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CAN ARBITRATION BECOME THE PREFERRED GRIEVANCE MECHANISM IN CONFLICTS RELATED TO BUSINESS AND HUMAN RIGHTS?

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Can arbitration become the preferred grievance mechanism in conflicts related to business and human rights?

Abstract: International law demands that States provide victims of human rights violations with a right to remedy, also in the case of violations of human rights by legal entities. International law also provides some indications as to how State and non-State based dispute resolution mechanisms should be like, in order to fulfil the human rights standards of the right to remedy. Dispute resolution mechanisms of an initially commercial nature, such as arbitration or mediation, could become very useful grievance mechanisms to provide redress for victims of human rights abuses committed by multinational corporations.¹

I. Introduction

Claims against Multinational / Transnational Corporations (MNCs) for Human Rights (HRs) violations share certain common characteristics: (i) victims usually have great difficulties to access justice, (ii) States may have omitted their duty to provide remedy and, finally (iii), MNCs may have a negative impact on the right to remedy.² Moreover, legal and judicial systems in developing countries are sometimes clearly underdeveloped and unable to perform the task of protecting individuals and groups *vis à vis* violations of HRs by MNCs.

Whereas the academic interest and scholarly debate on extraterritorial or even universal jurisdiction, both in criminal and civil matters, is totally justified, there is also need for a deeper understanding of the causes behind the underdevelopment of judicial and non-judicial dispute systems (e.g. arbitration and mediation) in the aforementioned states. This need is also underlined by Guiding Principles 25 through 31 of the Guiding Principles on Business and Human Rights (GPs).³

¹ This paper has been drafted as part of the EU Research Project “Business & Human Rights challenges for cross border litigation in the European Union” (Grant agreement No. JUST/2013/JCIV/AG/4661).

² Report on the existing legal framework for HRs and the environment (Report of the University of Edinburgh for the European Commission), pg. 13 y ss; and Informe Colectivo sobre Empresas y Derechos Humanos (Red Internacional para los Derechos Económicos, Sociales y Culturales (Red-DESC)) pg. 32 y ss.

³ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, endorsed by the UN Human Rights Council on 16 March 2011.

Some of the reasons behind this need lie in the fact that basic domestic jurisdiction rules call for the determination of liability in proceedings before the courts which are closest to the place where the facts have occurred. In the case of non-contractual liability and torts –most HRs violations by MNCs may be classified as such-, this is also the place where the alleged victims and the evidence are to be found. It is the place, too, whose courts should hear the case and whose domestic laws should be applied to the merits, according to the expectations of all the parties involved.

“Extraterritorial remedies” such as universal jurisdiction statutes, the Alien Tort Claims Act / Alien Tort Statute (ATCA / ATS) or similar legislation may be good complements for local court systems and do have certain benefits, because bringing the case to the country of the defendant may provide easier ways to finance the litigation, greater access to discovery, much higher compensatory damages, etc. Still, they are not a definitive solution. It may even be counterproductive, for the purposes of development, to give too much access to litigation venues in Europe and North America because, that way, there may be fewer incentives for the improvement of local judicial and legal systems and for the enforceability of other local judicial and extra-judicial systems such as arbitration, mediation and other kinds of grievance mechanisms.

The usefulness of private justice in this context was already acknowledged by Bernardo Cremades (cited by McCallion), an expert practitioner in the field of international commercial and investment arbitration:

The tortured procedural history of the Bhopal litigation demonstrates the need for an effective international dispute resolution tribunal, such as the Permanent Court of Arbitration, to resolve mass tort disaster claims in an efficient and expeditious manner. The US legal system, even with the broad jurisdictional provisions of the Alien Tort Claims Act [...] cannot fully obviate the need for an international tribunal where the merits of a case can be directly addressed without the extended procedural manoeuvring and forum non conveniens analysis.⁴

In addition to the above, the subsidiarity principle –which purports that governments should only carry out activities to the extent that inferior societal entities are unable to

⁴ McCallion, K. F. *Institutional and Procedural Aspects of Mass Claims Litigation and Settlement: The Exxon Valdez and Bhopal Gas Disaster Cases*. In The International Bureau of the Permanent Court of Arbitration (ed.) *Institutional and Procedural Aspects of Mass Claims Settlement Systems*. The Hague. Kluwer Law International, 2000, pp. 43-58.

do it properly- may also imply that states have a duty to widely acknowledge the adjudicating capacities of non-state actors, in the same way that some national constitutions contemplate the participation of citizens in the Judicial Power,⁵ via trials by jury or similarly to the way that out of court settlements are usually allowed and even encouraged by the State.

Furthermore, there is a clear relationship between the rule of law and economic development as it is indicated, for instance, by the efforts made by the European Union in order to foster judicial cooperation on the basis of the protection of the principle of due process, which in turn would protect and promote the economic European Internal Market.⁶ Beyond HRs violations in developing countries, a good court system and a good out-of-court dispute resolution and settlement system are key to achieving justice and order in society which is, in turn, basic for economic growth.

This paper tries to find out the characteristics that state and (above all) non-state dispute resolution mechanisms should have in order to be effective redress tools *vis à vis* violations of HRs by MNCs. The paper will first address the right to remedy under international law, i.e. what does international law say about state based and non-state based dispute resolution mechanisms. Then it will address the right to remedy under the United Nations Guiding Principles, a form of soft law which is still receiving much attention and which focuses specifically on violations of HRs by the private sector. Within the GPs, state and non-state, judicial and non-judicial mechanisms will be studied. Finally, an answer will be given to the question of whether arbitration and mediation –two classic commercial dispute resolution mechanisms- can be effective grievance mechanisms, i.e. non-judicial mechanisms for the resolution of human rights conflicts in the business context.

II. The right to remedy in International Law

As it has been mentioned above, States have an international duty, under international law, to provide access to remedy. This obligation encompasses remedies for HRs abuses caused by the State as well as abuses caused by non-State entities. Nevertheless, it is unclear how far the individual's international right to remedy goes, in the case of abuses by non-State actors.

⁵ E.g. art. 125 of the Spanish Constitution of 1978.

⁶ Art. 81 of the Treaty on the Functioning of the European Union.

