well-resourced, and accessible courts in their domestic systems countries, and many face significant legal and practical hurdles to accessing justice in the home jurisdiction(s) of the corporate entity. However, the lack of availability of courts to victims of human rights abuse can be partly attributed to the limits that companies themselves have fought for and secured. These limits include those arising from doctrines of *forum non conveniens*, and norms shielding parent companies from liability, or shielding assets from execution.

If multinational corporations are challenging jurisdiction and the requirement to defend cases in host countries, home countries, and elsewhere, we question the circumstances under which such companies would consent to arbitration, particularly in situations without privity of contract. Moreover, if a company does consent, will that consent come from the legal entity or entities that actually have assets to satisfy a judgment and which committed the wrong? If not, how can it be ensured that those entities are also joined in the dispute? If, on the other hand, companies are willing to submit to BHR Arbitration (either *ex ante*, in a contractual context, or post-harm), should we be skeptical as to what is motivating this agreement when the same companies raise barriers elsewhere? While BHR Arbitration may offer a comparatively attractive way for corporations to manage human-rights-related claims, the reasons for which corporations perceive it as such must be carefully analyzed to ensure that human rights, and access to justice of claimants, are not undermined.

[15] For discussion of issues in a related context (investor-state arbitration) and proposals for solutions that may be relevant in the BHR Arbitration context, *see* Lise Johnson & Brooke Skartvedt Guven, "The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest," Investment Treaty News (March 13, 2017) *available at* https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/.

We therefore think it critical that available leverage over corporations that may encourage them to submit to BHR Arbitration also be devoted to influencing them to:

- waive *forum non conveniens* objections (at least for suits brought in home and/or host countries) for certain types of human-rights related claims;
- agree to produce documents relevant to the issue of parent company control relevant for establishing liability of the parent company for acts of its subsidiaries;
- require their subsidiaries to waive jurisdictional objections to claims brought in the parent's home country;
- commit not to [re]structure for the purpose of judgment-proofing their assets;
- commit not to engage in anti-SLAPP suits; and
- agree to adhere to specified standards of responsible conduct in their business activities.

What will be the relationship between BHR Arbitration and other fora?

Claims arising from the same set of facts could in theory be brought before domestic courts (host state, home state, or third state courts) and international and regional human rights venues. There could be parallel or sequential proceedings in different fora raising a mix of contract-based claims, domestic law claims, and, if contemplated under a future treaty on business and human rights, for example, treaty-based arbitration. It is possible that the claimant could pursue a domestic law tort claim in addition to BHR arbitration—unless such multiple claims were prohibited by specific legal requirements such as res judicata, or specific provisions in the contract or arbitration rules. Given that the objective of the initiative is to expand, not narrow, avenues for effective relief, it would therefore be important to consider how arbitration rules and contract-based or other instruments of consent could be drafted so as to ensure that a claimant's or claimants' recourse to arbitration does not unduly limit recourse through other channels and fora. When opening a door to arbitration, caution should be taken so as ensure that one does not inadvertently or expressly close doors to other potential avenues for relief, including through overly extensive waivers.

These considerations related to claimants' choice of forum can affect litigants' rights and outcomes in a particular case and, over time, can also have systemic effects on the willingness and ability of courts and tribunals to decide human rights claims. Despite the lack of capacity of many domestic judicial systems to ensure effective access to justice, many stakeholders would argue that strengthening the capacity of national judiciaries to adjudicate these disputes is an important human rights goal. While we recognize the actual lack of justice experienced by millions of people, and agree with the importance of ensuring effective fora for them in which access to justice can be realized, we also wish to highlight the potential consequences of mechanisms, such as the BHR Arbitration proposal, that pull disputes out of domestic courts in favor of *ad hoc* supranational arbitration, as such mechanisms may in the aggregate further serve to undermine the rule of law and national judicial capacity building.