

AN INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS & HUMAN RIGHTS – RESHAPING THE JUDICIARY

VERSION THREE – JUNE 23, 2014

NOTE TO REVIEWERS: This draft is a work in progress and a part of extensive consultations intended to stimulate discussion of the topics surrounding the proposal for an international arbitration tribunal on business and human rights. It is by no means a final document. The drafters invite criticism and suggestions on all aspects of the proposed tribunal and on this memorandum. Reviewers are especially asked to submit comments on the subjects mentioned in footnotes 18 and 19.

Claes Cronstedt, Robert C. Thompson, Rachel Chambers, Adrienne Margolis, David Rönnegard and Katherine Tyler¹

¹ 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://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 the co-author of two of the articles mentioned in footnote 9, below.

Rachel Chambers MA LLM is a barrister who has worked in private practice at Cloisters chambers in London for ten years specializing in employment, discrimination, equality and human rights law. Rachel has held research roles at Monash University (Melbourne) and the Amnesty International Business and Human Rights team. Before being called to the Bar, Rachel worked for the corporate social responsibility (CSR) body, the International Business Leaders Forum. She is now a full-time doctoral student at Essex and an Associate on the Essex Human Rights and Business Project.

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

I. Introduction

For more than half a century, global trade and investment have helped 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 the increasing sophistication of 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, justice for most victims is still elusive. In these circumstances, why do some nation states often fail to protect their own people? Because states themselves are often part of the problem. We believe that Mary Robinson, former President of Ireland and former United Nations High Commissioner for Human Rights, correctly summed up the situation in 1998:

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.

Since those words were written, accountability for human rights violations has been enhanced by some highly encouraging developments. Two leading examples are the advent of the International Criminal Court and the work of John Ruggie in producing the UN Guiding Principles. But there have also been setbacks, such as

experience. She is currently a director of Tax Justice Research and a member of the UK Equality and Human Rights Commission Business and Human Rights Working Group.

David Rönnegard is a philosopher and economist (Ph.D., London School of Economics) specializing in CSR, with a particular focus on its political, moral, and strategic justifications. David is currently a teacher within the Sustainability and CSR program at the Stockholm School of Economics and is also a fellow at INSEAD.

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.

the recent U.S. Supreme Court decisions in *Kiobel v. Royal Dutch Petroleum*² and *Daimler AG v. Bauman*,³ both of which restricted the availability of U.S. federal courts for victims' lawsuits in cases involving multinational corporations. Overall, there remains much work 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. To meet their responsibilities, and to avoid such complicity, business enterprises in every industry sector, be it oil, gas, mining, transportation, finance, forestry or any one of a number of other fields, must engage in the kinds of due diligence that the Guiding Principles call for. But, to ensure that business enterprises take the prescribed steps, there must also be far more accountability for those that do not live up to their responsibilities. It is incumbent upon all elements of society to vigorously advocate for additional, and more effective, means to provide such accountability.

We have come together to work towards the ultimate goal of the creation of an international tribunal on business and human rights (the "Tribunal").⁴ Our preliminary discussions have outlined a number of fundamental parameters. The Tribunal would maintain rosters of highly regarded jurists and attorneys who are familiar with human rights law. The Tribunal would act in a fair and impartial manner.⁵ The Tribunal would apply tort/delict principles to cases concerning

² 133 S. Ct. 1659 (2013). The Supreme Court held that the federal Alien Tort Statute (ATS) does not apply extraterritorially, i.e., to events occurring outside of the territorial United States. Under this holding, 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.

³ 134 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 particular court sits.

⁴ For the present, we are content to refer simply to the "Tribunal." Suggestions for a more fitting title are welcome.

⁵ As Professor Jan Eijbouts, 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

business involvement in human rights abuses throughout the world, irrespective of the locus of the abuses, the nationalities of those involved or whether the perpetrators are legal or natural persons (i.e., corporations or individual business executives). In appropriate cases, the Tribunal would have the authority to award compensation. A secretariat would support the Tribunal. Modern technology would enable the Tribunal to carry out its functions worldwide. Funding for the Tribunal's own operations would come from foundations and other donors.⁶

The Tribunal would likely have wide-ranging subject matter jurisdiction, covering all human rights for which a cause of action could arise under the laws of a state that are applicable to a particular abuse.⁷ This could include not only the grave abuses that form the core crimes under the Rome Statute of the International Criminal Court⁸ but also all other internationally recognized human rights, such as, but not limited to, those contained within the International Convention on Civil and Political Rights and the various international labour conventions. The Tribunal could use its discretion as to which particular disputes it would accept, adopting standards to govern the acceptance process, such as the merits of the claim, the

multinational. In both cases the court could be prejudiced against the foreign party in the case.