With the help of the GPs, the following chart can be drawn of the possible mechanisms to which victims should have access in order to obtain the necessary remedy:

State based judicial mechanisms		State based non-judicial mechanisms
International judicial mechanisms	International non-judicial mechanisms	Non-state mechanisms

In addition to the GPs, whose wide acceptance by many entities and institutions goes beyond the fact that they were endorsed by a Human Rights Council Resolution of June 16, 2011, there are other international instruments and decisions that provide a lot of information about what a remedy for HRs abuses should be like, under international law. There is, for instance, the Declaration of Basic Principles of Justice for Victims of Abuse and Power (A/RES/40/34 of 29 November 1985); the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA Resolution 60/147, 2006); and the Rome Statute which, in this context, should be read together with the Lubanga ICC Decision of 7 August 2012, which provides precious information about reparations for victims.

In this regard, as it will be explained below, there are common issues identified by HRs treaty bodies, in their regulation and description of the right to remedy:

- The importance of conducting appropriate investigations;
- The importance of prompt, effective and independent remedial mechanisms established through judicial, administrative and legislative measures;
- The importance of (criminal) sanctions and prosecution of international crimes; and
- The importance of reparation (compensation, restitution, rehabilitation and changes in relevant laws).

Still, there is a lack of clarity in HRs treaties as to (i) the criminal and/or civil liability of legal entities in addition to natural persons; (ii) the existence of civil causes of action in addition to criminal sanctions; and (iii) the extraterritorial application of domestic law (State law).

The most important provisions within HRs treaties, which mention the right to remedy are the following:

- The Universal Declaration of Human Rights (General Assembly Resolution 217 A (III), of 10 December 1948) (art. 8).
- The International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966 (art. 2).
- The International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200A (XXI) of 16 December 1966 (art. 2): HRC General Comment No. 31 para. 18.
- The International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106 (XX) of 21 December 1965 (art. 6).
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46 of 10 December 1984 (art. 14).
- The Convention on the Rights of the Child; General Assembly Resolution 44/25 of 20 November 1989: (Arts. 37 and 39).
- The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) (art. 3).
- The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (art. 91).
- The African Charter on Human and Peoples' Rights, of 27 June 1981 (art. 7).

- The American Convention on Human Rights, of 22 November 1969 (art. 25).
- The European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950: (arts. 1, 6 and 13).
- Victims' right to remedies (VII.11 Basic principles⁷), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, of 29 November 1985. Right of victims to information and to "quality justice".
- Rome Statute of the International Criminal Court of 17 July 1998 (arts. 68 and 75) as well as the *Lubanga* decision of 14 March 2012.

The above-mentioned norms deal with common issues although the solution given by each one of them is not necessarily the same. For instance, some instruments, like the Basic Principles, focus on reparation for victims whereas others like the ICCPR focus on punishment for perpetrators. Sometimes the right to remedy is equated to the right to be heard in court, like in the Universal Declaration of HRs, whereas in other occasions, a more complete list of remedies is provided, which also encompasses administrative or legislative remedies, like in the case of the Convention on the Rights of the Child. Furthermore, differences are made between state and non-state aggressors: sometimes only the State can violate HRs, like in the case of the Convention against Torture, whereas, on other occasions, no difference is apparently made between State and non-State aggressors, like in the case of the Universal Declaration, so that States would be obliged to provide a remedy when MNCs violate fundamental rights of victims. The nature of the right violated is also a difference: the Universal Declaration, the African Charter and the American Convention seem to protect only fundamental rights; nevertheless, even in these cases there should be a remedy for violations committed by non-State actors because the latter can also violate fundamental rights (e.g. the right to life). Finally, instruments such as the Basic Principles also mention other rights which

⁷ AG Res 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International humanitarian Law.

are ancillary to the right to remedy such as the right to obtain information about violations.

Still, we may conclude that there is no general international human right to a remedy for harm suffered by an individual at the hands of a legal entity. Still, some thought ought to be given to the possibility of State enterprises violating HRs, for which violation the State would be liable. In this regard, States can of course be liable for the omission of their duty to protect *vis à vis* the harm caused by non State entities.

III. The Right to Remedy in the United Nations Guiding Principles on Business and Human Rights

The GPs do not intend to further International Law but to operate as a restatement of existing International Law norms. Furthermore, contrary to some international instruments, their focus is on the victims, not on the punishment of wrongdoers; it is on redress and reparation for all kinds of abuses –HRs and non HRs alike-, not on offenses. In the second place, the obligations listed in the GPs are addressed at States, but also at non-State actors. Still, there are some obligations which only correspond to States, like the obligation to investigate, punish, redress and ensure access to remedy (GPs 1 and 25).

The GPs also have a procedural approach, which corresponds to mechanisms, and a substantive approach, which corresponds to the applicable law. The GPs are therefore conscious that an effective remedy must have that twofold component: an effective procedure and suitable substantive norms. Concerning substantive law, the GPs envisage that the cause of action that may entitle the victim to commence proceedings might be found in law, contract, promises made, custom and general notions of fairness.

As it was indicated in the chart above, the GPs make a fourfold division between State-based judicial, State-based non judicial, Non State-based judicial and Non State-based non judicial mechanisms. The first type would correspond to ordinary judicial proceedings, criminal, administrative or civil. Criminal proceedings would lead to fines or to the deprivation of freedom, depending on whether the State admits criminal liability for legal entities and/or those who run and represent them. Civil liability might lead to financial compensation, restitution, injunctions, etc. Administrative liability might result in fines, withdrawal of permits, etc. The second type would correspond to,

for instance, legislative or administrative proceedings whereby compensation, restitution or rehabilitation is granted by the State to victims for the harm suffered, without confrontational proceedings. The third type would correspond to international tribunals and the fourth to grievance mechanisms put in place by corporations, by NGOs or by both.

GP 25 makes a further distinction where it states that the aggrieved party might seek a remedy by itself (e.g. through a claim filed in Court) or where a third party intermediary seeks remedy on behalf of the aggrieved, e.g. National Human Rights Institutions, Ombudsperson office, etc.

1. State-based judicial mechanisms

The GPs devote GP 26 to the effectiveness of State-based judicial mechanisms. Such effectiveness should accordingly be studied from the point of view of access to the mechanism, from the point of view of procedure and from the point of view of the outcome of the proceedings. Although the ideal characteristics of these mechanisms, as described by GP 26, should be in connection to all three aspects of the mechanisms (access, procedure and outcome), it is also possible to draw some insight from the Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law. These Guidelines, in number IX (Reparation for harm suffered), state that any mechanism should have the purpose of redressing violations and remedies and should be proportional to the harm, in accordance with domestic and international law; legal persons should also be held liable (Basic Principle IX. 15), which probably constitutes one of the early calls to hold corporations accountable for violations of HRs; the State should provide compensation itself if parties are unable or unwilling to provide reparation (e.g. the trust fund of the International Criminal Court); and foreign judgments should be enforced.

