

Summary Note

Title of session:

Exploring access to effective remedy: An international arbitration tribunal on business and human rights

Time and Room number

08:00-09:30 3 December, Room XXI

Names of the panellists and moderator

Claes Cronstedt, Member of the Swedish bar, former international partner, Baker & McKenzie

Rae Lindsay, Partner, Clifford Chance

Amol Mehra, International Corporate Accountability Roundtable (ICAR)

Robert Thompson, Member of the California bar and former Associate General Counsel of the U.S. Environmental Protection Agency.

Moderator:

Mauricio Lazala
Deputy Director,
Business & Human Rights Resource Centre

Short summary of the main points relayed by the presenters (1x paragraph for each panellist)

Claes Cronstedt

During the past two days of this important Forum one cannot avoid noticing the frustration among the attendees about the never-ending corporate impunity. Our belief is that an expert arbitration

tribunal could be a turnaround. The proposed Tribunal would be specially designed to handle human rights disputes. It would offer mediation and arbitration. Its swift proceedings could be held anywhere in the world. The arbitration awards would be widely enforceable under the 1958 New York Convention. In our rapidly changing society, the legal machinery must keep pace. The Tribunal would be a cutting-edge solution.

Rae Lindsay

This is a personal perspective. There is a thirst for access to remedy so I congratulate the people who proposed this. But for many human rights impacts that would need remedy, the adversarial model of traditional arbitration would not work. The focus should be on where the tribunal can make a difference. What need is the tribunal trying to meet and how will it reach the people who need to use it? The proposal to use contracts is interesting, but how do victims have input? How do you incentivise companies to use this? We need to look for new ideas, suited to the kinds of abuses that victims face.

Amol Mehra

This is personal view. The system of judicial remedy is stacked against rights holders. What more can be done? Is this proposed remedy fit for purpose? With an international arbitration mechanism through contracts, how are rights holders factored in? It is privatising remedy. What are we going to do about state capacity, where states are not providing remedy? Are we forgetting about governments? Arbitration does not protect rights holders so how do you fight against that imbalance? Ensuring transparency is critical.

Robert Thompson

The main effort we will be making is to continue our market research in the international human rights community. We asked the central question: "If we build it, will they come?" From the business community, we have learned that if there is to be a new ADR system, it must be fair and not expose businesses to undue risks and liabilities. In the human rights community our fundamental finding is that arbitration has a bad reputation due, in large part, to the experience of being excluded from many arbitration proceedings in the area of investor-state conflicts. The human rights community has given us a shopping list of concerns. International arbitration can be flexible enough to address all of them.

Key issues of discussion- record of ensuing discussion and interventions from the floor (comments and questions).

Arbitration is not just a tool for investment disputes. It can be used in human rights as in other areas. Costs are a real issue but contracts can be structured to take this into account.

The Access facility in the Hague is a forum for non judicial remedy. From a business point of view, such remedy adds to the human rights infrastructure. To get buy in from civil society, you need to tailor it to local circumstances.

Relationship between the treaty and the tribunal: the treaty could assist the tribunal, it could “catch up”.

The NGO community have a significant role to play in making the tribunal successful – keeping track of how businesses respond to questions put to them about human rights impacts in their supply chains. NGOs could also pick up and fund cases.

The Tribunal could elaborate how the UN Guiding Principles apply in practice.

Arbitration could be used today. Lawyers could advise clients to put it into contracts.

It could be done right now but it would need a special rule – it gives a greater degree of comfort to include it in contracts.

There is a problem with third party beneficiaries – how would they know about the relevant contractual terms? There must be transparency in contracts.

How will communities know they have the right to use a tribunal? It will need something public out there.

At project level, non-judicial grievance mechanisms are already in the UN Guiding Principles. These are a source of concern / criticism in some quarters and are another example of privatising access to justice.

Contribution and complicity issues / cumulative impacts; how to build in the ability to deal with these complex matters?

There is concern over privatising remedy – there is a lot of precedent.

You are trying to be all things to all people. You need to define what kind of disputes will be dealt with and what substantive standards will be. Is it envisaged that the Tribunal will apply the Guiding Principles and will assess human rights breaches by reference to breaches of those principles?

How can it be mutual when there is an imbalance between the parties?

We want to empower citizens to bring cases.

The state needs to apply leverage to enforce judicial remedies. We need to move forwards with a rights holder orientation.