Professor Jan Eijbouts, "Corporate Responsibility, Beyond Voluntarism - Regulatory Options to Reinforce the License to Operate" (2011).

⁶ Regarding the parties' own expenses for legal fees and costs, there are limited options. In some jurisdictions, parties bear their own costs; in others, fee shifting is allowed, whereby the winners' fees and costs are paid by the losers. It would seem to be counterproductive to allow fee shifting in the case of the Tribunal, since it would discourage plaintiffs of modest means from participating, due to the risk that a loss would burden them with the defense costs incurred by business enterprises.

Additionally, unless there is a statutory prohibition against the use of contingency fees that would be applicable to the Tribunal, it would seem desirable, and in the interests of justice, to permit such arrangements because it would enable plaintiffs of modest means to obtain legal representation.

⁷ In a case where a particular internationally recognized human right has not been incorporated into a state's laws, the Tribunal would entertain a dispute based on tort/delict law, as discussed below, since the harms inflicted would likely give rise to a claim under such law.

⁸ The Rome Statute of the International Criminal Court contains a list of four international crimes, some set out in great detail: aggression (not yet entered into force), genocide, war crimes and crimes against humanity.

gravity of the abuse and the extent of the injuries, the need to resolve controversial legal issues and the potential importance of the outcome as a precedent for the future. The Tribunal would be designed to provide transparent and credible processes that are easy to understand and that would consistently result in outcomes that are widely accepted. The jurists and attorneys who would be selected to serve as mediators and arbitrators would, in addition to having other eminent qualifications, be expected to possess a degree of awareness of, and sensitivity to, local cultural customs and sensitivities that bear on the merits of all parties' positions before the Tribunal.

This draft memorandum proposes that a broad effort be undertaken to establish the Tribunal. This draft is intended to provide the framework for further discussions that hopefully will lead to an overall agreement on the dimensions of an approach towards that goal. Comments are welcome from all.

II. The Case for the Tribunal

Victims of human rights abuses need to be compensated for their suffering, including personal injury, property destruction and environmental damages. Criminal courts are generally unsuited to provide such compensation. A *civil* court, not a criminal court, is thus the venue to achieve adequate remedies. However, there are numerous reasons that are all too familiar to the international human rights community as to why serious human rights abuses involving business enterprises are not being addressed in today's civil courts.⁹ Suffice it to say, the

⁹ Several recent publications have extensively discussed obstacles to international justice. 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/gwlr/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," (Fafo 2010), available at: <http://www.fafo.no/pub/rapp/20165/20165.pdf>. The UN Guiding Principles on Business and Human Rights lists a number of legal and practical obstacles in the Commentary to Paragraph 26. 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),

absence of independent and functional judicial systems in host countries in many parts of the world is a major factor. And civil courts in the home states of multinational business enterprises either lack extraterritorial jurisdiction or the willingness to assert jurisdiction where it may be authorized.¹⁰ Thus, the lack of access to civil courts needs to be addressed.

There are welcome developments on both the legal and practical level that hold great promise for changing this picture over time. But until fair and functional civil courts become universally available, society must create a forum designed to provide swift and affordable justice to all. The Tribunal would be such a forum.

Simply stated: The Tribunal would provide justice where justice is currently lacking, using time-tested methods of mediation and arbitration (ADR). Even if civil courts were to become available sometime in the not-too-distant future, the Tribunal would still offer distinct advantages, and thus would serve a continuing and complementary function.

Through the use of ADR, the Tribunal would, in many situations, be more suitable than a civil court for resolving human rights disputes. The Tribunal would offer: (a) the ability of parties throughout the world to avail themselves of its services (there being no role for the *forum non conveniens* doctrine); (b) streamlined procedures, e.g., simplified discovery procedures, less formal pleadings required, flexibility in the examination of witnesses, and simplified written decisions; and (c) far fewer delays, due to an un-crowded calendar and the availability of the arbitrators to work on a relatively dedicated basis, instead of spreading themselves among various competing cases and numerous different legal fields, as is the case with judges in most civil courts. Additionally, ADR offers substantial cost advantages to both sides. Fairness to both parties would be assured through, among other features, the use of widely accepted methods of selecting the arbitrators and mediators. Thus, parties that would otherwise be facing formal litigation may see it in their interest to try to resolve disputes through ADR rather than engage in a lengthy and costly trial proceeding.