Other characteristics of State based judicial mechanisms, in accordance with GP 26 are impartiality, integrity, ability to protect due process and to protect HRs defenders. Impartiality is such a necessary factor of a judicial mechanism that it is the only one measured by the Global Competitiveness Report 2012-2013 (World Economic Forum).⁸ Whereas independence makes reference to the fact that the adjudicator is not “chained”

⁸ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

to any other person or institution that may impair its ability to decide on fair grounds (absence of corruption would be a similar characteristic), impartiality is a subjective quality that makes reference to the lack of prejudices. Due process is generally understood to be a procedural fundamental right which has to do with the ability to accord a fair hearing and allow parties to present their case. Finally, the need to protect HRs defenders as part of the mechanism is perceived as more and more necessary, especially because, in HRs litigation in developing countries, victims are many times illiterate and helpless and NGOs must assist them to have access to justice.

Which are the key elements for a suitable and modern dispute resolution system, necessary for the adjudication of human rights disputes against MNCs? Notwithstanding traditional and native grievance mechanisms, which have to be used and integrated into a broader dispute resolution system, we may partly make use of the ten year long Council of Europe research work which has so far produced four reports on the state of European judicial (court) systems.

According to these reports, *“key areas of interest include the protection of the independence of judges and the statute and role of legal professionals, the safeguard of the principles of a fair trial within a reasonable time, the promotion and protection of access to justice, efficient and effective court organisation, adequate judicial proceedings adapted to the needs and expectations of the society, as well as the development of the public service of justice aimed at court users”*.⁹

The reports also show a correlation between the budget devoted to the court system and the quality of such system. Therefore, it might be reasonable for international bodies to pay attention to the amount of international aid that is devoted to this area. Furthermore, *“states must take measures to ease financial barriers for citizens who do not have sufficient means to initiate a judicial proceeding. In practice, this implies the introduction of a legal aid system”*¹⁰ which may cover, partly or totally, both the costs of the proceedings and the legal counsel. Finally, attention should also be paid to recruitment, training and retribution of judges, lawyers, prosecutors and court officials, in order to improve any kind of dispute resolution system.

⁹ http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf (Chapter 18).

¹⁰ Id. Chapter 18.1.

The Council of Europe, in its 2012 report,¹¹ also listed certain characteristics among which we may mention: the definition of the statute and role of legal professionals, fair trial within a reasonable time, efficient and effective court organisation, etc. The World Justice Project has also elaborated a Rule of Law Index 2012-13¹² which describes the characteristics both civil and criminal justice systems should have. Civil justice systems should be, according to this index: (i) accessible and affordable, (ii) free of discrimination, (iii) free of corruption, (iv) free of improper government influence, (v) not subject to unreasonable delays and (vi) effectively enforced. In addition, this index mentions that ADR mechanisms should be accessible, impartial and effective. Furthermore, the characteristics of criminal justice systems are: (i) effectiveness, (ii) timeliness, (iii) effectiveness in reducing criminal behaviour, (iv) impartiality, (v) freedom of corruption, (vi) freedom of improper government influence and (vii) should accord due process of law and rights of the accused.

GP 26 commentary also devotes some space to the reduction of legal, practical and procedural barriers in the access to justice. Concerning legal barriers, the commentary mentions jurisdiction, liability (lifting of the corporate veil) and due process issues (e.g. discrimination). Concerning practical and procedural barriers, the commentary mentions too high judicial fees, unavailability of contingent fee systems, unavailability of help with court costs, unavailability of class actions and lack of resources for State prosecutors.

With the aforementioned indexes and reports, it might be possible to make a list of the most important procedural rights and the features of State based judicial mechanisms in order to be effective and in order to grant due process. Such list should give a clear picture of what the international right of access to remedy is or should be by any standard:

- Right to an impartial and independent third party adjudicator;
- Right to adequate access norms;
- Right to absence of harassment;

¹¹ http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp

¹² <http://worldjusticeproject.org/rule-of-law-index>

- Right to adequate legal representation;
- Right to be heard and present evidence;
- Right to a correct application of substantive norms;
- Right to obtain an enforceable decision in a reasonable time;
- Right to an adequate and effective reparation of the harm;
- Right to appeal the decision on the merits;
- Right to have a valid foreign decision enforced.

2. State-based non judicial mechanisms

As to State-based non judicial mechanisms, GP 27 states that they might be administrative, legislative, mediation based, adjudicative (so arbitration might be included) or a combination of the above. Furthermore, National HRs institutions should also play a role. Non-State based mechanisms, described in GP 28 also comprise adjudicative (again, arbitration might be a possibility) or dialogue based (mediation/conciliation), with the intervention of Regional and International HRs bodies. The advantages that GP 28 observes in this type of mechanisms are speed, reduced costs and transnational reach. Speed and reduced costs are achieved through the prohibition of appeal. Transnational reach is based upon the fact that ADR mechanisms are based upon consent, not upon jurisdiction rules, as will be explained later.

GP 29 imposes an obligation upon businesses to participate in grievance mechanisms. This obligation, like all other obligations contained in the GPs can only be either an obligation established by national law or a social expectation (i.e. not an international obligation). The obligation could also be based on commitments by businesses, like those contained in Global framework agreements (e.g. the Global compact), Multi-stakeholder agreements or codes of conduct.

3. Non-State non-judicial mechanisms

As it has been said, this paper also deals with the characteristics that non-State based non-judicial mechanisms must have in order to fulfil the standards set by the GPs. These

principles do not mention arbitration specifically, in the same way that they do in fact mention mediation, but they seem to have in mind both Alternative Dispute Resolution mechanisms in several places, as when they state that “*State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights*”;¹³ or when they state that “*Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new 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*”;¹⁴ or, finally, when they mention that “*Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise... They may also be provided through recourse to a mutually acceptable external expert or body*”.¹⁵

The GPs also allow businesses to participate in either grievance mechanisms set up by the corporations themselves (query if, in this case, they would be independent or impartial enough to be effective), by the enterprises and other stakeholders such as NGOs, or by an external body. GP 29 explains that participation in these mechanisms is not a substitute for stakeholder engagement, collective bargaining obligations, and access to other kinds of mechanisms.

GP 30 (“*Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available*”) may be making references to how codes of conduct should provide that grievance mechanisms have to be put in place, probably in order to apply the code of conduct itself.

¹³ Commentary to Guiding Principle 25.

¹⁴ Commentary to Guiding Principle 27.

¹⁵ Commentary to Guiding Principle 29.

