

AN INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS & HUMAN RIGHTS – ENHANCING ACCESS TO REMEDY

VERSION FOUR – NOVEMBER 10, 2014

NOTE TO REVIEWERS: The Working Group gratefully acknowledge the comments received from many reviewers of earlier versions of this draft, which the authors, Claes Cronstedt and Bob Thompson, have endeavoured to incorporate into this latest version. The project is still a work in progress and all are invited to submit further comments.

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Count up the results of fifty years of human rights mechanisms, thirty years of multibillion dollar development programs and endless high level rhetoric and the general impact is quite underwhelming . . . this is a failure of implementation on a scale that shames us all.

-- Mary Robinson, former President of Ireland and former United Nations High Commissioner for Human Rights (1998)

I. Introduction

Global trade and investment are helping to raise people's standards of living in many parts of the world. However, businesses have also done harm, resulting in increasing calls to hold companies legally accountable for serious human rights violations. Today, a vigilant press, alert NGOs and increasingly sophisticated victims' organizations, all with access to the Internet, enable close scrutiny of a company's human rights impacts in almost any part of the world. But, sadly,

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although there are almost daily media reports of abuses of every description, justice for nearly all victims remains elusive. In these circumstances, why do some states often fail to protect their own people? Because, in addition to numerous other practical and legal obstacles to justice for victims,² states themselves are often part of the problem.

Since Ms. Robinson's summation of the situation in 1998, accountability for human rights violations has been enhanced by some highly encouraging developments. Two important examples are the advent of the International Criminal Court and the work of John Ruggie in producing the UN Guiding Principles.³ But there have also been setbacks, such as the recent U.S. Supreme Court decisions in *Kiobel v. Royal Dutch Petroleum*⁴ and *Daimler AG v. Bauman*⁵

² See, for example, Robert C. Thompson, Anita Ramasastry and Mark B. Taylor, "Translating Unocal: The Expanding Web of Liability for International Crimes," 40 *George Washington International Law Review* 841 (2009), (hereinafter "Translating Unocal") available at: <http://docs.law.gwu.edu/stdg/gwirlr/PDFs/40-4/40-4-1-Thompson.pdf>. This article compiled a list of several dozen specific practical and legal obstacles, based on survey responses from human rights lawyers in sixteen countries. The article was followed up by a more extensive discussion of many of those obstacles in Mark B. Taylor, Robert C. Thompson and Anita Ramasastry, "Overcoming Obstacles to Justice; Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses," (Faf0 2010), (hereinafter "Overcoming Obstacles to Justice") available at: <http://www.faf0.no/pub/rapp/20165/20165.pdf>. Most recently, a study performed for a coalition of international human rights NGOs led to the publication of a report on a selection of ten major obstacles. See, Gwynne Skinner, Robert McCorquondale and Olivier de Schutter, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business," (ICAR, CORE and ECCJ, 2013), available at: <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>.

³ The third pillar of the Guiding Principles is a call for the creation of greater access to remedy for victims. See, *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations HR/PUB/11 2011), available at: http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf.

⁴ 133 S. Ct. 1659 (2013). The Supreme Court narrowed the extraterritorial applicability of the federal Alien Tort Statute (ATS) in regard to events occurring outside of the territorial United States. Under the ruling, the vast majority of cases previously brought under the ATS would not have been allowed. Thus, *Kiobel* materially reduces the potential for future use of the ATS by foreign victims.

⁵ 134 S. Ct. 746 (2014). The Court held that a federal lawsuit could not be filed against a corporation that conducts only a small amount of its total worldwide business in the state where a

both of which restricted the availability of U.S. federal courts for victims' lawsuits in cases involving multinational corporations. Overall, much work remains to be done before it can be said that Ms. Robinson's words no longer ring true.

Although "corporate complicity" in human rights abuses is only a part of the overall problem, it plays an important and visible role.⁶ To meet their responsibilities, and to avoid such complicity, business enterprises in every industry sector must engage in the type of due diligence that the Guiding Principles call for, along with creative prevention and mitigation efforts both by themselves and their business partners. Creating enforceable contractual obligations on the parts of their business partners is an integral part of those efforts. And to ensure that business enterprises and their partners take the prescribed steps and such steps are monitored and enforced, there must also be far more accountability for those that do not live up to their responsibilities. Civil society should vigorously advocate for additional, and more effective, means to provide such accountability.