III. Salient Features of the Tribunal

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>.

¹⁰ Viz., the two recent U.S. Supreme Court cases, see, fns. 2, 3, *supra*.

The Tribunal would handle disputes concerning business involvement in abuses of all human rights that are protected under international law, as incorporated into national jurisprudence.¹¹ The Tribunal would apply the substantive laws of the jurisdiction(s) selected by agreement of the parties or, lacking such agreement, would apply generally accepted choice of law principles to determine which jurisdiction's laws should apply.

Although the Tribunal's jurisdiction would extend to such human rights disputes of every nature and description, its principal initial focus would likely be on the most serious abuses and those whose resolution would establish the most valuable precedents. The Tribunal's rules would provide screening criteria for selection of such cases.

The Tribunal would apply tort/delict principles, which are found in most, if not all, national legal systems.¹² Tort/delict law may vary from one country to another, but what is common among these jurisdictions is that one who harms another or damages others' property in an unlawful manner is liable to compensate the injured party. In a situation that is not expressly covered by the applicable substantive law, all parties could agree to authorize the Tribunal to exercise *ex aequo et bono* (that which is "fair" and "in good conscience") powers in resolving a dispute.¹³

The Tribunal, from its outset, would be distinguished by its expertise in business and human rights matters. As a permanent institution, its expertise would be expected to grow over time, and its authoritative rulings would clarify the roles and responsibilities of business enterprises when dealing with human rights issues. It would enhance legal certainty and encourage companies to engage in preventative

¹¹ See n. 7, *supra*, discussing the potential use of tort/delict law to fill in gaps in national human rights law.

¹² See, Translating Unocal, *supra*, n. 9, at 887.

¹³ A rarely-used provision allowing the parties to agree to the exercise of *ex aequo et bono* powers is found in Rule 33 of the UNCITRAL Rules and mentioned in Article 43 of the ICSID Convention. These rules are discussed in the immediately following paragraph. Similar provisions are found in the rules of other international arbitration authorities. See, Leon Trakman, "Ex Aequo et Bono: De-mystifying An Ancient Concept," University of New South Wales Faculty of Law Research Series, n. 45 (Berkeley Electronic Press 2007), available at: <http://law.bepress.com/cgi/viewcontent.cgi?article=1041&context=unswwps-flrps>.

due diligence efforts. Hence, the Tribunal would significantly influence patterns of business behavior in a way that levels the playing field.

The rules for the conduct of the Tribunal's proceedings would be drafted by a committee that represents a balance among all concerned stakeholders. The drafting committee should be constituted at a relatively early stage in the process of creating the Tribunal so that authoritative drafts can be made available to those who are considering whether to support its ultimate adoption. There are numerous examples to draw upon, including those in use by international conciliation/mediation¹⁴ and arbitration entities such as the International Centre for Settlement of Investment Disputes (ICSID),¹⁵ the United Nations Commission for International Trade Litigation (UNCITRAL)¹⁶ and the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO).¹⁷ Each of these entities has developed well-received rules of procedure and other instruments for

¹⁴ The term “conciliation” as used in the ICSID and UNCITRAL documents is synonymous with “mediation.”

¹⁵ 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 devoted to investor-state dispute settlement. Its procedural rules are available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

¹⁶ UNCITRAL is an international commission formed by General Assembly Resolution 2205 XXI (17 December 1966). It has a governing body consisting of 60 member states selected from among members of the United Nations that represent different legal traditions and levels of economic development. UNCITRAL does not itself conduct conciliation and arbitration proceedings, rather its function 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.

UNCITRAL's conciliation rules are available at: <https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>.

¹⁷ WIPO is a self-funding agency of the United Nations, with 187 member states. Headquartered in Geneva, it is the global forum for intellectual property services, policy, information and cooperation. It was established by the WIPO Convention in 1967 and issued its first arbitration award in 1999. WIPO's arbitration and mediation rules were last updated in 2014. They are available at: <http://www.wipo.int/amc/en/arbitration/expedited-rules/newrules.html>.

ensuring fair and impartial mediation and arbitration of international disputes. The task for the working group would be to ensure that the final rules were fair to all participants and that they were tailored to the human rights arena.¹⁸

As do ICSID, UNCITRAL and WIPO, the Tribunal would maintain two rosters: one of mediators and one of arbitrators. Only highly respected lawyers and judges with expertise in mediation and/or arbitration, plus a deep familiarity with human rights law, would be eligible for appointment to one or both of these rosters. The development of the procedures for selecting the arbitrators and mediators for the rosters of the Tribunal should involve the participation of numerous interested stakeholders, including business interests, so as to ensure that the most eminently qualified jurists and attorneys are drawn from all regions of the world.¹⁹

