

AN INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS AND HUMAN RIGHTS

Version Five

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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

Victims of business-related human rights violations have little access to justice. They face substantive and jurisdictional gaps in domestic and international legal systems as well as daunting legal and practical obstacles that discourage the filing of claims.² Courts have largely failed to provide for their needs. Countless victims are simply left to suffer. We have seen only a handful of national court claims, mainly brought against multinational business enterprises (MNEs) in their home courts by human rights NGOs on

¹ See Appendix A for biographical sketches of the authors and other members of the Tribunal's Working Group, along with the names and affiliations of those providing advice to the Project.

² For a comprehensive discussion of the principal obstacles, see Gwynne Skinner, Robert McCorquodale and Olivier de Schutter, with case studies by Andie Lamb: "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>.

behalf of victims. These cases drag on for years and often end inconclusively. This situation cannot be said to serve anyone's interests, even those of the MNEs involved in the lawsuits. If we are to improve upon the dismal state of affairs that Mary Robinson's above words deplore, we must create a new system designed to meet the needs of all parties to human rights disputes.

We propose the establishment of an International Arbitration Tribunal on Business and Human Rights (the Tribunal).³ International arbitration is a time-tested method that would allow business enterprises and human rights NGOs a new way to adjudicate their disputes. It would provide arbitrators who are specialists in hearing and deciding human rights disputes involving business enterprises. They would follow a set of rules that were custom designed for such disputes. The Tribunal would also have access to skilled mediators who specialize in resolving human rights disputes at an early stage.⁴ It would be served by a fund established to provide support to victims.

Once the Tribunal is established, it would offer international arbitration and mediation services worldwide to disputants who would otherwise either engage in protracted court litigation or, where no court is available, resort to bitterly fought media battles. The Tribunal would fill a legal vacuum that now exists. These reasons alone provide ample justification for its creation.

There are additional uses for the Tribunal that are prospective in nature. One of these prospective uses would be to provide a tool that enables MNEs to prevent and mitigate abuses throughout their supply chains. Another prospective use would be to enable international bodies, states, lenders and others to improve their programs for preventing and mitigating human rights impacts that are caused by borrowers, aid recipients, and regulated business enterprises. These new uses would assist MNEs and states in fulfilling their

³ For the sake of convenience, we refer to the rosters of arbitrators, mediators and specialists, the custom rules and the fund for victims, all discussed below, as, collectively, the "Tribunal."

⁴ We acknowledge that currently the number of arbitrators and mediators with the combined skills required to service the Tribunal is limited. Training and pertinent experience will be necessary to fully staff the Tribunal's rosters.

responsibilities under the United Nations Guiding Principles on Business and Human Rights (the UNGPs).⁵

II. The Potential for the Permanent Court of Arbitration to Establish the Tribunal

After considering several other options, we have concluded that the Permanent Court of Arbitration (the PCA), with headquarters in the Peace Palace at The Hague, would be the preferable institution to create the Tribunal.⁶ The PCA, founded in 1899, has a distinguished history, a skilled professional staff, high credibility, deep political and financial backing, and cooperative arrangements with states and other institutions throughout the world.⁷ It has considerable experience in crafting international arbitration rules in multiple specialized areas. The PCA also maintains a Financial Assistance Fund that provides a means for donor states to fund the arbitration costs of less wealthy states.

The PCA has been seen as an appropriate forum for a variety of highly sensitive claims, including its Eritrea-Ethiopia Claims Commission, which dealt with various alleged violations of customary international humanitarian law in the Eritrea-Ethiopia war of 1998-2000. Those claims included physical and mental abuse of prisoners of war, inadequate medical care in prisoner of war camps and unlawful assault on female prisoners of war. Such claims have similarities to some potential human rights claims that could arise before the Tribunal.

The PCA recently created special rules to govern arbitration and conciliation involving environmental disputes. It appointed an eminent expert on international law to lead the effort. The expert assembled a distinguished

⁵ The United Nations Guiding Principles on Business and Human Rights (hereinafter “the UNGPs”) are discussed further in Section X below. The UNGPs are available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁶ The PCA website is at http://www.pca-cpa.org/showpage.asp?pag_id=363.

