

A Proposal for an International Arbitration Tribunal on Business and Human Rights

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The world has suffered in the last half-century an endless avalanche of repetitious and overlapping rules, cascading from UN conferences and commissions and conventions. It is time to enforce a few of them, with the help of international tribunals sufficiently learned and independent to be accredited with judicial wisdom.

Geoffrey Robertson QC¹

In the latter part of the twentieth century, globalization gathered momentum and increasingly states became unable to efficiently regulate the growing cross border trade and flow of capital and investment and the accompanying behavior of multinational business enterprises (MNEs) and their supply chains. This created a governance gap that left victims of business-related human rights abuses without access to effective remedies.² The present system of legal remedies is patchy, unpredictable, and ineffective. The national courts are often politically influenced or swayed by corruption. Hence, the system is failing victims who are unable to access effective remedies for the abuses they have suffered. And it is failing many MNEs as well, which often are operating in environments of great legal uncertainty and where participants are not competing on anything even close to a level playing field.

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¹ GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE xviii (2000).

² John Gerard Ruggie: "...how to close the gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. Among other effects, these governance gaps, as I call them, provide the permissive environment for wrongful acts by companies without adequate sanctioning or reparation. How to narrow and ultimately bridge such governance gaps in relation to human rights is the focus of my work." (Testimony at UN General Assembly, 27 October 2008)

There is a historical parallel to which we can turn. Let's go back to the medieval city-states in Europe, where the merchants traded across borders. The merchants were organized into guilds, often with considerable power. Their trade practices developed out of the needs of the market and created norms through custom. These norms were *Lex Mercatoria*, the "Law Merchant." The merchants had their own courts of arbitration and elected their own judges. Using high moral standards, these courts swiftly settled disputes. A merchant who violated these norms or refused to obey an arbitral decision could find that other merchants would not do business with him. Ultimately these practices crystallized into different national laws during the 19th century, and *Lex Mercatoria* faded away.

To be successful, businesses today must have good relations with other stakeholders in society. In order to address the widespread governance gap that we have witnessed since globalisation has gained traction and created global markets, we see the emergence of a set of private transnational norms and rules *outside* national laws. This has come to be called "New *Lex Mercatoria*."³ It is comprised of initiatives, such as the ones covering the entire scope of corporate social responsibility (CSR)—for example, the UN Global Compact, the ISO 26000 guidance standard on social responsibility and the Global Reporting Initiative (G4), and certain specific sector initiatives such as the Kimberly Process Initiative (conflict diamonds), the Extractive Industries Transparency Initiative, and the Equator Principles (environmental and social risk management for project finance).

These initiatives represent examples of collective self-regulation, norms, or soft laws that have been established after pressure from society at large and are now growing worldwide with minimal intervention by national politics. This development is very encouraging. However, when corporate human rights abuses occur, there is still no effective access to justice for the victims.

We are therefore proposing that the reach of existing international arbitration rules and institutions be broadened to include human rights disputes involving MNEs, their business partners, and victims of abuses.⁴ This is an area heretofore largely untouched by arbitration. The first step would be for a team of experts in international and human rights law that represents diverse stakeholders to evaluate existing international arbitration and mediation rules, such as UNCITRAL's recently adopted rules that make arbitration transparent to the public.⁵ They would be asked to determine whether any changes need to be made to ensure that the particular needs of parties in business and human rights matters can be accommodated by them—and if not, to draft appropriate changes. The resulting rules would be administered by one of the most highly regarded arbitral institutions, which would maintain rosters of arbitrators and mediators with recognized expertise in human rights

³ John Gerard Ruggie & John F. Sherman III, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice* (September 8, 2015), <http://ssrn.com/abstract=2657885>.

⁴ Claes Cronstedt & Robert C. Thompson, *An International Arbitration Tribunal on Business and Human Rights – Version 5* (Apr. 14, 2015), <http://www.i4bb.org/news/TribunalV5B.pdf>.