The Tribunal would be available for the parties to make an effort to settle the dispute through mediation if their own direct negotiations have failed. The mediator's role would be to facilitate communications among the parties in an effort to reach a settlement agreement. If this is not successful, or if the parties agree that arbitration should be the initial step, the parties could apply to the Tribunal for the establishment of an arbitration panel that would hear the matter and render a final decision.²⁰ There should be flexibility under the rules for the

¹⁸ One issue would be how to deal with “default” cases, i.e., disputes when one of the parties, having initially joined the proceedings, withdraws. The three templates have evolved workable precedents for how the proceedings may nonetheless proceed to a final ruling. ICSID Rule 42, UNCITRAL Article 30 and WIPO Article 50. Other issues to be resolved in connection with the drafting of the rules of the Tribunal are: (a) how to maintain the confidentiality of the proceedings; (b) how to protect confidential business information and other proprietary information; (c) whether to allow victims to be represented before the Tribunal by NGOs; (d) whether to allow related matters to be joined in joint or consolidated proceedings; (e) what criteria should be used in determining whether a given matter should be accepted by the Tribunal for arbitration and/or mediation; (f) whether states should be subject to the Tribunal, and, if so, under what circumstances, and (g) to what extent should an arbitration panel be empowered to compel the disclosure of documents and other information deemed relevant to the proceedings.

¹⁹ There are several alternate approaches to the appointment of arbitrators. The working group is seeking comment on the issue of whether arbitrators should be selected only from the official roster or whether a party should be allowed to name an arbitrator not on such roster, as allowed under Article 31 of the ICSID Convention and other commercial arbitration rules (e.g., the American Arbitration Association). A principal concern is which alternative would make the Tribunal more, or less, attractive to all potential parties.

²⁰ The arbitration results would be final, subject to appeal within the Tribunal itself only on limited grounds, as discussed below. The decision would be binding on the parties and

arbitration panel to refer matters to mediation during the pendency of the arbitration proceedings. In rendering its final decision, the arbitration panel would have the authority to include both legal and equitable relief.

IV. Obtaining the Consent of the Disputants to the Use of ADR

Arbitration and mediation require the consent of the parties. Often, consent is expressed in an agreement signed immediately before a dispute is accepted for resolution. Hopefully, the existence of the Tribunal, with its highly regarded expert arbitrators and mediators and the support of a competent secretariat, would make ADR attractive to all concerned and that obtaining consent would be only a formality.

Plaintiffs/victims would likely be inclined to consent to the use of the Tribunal for a variety of reasons, especially where no other desirable forum is available. Whether business entities could be expected to consent to the use of the Tribunal as readily may be problematic, although many businesses may also find the Tribunal to be acceptable, for reasons discussed below. Additionally, there are various mechanisms to obtain blanket consent to arbitration and mediation in advance of the occurrence of an abuse, also discussed below.

Some business enterprises may see the advantages of the Tribunal and readily

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). By 2013, its membership had grown to 149 countries. 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. Although the final grounds for such review would be set forth in the rules of procedure for the Tribunal, it is suggested that the ICSID Rules of Procedure for Arbitration Proceedings might serve as a useful example. Under Rules 50 to 55, the Secretary-General (i.e., the “legal representative and the principal officer of the Centre”), upon the filing of an application by an aggrieved party, is authorized to appoint an *ad hoc* committee that may annul all or part of an award. The grounds for an annulment of a decision under Rule 50 are limited to:

- that the Tribunal was not properly constituted;
- that the Tribunal has manifestly exceeded its powers;
- that there was corruption on the part of a member of the Tribunal;
- that there has been a serious departure from a fundamental rule of procedure; and/or
- that the award has failed to state the reasons on which it is based.

consent to its use.²¹ For example, business executives have commented that their companies are sometimes attacked with unfounded allegations that create a situation that easily gets out of hand and turns into a flood of allegations that are snowballed around the world on the Internet and through other media. Such widespread allegations may be difficult for an enterprise to rebut unless it is afforded a fair 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. Thus, business enterprises may see it in their interest to agree to an ADR proceeding, even one where the Tribunal could issue an award of damages, out of a desire to clear their names as expeditiously as possible, or at least to avoid further harm to their reputations. Reputational damage resulting from accusations of involvement in human rights abuses can be a serious matter, particularly for business enterprises that deal with the public, have shareholders and investors who are sensitive to these matters, or are seeking favours or support from governments or other institutions.²² In some cases, one's trading partners may choose to shift business away from an enterprise with such reputational damage.

