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Roger P. Alford  
ralford@nd.edu

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# ARBITRATING HUMAN RIGHTS

Roger P. Alford\*

## INTRODUCTION

Corporate liability for human rights abuses is one of the most important developments in current international law and practice. Since the inception of the human rights litigation revolution just over twenty-five years ago,<sup>1</sup> victims have faced little hope of securing genuine redress. Claims against sovereign entities foundered on the rocks of sovereign immunity. Claims against individual perpetrators were occasionally successful in securing judgments, but even successful claimants almost never collected on the judgments. For years human rights litigation appeared to be an act of public shaming—somewhat effective as a tool of embarrassment, but of little use to genuinely compensate victims or punish violators.<sup>2</sup> But with the advent of human

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\* Associate Professor of Law, Pepperdine University School of Law, Malibu, California. L.L.M., University of Edinburgh, 1992; J.D., New York University, 1991; M. Div., Southern Seminary, 1988; B.A., Baylor University, 1985. Grateful acknowledgement is given to Audrey Maness, Mary Skouras, and Sylvia Sultanyan for their excellent research assistance. The work was supported by a Pepperdine Summer Research Grant.

1 See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1049 (2d ed. 2000).

2 See Rosemary Nagy, *Post-Apartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?*, 40 *LAW & SOC'Y REV.* 623, 627–28 (2006) (“[T]he moral and political symbolism of the litigation is just as significant as the unsettled question of legal culpability. Even successful alien tort claims rarely collect damages; they are usually filed with goals of affording victims a measure of recognition and respect, of publicly shaming those responsible for human rights violations, and of perhaps instigating change outside the courtroom.”); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, *FOREIGN AFF.*, Sept./Oct. 2000, at 102, 106 (“The impact of such cases has been greater in theory than in practice. . . . *Filartiga* and its progeny have created an opening in this rule, but one too narrow for lawsuits against those most responsible for human rights violations abroad—namely, leaders and governments—since they tend to be protected by sovereign immunity. At the same time, the effect of these civil

rights litigation against corporations, there is now the prospect of a deep-pocket defendant that is complicit in grave human rights abuses, subject to personal jurisdiction, and not immune from suit. This development became an “existential”<sup>3</sup> moment in the history of human rights litigation, with both victims and corporations cognizant of the genuine risks and rewards of human rights litigation.

However, an honest appraisal of this current trend raises troubling questions. One has a nagging suspicion that human rights litigation against corporations is a proxy fight in which the accomplice is pursued while the principal evades punishment. Indeed, if a corporation is accused of “aiding and abetting” human rights abuses, this is all but a concession that the corporate actor is not the principal wrongdoer. It is of course possible that this controversial trend toward corporate responsibility may reflect a genuine concern about corporate abuse of power. But more likely it reflects an abiding frustration that the primary perpetrators—sovereigns—are beyond the reach of most victims. If victims cannot pursue claims against the principal, they will resign themselves to pursue claims against those who aid and abet.

How have we come to this state of affairs, in which the corporation is pursued while the sovereign evades punishment? Why should the corporate accomplice alone be found liable if the sovereign is the primary malfeasant? For the first time in scholarly literature, this Article suggests an alternative approach, a solution to this conundrum. It suggests that corporations have existing tools to remedy the situation, drawing on principles derived from human rights, contract law, and arbitration. The essential idea is that if a corporation is found liable for aiding and abetting human rights abuse, it may invoke contractual provisions in the agreement with the sovereign to arbitrate the question of shared responsibility. While the victims may not pursue the sovereign, there is no impediment for a corporation that is found liable to pursue the sovereign in arbitration to secure its share of liability, either in the form of contribution or indemnification. In short,

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suits in fostering respect for human rights has been uncertain at best. The massive judgments . . . that the courts entered against Karadžić and others have gone unpaid. For the moment, then, the principle benefit of these suits to their plaintiffs is the public attention they generate.”).