There are welcome developments on both the legal and practical level that hold great promise for improving the current situation. Many NGOs, public institutions, individual advocates and business enterprises are conscientiously working to provide greater access to justice throughout the world. But until fair and functional civil courts and other institutions become universally accessible to victims, society must find another means to ensure such access and accountability.

We have come together to work towards the creation of an International Tribunal on Business and Human Rights (the "Tribunal")⁷ that would suit those very purposes.

II. The Case for the Tribunal

particular court sits when the suit is based on conduct that took place entirely outside of the forum state.

⁶ The term "corporate complicity" includes any course of conduct, any business relationship or transaction that facilitates, enables or exacerbates the commission of a human rights abuse. This is the broad sense commonly used in discussions of business and human rights matters today.

⁷ For the present, we refer simply to "the Tribunal." As discussed below, there are various options for the structure of the Tribunal. One of the options calls for the functions of the Tribunal to be carried out as a new function of an existing arbitration institution, in which case the Tribunal would bear that name of that institution.

Many people are puzzled that impunity for human rights abuses is so prevalent today. After all, a common feature of most domestic legal systems is that those who suffer harm as a result of the unlawful or negligent conduct of others should have rights of action that result in restitution or other forms of relief.⁸ On paper at least, victims of human rights abuses should have rights to sue their abusers. Sadly, however, something seems to have fallen through the cracks.

It is true that some criminal courts afford rights to restitution, but victims suffer from the inability or unwillingness of prosecutors to pursue cases on their behalf. And, although a *civil* court, not a criminal court, is often considered the proper venue to achieve adequate remedies, there are numerous reasons familiar to the international human rights community as to why those courts are not addressing serious human rights abuses involving business enterprises.⁹ In many parts of the world, the lack of access to independent and functional judicial systems in host countries in many parts of the world is a major factor.¹⁰

Fortunately, this is beginning to change. Business enterprises that are implementing the UN Guiding Principles and other corporate social responsibility initiatives¹¹ are using their leverage to persuade their business partners to agree to

⁸ See, *Translating Unocal*, at 887, footnote 2, *supra*. Each of the sixteen countries surveyed, representing all regions of the world, reported the existence of a tort-based civil compensation scheme.

⁹ For extensive listings of obstacles to justice, see, *Translating Unocal*, at 889 and *Overcoming Obstacles to Justice*, beginning at p. 10, both in footnote 2, *supra*.

¹⁰ As Professor Jan Eijsbouts, former General Counsel of Akzo Nobel, stated when accepting the appointment of Extraordinary Professor of Corporate Social Responsibility at the Faculty of Law, Maastricht University:

[I]deally, these cases should in my opinion neither be tried in court in the home state of the multinational nor in the host state against the multinational. In both cases the court could be prejudiced against the foreign party in the case.

Professor Jan Eijsbouts, “Corporate Responsibility, Beyond Voluntarism - Regulatory Options to Reinforce the License to Operate” (2011).

¹¹ In addition to the Guiding Principles, there are external pressures that could encourage such contracts: government procurement policies; public and private “socially conscious investors,” such as CalPers and the Norwegian state oil fund; national and international aid organizations,

contractual provisions designed to prevent or mitigate social and environmental ills of many types, including human rights abuses.¹² One principal objective, of course, is to prevent one's own company from being "tarred with the brush" of any human rights offenses committed by those with whom they or their products and services may be associated.¹³ In addition, lenders, licensors and investors are inserting human rights covenants into their contracts, some of which contain arbitration clauses.

The Tribunal that we are proposing would be uniquely designed to enforce those human rights contract provisions, anywhere in the world. This alone would justify the establishment of the Tribunal. The existence of the Tribunal would be likely to encourage such initiatives. It would significantly enhance the impact of the Guiding Principles.