⁷ Although the seat of the Tribunal would be at The Hague and would be served by the PCA’s Secretariat, the parties would have the freedom to mediate and arbitrate almost anywhere in the world. Having the seat of the Tribunal at The Hague would be an asset because the laws of The Netherlands have long been supportive of international arbitration.

team to assist him in drafting the rules. Then, to implement the new rules, the PCA appointed rosters of recognized experts in environmental arbitration and conciliation and a roster of other specialists skilled in subjects related to environmental disputes. Based on this track record, we feel that the PCA can be counted on to observe its usual high standards in creating and staffing the Tribunal.

We hope that the PCA's Administrative Council will authorise the drafting of new PCA procedural rules at one of its future meetings.

III. The Tribunal's Procedural Rules

The first step towards the creation of the Tribunal would be the development of procedural rules that take into account the special features of human rights disputes. The PCA would appoint an appropriate, independent world-renowned expert in international arbitration who would assemble a drafting team drawn from the principal stakeholders, such as experts in international arbitration, MNEs, NGOs from the human rights community, concerned international bodies and states. It can be expected that the new rules would likely use as a starting point the PCA's own UNCITRAL-based rules.

Some of the issues that the drafting team will need to address are:

- How transparent the proceedings and awards should be and how to accommodate any confidentiality concerns that either side might have.⁸
- The procedures for the selection of arbitrators by the parties or by an appointing authority, including the qualifications of arbitrators not on an official Tribunal roster.
- How to ensure "equality of arms" between the parties, i.e., to account for the disparate financial and other resources of business and victims.

⁸ The drafting team would likely take into account UNCITRAL's recently adopted rules (effective April 1, 2014) that make investor-state arbitration transparent to the public. The new rules authorize the arbitrators to make rulings designed to protect confidential business information. Outside parties may be allowed to submit amicus briefs. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

- Whether to allow for the annulment of awards and, if so, what the procedures for such annulments might be.
- Whether to allow groups of victims to aggregate claims in common actions through consolidation or class action arbitration.
- What roles states should play as potential parties.
- What roles third parties, such as NGOs, trade associations or others that represent victims, should have with respect to the arbitration.

IV. The Initial Uses of the Tribunal

The initial use of the Tribunal would be to offer international arbitration to parties who would otherwise find themselves without a dispute resolution forum or in protracted court proceedings.

Choosing between arbitration and court litigation may involve complex issues. Some of the advantages that international arbitration offers the parties are:

- Proceedings are based upon mutual agreement between the parties and can be held in many places throughout the world, to suit their convenience.
- Instead of the five to ten years that court proceedings often entail, arbitrators could issue a final award in a shorter timeframe.
- The parties may choose both a neutral place for the resolution of their dispute and a neutral tribunal.
- Instead of submitting cases to judges chosen by “the luck of the draw,” parties would participate in choosing arbitrators who have expertise directly related to business and human rights issues.⁹

⁹ Three arbitrators are commonly used, but the parties may select a single arbitrator. If three are used, each side selects one arbitrator and the two then jointly agree upon a third, who serves as the chairman of the panel. The parties would be free to name arbitrators and mediators not on the Tribunal’s lists, provided that they otherwise meet the Tribunal’s standards. Arbitration rules generally provide that an outside “appointing

- There is continuity of decision makers throughout the arbitration process.¹⁰
- The parties specify the substantive and procedural laws that govern the dispute.¹¹
- The parties are able to craft individual discovery plans; motion practice would be simplified; and annulment proceedings would be considerably limited in scope, all of which would tend to keep the duration of the proceedings short and the costs down.¹²
- Proceedings can be less adversarial than in-court litigation, thus preserving working relationships.
- Awards are potentially enforceable throughout the world, including under the New York Convention.¹³

authority” may select arbitrators where the parties, or the selected arbitrators, are unable to make a selection. 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 their replacement.