3 See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Promotion and Protection of Human Rights, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 16, at 6, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (prepared by John Ruggie) [hereinafter *Ruggie Interim Report*], available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/pdf/G0611027.pdf?OpenElement>.

human rights litigation against the corporation could lead to “who pays” arbitration against the sovereign.

But the tools of contract law and arbitration are not simply for the corporation that aids and abets human rights abuse. They also are tools available to the vast majority of corporations that are good corporate citizens and wish to contract for compliance with basic human rights. For these corporations, contract law and arbitration procedures create opportunities to impose human rights obligations on contractors, vendors, and suppliers. Human rights obligations can be internalized by contract and subjected to effective dispute resolution procedures, including international arbitration. Such provisions may be included out of genuine reflection of concern for such human rights, or to minimize bad publicity or accusations of legal complicity in human rights violations.

Finally, some corporations may wish to go even further and create opportunities for noncontracting parties—such as employees or non-governmental organizations—to invoke third-party beneficiary rights to facilitate compliance with human rights embedded in the contract. Not unlike the third-party beneficiary rights that corporations enjoy pursuant to bilateral investment treaties, corporations could empower relevant third-party stakeholders to invoke contractual social responsibility clauses against those contracting parties who violate their commitments.

This Article begins in Part I by briefly outlining the doctrine of sovereign immunity, which has proven to be the principal impediment to pursuing human rights claims directly against the sovereign in domestic courts. Plaintiffs have tried in vain to hold sovereigns accountable by articulating convoluted arguments that the human rights abuses fall within one of the Foreign Sovereign Immunities Act exceptions. Part II then summarizes the debate regarding corporate responsibility under international law and outlines the growing trend of holding corporations liable for human rights violations. Courts increasingly are concluding that corporate responsibility for human rights violations flows from the corporation’s ties to the sovereign, especially when the corporation aids and abets a violation, performs government functions, or authorizes government actors to engage in such abuse. Part III addresses the critical step that is missing in most human rights litigation involving corporations: arbitrating who pays for the human rights abuse. Most relationships between sovereigns and corporations that give rise to these allegations are governed by contract. These contracts typically include broad arbitration clauses and waivers of sovereign immunity. Thus, one can anticipate that in the coming years the focus will be not only on the question of corpo-

rate liability, but also on the possibilities of contractual arbitration between the corporation and the sovereign over who should pay for the human rights liability. This possibility of arbitrating the question of who pays properly limits the exposure of corporations to third-party claims. It also has the potential of offering a rare and meaningful tool to indirectly hold the sovereign accountable for its part in the human rights abuse. Part IV addresses the developing trend of including human rights obligations in international agreements. By including human rights as a substantive contractual obligation and arbitration as a procedural guarantee, corporations can establish a firm basis for contractual enforcement of human rights. Finally, Part V considers the possibility of incorporating third-party beneficiary rights in international agreements as a means to empower a narrow set of noncontracting parties to challenge human rights violations through an effective dispute resolution procedure. Corporations can create third-party beneficiary rights by contract analogous to the third-party beneficiary rights they enjoy under bilateral investment treaties. These corporations thereby can incorporate a mechanism for those third parties to initiate an effective dispute resolution process to address core human rights concerns.

#### I. SOVEREIGN IMMUNITY FOR HUMAN RIGHTS ABUSE

If human rights victims had their way, a viable judicial mechanism in which sovereigns could genuinely be held accountable would already exist. Sovereign accountability might be pursued through litigation in domestic or foreign courts, or before international tribunals. But for victims in many countries, domestic litigation against the sovereign for human rights offenses is simply not available. And absent a treaty expressly providing a mechanism for resolving human rights claims before international tribunals, they have no opportunity to pursue claims in international human rights tribunals. The result is that many claims for human rights abuses have been pursued in foreign courts, particularly in countries that are more amenable to such claims.