Finally, the GPs make a list of effectiveness criteria for non-State non-judicial mechanisms which is far more detailed than those lists of features displayed for other types of mechanisms. The reason may be that the GPs believe that, for instance, judicial mechanisms are sufficiently well known, whereas grievance mechanisms and their advantages are not. Legitimacy, the first feature for effectiveness, rests upon trust and accountability, i.e. in order to be legitimate, a grievance mechanism must have been either chosen by the parties to the dispute or must be trusted by them for other reasons. Accessibility deals with the fact that the grievance mechanism must be well known to users, must provide assistance to users, must be language friendly, must not be expensive, must be well located, and participation in it must not raise fears of reprisal, which goes beyond the simple organisation of the mechanism. Predictability should be achieved through a well known procedure, an indicative timeframe, clarity and means of monitoring implementation. Equitable means that there must be access to information (evidence is, many times, one of the most difficult problems for claimants in HRs litigation), legal advice and expertise. Transparency means that there should be confidentiality and, at the same time, information about progress and performance. Confidentiality raises the issue of *amicus curiae* briefs and interventions which, in other ADR mechanisms such as investment arbitration with HRs implications, have also raised deep concern.

Non-judicial grievance mechanisms should be rights compatible and their outcomes should be in accordance with international HRs law. This is a harder issue than it seems because, although the mechanisms may foresee that a decision in equity is to be issued, such decision should nonetheless respect HRs law.

Finally, as the GPs put it, grievance mechanisms should be a source of learning to allow for constant improvement.

IV. Grievance mechanisms and effective Human Rights enforcement: advantages, disadvantages and problems to be tackled

The GPs hint at an interesting possibility when they state that “*State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy*”.¹⁶ This may call the attention of legislators and non-State actors alike to the

¹⁶ Commentary to GP 25.

possibility of using ADR mechanisms such as arbitration, mediation and dispute resolution boards for disputes involving violations of HRs by corporations.

Arbitration's two key features are the fact that it is voluntary and that it is confrontational, i.e. (i) parties must wish to submit their dispute to arbitration as a dispute resolution mechanism and (ii) the mechanism works in such a way that one party must request something from the other.

In the following chart¹⁷ it is possible to see the characteristics of arbitration in comparison with other common dispute resolution mechanisms:

¹⁷ Berger, K. P. *Private Dispute Resolution in International Business*. The Hague. Kluwer Law International, 2006.

	Negotiation	Mediation / Conciliation	Arbitration	Court Litigation
Presence of third party	No	Yes	Yes	Yes
Decision-making power	Parties	Parties	Third Party	Third Party
Dispute-Resolution Guaranteed	No	No	Yes	Yes
Based on Contract	Yes	Yes	Yes / No (ICSID)	Not necessarily
Right to Walk Away	Yes	Yes	No	No
Control over Process	Parties	Parties	Parties + Third Party	Third Party
Degree of Formality	Very Low	Low	Medium	High
Adversarial / Conciliatory	Conciliatory	Conciliatory	Adversarial / Conciliatory	Adversarial
Focus on Interests / Positions	Both	Interests	Both	Positions
Confidentiality	Yes	Yes	Yes	No
Enforceability	Sometimes	Sometimes	Under domestic law or New York Convention	Under bilateral / multilateral treaties or domestic law

Some of the advantages that arbitration as a grievance mechanism, may have over other HRs enforcement mechanisms such as domestic courts or international tribunals are the following:

a) Avoidance of jurisdiction issues: Arbitration and other ADR mechanisms are based on consent. Therefore, once consent by the parties was established, no jurisdictional problems would be encountered, such as the highly complicated ones which arise in ATCA litigation.

b) Application of suitable standards of protection: the law to be applied by international tribunals and bodies has always been a controversial matter: The United Nations Compensation Commission has basically applied UN Security Council Resolutions and, occasionally, general principles of law. The Commission for Real Property Claims in Bosnia and Herzegovina has applied former Yugoslav property law, applicable in Bosnia as "*lex rei sitae*" on the eve of the Balcan war. The Claims Resolution Tribunal for Dormant Accounts (CRT) has also had to face some complex conflict of laws relating to inheritance norms. Nevertheless, many HRs disputes involving an MNC are quite straightforward and fact based. In this regard, arbitration is a facts oriented dispute resolution mechanism which gives much more importance to clear evidence of harm than to complicated and sometimes pointless law discussions.

c) Avoidance of harsh confrontation: Arbitration favours the continuity of relationships between the parties, once the proceedings are over, because of the confidentiality with which the dispute is carried forward and because ADR mechanisms lack some of the stress and confrontation traditionally linked to court litigation. This may be particularly useful in labour rights disputes,¹⁸ where the workers may be as anxious to have their labour rights enforced as to keep their jobs. Governments and the public in general may also be concerned that the bad publicity for the MNC involved in litigation, as well as the enormous punitive damages awarded, may be decisive in the MNC's decision to abandon

¹⁸ Some countries do allow for the arbitration of labour disputes involving individual employment contracts or collective bargaining agreements. Nevertheless, this kind of labour arbitration proceedings are mostly based on national labour laws, which have little or no extraterritorial effect and which cannot in principle be applied to disputes involving foreign workers and disputes taking place abroad, probably against foreign employers or legal entities incorporated in the country of origin of the workers. See, too Internationalization of Labor Dispute Settlement, Permanent Court of Arbitration Publications, 2003.

its investment and resettle in another country, with possibly catastrophic economic consequences for the workers and their families.

d) Funding the claim: By submitting the case to an international arbitration tribunal a suitable seat could be chosen, where there is no ban on contingent fees.

e) Enforcement: Thanks to the New York Convention of 1958 and the policy in favour of arbitration adopted by many countries, recognition and enforcement of foreign arbitral awards is quicker and easier than recognition and enforcement of court decisions.¹⁹

f) Speed and finality: Considering that arbitral awards can only be appealed in very rare circumstances, the usual length of arbitral proceedings is actually less than ordinary court proceedings, which can take years until a decision which cannot be appealed is reached.

g) Less expensive in the long run: Although the private nature of the proceedings makes arbitration costly, the fact that awards cannot be appealed makes the total costs smaller than costly and long litigation proceedings.

Nevertheless, private justice also has its drawbacks and problems in comparison with court litigation.