¹⁰ This assumes that the rules would not provide for a substantive annulment process. An arbitrator who drops out in mid-proceeding, for health or other reasons, would be replaced in the same manner as he or she was originally selected.

¹¹ See Section VII for a discussion of how international legal norms may come before the Tribunal.

¹² For a set of widely accepted international rules on the taking of evidence in arbitration, see IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

¹³ The New York Convention on the Enforcement of Foreign Arbitral Awards. As of December 31, 2014, it had 152 parties. It is There are several exceptions to enforcement of arbitration awards that may apply in individual cases. In order to be enforced in some states, the award must be based on a “commercial” contract. In all states, it must not be a “domestic” award and the enforcement of such award must not be contrary to the “public policy.” Because these exceptions are to be interpreted by the courts of each state, prospective parties to arbitration should examine the interpretations of these exceptions

Where no viable court is available, the Tribunal would present victims with a choice between arbitration or a media campaign. Even where viable courts are available, both victims and MNEs have something to gain by voluntarily agreeing to submit the dispute to international arbitration. The victims would have a forum to seek justice; the MNE would have a way of resolving a matter that, if allowed to fester, could have deleterious consequences for its risk profile and public image. Some executives have told us that their companies are occasionally attacked with unfounded allegations that are amplified around the world through the media. Such widespread allegations may be difficult for an MNE to rebut without a fair and prompt hearing. Even in cases where there is substance to the allegations, an MNE may prefer to mediate or arbitrate to dispose of the matter.¹⁴

At the outset, the business side may be more likely than the victims' side to choose arbitration over court litigation because MNEs have had more extensive experience with commercial arbitration and are familiar with its advantages. Human rights NGOs have tended to criticize international arbitration as a general matter. They perceive that investor-state arbitration proceedings, the form of international arbitration that they are most familiar with, are a means to protect commercial interests and they express concern that parties to those arbitrations sometimes prefer that proceedings be kept confidential, even where they involve matters of public interest.

However, we have reason to expect that NGOs will see how different the Tribunal will be from the investor-state arbitrations that they have observed and that there are significant benefits that the Tribunal can offer victims. These differences include the following factors: its arbitrators would be experts in international human rights law; its rules would allow for transparent proceedings; it would be available where no other access to remedy exists; it would be focussed on the implementation of accepted and/or agreed-upon international human rights norms; and its links to

by the courts in which enforcement may eventually be sought. Available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

¹⁴ 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."

sources of funding to assist victims would address some concerns about the “inequality of arms” problems that have long placed victims at a disadvantage vis-à-vis their business opponents.

It may take time for both MNEs and human rights NGOs to make broad use of the Tribunal, but there is reason to hope that the Tribunal’s advantages will ultimately lead to its being seen by both sides as an acceptable forum.

V. The Tribunal and Mediation

Generally speaking, the longer a dispute drags on, the more the positions of the parties can become hardened, resulting in mounting legal and administrative costs to both sides. Thus, before resorting to binding arbitration, the parties to a dispute would do well to consider the use of mediation, which promises to obtain a resolution quickly and at low cost. Another advantage, for parties wanting to preserve a valuable commercial relationship, is that it is collaborative, whereas arbitration and litigation are adversarial in nature.

The Tribunal would make mediation services available worldwide. In doing so, it may be possible to draw upon the resources of other mediation/facilitation mechanisms. ACCESS Facility, for example, is a global nonprofit organization based in The Hague that supports rights-compatible, interest-based problem solving to prevent and resolve conflicts between companies, communities and governments through mediation/facilitation.¹⁵

In addition to resolving bilateral disputes between business enterprises and victims of abuses that have already occurred, the mediators could help development projects and potentially impacted communities work out agreements for mitigation of expected impacts and for acceptable offsets – thus preventing difficulties that could affect not only the human rights of the community members but also the project’s economic viability. As part of any final agreement, the parties could specify the Tribunal as the forum to resolve any future disputes that might arise.

