International Arbitration Tribunal on Business and Human Rights: Reshaping Access to Remedy

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Remarks by Claes Cronstedt

Dear Chair, Excellencies, Ladies and Gentlemen,

I want to thank you Doug of Notre Dame Law School, Rae and Roger of Clifford Chance and Mauricio of the Business and Human Rights Resource Centre for inviting me to speak today about the proposal for an International Arbitration Tribunal on Business and Human Rights. I am honoured indeed.

I am delighted that Adrienne Margolis, members of the working group is here. Unfortunately Katherine Tyler and Rachel Chambers could unfortunately not attend due to court work. Bob Thompson could not come from New York and join us today. His expertise is instrumental for the development of the project.

Our Working Group has spent the past year refining a number of draft proposals for the Tribunal. Version Three has been distributed to you.[1] Comments and suggestions on this version will be included in Version Four, which will be available in October. Let's get started.

The idea of the Tribunal came up when the Supreme Court of the United States decided the Kiobel case in April of last year. The Alien Tort Statute was thus severely crippled. For many victims of alleged human rights abuses by businesses, this statute was perhaps their only resort.

We thought that there must be a way to offer victims access to fair justice when competent courts are unavailable or unreliable. This flagrant inequity is a destabilising factor in our society. An expert arbitration tribunal could perhaps fill in the gap to reduce the present impunity.

Trade, industry and investment are becoming increasingly complex and cross-border in nature. And so too are their disputes. The caseload of ICC in Paris and other prominent arbitration institutes is expanding. Disputes on

[1] Successive versions of the draft proposal are being posted on the Lawyers for Better Business website at: http://www.l4bb.org/pages/advert.php?advertiser=tort_tribunal.

corporate violation of human rights are often also complex, indeed. So why not also solve such disputes with arbitration?

Further, we thought that the Tribunal could be a key response to John Ruggie's Guiding Principles that are calling for new ways to provide remedy for victims.

Then, last year, the idea of a binding Treaty for business and human rights came up at the UN. At first blush, it would seem that the proposed Tribunal could be blended into the Treaty at some point. I will return to this subject.

The proposed new expert arbitration tribunal would technically follow the lines of existing civil international tribunals**.** It would take on disputes arising out of business abuse of human rights.

Victims would be able to come before the Tribunal to settle their alleged claims through mediation - or to have them decided by a panel of arbitrators with expertise in the human rights responsibilities of business**.**

Corporations may want to use the Tribunal to clear themselves from accusations of alleged human rights violations. And even though it is not central to the Tribunal's initial workings, we see no reason why states should not also agree to become parties to such arbitration.

A *civil* court, not a criminal court, is the most effective way to achieve adequate remedies. The Tribunal would operate under national laws, but it would also implement international law in an indirect way. I'll explain.

For a dispute to come before the Tribunal, it would have to meet a two-part test. Firstly, there must be a cause of action under local law. This could be based on, for example, a tort or delict (hereinafter I collectively refer to *tort* only) or a breach of contract. Secondly, the underlying actions must also constitute an alleged violation of an internationally recognized human right. For example, the excessive use of violence by security forces would constitute a tort as well as an international crime. The refusal to pay wages would constitute a breach of an employment agreement, but it could also be a violation of a recognized ILO right.

Tort laws may differ from one country to another - but what these laws have in common is the principle that one who harms another, or damages another's property in an unlawful manner, is liable to compensate the injured party.

We have been asked whether the Tribunal could be designed to enforce international human rights directly, without depending upon the presence of causes of action under national laws. This is a highly complex issue for which there is as yet no readily available answer, at least under existing law. The question is open to further discussion.

The Tribunal would implement the UN Guiding Principles - third pillar - by offering a non-judicial source of justice. The Tribunal would be legitimate, accessible, predictable, equitable, rights-compatible and a source of continuous learning. The transparency criteria would, however, have to be further considered. I will come back to this issue.

The Tribunal would operate on a universal basis, which is to say that a dispute arising anywhere in the world could be brought to it. The awards of the Tribunal, which could be both monetary compensation and injunctive relief, would be widely enforceable under the 1958 New York Convention.

Although the Tribunal's jurisdiction would potentially cover human rights disputes of every nature, principal initial focus would likely be on the most serious abuses and those whose resolution would establish valuable precedents.