The Tribunal could also be chosen by disputants who have not signed pre-dispute contracts, for whom arbitration would offer an attractive alternative to civil litigation. And even where the victims have little or no access to any kind of judicial forum, the parties to a dispute could find themselves amenable to using the Tribunal on a the basis of a post-dispute agreement.

such as USAID, the US Overseas Private Investment Corporation (OPIC), the International Financial Corporation (IFC) and the International Monetary Fund; and major consumers such as colleges and universities that have signed the Fair Labor Association's Workplace Code of Conduct demanding human rights compliance as a condition for doing business with its licensees. See, <http://www.fairlabor.org/affiliates>. In addition, the criminal laws of many countries provide for a complete due diligence defense to certain crimes or provide that corporations that have apply adequate due diligence are given more favorable treatment when it comes to charging and sentencing decisions. See, Olivier De Schutter, Anita Ramasastry, Mark B. Taylor and Robert C. Thompson, "Human Rights Due Diligence: The Role of States," (International Corporate Accountability Roundtable, et al., 2012), available at: <http://accountabilityroundtable.org/initiatives/human-rights-due-diligence/>.

¹² Arbitration agreements generally require that the parties either suspend or forego entirely their rights to pursue civil litigation.

¹³ Leading of examples of this "tarring" effect are the problems that Apple encountered due to the revelations of rights abuses at its Chinese supplier's facilities or the uproar that followed the discovery that many large Western clothing retailers were using the ill-fated garment manufacture located at Rana Plaza. Diamond dealers were adversely affected by the movement to stop the trade in "blood diamonds," leading to the Kimberley Process.

III. The Tribunal's Jurisdiction Over Abuses of Internationally Recognized Human Rights

The Tribunal would enforce international human rights law wherever pre-dispute commercial contracts and post-dispute agreements arbitral agreements so provide.

a. Pre-Dispute Contractual Arbitration Arrangements; the Potential for Creating Third-Party Rights.¹⁴

As mentioned earlier, many business enterprises have begun to use their leverage to insert human rights clauses into their commercial contracts, along with arbitration clauses.

Contractual requirements to respect international human rights norms might be expressed in general terms, i.e., "all internationally recognized human rights," but it is more effective to specify which particular international norms are to be observed, for example, the labour rights defined in conventions under the

¹⁴ The concept of using contract law to embed ADR into human rights commitments in commercial agreements and to grant third-party rights to non-signatories has been recognized as a logical step for business enterprises. See, Roger P. Alford, *Arbitrating Human Rights*, 83 Notre Dame L. Rev. 505, 507 (2008):

[T]he tools of contract law and arbitration are not simply for the corporation that aids and abets human rights abuse. They also are tools available to the vast majority of corporations that are good corporate citizens and wish to contract for compliance with basic human rights. For these corporations, contract law and arbitration procedures create opportunities to impose human rights obligations on contractors, vendors, and suppliers. Human rights obligations can be internalized by contract and subjected to effective dispute resolution procedures, including international arbitration. . . . Finally, some corporations may wish to go even further and create opportunities for noncontracting parties-such as employees or nongovernmental organizations - to invoke third-party beneficiary rights to facilitate compliance with human rights embedded in the contract. Not unlike the third-party beneficiary rights that corporations enjoy pursuant to bilateral investment treaties, corporations could empower relevant third-party stakeholders to invoke contractual social responsibility clauses against those contracting parties who violate their commitments."

Available at:<http://scholarship.law.nd.edu/ndlr/vol83/iss2/2> and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978305.

International Labour Organization or the anti-discrimination rights contained in the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. The drafters of these contracts have wide latitude in selecting the particular rights to be respected, but there are pressures, exerted under the watchful eye of civil society, for the inclusion of more, not fewer, internationally recognized rights.

Drafters of these contract terms also have great latitude as to how far the enforcement rights of the originating business enterprise may extend. For example, do those rights extend only to the first tier of suppliers, i.e., the business partner who is its direct vendor of goods? This latter approach would allow for enforcement steps against a remote supplier if a mid-level supplier decides to do nothing. Does the originating business enterprise retain arbitration rights that extend all the way to the end of the supply chain? Clearly, the wider the net, the more effective the coverage.