Another function of the Tribunal could be to assist parties in mediation who are experiencing a deadlock in the process on a minor technical legal issue

¹⁵ Information about ACCESS Facility may be found at <http://accessfacility.org/>.

by providing an expedited legal decision to resolve the deadlock and enable parties to proceed with the mediation.

VI. Prospective Future Uses of the Tribunal

The Tribunal would serve as the foundation for new approaches that could be adopted by numerous participants in the struggle to protect human rights, including:

- The use of international arbitration clauses in supply chain and other commercial agreements.
- The insertion of international arbitration clauses into loan agreements, insurance policies, aid and development agreements, permits and the like.
- The creation of third-party rights for potential victims that would allow them and their representatives to take direct action against offenders under arbitration clauses.
- Regulatory uses of the Tribunal.

A. Supply Chain Contracts

MNEs have a compelling interest in seeing that their supply chains are free from human rights abuses.¹⁶ The UNGPs urge MNEs to use their leverage with their business partners to bring them into compliance with human rights norms.¹⁷ In order to ensure that its business partners are compliant, an MNE should assess whether it has sufficient leverage to

¹⁶ One potential consequence is that an MNE may become “tarred with the brush” of any human rights offenses committed by its suppliers, leading to adverse reactions among its customers, lenders, stockholders and regulators. Leading 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 manufacturer located at Rana Plaza. Diamond dealers were adversely affected by the movement to stop the trade in “blood diamonds,” leading to the Kimberley Process.

¹⁷ The UNGPs, Principle 19 and Commentary thereto.

require its partners to observe international human rights norms through express contractual commitments, and, if so, employ that leverage in its contracts.¹⁸ It may also examine whether it might enforce those commitments through a so-called “escalation clause” whereby the parties agree to a process for resolving any disputes that arise.¹⁹ The escalation process would begin with a time period for informal negotiations, to be followed by a time period for mediation and then, if that does not work, by mandatory arbitration.²⁰ The Tribunal could be named as the provider of both mediation and arbitration services.

We are aware that some MNEs already use such escalation clauses in their supply chain contracts. They serve as the thought leaders, providing examples of how international arbitration can be integrated into a human rights compliance program. Through their influence, and the efforts of civil society throughout the world, it is to be hoped that the Tribunal’s special rules and the specialized expertise of its mediators and arbitrators would ultimately encourage a widespread use of these tools.

Arbitration can result in relatively swift and effective enforcement of suppliers’ human rights commitments. Indeed, even if it is not ultimately used, the mere presence of an escalation clause requiring binding arbitration could serve as a deterrent to violations.

¹⁸ For a leading example of the use of arbitration as a dispute resolution mechanism in an agreement between MNEs and global labour unions, see the Accord on Fire and Building Safety in Bangladesh, (Unfortunately, through inadvertence, the Accord refers to the UNCITRAL model arbitration law instead of the UNCITRAL international arbitration rules.) Available at http://www.bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf.

¹⁹ An MNE that prefers to terminate an offending supplier, or to litigate in court rather than arbitrate, should take into account the likely consequences of either course of action. If the goal is to stop the human rights impacts as soon as possible while maintaining an otherwise advantageous business relationship, then termination or court litigation may achieve neither. Further, termination would likely result in the loss of employment by the victims, thereby compounding their suffering.

²⁰ Model arbitration clauses and other model contractual language adopted by national and international associations of attorneys would be of great help to business enterprises by providing thoroughness, clarity and uniformity.

B. Arbitration Clauses in Loan Documents and Other Commercial Agreements

Outside of the supply chain context, there are numerous other commercial relationships in which a party may exercise its leverage to persuade or require another to respect human rights. These include loans and loan guarantees, equity investments and foreign aid agreements, particularly those involving large infrastructure projects such as highways and airports.