The Tribunal would consist of a secretariat, a roster of arbitrators and a roster of mediators. It would have procedural rules that are based on existing international civil tribunals, but tailored to fit human rights disputes. We have found it useful to examine the rules of, e.g., ICSID, UNICITRAL and WIPO**.** When it comes to actually drafting its rules, we anticipate that experts in the field will be involved.

Our current proposal, published in June, is open for comments from any interested party. We will revise the draft in stages as comments are reviewed and considered. The next revision will take place in October.

We are now grappling with a number of open issues.

The first issue is general. It is whether both the business community and the human rights community would use the Tribunal. Arbitration occurs only with the consent of all parties. We don't want to be in the position of building a Tribunal - only to find that no one will come to it. So we are now conducting advanced "market research." You are an important part of this process.

We believe that there are certain advantages to arbitration and mediation that will attract both businesses and alleged victims to the Tribunal. For victims, the Tribunal would, in many situations, likely be their only source of remedy. For businesses, more rapid time frames for resolving human rights disputes may prove decisive. We are told by some corporate counsels that they are frustrated by their inability to put to rest accusations - especially when those accusations are repeatedly ricocheting around the social media and in the press during a long-lasting procedure in a national court. The Tribunal could provide an expeditious way to get these matters resolved and behind them.

As I mentioned earlier, the Tribunal would provide both arbitration and mediation services. We are very much in favour of mediation. This mechanism is clearly underutilized. Mediation can calm down floods of boiling emotions, and with a de-escalation of antagonisms, intense conflicts can be avoided. Mediation offers an additional advantage over judicial proceedings by providing an atmosphere in which the parties establish the basis for a long-term amicable relationship. This could be of great importance when dealing with projects with long life spans - mining developments being prime examples.

The Tribunal could also level the corporate playing field. I'll explain. Companies with good human rights and environmental records are bothered by the fact that many other companies are not being held to the same standards, thereby creating unfair competition.

We believe that right-thinking corporations would be motivated to support the creation of the Tribunal, so as to ensure that all businesses would be held to the same standards. It has also been suggested that many non-complying companies could be brought into the arbitration picture through policy measures that have been suggested by John Ruggie.

That is, by making their participation in the Tribunal mandatory under governmental loan and development programs, such as export-credit and export-insurance facilities. This would tend to level the playing field, and, for that reason, the right-thinking corporations would be motivated to support the creation of the Tribunal. This could level the playing field even more.

Thus far, the feedback from both NGOs and businesses has been “curiously positive,” which is encouraging.

The second issue is how transparent the proceedings at the Tribunal should be. We are well aware that there is a good deal of tension between business and the NGO community on this issue.

Business enterprises seem to prefer confidentiality. Indeed, it is, for them, one of the main attractions of the arbitration route. NGOs, on the other hand, seem to prefer to litigate in open court, using the media as one tool for making society aware. Both sides have to consent before arbitration can occur and, clearly, one can't have it both ways. But, hopefully, we can find a middle way. We will continue to take comments on this.

The third issue is how to fill the rosters of arbitrators and mediators with skilled and ethical lawyers. This is vital for building trust in the Tribunal. The optimal qualifications of an arbitrator or mediator are: (1) business expertise, (2) human rights expertise, and (3) sensitivity to the cultural issues in a country. Finally, both the arbitrators and the mediators must be impartial. Some say that the combination of all these qualifications may be too difficult to find in most individual arbitrators or mediators.

But I can't see any problem. Listen to this. Jeff Immelt is the current CEO of General Electric. When he took the job as head of the company, people said to him, "*Jeff, you come from the healthcare business. You don't know anything about wind turbines or appliances. How can you possibly do a good job?*" And Immelt replied, "*It's not how much you know, it's how quickly you learn.*" Jim Yong Kim is a Korean American medical doctor and anthropologist who became the President of the World Bank. He rules a world of economists and is reorganizing the bank's structure.

The Tribunal's rosters will be comprised of a brilliant group of people - if not already full-fledged experts, they will learn fast. In any case, these arbitrators would likely be more competent on the subject of human rights and business than most national court judges.