Further, the drafters could provide that the contract gives enforcement rights to outside stakeholders who are not parties to the contract, as third-party beneficiaries.¹⁵ These third-party rights could extend to potential victims as well as to organisations that represent groups of potential victims, such as labour unions or NGOs. For example, a developer that committed to observe international norms when acquiring lands occupied by indigenous peoples could be required respond to a notice of arbitration filed on behalf of any such people whose rights had been abused during a land acquisition process. Whether to designate such beneficiaries is entirely up to the originating business enterprise, of course, but the creation of such rights could be seen as a barometer of the degree of commitment of the business enterprise to respect human rights.¹⁶ The case for the Tribunal does not

¹⁵ Third-party enforcement rights as a method of furthering public goals are found in a wide variety of private and governmental regulatory schemes. For example, the United Nations Convention Against Corruption, which calls upon its signatories to grant rights of action by injured parties against those who commit corrupt acts. The World Intellectual Property Organization (discussed below), which grants those who own trade names to arbitrate their ownership claims against so-called “cybersquatters” who attempt to register such names as domain names on the Internet. At the national level, the U.S. federal Clean Air and Clean Water Acts grant individuals and NGOs that represent the environmental interests the right to sue polluters.

¹⁶ A further refinement could be to require the business partner to defray the costs of arbitration for any claimant. This operates in various commercial settings, such as arbitral claims brought against securities firms.

depend upon its potential to enforce such rights, since it would have other important functions. But it is important to note that such potential would exist.

It is unclear how commonly such third-party rights are inserted into commercial agreements, but in the case of human rights, there are compelling business reasons why originating business enterprises should do it. First, it permits the commitments to be enforced without the need for further action by a downstream business partner who may have commercial or relationship reasons not to take action. Second, it amplifies the potential liability of all downstream business partners and thus discourages abuses. It has a far greater deterrent effect: a business partner who might be inclined to commit an abuse would think twice before doing so if the victims could invoke binding arbitration.

Finally, indemnification clauses, which are typical in commercial contracts, would play an important role in discouraging abuses by downstream business partners. It is in the interest of originating business enterprises to have indemnification rights in their supply chain contracts so that they would have the right to be made whole in case they are sued for the human rights abuses that are caused by a downstream business partner.

Contracts that contain some or all of the provisions above will allow at least some parties, and potentially an entire network of business enterprises and outside stakeholders, to access the Tribunal to enforce international law. Any infraction would create the possibility that the perpetrator will be subject to binding international arbitration before the Tribunal, with the potential for damages and injunctive relief.¹⁷

b. Post-dispute Arbitration Agreements

In the absence of an agreement signed prior to the occurrence of a dispute, arbitration and mediation can occur only with the post-dispute consent of the disputants. In instances where courts are accessible, the disputants might prefer arbitration in order to obtain a faster (and potentially less expensive) result, using a forum tailored to their needs.¹⁸

¹⁷ Once a party has agreed to arbitrate, it can be held liable for contract damages even if it refuses to participate in the arbitration process.

¹⁸ The Associate Editor of *Oil & Gas Journal* has observed:

In instances where courts are not accessible, victims and their representatives would have no other alternative but to arbitrate. But, for a business enterprise that may feel that it has legal or practical impunity,¹⁹ a decision to voluntarily submit to binding arbitration is another matter.

Some business enterprises may see the advantages of using the Tribunal even if they face no threat from litigation. For example, some executives have commented that their companies are sometimes attacked with unfounded allegations that are amplified around the world on the Internet and through other media. Such widespread allegations may be difficult for an enterprise to rebut unless it can obtain a fair and prompt hearing. Even in cases where there is substance to the allegations, a business enterprise may recognize the need to address the issues head-on as a way of moving beyond any past misdeeds.

Reputational damage resulting from accusations of involvement in human rights abuses can be a serious matter, particularly for business enterprises that have customers, shareholders and investors who are sensitive to these matters.²⁰ Business enterprises that are seeking favours or support from governments or other institutions have an obvious need to avoid reputational loss.

The Tribunal would hold all business enterprises to the same high standards, thereby reducing unfair competition by levelling the playing field.

Dispute resolution and arbitration can be good strategies for mitigating risk because they enable companies ... to avoid hostile local courts, where the location and language may put them at a disadvantage, where resolution could take 5-10 years, and national pride or political intervention could influence the outcome.

Judy Clark, "International Arbitration," 102 *Oil & Gas Journal* 18, p. 15 (May 10, 2004).

¹⁹ Impunity could stem from a variety of factors, for example where parents of local subsidiaries are shielded by the "corporate veil" or where the damages awarded are so low that victims cannot obtain meaningful financial recovery. Hopefully, these gaps will ultimately be filled by advances in domestic jurisprudence.