Doing business with an MNE that becomes linked with human rights abuses involves the risk that the loan or investment could suffer from any resulting economic impacts on the enterprise. Lenders and investors could benefit from the Tribunal by ensuring that those abuses are prevented, mitigated and remediated. A lender such as the International Finance Corporation within the World Bank Group could enhance the implementation of its human rights policies. The same might be expected of socially conscious investors, such as universities, the California Public Employees Retirement Fund (CalPers), and the Norwegian Government Pension Fund Global (the Norwegian Oil Fund). It would be a relatively simple matter for lenders and investors to demand, as a condition of their financing, that the recipients adopt and implement the contractual mechanisms discussed earlier.

C. Third-Party Enforcement Rights for Potential Victims

MNEs and other originators of contracts could also insert provisions into their escalation clauses that require all suppliers and other parties to agree that potential victims of rights impacts would have the right to require the party in breach of contract to engage in negotiations, mediation and arbitration.²¹ This would create a situation where an offender would face potential enforcement from both the MNE and the victims.

Since it may be unrealistic to rely upon the victims alone to be able to assert their rights, a contract clause could authorize representatives such as

²¹ It should be pointed out that the exercise of such a right would be voluntary. A third party could forego its contractual rights and still have its other remedies at its disposal.

labour unions, human rights NGOs or others to act on their behalf.²² Such clauses should be drafted with care so as to avoid any confusion as to precisely what rights are being conferred and who would be empowered to exercise them.

Allowing victims who are not signatory parties to an arbitration agreement to invoke arbitration rights is an accepted feature of international arbitration. For example, bilateral investment treaties (BITs), where states are the only signatories, provide that MNEs who consider that they may be adversely affected by an action of the “host” state are granted the right to binding arbitration with such state. The MNE, with respect to the BIT, is seen as akin to a third-party beneficiary of a contract.²³

Investment chapters in free trade agreements such as the North American Free Trade Agreement (NAFTA) customarily provide that a

²² See Roger P. Alford, *Arbitrating Human Rights*, 83 Notre Dame L. Rev. 505, 507 (2008), available at: <http://scholarship.law.nd.edu/ndlr/vol83/iss2/2> and, in another publication, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978305.

[T]he tools of contract law and arbitration 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.” (emphasis supplied)

²³ The World Intellectual Property Organization (WIPO) uses a similar approach to allow owners of trade names to invoke mandatory arbitration against so-called “cybersquatters” (those who register other peoples’ trade names as Internet domain names in the hope of extracting payment to allow the trade name owner the right to use that name on the Internet). One who registers a domain name must agree to arbitrate its right to register that name if another person claims ownership of the name and seeks arbitration. For example, Apple recently won an arbitration award against someone who had registered “iPod” as a domain name. *Apple Inc. v. Private Whois Service*, Case No. D2011-0929 (July 21, 2011), available at <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0058>.

business enterprise (not a party to the trade agreement) whose rights have been infringed by a state may invoke mandatory arbitration against that state.²⁴

D. Regulatory Uses of the Tribunal

If the Tribunal lives up to its expectations and ultimately becomes widely used by MNEs and victims as a forum for resolving their disputes, it is likely to come under consideration for use as a regulatory tool.

Although it is premature to draw any firm conclusions, one can raise questions concerning its prospective use by a wide variety of regulatory or quasi-regulatory bodies. Could the European Union, for example, require its states to mandate the use of escalation clauses in supply chain agreements? Could states generally impose such a requirement? Could it become a requirement of government procurement contracts? Could states with emerging markets require foreign investors to consent to arbitrate any human rights disputes that arise in the course of a business project? Could the use of the Tribunal be incorporated into National Action Plans on Business and Human Rights for the implementation of the UNGPs, any future UN treaty on business and human rights, or any future bilateral or multilateral arbitration treaties?

There are also various quasi-regulatory schemes that might consider use of the Tribunal. Could an international governmental organization, such as the OECD, integrate international arbitration into its monitoring program for compliance with its Guidelines for Multinational Enterprises? Could the effectiveness of the Equator Principles²⁵ or the Voluntary Principles on Security and Human Rights²⁶ be enhanced by incorporating the use of the Tribunal?