For good or for ill, the United States has become the preferred venue for pursuing international human rights claims.<sup>4</sup> The reasons for this are legion, but they include liberal pretrial discovery; broad rules on personal jurisdiction, including “tag” and “doing business” jurisdiction; jury trials in civil litigation; higher damage awards,

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4 See Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1001, 1023–24 (2001).

including punitive damages; class action litigation; contingent fee arrangements with counsel; the absence of “loser pay” rules for the unsuccessful party; and statutory protections for international law violations. As a result of these systemic advantages, victims of human rights abuses have pursued and occasionally succeeded in claims against individuals responsible for grave human rights violations.<sup>5</sup> While the percentage of successful claims is quite small, the opportunity to pursue human rights claims against individual perpetrators such as Américo Peña<sup>6</sup> and Radovan Karadžić<sup>7</sup> has led to a cottage industry of international human rights litigation in the United States.

But for all these systemic advantages, perpetrator responsibility remains elusive. One of the principal problems with litigation against individual perpetrators is that, with very rare exception,<sup>8</sup> these low-level offenders are not subject to personal jurisdiction and are generally judgment proof. So another common approach that has been employed is for human rights victims to pursue claims directly against sovereign entities. But when human rights victims have pursued claims against sovereigns, they have been met with formidable defenses, not the least of which is the claim of sovereign immunity.<sup>9</sup>

Under well-developed United States law, sovereigns typically enjoy foreign sovereign immunity for their sovereign acts,<sup>10</sup> unless their conduct falls within a narrow set of exceptions outlined in the

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5 See *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Filartiga*, 630 F.2d 876; *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); see also Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT’L L. REV. 169, 173 (2005) (discussing successful suits).

6 *Filartiga*, 630 F.2d at 876.

7 *Kadic*, 70 F.3d at 232.

8 See *Jean v. Dorelien*, 431 F.3d 776, 783 (11th Cir. 2005) (entering judgment for damages against a convicted human rights offender who won the Florida lottery); Posting of Roger Alford to Opinio Juris, <http://www.opiniojuris.org/posts/1133793000.shtml> (Dec. 5, 2005, 09:30) (discussing *Dorelien*).

9 See K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT’L L.J. 1, 2–3 (2004) (explaining the difficulties human rights plaintiffs face).

10 See, e.g., *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135–37 (1812) (recognizing the immunity of a foreign sovereign as being a necessary incident of the sovereign’s “exclusive and absolute” jurisdiction within its borders and waivable only by “consent of the nation itself”).

Foreign Sovereign Immunities Act (FSIA).<sup>11</sup> Unremarkably, those exceptions are unhelpful to human rights victims, as they were not designed with human rights offenses in mind. In order to pursue a claim against a sovereign, one must establish that the sovereign committed acts which justify the removal of immunity, such as engaging in commercial activity, waiving immunity, expropriating property, or committing a noncommercial tort within the United States.<sup>12</sup> Proponents have tried to fit the square peg of human rights claims into the round holes of the FSIA exceptions, but with very limited success.<sup>13</sup> Such litigation has led to convoluted arguments, such as contentions that the commission of torture is a commercial activity,<sup>14</sup> or that offenses occurring inside an American foreign embassy are torts committed within the United States,<sup>15</sup> or that the commission of serious human rights offenses constitutes an implied waiver of immunity.<sup>16</sup>

Unable to fit human rights claims under the existing FSIA exceptions, proponents also have made numerous attempts to amend the FSIA to include a human rights exception.<sup>17</sup> Not surprisingly, those attempts have uniformly failed. The concern, of course, is if the

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11 28 U.S.C.A. §§ 1602–1611 (West 2006 & Supp. 2007); *see also* Beth Stephens, *Conceptualizing Violence Under International Criminal Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 598 (1997) (explaining that human rights “[l]itigation . . . has not been successful against sovereign states, which are protected from suits in U.S. courts by the Foreign Sovereign Immunities Act (FSIA), unless the claim falls within one of the enumerated exceptions to immunity,” and these “do not include a general authorization for claims of gross human rights abuses”).