²⁰ When Warren Buffet took over as an interim chairman of Salomon Brothers after the Treasury auction scandal in New York in 1991, he told the assembled personnel: "Lose money for the firm, I will be very understanding; lose a shred of reputation for the firm, I will be ruthless."

IV. The Tribunal's Lists of Arbitrators, Mediators and Experts

The Tribunal would maintain lists of arbitrators and mediators, drawn from candidates who demonstrate a high level of achievement, along with familiarity with human rights law and business affairs. It would also provide a roster of experts in various fields that come into play in human rights cases.²¹

A panel of arbitrators generally consists of one member named by each side and a third (who acts as the chair) named by the first two.²² Parties would be free to name arbitrators and mediators not on the Tribunal's lists, provided that they otherwise meet the Tribunal's standards. As with other international arbitral tribunals, the arbitrators would be bound by a duty of independence and impartiality, and the failure to maintain such a duty would be grounds for challenge and replacement of an arbitrator. Mediators would be selected jointly by the disputants.

V. The Tribunal's Procedural Rules

The Tribunal would operate under a set of rules prepared by a high-level official drafting committee whose members reflect a balance among concerned stakeholders. The final rules would be tailored to address the unique needs of the human rights arena. The drafters could draw on the arbitration rules of recognized international tribunals and major arbitration institutions. There are numerous examples, including rules of the United Nations Commission for International Trade Litigation (UNCITRAL),²³ the Permanent Court of Arbitration (PCA),²⁴ the

²¹ This would include experts in human rights law, medical experts to investigate claims of physical injuries and environmental experts who could assess the impacts of various kinds of pollutants or effects of changes in land uses. Experts would be independent of the parties, and could act as impartial fact-finders to help the parties and the arbitrators sort out factual claims. An example of this type of roster is the panel of environmental experts maintained by the Permanent Court of Arbitration.

²² If the parties are unable to agree on a third arbitrator or a mediator, the Tribunal could act as the "appointing authority," as is customary in international arbitration. Where more than three panelists are needed, each side would name an equal share and those named would name the chair.

²³ UNCITRAL is an international commission formed by General Assembly Resolution 2205 XXI (17 December 1966). It has a governing body of 60 member states selected from members of the United Nations that represent different legal traditions and levels of economic development. UNCITRAL does not conduct conciliation and arbitration proceedings; its function

Court of Arbitration for Sport CAS),²⁵ the World Intellectual Property Organization (WIPO)²⁶ and the International Centre for Settlement of Investment Disputes (ICSID).²⁷

Among the significant human rights-specific issues the drafting committee should consider are: (a) how transparent the proceedings and awards should be (and how

is to devise rules for disputants to follow when conducting such proceedings. Its arbitration rules are available at:

https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

UNICITRAL's conciliation rules are available at:

<https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>.

²⁴ The PCA was founded in 1889 and is located in the Palace of Justice in the Hague. It generally applies the rules adopted by UNCITRAL in 2010, although it also makes specialized versions of such rules available, such as for environmental disputes. It maintains rosters of qualified arbitrators and mediators, including a specialized roster of environmental specialists. It is authorized to serve as the appointing authority for UNCITRAL arbitrators. It has cooperating agreements with other arbitration institutions around the world that allow its proceedings to be conducted in a number of other countries. It administers a Financial Assistance Fund that provides funding for states that qualify for assistance with their arbitration expenses. Information about the PCA is found at: http://www.pca-cpa.org/showpage.asp?pag_id=363.

²⁵ CAS resolves disputes pursuant to arbitration agreements between athletes and athletic federations, particularly in the context of doping at athletic competitions. Details on CAS are available at: <http://www.tas-cas.org/>.

²⁶ WIPO resolves disputes between domain-name registrants and third-party trademark holders pursuant to a domain-name registration agreement. As discussed earlier, the WIPO system grants third-party beneficiary rights to such trademark holders, an example that commercial contracts should consider following when considering the extension of third-party beneficiary rights to nonsignatory persons whose rights might be affected by the activities of a party to the contract. Details on WIPO domain-name dispute settlement are available at: <https://www.icann.org/resources/pages/rules-be-2012-02-25-en>.