Human rights NGOs may wish to consider advocating for regulatory and quasi-regulatory options. Even MNEs that have led the business sector

²⁴ See Jan Paulson, "Arbitration Without Privy," 10(2) ICSID Review - Foreign Investment Law Journal, p. 247 (Fall 1995).

²⁵ Available at <http://www.equator-principles.com>.

²⁶ Available at <http://voluntaryprinciples.org/principles/introduction>.

by adopting the Tribunal as their preferred dispute resolution forum might advocate the use of new regulatory authority in order to “level the playing field” by requiring all others to do so. For them, it would be a simple matter of preserving fair competition.

VII. Arbitration and International Human Rights Norms

There are two principal avenues whereby international human rights norms could become the substantive legal basis in cases before the Tribunal.²⁷ The first would be by means of domestic tort/delict law. The second would be through contract law.

A tort action could arise in the following simplified manner: International covenants that recognize human rights norms call upon their signatory states to incorporate such norms into their domestic jurisprudence, thereby making a breach of such a norm a domestic tort or a crime. Domestic tort/delict laws generally provide that a criminal act that results in harm to a victim gives rise to a cause of action. Although legal persons, such as corporations, are not covered by international criminal law, they are subject to criminal laws in numerous states, and they are also subject to civil tort/delict laws in almost all states.²⁸ Thus, victims would be entitled to sue under domestic law, but only for breaches of those norms that have been incorporated into domestic law. This is a limiting factor that could be overcome only when the full range of international human rights norms has become incorporated by action on the part of the states concerned.

Prospectively, MNEs will have the option of using contracts that require their suppliers and other business partners to observe specified international human rights norms. Contracts that contain escalation clauses could

²⁷ 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 may state what the law *should* be) unless the parties to the dispute so agreed.

²⁸ 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*). This article discusses the incorporation of international humanitarian law into the jurisprudence of sixteen countries and the status of legal persons under the criminal and civil laws of those countries. Available at <http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-1-Thompson.pdf>.

conceivably commit suppliers and others to a wide range of specified international human rights norms that could result in their being brought before the Tribunal for any breach. Presumably, an MNE would place priority on those rights that its due diligence efforts have disclosed as being at risk. The draftsmen of such contracts have wide discretion in how many rights to include, but in each case it would behoove them to describe those rights with great care.²⁹

VIII. Financial Assistance for Victims

Victims who wish to utilize the Tribunal may need financial assistance to help defray their arbitration and mediation costs, either through outright grants or an advance of funds to be repaid out of the proceeds from final settlements or awards. This would help to offset the financial advantages that business enterprises generally have over complaining victims, i.e., to deal with the problem of “inequality of arms.” As mentioned earlier, the PCA has for many years had a special Financial Assistance Fund that provides for the needs of less wealthy states. This could be used as a model for any new fund to be set up within the PCA. Alternately or additionally, an assistance fund that is separate from the Tribunal, but that would make its assistance available to victims using the Tribunal, could serve that purpose. Perhaps the PCA could explore ways of cooperating with sponsors of any outside fund.³⁰

IX. The Tribunal’s Powers to Make Awards; Enforcement of Awards

Depending upon how the rules are drafted, the Tribunal could have authority to grant extensive relief, including restitution and other damages and to order injunctive relief such as specific enforcement of contracts, remedial measures and measures to prevent prospective abuses. As mentioned earlier, awards could be enforceable in many domestic courts around the world pursuant to the New York Convention.

²⁹ As stated earlier, bar associations and law societies could play a productive role by providing model language that describes with clarity the various human rights at stake.

³⁰ The timing for the establishment of the PCA’s fund would depend on several factors. There would first need to be a demonstrated willingness on the part of victims to want to use the Tribunal. In addition, it would be important to assess whether efforts currently under way to establish an outside trust fund for victims might suffice.

The Tribunal's growing body of authoritative written rulings may not be accepted as binding precedents in courts. But they would be available to other arbitration tribunals as persuasive authority to guide them in arriving at decisions on like matters. And they would be important as guidance to business enterprises to clarify their own responsibilities. Thus the rulings would serve to "level the playing field" within the business community.