1. Consent and jurisdiction

A) Consent mechanisms

Arbitration is based on the voluntary consent and submission of the parties to the jurisdiction of an arbitration tribunal. As a rule, commercial arbitrations are commenced on the basis of arbitration clauses inserted into contracts which bind the parties in dispute. Nevertheless, ICSID arbitration, - which may provide a useful model for HRs arbitration, in certain ways- has been labelled “arbitration without privity”,²⁰ in the

¹⁹ Nevertheless, there may be concerns that the commercial character of the New York Convention may make some awards in basically HRs disputes unenforceable, at least in some countries which have the so called “commercial reservation”.

²⁰ Paulsson, J. “Arbitration Without Privity” 10(2) *ICSID Review – Foreign Investment Law Journal*, 1995, p. 232.

sense that one of the parties offers its consent in advance (the host State), whereas the investor is allowed to give its own consent later on, usually by way of filing a claim before ICSID (Figure 1).

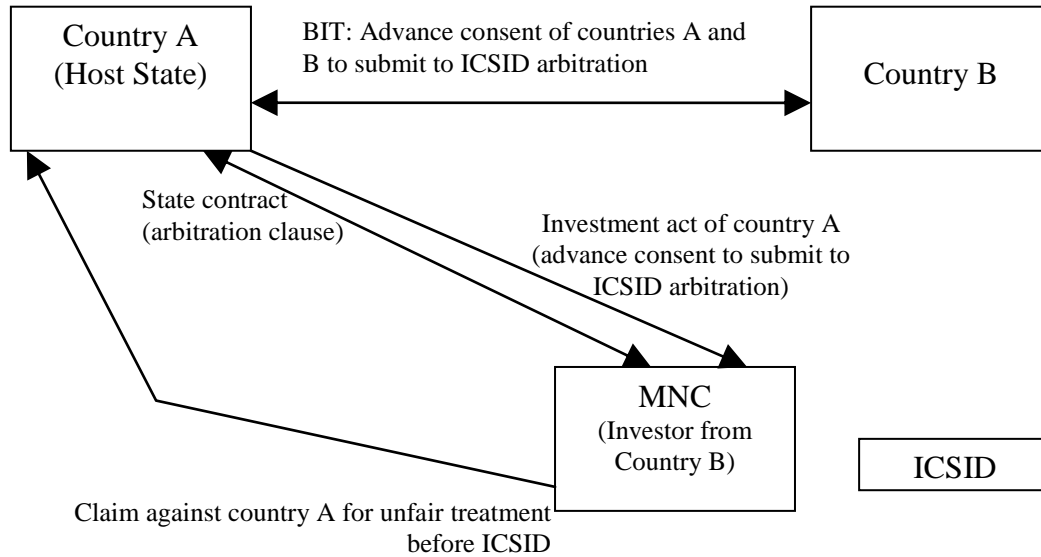
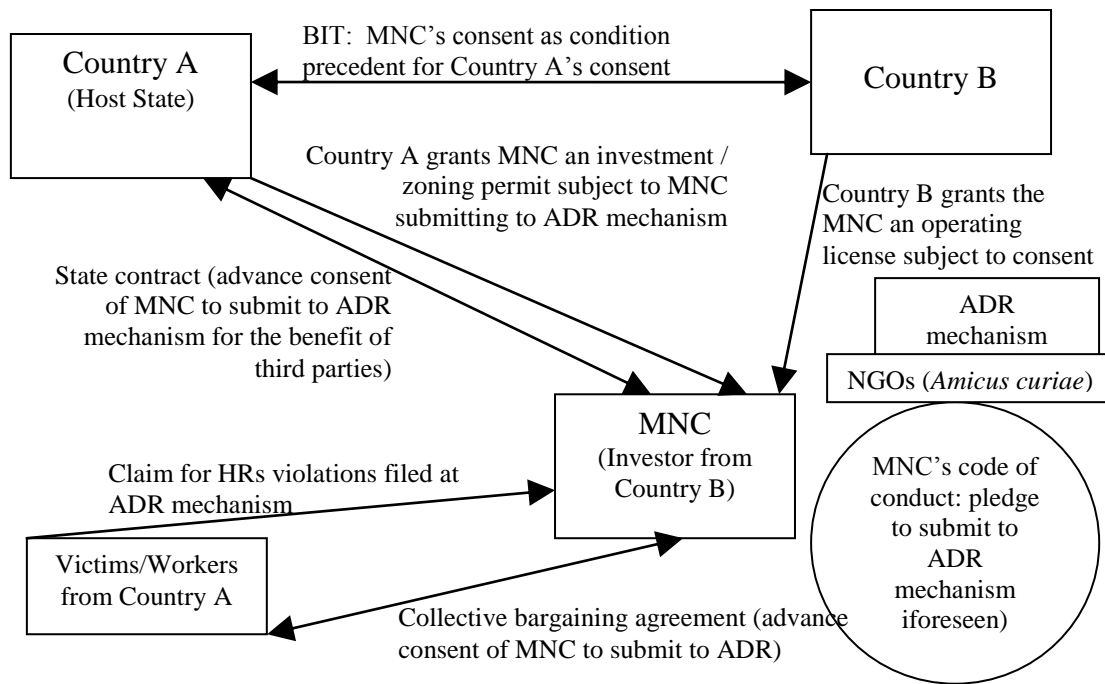


Figure. 1

Drawing an analogy with investment arbitration, submissions to arbitration on the part of MNCs, inserted in different kinds of instruments, like collective bargaining agreements, codes of conduct or Economic Development Agreements may be binding and enforceable and provide the necessary consent. Arbitration proceedings involving MNCs may be made compulsory via investment, labour or environmental protection laws of the country of origin of the MNC (extraterritorial effect) or the country where the MNC or its subsidiaries and subcontractors operate. BITs may also contain the obligation of MNCs to submit to future arbitration proceedings, e.g. as a condition precedent for the host State's consent to ICSID or UNCITRAL arbitration. (Figure 2)



B) Incentives and disincentives for the host State's and home State's involvement

Nevertheless, the host and the home country of the MNC would have to be actively involved in the setting up of these mechanisms, in order to obtain the consent of the MNC. As it has been said above, the host and home State of the MNC would have to be willing to include in their BIT a provision which made the consent of the MNC to submit to arbitration a condition precedent for the host State's consent to submit to ICSID arbitration.

Secondly, the home State would have to be willing to grant investment, commercial or zoning permits to MNCs operating within their borders subject to the condition that the MNC grants its advance consent to submit to arbitration. Equally, the home State would have to be willing to insert arbitration clauses for the benefit of third parties (the victims) in the investment contract they agree upon with the MNC. Furthermore, the home State would have to be willing to enact legislation allowing MNCs and workers to include in their collective bargaining agreements the advance consent to submit to arbitration.

