

United Nations Annual Forum on Business and Human Rights

International Arbitration Tribunal on Business and Human Rights Enhancing Access to Remedy

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Remarks by Claes Cronstedt

Dear Chair, Excellencies, Ladies and Gentlemen,

Good morning.

In April last year the Supreme Court of the United States decided the *Kiobel v. Shell* case restricting the reach of Alien Tort Statute. This Act was perhaps the only resort for many victims of alleged human rights abuses by businesses. The decision sparked the idea of an International Arbitration Tribunal on Business and Human Rights to provide a forum for victims.

The Tribunal's Working Group of six members has developed a draft proposal on how international arbitration can facilitate access to justice for victims of human rights abuses. The proposal has benefited from consultations with experts in various areas. Our latest draft was posted two weeks ago on Lawyers for Better Business and Business & Human Rights Resource Centre (www.l4bb.org and <http://business-humanrights.org/en/binding-treaty/proposals-for-intl-tribunal-on-corporate-liability-for-human-rights-abuses>).

And now, we are here today. We are very grateful to the UN Working Group for giving us opportunity to present our proposal.

Let's get started.

Many of you in this room, no doubt, share our deep concern about the lack of access to justice for victims of human rights abuses. During the past two days of this important Forum one cannot avoid to notice the frustration among the attendees about the never-ending corporate impunity.

The Financial Times wrote last month about the Bhopal and other disasters: "*It just shows the failure of all systems: the failure of the government system, the*

failure of the judiciary and primarily the corporations – and the support these corporations have got from both the US government and the Indian government.”

We have talked about corrupt or ignorant domestic courts, about *forum non-conveniens* and other barriers to access to justice - nothing seems to change.

However, our belief is that an expert arbitration tribunal could be a turnaround. The proposed Tribunal would be specially designed to handle human rights disputes. It offers mediation and arbitration. Its swift proceedings could be held anywhere in the world. The arbitration awards would be widely enforceable under the 1958 New York Convention. In short, it would offer fair justice.

The arbitrators would be specialized in human rights abuses. Judges in domestic courts, on the other hand, deals with all sorts of cases and their backlog are often substantial. It is not unusual that litigation in some jurisdictions takes more than ten years.

The Tribunal's mediators would be available to assist parties to tackle their disputes at an early stage before they spiral out of control and in the worst case amount to international crime.

The structure of the Tribunal would briefly consist of the following six elements:

First element - the rules

We would draft the Tribunals rules by looking at the rules of major international arbitration bodies as template. At present, we look at the rules of the *Permanent Court of Arbitration* in The Hague, the PCA. It basically applies the *United Nations Centre for International Trade Litigation*, the UNCITRAL.

The rules of the Tribunal would be tailored to human rights matters, as human rights disputes are different from business disputes. The rules would also accommodate group actions and *who* could represent them before the Tribunal, such as NGOs.

The drafting of the rules will involve representatives from the various stakeholders that are affected by the process.

Then we have the highly controversial question of transparency. Business enterprises prefer confidentiality. NGOs, on the other hand, want to litigate in open court.

As you certainly know there is a strong trend in society towards transparency. At the recent G20 summit the leaders committed to improve the transparency principles of the public and private sectors. The Financial Times remarked that this commitment will intensify the pressure on world leaders to address the issue of corporate secrecy.

The judiciary is already affected by this trend. There are ongoing discussions to make arbitration more transparent. One example is that UNCITRAL recently amended its investor-state rules to open up proceedings to the public.

All this makes the arguments against transparency increasingly difficult to maintain by the corporate sector, especially as human rights disputes are of significant public interest. The corporate disclosures in arbitration proceedings do not need to include information about the company's trade secrets or other sensitive facts not relevant to the outcome of the case.

Second element - the arbitrators and mediators

The arbitrators and mediators on the Tribunal's roster will be highly qualified and have different skill sets from those who handle commercial cases.

Third element - the experts

The Tribunal would have a roster of scientific and technical experts on human rights issues, who may be appointed as expert witnesses in arbitration as well as in mediation.

Fourth element - the special fund

Litigation is expensive and arbitration is no exception - despite its efficiency. The issue of "equality of arms" is crucial for victims. The idea of setting up a special fund at the Tribunal was suggested by the example at the PCA, which has a *Financial Assistance Fund*. Such a fund could obtain donations from individuals, states and foundations.

Fifth element - the secretariat

The secretariat would manage the process, e.g. to find arbitrators and mediators to fill the rosters, handle the document flow, etc. If the Tribunal were to become part of an existing international arbitration body, these functions could be carried out by the secretariat of that body.

Sixth element – the Tribunal’s role in enforcing international law

Is it really possible that contracts could be a tool to enforce international law?

But first – why would victims and corporations in human rights disputes arbitrate rather than litigate in domestic courts? Hence, what are the benefits for the victims and for the corporations to sign an arbitration agreement?

Simply stated: for the *victims* - the Tribunal would provide justice where justice is currently lacking.

And for the *corporations* – it is about protecting their reputation; it is about qualifying to have export-credit and export-insurance facilities; it is about getting support from government and having access to the capital market and more; it is about fighting unfair competition in an environment, which is not even close to a level playing field.

So, how would it work? I will explain.

Let’s assume the following: *Marks and Spencer* has concluded a supply contract with a subcontractor. It includes an arbitration clause. As being a good corporate citizen *Marks and Spencer* has also inserted a human rights clause - along with a provision that gives so called *third party beneficiary rights* to potential victims.

This would allow third party victims to bring the subcontractor before the Tribunal for alleged abuse. Now - *Marks and Spencer* requires that these clauses shall be inserted down the chain of supply contracts.

In this story all sub suppliers do, indeed, comply as good corporate citizens. Except at the bottom end of the chain, where a Turkish factory is found to have child labour. So what to do?

Marks and Spencer or any of the suppliers in the chain can, based on the arbitration agreement of which the Turkish factory is bound, put a stop to the use of child labour by going to the Tribunal for an injunctive relief.

Marks and Spencer or any of the suppliers can also arbitrate against the Turkish factory to claim compensation *on behalf* of the victims. Alternatively the victims can go directly to the Tribunal according to the third-party beneficiary clause in the supply contract and claim compensation from the Turkish factory.

These examples may give a simplified picture. The arbitral agreements have to be drafted carefully as domestic laws in some jurisdictions can complicate the

situation. But, overall, arbitration would provide a tool that benefits both the victims and the corporations.

Let us change the facts and assume that there is no arbitration clause in the supply contracts. Here, there can be no arbitration unless we have both parties' consent. The Turkish factory may simply refuse to consent. That would seem to be the end of story, at least in the short term.

But, once the Tribunal is in place, over time, many other businesses could be using it to resolve disputes. Hence, refusal to use the Tribunal could become harder and harder to defend. The NGO community, social media, the press and others would ultimately push the alleged abuser to consent to mediation and arbitration. The Tribunal would also enhance the impact of John Ruggie's UN Guiding Principles.

In our rapidly changing society, the legal machinery must keep pace. The Tribunal would be a cutting-edge solution.

Thank you very much.