X. The Tribunal and the UNGPs

The Tribunal could serve to implement all three Pillars of the UNGPs — the State duty to protect human rights (Pillar One), the corporate responsibility to respect human rights (Pillar Two) and access to remedy (Pillar Three).

- Pillar One. States could mandate the use of the Tribunal as an enforcement mechanism in government contracts (e.g., when contracting out governmental functions, procuring goods and services or operating state owned enterprises) in furtherance of their own duty to protect human rights. States could also use their regulatory authority to require business enterprises under their jurisdiction to observe human rights norms through supply chain and other contracts that are enforceable by means of the Tribunal. Further, the states' duty to protect includes promoting access to justice by making remedies, such as the Tribunal, available to victims.
- Pillar Two. As stated earlier, MNEs could implement their responsibilities to prevent, mitigate and remediate human rights impacts by using supply chain and other contracts to require their business partners to comply with specified human rights norms and by enforcing those contracts via the Tribunal.
- Pillar Three. The Tribunal would provide access to consensual legal (arbitration) and non legal (mediation) remedies to MNE's and human rights holders to resolve their issues.

Considered as a whole, the Tribunal has significant potential to contribute towards the implementation of the UNGPs.

XI. The Prospective Benefits to the International Human Rights Community

Some human rights NGOs may need to overcome their reluctance to accept international arbitration as a valid forum to vindicate human rights norms. We anticipate that the Tribunal's new rules adequately address all of the concerns that these NGOs have expressed, particularly those that stem from past investor-state arbitrations. Thus, we expect that many NGOs will ultimately see that the Tribunal would serve the cause of human rights victims and willingly participate in the creation and operation of the Tribunal.

They would be welcome to designate experts to join the group that drafts the Tribunal's new rules and also assist the Tribunal to identify its arbitrators, mediators and experts.

They could become advocates for the adoption by MNEs and others of escalation clauses in supply chain and other contracts, including clauses that grant victims the kind of third-party rights discussed earlier. Where such rights are granted, NGOs could agree to represent victims before the Tribunal.

Finally, they could advocate for the Tribunal to be incorporated into public and private loans, aid agreements, and the like, and into regulatory and quasi-regulatory programs. This could include efforts to ensure that the use of the Tribunal is featured in National Action Plans.

XII. Conclusion

It is time to look beyond existing court systems and regulatory mechanisms that have largely failed to provide the kind of accountability that is urgently needed to protect human rights. There is every reason to believe that international arbitration will prove to be as successful in resolving human rights disputes as it has been in resolving countless other disputes.

Since the Tribunal project began, we have invited comments from the business community, the international human rights community, the academic community and governments.³¹ Thus far, nearly all of the

³¹ As with the preceding four versions of this proposal, the authors welcome comments from all reviewers. Comments received to date have been invaluable.

responses we have received have been largely positive or have urged us to pursue the project. This leads us to the tentative conclusion that the case for the Tribunal is holding up and that it is likely to emerge intact from further scrutiny.

Business enterprises, victims, NGOs representing victims, international bodies and states are all stakeholders in the effort to rid the world of abuses. The Tribunal sits at the intersection where their interests converge. It presents a rare opportunity. The establishment of the Tribunal would be a lasting achievement of the Permanent Court of Arbitration. It would unquestionably be worth the effort.

APPENDIX A

The Authors, the Tribunal Working Group and Advisors to the Project

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. From 2001 to 2014 he was a member of the CSR (Corporate Social Responsibility) 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://www.gaemogroup.com>].

Robert C. Thompson (AB, LLB Harvard University) 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 LLP, where he was the chairman of the firm's international environment, health and safety practice. Following his retirement in 1999, he has been active in human rights research and writing. He is a co-author of four articles on human rights topics, including the one cited in note 29.

The other members of the Tribunal Working Group who have contributed much insight and effort to the project are:

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The following individuals have provided many productive and informed comments on previous drafts of this proposal:

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The authors are solely responsible for the contents of this draft.