Finally, the MNC's home State would have to be willing to, for instance, condition the grant of any operating licence the MNC may need, to the MNC's giving its consent to submit to arbitration in favour of any potential litigants of Country A.

The incentives for the host State are numerous, to the extent that its workers and population would be more protected, having one more dispute resolution mechanism they can choose from, in addition to domestic courts (in case there is no waiver of jurisdiction before such courts) or in case the advantages of a modern and specialised dispute resolution mechanism outgrow the advantages of a maybe not so efficient or corrupt national court system. Nevertheless, these incentives would have to be bigger than the incentive of the Host State to attract foreign investment, in case it can be proved that an MNC would rather invest in another country which does not force it to submit to arbitration. This would probably have to be ascertained on a case by case basis (i.e. there will be some countries which cannot afford to lose foreign investment in exchange for more HRs protection). There may even be incentives for other host States not to force MNCs to submit to arbitration, hoping that they relocate their investment to that country. Furthermore, it cannot be ascertained beforehand whether MNCs would rather move their investments to a country which offers worse profit prospects in exchange for the security that they cannot be brought before an arbitration tribunal or mediation board.

The incentives of the MNC's home State to put in place mechanisms such as the BIT special clauses or the operating licenses may be more difficult to find, given the fact that offering consent to arbitration may place a national corporation under the constant threat of a "lawsuit". In the worst scenario, a national MNC may decide to stop its investment activities abroad, diminishing the State's biggest source of revenue: taxes. Nevertheless, home States, duly pressured by NGOs and international institutions may also put some pressure on their domestic MNCs doing business abroad to submit to arbitration, which would increase their accountability.

C) Incentives for MNC's consent

Irrespective of the host or home country's efforts to force the MNC to give its consent to arbitration or other kind of Grievance Mechanisms, there may be other incentives through which MNCs may be induced to submit to arbitration after the facts giving rise to the dispute have already taken place and/or agree to include consent clauses in instruments such as State contracts, codes of conduct or collective bargaining agreements with their workers. MNCs may agree to submit to arbitration in exchange for one or several of the following possible concessions:

a) *Waivers of jurisdiction and liability before ordinary courts.* The threat of litigation may induce MNCs to submit to confidential and potentially less costly dispute resolution mechanisms,

b) *Limitations on discovery and reinforcement of confidentiality, including the confidentiality of the final award.* Corporations desperately want to avoid exposing their disputes to the public, because it may imply bad publicity.²¹ In fact, some authors contend that public relations campaigns against multinationals are key to securing advantageous settlement agreements.²² Confidentiality should therefore make private justice highly tempting for MNCs accused of violating HRs, provided that the suit can go at least as far as the discovery stage. Confidentiality in HRs proceedings may also stop the criticism that HRs litigation thwarts national foreign policy.

c) *Limitations on the amount of damages to be awarded.* The effectiveness of the abovementioned waivers of jurisdiction and liability may or may not be fully effective under the laws of the countries where most suits against MNCs are brought or can potentially be brought, i.e. USA, the UK, the Netherlands, Japan. Obviously, criminal liability –both before domestic and before international courts- cannot be waived.

D) Advantages of arbitration in the Business & HRs context

Irrespective of concessions made to MNCs in exchange for their consent to arbitration or mediation, the advantages of commercial arbitration over litigation are well known²³ and may serve both to solve many of the technical and practical problems arising out of the abovementioned HRs protection systems and to convince both MNCs and their victims to submit to arbitration. Some of these advantages are:

- The presence of party appointed arbitrators/mediators/conciliators would give the parties confidence that their case would receive the attention it deserves and would

²¹ Nevertheless, in many cases of HRs violations such as, for instance, those involving environmental harm, where proof of causal nexus is vital, limitations on discovery may be detrimental to justice.

²² Byers, M. *English courts and serious human rights violations abroad: a preliminary assessment.* In Kamminga, M. T. and Zia-Zarifi, S., *Liability of Multinational Corporations under International Law.* The Hague. Kluwer Law International, 2000, p. 248.

²³ Redfern, A. and Hunter, J. M. 1999. *Law and Practice of International Commercial Arbitration.* London. Sweet & Maxwell, p. 23 et seq.

facilitate that decisions on the merits are accepted voluntarily. A well balanced tribunal, with jurists and experts from different legal traditions, cultural, professional and economic backgrounds may also be key in disputes that are sometimes presented as part of a global “culture clash” or “class struggle”.

- The expertise and prestige of arbitrators in the relevant field may also encourage the parties to submit to private justice mechanisms.

- Neutral territory: Non-legally trained claimants (the victims) may overcome a feeling of unfairness if the proceedings do not take place in the country where the MNC is incorporated.

- Flexibility: Arbitration can be tailored by the parties according to their procedural needs, being able to decide on how many different procedural stages will there be, the extent of discovery, etc, which may increase their confidence in the justice of the final decision and make them more cooperative. As it has been said, although key decisions on the proceedings are taken by the parties, arbitrators are not curtailed by centuries old procedural codes and can help structure the proceedings according to the needs of each particular case. Depending on the nature of the dispute, the proceedings need to be longer or shorter, or must provide for more or less strict standards of proof, discovery rules or cross examination of witnesses. Finally, court litigation does not, in many countries, avail itself of the IT resources which enable a much more efficient handling of the proceedings and which are nowadays absolutely necessary in mass claim litigation.

- Confidentiality: even without an increased degree of confidentiality²⁴, this is certainly an advantage for sophisticated corporations, *vis à vis* court litigation.

- Speed and finality: As it has been pointed out above, the fact that arbitration awards cannot be appealed but under very limited circumstances makes arbitration quicker than court proceedings, not to speak of overloaded courts. Speed may afford victims the emotional compensation of which they are deprived in cases of incredibly delayed court litigation. It may also provide for a dispute resolution method which is cheaper than litigation. Nevertheless, in some cases, MNCs and their victims may

²⁴ See “limitations on discovery”, above.

actually profit more from dilatory tactics than from speed and may thus be more inclined towards traditional court litigation.

- Exclusion of punitive damages: Arbitration tribunals are usually more reluctant than national courts to grant punitive damages. Voluntary limitations on punitive damages may make HRs arbitration attractive for MNCs. In this regard, victims may only be awarded compensation to the extent of the harm, both physical and emotional.