The fourth issue is how to make the costs of arbitration affordable for poor victims. This is a frequently asked question, and rightly so. These costs include legal fees and the victims' shares of the arbitrators' and mediators' fees, plus the costs for the Tribunal's administration. The costs of arbitration and mediation alone would likely ensure, at least at the outset, that only disputes involving quite serious human rights violations or other issues of great public importance would find their way to the Tribunal.

We are considering a number of avenues. What could be said today is that the Tribunal's reach should not be limited on account of the poverty of victims. We will in the next version of the draft proposal come back to this paramount issue.

The fifth issue is a compound one: Should the Tribunal be a public or a private institution and where should it be domiciled? One answer would be to form a private foundation domiciled in a "neutral" country. Others have suggested that the Tribunal should be established as a treaty body pursuant to an international covenant. That, however, would take time to negotiate.

We are at an early stage on this issue, and we want to refine the proposal, based on comments from you and other experts in the field. We will then have discussions with various international organizations and foundations that represent both victims and business constituencies**.** Hopefully, some of you may have suggestions about this.

The remaining issues involve substantive laws to be enforced by the Tribunal, regarding both causes of action and measures of damages. Our current draft envisions that the Tribunal would hear disputes arising under national laws in force. Which country's national laws - whether of the home state or the host state - would be decided by the Tribunal based on conflicts of laws principles.

Some commentators have pointed out that there may be gaps in a state's jurisprudence that would result in less chance of success for victims. Others maintain that even if a victim is successful on the merits, there are huge variations in measuring damages under various states' laws. Assuming that's the case, do we have any alternatives to offer?

The answer to this question is that the Tribunal will have to enforce the laws as they now stand. But human rights law is rapidly expanding on a national level, and the very existence of the Tribunal may lead the international community to exert pressures on states to bring their tort laws up to international standards - starting, for example, with the laws that they have neglected to adopt despite their existing treaty obligations to do so, and perhaps going on to include new laws designed to implement various features of the UN Guiding Principles.

Businesses would risk civil liability for human rights impacts if, e.g., their duty to carry out due diligence is ignored. This risk is now increasing, as the UN Working Group on Business and Human Rights is developing guidance

on the substantive elements to be included in the various National Action Plans for implementing the Guiding Principles.

And what about the proposed new Treaty? It could contribute to this process. If international law is changed, such as by the Treaty, the Tribunal could easily accommodate any new causes of action that states may adopt, as well as any upgraded remedies.

However, the establishment of the Tribunal should be on a track of its own. There is no need to wait for changes in international law. There is a pressing need today for accountability and remedy for human rights violations.

We hope that further discussions might shed light on all these issues. The project is still a skeleton that needs flesh on the bone. If anyone wishes to lend a hand to help reshape access to remedy, we would be very pleased to talk to you.

Finally, to work for access to justice for all is fundamental. To create the Tribunal will be a substantial undertaking, but with your help, we can make it a reality. We can't wait much longer.

Thank you

ATTACHMENT A

THE INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS & HUMAN RIGHTS

Members of the Working Group

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

Robert C. Thompson is a member of the California bar, a former Associate General Counsel of the U.S. Environmental Protection Agency and a former partner of LeBoeuf, Lamb, Greene & MacRae, where he was the chairman of the firm's environmental, health and safety practice. He is the co-author, together with Anita Ramasastry and Mark B. Taylor, of "Translating Unocal: The Expanding Web of Liability for International Crimes," 40 George Washington International Law Review 841 (2009), available at: http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-1-Thompson.pdf. and "Overcoming Obstacles to Justice; Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses," (Fafo 2010), available at: http://www.fafo.no/pub/rapp/20165/20165.pdf.

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Adrienne Margolis is founder and editor of Lawyers for Better Business (L4BB), a website and global network to keep lawyers one-step ahead of developments in business and human rights. She is a journalist and consultant with a wealth of writing and project management experience. She is currently a director of Tax Justice Research and a

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Katherine Tyler LLM (International Law and Human Rights) is a barrister specializing in public, regulatory and extradition/criminal law. Katherine has worked with NGOs and law firms on issues of international corporate responsibility and liability for human rights and environmental harm. Katherine's published articles consider subjects including the regulation of the extractive industries, the UN Norms, the OECD National Contact Point and other grievance mechanisms.