Thus, disputants on both sides may be drawn to the use of the Tribunal so as to avail themselves of its fair and expeditious proceedings. However, there may be some business enterprises caught up in a human rights dispute for whom the preferred method of dealing with the problem is to exercise all legal and practical means at their disposal (which, in all fairness, they are entitled to do) and to resist any sort of adjudication attempts. The use of the Tribunal is unlikely to appeal to them despite its advantages. However, the refusal of a business enterprise to agree to arbitrate a dispute could lead to further damage to its reputation: It could face

²¹ The Associate Editor of *Oil & Gas Journal* has observed:

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).

²² 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."

disapproval for the refusal itself, along with creating the implication that it has something to hide.

There are various means to obtain the consent of business enterprises prior to the eruption of a dispute. Public and private financial institutions could insert arbitration clauses into their agreements with their funding recipients that provide advance consent to the use of the Tribunal (and, in appropriate cases, consent to access to the Tribunal by third beneficiaries under such agreements). This is a feature commonly found in commercial agreements. National and international financial assistance organizations, such as USAID, the US Overseas Private Investment Corporation, the International Financial Corporation (IFC), the International Monetary Fund, etc., could require the use of ADR for resolving human rights disputes that may arise in the course of implementing funded programs. For example, IFC guidelines that now mandate the use of an administrative grievance mechanism could be amended to require disputes that are not settled administratively to be referred to the Tribunal. The use of the Tribunal could also be incorporated into the Equator Principles and other statements of voluntary principles. It has also been suggested that states could require the consent to the use of the Tribunal as a condition of a business enterprise's registration to do business in the jurisdiction.

Another avenue to explore that could prove to be fruitful would be an affiliation with the National Contact Points (NCP) established in many OECD members under the OECD Guidelines on Multinational Business Enterprises (the "OECD Guidelines"). At least some NCPs already urge parties to a specific instance to seek mediation of their dispute. It would be a reasonable next step for an NCP to suggest to the parties to a dispute to make use of a qualified arbitration tribunal, such as the Tribunal. Thus, although the NCPs currently do not make use of arbitration, each OECD member has considerable latitude regarding the operations of its NCP. Once the Tribunal becomes operational, it might appeal to individual NCPs as a source of potential assistance in resolving disputes arising under the OECD Guidelines. Given some of the criticism that has been levelled at the NCP system, the NCPs and even the OECD itself might welcome such an innovation.²³

²³ For example, John Ruggie said, at a presentation in Madrid in May 2013 when the subject of NCPs came up, that "... if that process says that the company was in violation of the guidelines, what happens? Nothing. That company can go next day and apply for investment insurance and export credit from the same government. Absolutely absurd."

The ability of the Tribunal to make binding decisions and to award compensation would greatly enhance the authority of the OECD Guidelines.

Additionally, because there is the potential for the Tribunal to be open to states as parties to human rights disputes involving business,²⁴ the Tribunal could also potentially become affiliated with various human rights courts that deal with state interests, such as the Inter-American Court of Human Rights, the European Court of Human Rights or the African Court on Human and Peoples' Human Rights. These courts could use their leverage in appropriate disputes to see that the parties agree to submit their disputes to the Tribunal. This approach has been referred to as "court-induced" ADR.

Finally, one may envision a circumstance where the government of a home or a host state or an international organization might use its regulatory authority or other leverage over business enterprises to see that a particular human rights dispute, or all such disputes in general, are adjudicated by the Tribunal.²⁵

V. A Call for Action

We propose to develop a program that stimulates discussions, conferences and exchanges of papers at a professional and academic level. We aim to flesh out the case for the Tribunal (e.g., staffing, use of technology, rules of procedure, etc.). We also want to persuade senior policymakers and the world community at large of its desirability. The work would focus on building support for the Tribunal, targeting the international human rights community, business organizations, states and international organizations.

Making the Tribunal a reality could be a tall order. We acknowledge that there are many challenges associated with such an ambitious undertaking. But the alternative - to rely solely upon the efforts of individual nation states to solve the

²⁴ See the question raised in footnote 18 regarding potential participation by states.

²⁵ The UN Guiding Principles embrace this notion:

States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms. ... These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. Guiding Principles, Paragraph 27 and its Commentary.

problem over the course of time - would be a mistake, for it 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 shared conviction that the goal merits the effort.