Finally, Professor Alford envisages another kind of HRs arbitration mechanism whereby those MNCs which have been found guilty of aiding and abetting governments or government officials who have violated HRs of groups of their own nationals, would have recourse against those same governments for the financial loss incurred. Consent to submit to arbitration would be found in the state contracts which normally bind MNCs and local governments and which usually provide the factual basis for the aiding and abetting claim. The scope of arbitration clauses in state contracts is usually sufficiently broad to include any losses incurred by one of the parties, as a result of actions of the other party, arising out of the contract. This kind of arbitration consent would also serve to understand that the host state has waived its sovereign immunity rights. Professor Alford further contemplates the possibility that arbitration clauses included in the state contracts are made for the benefit of third parties (i.e. the potential victims of governmental HRs abuses), who would be able to claim directly against the host state, using arbitration proceedings.²⁵

2. Arbitration or mediation/conciliation? Or both?

The abovementioned advantages and disadvantages of arbitration, with respect to mediation and conciliation, have to be balanced against each other, in order to adopt arbitration or mediation, depending on the type of conflict and the specific HRs violation. Furthermore, traditional key features of ADR, such as voluntariness and neutrality may have to be revised in such a field as HRs, where adjudicators are sometimes not expected to remain neutral but to comply with and enforce certain legal and ethical parameters. Nevertheless, if adjudicators do manifest a proactive attitude, it may deeply damage a system which is based upon confidence and consent (Rycroft, 2002, 287).

²⁵ Alford, R. P. "Arbitrating Human Rights", *Notre Dame Law Review* 83, 2007-2008, p. 505.

Mediation and conciliation may be an alternative to arbitration, also in the field of HRs violations²⁶ For instance, the fact that parties do not have to waive their right of access to court litigation and that they are not bound by any final decision or settlement proposal reached during the mediation, would make it more tempting for MNCs to submit to these type of dispute resolution mechanism. In this regard, much may be learnt from the Chinese dispute resolution tradition, which has learnt to effectively combine arbitration and mediation in a single dispute resolution mechanism which has forged a legal and commercial community that avoids confrontation and strives for harmony. On the other hand, mediators who earn their fees on the basis of achieving a settlement between the parties may not have incentives to ensure that justice is done or that, at least, the position of the party who claims to have suffered at the hands of the MNC is sufficiently protected. This danger is bigger when the mediator is poorly trained and cannot anticipate the likely result of adjudicating the case in court litigation.²⁷

Elements could also be taken from Truth and Reconciliation Commissions, especially in so far as these mechanisms may provide victims with the emotional compensation derived from an apology, to a greater extent than in litigation or monitoring procedures.

There is also a real need to alleviate the tension between HRs advocates' post-conflict focus on justice and conflict resolvers' post-conflict desire to promote reconciliation.²⁸ In this respect, the choice between arbitration and mediation may also depend upon the great question of whether justice and compensation is needed (in addition to forgiveness), in order to resolve HRs conflicts, or whether a mere compromise of interests would be enough.

Finally, there is also a need to strike a balance between (i) having a final decision which holds someone accountable for the violation occurred and is made to pay for it and (ii) the "fund" approach which may provide easier access to compensation for victims but which may leave them without someone to blame and maybe without assurance as to

²⁶ Bryden, P. and Black, W. "Mediation as a Tool for Resolving Human Rights Disputes", *University of British Columbia Law Review* 37, 2004, pp. 111-112.

²⁷ Kuhner, T. "Court-Connected Mediation Compared: The Cases of Argentina and the United States". *ILSA Journal of International and Comparative Law* 11, 2005, pp. 519-554.

²⁸ Lutz, E., Babbitt, E. and Hannum, H. "Human Rights and Conflict Resolution from the Practitioner's Perspective". *Fletcher Forum of World Affairs* 27, 2003, p. 177.

whether the same events will happen again.²⁹ In this regard, the examples of the Iran-US Claims Tribunal, the 9/11 Victims Compensation Fund or the Claims Resolution Tribunal for Dormant Accounts in Switzerland may provide a useful starting point.

3. Applicable law

The selection of the applicable law sometimes plays a minor role in arbitration, in comparison to court proceedings, because what is of paramount importance is a thorough analysis of the facts and the achievement of material (as opposed to formal) justice. Furthermore, in mediation, law may only provide a clearer picture for the parties, in order to calculate the advantages of a settlement, *vis á vis* future litigation.

Commercial arbitration rules usually point to the law chosen by the parties or to the rules of law which the tribunal determines to be applicable on the basis of freely chosen conflict of laws rules or absolute discretion –the so called *voie direct*. This flexibility has allowed commercial arbitration tribunals to develop and apply concepts such as “the new *Lex Mercatoria*” or “General Principles of Law”.³⁰

In the same way, the conflict of laws rules or substantive law principles to be applied must be *a priori* acceptable by both MNCs and potential victims. They would also have to allow arbitration tribunals to draw from the wide array of rules of law for the protection of HRs, labour rights, the environment, indigenous populations, etc.

For instance, codes of conduct could be useful both as the legal instrument where consent to arbitration is to be found and as the instrument where individual victims can find a right of action and/or the applicable legal rules which support their claims. In this regard, arbitral tribunals may decide that the codes of conduct are manifestations of principles accepted in the market worldwide and therefore binding on MNCs. In the same way that the International Chamber of Commerce and ICSID arbitration tribunals have, over time, contributed to the development of international commercial and investment law, HRs arbitration tribunals could be entrusted with the task of elaborating and adapting some sort of international (or a-national) law for the protection of HRs *vis á vis* legal persons: protected rights, standards of liability, causation, complicity, etc.

²⁹ Ramírez, J. “The Victims Compensation Fund: a Model for Future Mass Casualty Situations”. *Transportation Law Journal*, 2002, p. 298.

³⁰ Sornarajah, M. *The Settlement of Foreign Investment Disputes*. The Hague. Kluwer Law International, 2000, p. 242.

4. The advantages of ad hoc arbitration tribunals vis à vis permanent institutions

The accredited success of arbitration institutions such as the Iran-US Claims Tribunal or the CRT may be partly due to the fact that they were created to resolve a specific dispute or set of disputes. The establishment of any kind of truly supranational adjudicatory body, on the other hand, always involves too lengthy procedures and compromises between states or the parties involved. Nevertheless, it cannot be disputed either that, as far as arbitration is concerned, the life-long experience of institutions such as the International Chamber of Commerce may account for the raise in the use of arbitration between commercial parties, who rely on such institutions because of their well evidenced success.

5. Procedural rules

Especially in the case of a permanent institution, the issue of procedural rules is of extreme importance. However, the great majority of arbitration rules issued by institutions such as the ICC, UNCITRAL and ICSID are mainly designed for commercial disputes or, at least, disputes arising out of contractual or investment relationships. On the contrary, arbitration proceedings which effectively provide accountability for damages caused by MNCs should probably be tort-centred, *i.e.* the cause of action will be for damages not arising out of a contractual relationship.