⁵ *UNCITRAL Arbitration Rules*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited Apr. 28, 2016)

matters. We refer to this new arrangement as “the International Arbitration Tribunal on Business and Human Rights” or “the Tribunal.”

International arbitration under the auspices of the Tribunal would offer these features:

- Instead of proceedings in overloaded courts which often take five to ten years to reach a decision, the Tribunal could significantly shorten the time (and cost) for resolving a dispute.
- Instead of having to submit to judges chosen by “the luck of the draw” in national courts, the parties could choose arbitrators who are independent, impartial, and have high levels of expertise related to human rights disputes.
- The Tribunal would make available skilled mediators specialized in assisting in the resolution of human rights conflicts at an early stage, which would avoid escalation in legal disputes and reduce legal costs.
- Hearings could take place virtually anywhere in the world and even online.
- Legal development on business and human rights would be enhanced over time through the publication of a body of reasoned arbitration decisions.
- Instead of being dependent on existing complex and frail mechanisms for enforcing court judgements, international arbitral awards could benefit from existing mechanisms for enforcement, including the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, to which 156 states have acceded.

Arbitration requires the consent of all parties to a dispute. Consent can be obtained in various ways: In the absence of an arbitration agreement signed in advance of the occurrence of a dispute, the parties could choose arbitration rather than a court, owing to the advantages that arbitration offers. If a dispute arises where the victims have no access to a court, an MNE might feel that even in spite of its legal immunity it should voluntarily submit to binding arbitration, motivated, positively, by its sense of corporate social responsibility or, more defensively, by a fear that its refusal to cooperate in a solution could boost negative reactions from the society at large. Moreover, companies that do not agree to refer human rights disputes to the Tribunal may find it difficult to compete in public procurement or to be included in World Bank finance programs. Sooner or later, such outsiders will not be welcome as business partners.

Additionally, MNEs that have an interest in seeing their business partners and supply chains free from human rights abuses could insert human rights clauses into their supply and other contracts along with a so-called “escalation clause” whereby the parties agree to a process for resolving disputes. This process begins with direct negotiations, to be followed by mediation and then, if that does not work, by arbitration. The Tribunal could be named as the provider of both mediation and arbitration services. This arrangement would be a strong incentive for business partners and suppliers to live up to their commitments.

Furthermore, lending to or investing in an MNE that becomes linked to human rights abuses involves the risk that the loan or investment could suffer from any resulting economic impacts on the enterprise. Thus, lenders and investors could add to their lending criteria a requirement that their supply chain and other contracts include human rights and

arbitration clauses. Such contracts could even allow potential victims, as third party beneficiaries, to initiate or join the proceedings. Or public agencies that have human rights responsibilities could insist that MNEs utilize such an approach, either as a condition of doing business within the agencies' jurisdictions or in return for any governmental authorization or assistance.

Arbitration under the auspices of the Tribunal would complement the work of other stakeholders in the effort to improve access to justice. For example, the Tribunal could be an avenue for MNEs to implement their responsibilities under the UN Guiding Principles on Business and Human Rights to "prevent," "mitigate" and "remediate" their adverse human rights impacts and also help to fulfill the need for remedy expressed in the Principles. Also, the OECD National Contact Points, whose role is to urge parties to settle their disputes informally, could recommend that the parties submit cases that do not settle to the Tribunal for arbitration. Additionally, the Tribunal could be referenced in future versions of the Equator Principles.

The Tribunal proposal has attracted international interest and positive responses. NGOs argue that the Tribunal should be tailored to the specific needs of victims of business-related human rights abuses. The business responses indicate a favorable view of arbitration as a potential fast lane for dispute resolution and a way to level the corporate playing field by reducing the use of human rights abuses as a form of unfair competition.

In the growing movement for access to justice, the Tribunal would operate on a parallel or complementary track with the court systems. It would become one of the most effective avenues to rid the world of abuses.