²⁷ ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), with 158 signatories. The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the "World Bank"). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966. Today, ICSID is considered to be the leading international arbitration institution for investor-state dispute settlement. Its procedural rules are available at:

https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

to accommodate business confidentiality concerns);²⁸ (b) how to ensure “equality of arms” between the parties;²⁹ (c) whether to allow appeals from awards made by the arbitrators (and what the procedures for such appeals might be);³⁰ (e) whether to allow groups of victims to aggregate their claims in common actions either through consolidation or class action arbitration; (f) what roles states should play as potential parties to disputes; (g) what role third parties to a dispute (such as international organizations, NGOs, trade associations, or other interested parties) should have with respect to the arbitration;³¹ and (h) what other types of special procedural and evidentiary rules are needed for human rights disputes.

VI. The Tribunal’s Powers to Make Awards

²⁸On the issue of transparency of arbitration proceedings, we recognize that the confidentiality of arbitration proceedings is one of the main attractions for business. However, human rights NGOs have pointed out that it is important to them that the proceedings are open to the public and that awards should be made available to the public as well, so that society may be kept informed of matters of vital interest. Clearly, one cannot have it both ways. The official drafting committee would need to devise a “default” rule that could be modified by agreement of the parties. UNCITRAL has recently adopted a new rule that provides for most documents to be made available to the public. See, http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html.

²⁹ In the context of the Tribunal, the term “equality of arms” relates to the disparate financial resources of business entities, on the one hand, and victims and their representatives, on the other. A partial solution would be the creation of a fund designed to assist victims. The fund could rely upon contributions from governmental and private sources. A fund along the lines of the latter model is in use at the Permanent Court of Arbitration, discussed above. Another approach, used in domestic consumer arbitration and some international arbitral tribunals (such as the Claims Resolution Tribunal that existed prior to 2012), would be to require the “business” side to pay all of the administrative and tribunal costs. One example of this is consumer arbitration using the American Arbitration Associations’ Consumer Due Process Protocol. See: www.adr.org/consumer. Another example is the Claims Resolution Tribunal (Holocaust) arbitration, involving contested assets held by Swiss banks. See: <http://www.crt-ii.org/>.

³⁰ It will be the responsibility of the official drafting committee to work this out, bearing in mind that, on the one hand, parties may wish to achieve a “final and binding” result -- without an appeal – in order to achieve a quick resolution of their dispute. On the other hand, parties may be wary of entering into a proceeding where mistakes of law or misinterpreted facts could result in a flawed result – with no recourse for the losing party.

³¹ Some arbitral tribunals allow public access to the proceedings and permit third parties to file *amicus* briefs.

The Tribunal's would have authority to grant both legal and injunctive relief.³² Legal relief could include restitution and other damages available under the concerned contract or statute and injunctive relief could include measures to enforce a contract, including ordering steps to prevent a prospective abuse. Awards could be enforced in domestic courts around the world pursuant to the New York Convention.³³

The Tribunal's authoritative rulings could clarify the roles and responsibilities of business enterprises when dealing with human rights issues. They could enhance legal certainty and encourage companies to pursue preventative due diligence efforts. Hence, the Tribunal could significantly influence patterns of business behaviour.³⁴

VII. The Importance of the Tribunal's Mediation Functions

The Tribunal's mediator would have multiple roles. They would handle human rights disputes that come before the Tribunal where the parties wish to seek an informal settlement. There should also be flexibility under the rules for an arbitration panel to refer issues to mediation during an arbitration proceeding. The mediators could be called upon to handle conflicts arising anywhere in the world,

³² As with other international arbitral tribunals, the Tribunal would not have the power to render awards *ex aequo et bono* (i.e., in the absence of a governing law, the arbitrators could state what the law *should* be) unless the parties to the dispute so agreed.

³³ The decision would be generally enforceable under the New York Convention on the Enforcement of Foreign Arbitral Awards (the "New York Convention"). The New York Convention entered into force on 7 June 1959 (article XII). In 2013 it had 149 states as its members. It provides for the enforcement of arbitration awards internationally among all states parties. The New York Convention is available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

Article 1(3) of the New York Convention provides that a state party may file treaty reservations that restrict recognition and enforcement of awards to those "arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Approximately one-third of the Convention's parties have filed such reservations. Query whether human rights disputes arising out of the commercial contracts discussed above should not be excluded by such reservations.