The UN Compensation Commission, as well as the Commission for Real Property Claims, are inquisitorial, without much room for confrontation. Still, it can be foreseen that the rules of the most effective and successful mass claims tribunals, such as the Claims Resolution Tribunal for Dormant Accounts in Switzerland, as well as the usually applied commercial and labour arbitration rules, may be used for the purposes of HRs enforcement.

Finally, MNCs may have to be reassured that, by accepting the arbitration agreements included in the codes of conduct, they are not opening the door to potentially unfounded arbitrations or mediation proceedings. Therefore, some sort of preliminary proceedings may have to be foreseen whereby the arbitral institution itself, upon receipt of the

request for arbitration, examines if there are *prima facie* grounds to hold that the MNC is liable *vis à vis* the plaintiff.³¹

6. Standard of proof

It is well known that arbitration is many times about facts, rather than about law. Nevertheless, evidentiary issues in commercial and tort cases may be quite different from evidentiary issues in HRs cases, where there may be no reliable records or unbiased witnesses. Furthermore, whereas in ordinary litigation, the standard of proof is a preponderance of the evidence, HRs claims may many times take the form of hundreds of very similar claims, a fact that calls for less stringent standards of proof.³² The goal would be to propose standards of proof which respect due process of law and, at the same time, prevent slow and inefficient proceedings.³³

7. The role of the domestic courts of the seat of the arbitration

Arbitrators do not have the authority to carry out certain activities which are part of the adjudicative function: enforcement of interim measures, injunctions and awards, obligatory summon of witnesses, etc. Still, not all legal rules of the seat of arbitration would be equally suitable, in the sense that their courts may, to a different extent, assist arbitrators in their tasks without preventing them from carrying out their mission. It is not clear either, at this point, to what extent national arbitration laws of the seat of the arbitration should be applicable to these kind of proceedings.

8. Suitable remedies which are acceptable by both parties

There is a need to explore the different kinds of remedies that should be available to victims of HRs violations. The criminal court system places too much emphasis on the punishment of the perpetrator and the prevention of future offenses so that the victim may be forgotten.³⁴ In this regard, it cannot be assumed that the victim necessarily

³¹ Usually, arbitration institutions solely examine if the dispute is within the jurisdiction of the court or if there is, *prima facie*, a valid arbitration agreement. Art. 36(3) ICSID Convention, art. 6.2 International Court of Arbitration Rules (International Chamber of Commerce).

³² Haersolte-van Hof, J. "Innovations to Speed Mass Claims: New Standards of Proof". In The International Bureau of the Permanent Court of Arbitration. *Redressing Injustices Through Mass Claims Processes*. Oxford. Oxford University Press, 2006, p. 13.

³³ Wühler, N. "The United Nations Compensation Commission". In The International Bureau of the Permanent Court of Arbitration. *Institutional and Procedural Aspects of Mass Claims Settlement Systems*. The Hague. Kluwer Law International, 2000, p. 21

³⁴ UN AG Resolution 40/34, of 29 November, 1985.

wants some sort of “revenge”. Justice, in the eyes of a victim, may sooner mean material or economic redress, as well as security towards the future. Even in cases where compensation may be granted by way of criminal proceedings,³⁵ the difficulties in assessing damages in cases of physical and psychological harm may be enormous. Furthermore, arbitrators, conciliators and mediators normally have more latitude than trial judges, to assess suitable compensation. On the other hand, the lack of enforcing authority makes it difficult for arbitrators to grant other kinds of remedies, such as restitution or specific performance. Post World War II lump sum agreements, negotiated at State level in order to compensate globally those citizens affected by a foreign country are also a good example from which Grievance Mechanisms may have a lot to learn. This solution might prove useful in cases of mass claims and thousands of victims. The value of public apologies³⁶ and the experience of Truth and Reconciliation Commissions would also have to be duly explored. Finally, interesting experiences, such as victim-offender reconciliation in German Criminal Law would have to be explored in search of analogies and solutions.³⁷

9. Enforcement of arbitral awards, decisions and party settlements

Arbitration awards are usually complied with voluntarily. Nevertheless, in case of non compliance, enforcement would eventually have to be carried out by the national courts of the places where the defendant MNC has its assets, because those courts are the only ones which, as a general rule, have jurisdiction to enforce. Existing examples of special tribunals such as the Iran-US Claims Tribunal, the UN Compensation Commission, the Property Claims Commission of the German Foundation “Remembrance, Responsibility and the Future”³⁸ or the CRT in Switzerland have probably benefitted from the fact that

³⁵ Vid. articles 109 et seq. Spanish Criminal Code.

³⁶ Davenport, A. 2006. *Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases*. Pepperdine Dispute Resolution Law Journal 6, pp. 81-108.

³⁷ Hartmann, U. 1996 “Victim-offender reconciliation with adult offenders in Germany” In: Sumner, C. Israel, M. O’Connell, M. and Scarre, R. *International victimology: Selected papers from the 8th International Symposium – proceedings of a symposium held in Adelaide, 21-26 August 1994*. Canberra. Australian Institute of Criminology, pp. 321-327.

³⁸ Karrer, P. A. 2005. “Mass Claims to Provide Rough Justice – The Work of the Property Claims Commission of the German Foundation “Remembrance, Responsibility and Future”. In Bauchmann, B. *Grenzüberschreitungen. Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit. Festschrift für Peter Schlosser zum 70. Geburtstag*. Tübingen. Mohr Siebeck, p. 329 et seq.

the assets with which the claims had to be eventually settled were within reach of the tribunal from the very beginning, contrary to ordinary court and arbitration proceedings, where adjudication and enforcement proceedings are normally separated and may even take place in different jurisdictions. Escrow accounts could also be a good tool for these kind of HRs disputes, where MNCs would pay in blocked amounts of money to face future awards in favour of the plaintiffs.

IV. Conclusions

International law requests that victims of HRs violations have access to remedy and provides some characteristics as to what this remedy should be like. International law also paves the way for accountability mechanisms and remedies other than classical litigation before domestic courts, thus making it possible to use other kinds of HRs, labour, environmental and cultural rights enforcement mechanisms to ensure the protection of such rights *vis à vis* violations by MNCs. Non-national enforcement mechanisms, such as arbitration, mediation, grievance mechanisms and Mass Claims Settlement Systems may prove to be a useful alternative, although many theoretical and practical problems are still to be resolved.

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