³⁴ This would necessitate making the Tribunal's rulings publicly available. The importance of those rulings to the public (and to other arbitration panels) is a powerful argument in favour of making them available.

such as those between the owners of development projects and impacted local communities.

VIII. Would there be a “Floodgate” Problem?

Comments on an earlier version of this proposal have questioned whether the wide reach of the Tribunal could lead to an influx of minor or even frivolous cases. The Working Group feels this is unlikely because of the expenses of arbitration and mediation. But to further address such concerns, the official drafters of the Tribunal’s rules would need to develop appropriate provisions. The victims’ fund would need to operate on established guidelines to ensure that only the most worthwhile cases are funded.

IX. Potential Routes to Establish the Tribunal

The Working Group is examining several models for the Tribunal, based on a review of existing international arbitration and mediation institutions. These models are being presented here for review and comment:

A. The Permanent Court of Arbitration Model. In 2001, the PCA created its Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources and set up a special roster of arbitrators with environmental qualifications and a list of environmental specialists. This was done in response to official requests by some of its states members. The PCA appointed a high-level working group to develop the new rules, which were then adopted by its administrative council. It would be worthwhile examining whether this model could be appropriate for establishing similar rules and a like administrative structure for the Tribunal (which would then be an integral part of the PCA).

B. The UNCITRAL Model. UNCITRAL was established by an action taken by the UN General Assembly that set up the Commission, which then appointed experts that drafted its rules, subsequently approved by another General Assembly resolution. The PCA acts as the “appointing authority” to select arbitrators when the parties are unable to do so.

C. The ICSID Model. ICSID was established by an international treaty. It is administered and funded by the states that are its members, although the bulk of its revenue comes from charges paid by the parties. It has a central office and secretariat and provides hearing rooms at its central location (although it could also

make arrangements for hearings at, and field visits to, other locations throughout the world).

D. A Private Institution. This model assumes that the Tribunal would be a private institution, funded initially by donations from private and governmental sources. It would be governed by a board that would make the rules and have a secretariat to administer its functions, such as maintaining its lists of specialized arbitrators and mediators. It would have a central office and hearings rooms, although it could also make cooperative arrangements with other institutions for hearings and site visits involving other locations.

Although the seat³⁵ of the Tribunal would be in one jurisdiction, the parties to the dispute would have the freedom to mediate and arbitrate anywhere in the world that is amenable to the parties and the Tribunal.

X. A Call for Action

The Tribunal would be an effective means to address the problems of access to justice and accountability for business-related human rights abuses worldwide, but it would not be a solution to every such problem. All other efforts to open up additional channels to justice for victims should continue on an urgent basis, particularly those that will enable the effective judicial resolution of disputes in the countries where the abuses occur. Our immediate goal is to design and put in place the most effective institution for offering arbitration and mediation services to human rights disputants that can be devised under existing circumstances. The Tribunal would be a building block for future improvements.

It is hoped that the widespread discussion and the stream of informative comments that the proposal has provoked will continue as we flesh out the case for the Tribunal. We also want to persuade senior policymakers and the world community at large of its desirability and encourage them to take the necessary steps to bring it to fruition. We invite the international human rights community, businesses, states and international organizations to join with us in this process.

³⁵ Choosing the official seat for the Tribunal would be important because it provides the *lex arbitri* of the arbitration, i.e., the procedural rules of the arbitration not otherwise chosen by the parties. The seat of the Tribunal would be in a jurisdiction, such as the Netherlands, with recognized competence in resolving international disputes. The official drafting committee would decide whether the seat would be permanently located in one jurisdiction (as is the case with CAS arbitrations), or whether the parties to the dispute would have the freedom to choose the seat of arbitration (as is the case with UNCITRAL and other international arbitrations).

When the Working Group began this project over a year ago, making the Tribunal a reality seemed to be a tall order. But we are now encouraged by the response that the idea has generated. We appreciate that there are many challenges associated with such an ambitious idea. But the alternative -- to rely solely upon the efforts of individual business enterprises and individual states to solve the problem over the course of time -- would disregard a promising opportunity.

Time is of the essence. It is not acceptable for human suffering and environmental and property devastation to continue to plague the poor and vulnerable for decades to come. In our rapidly changing society, the legal machinery must keep pace. We must find cutting-edge solutions. Our commitment is premised upon the conviction that the goal merits the effort.