12 28 U.S.C. § 1610 (2000). The only exception that clearly applies to human rights claims involves those limited cases pertaining to state-sponsored terrorism. *See, e.g.*, *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 359 (D.C. Cir. 2006); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126–27 (D.C. Cir. 2004); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12–13 (D.D.C. 1998).

13 *See* Boyd, *supra* note 9, at 27–28; Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1168–69 (2004); Stephens, *supra* note 11, at 598.

14 *Saudi Arabia v. Nelson*, 507 U.S. 349, 354 (1993); *Garb v. Republic of Poland*, 440 F.3d 579, 582 (2d Cir. 2006).

15 *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839 (D.C. Cir. 1984).

16 *See* *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1150–51 (7th Cir. 2001); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244–45 (2d Cir. 1996); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992).

17 *See* David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 282–84 (1996); Elizabeth F. Defeis, *The Foreign Sovereign Immunities Act and the Human Rights Violations*, 8 ILSA J. INT'L & COMP. L. 363, 370–71 (2002); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 27 (1996).

United States were to opt for such an exception for grave human rights violations, other countries might reciprocate, opening the door for national courts to be the final arbiter of the global conduct of other nations, including our own. Such reciprocity concerns do not suggest that the United States fears accountability for human rights violations, but rather that it fears the demise of foreign sovereign immunity's traditional distinction between immunity for public acts and accountability for private or commercial acts. An exception for human rights violations would reflect a dramatic normative shift away from traditional understandings of immunity for public acts, a shift arguably no less significant than the move from absolute to restrictive immunity.<sup>18</sup> As Anne-Marie Slaughter and David Bosco put it:

[T]he case against further congressional encroachments on sovereign immunity is compelling. By weakening its sovereign-immunity laws, the United States may put its own assets and interests abroad at risk. After all, sovereign immunity is meant to be a reciprocal arrangement. With its worldwide reach, the United States would be particularly vulnerable should other countries imitate Congress and permit suits against the U.S. government abroad.<sup>19</sup>

A human rights exception to the FSIA would shift the focus in addressing human rights abuses away from the executive branch and toward the judicial branch, something the United States consistently resists in the various statements of interest that it has filed opposing human rights litigation that casts judgment on a foreign sovereign's conduct abroad.<sup>20</sup>

## II. CORPORATE RESPONSIBILITY UNDER INTERNATIONAL LAW

As human rights claims against sovereigns generally have proved unavailing, the issue of corporate liability under international law has become increasingly important. The viability of such claims is uncer-

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18 For a thoughtful examination of the potential for such a doctrinal shift, see Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 765-80 (2003).

19 Slaughter & Bosco, *supra* note 2, at 113.

20 See, e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1203 (9th Cir. 2007), *reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 351 (D.C. Cir. 2007); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59 (2d Cir. 2005); *Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005); see also David P. Stewart, *Immunity and Accountability: More Continuity than Change?*, 99 AM. SOC'Y INT'L L. PROC. 227, 230 (2005) (pointing out that there are already exceptions to the FSIA for expropriation and terrorism).



tain,<sup>21</sup> but the prospect of pursuing international law claims against wealthy corporate wrongdoers has whet the appetite for a new and effective form of litigation. While the law is in a state of flux, it is subject to pressures to broaden the scope of the claims and the identity of the defendants to include corporate actors.

Classic understandings of international law suggest that only states enjoy legal personality under international law. Oppenheim's International Law articulated the classic formulation as follows:

States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are States solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being.<sup>22</sup>

From this general proposition is the corollary principle that corporations do not have rights and responsibilities under international law. A generation ago one could say that *prima facie* it would be "absurd to accord any *public* international law status to a *private* corporation."<sup>23</sup> The traditional argument, recently expressed by Christopher Greenwood, is that "there is no basis in existing international law for the liability of corporations and, consequently, no rules of international law regarding the questions which necessarily arise when a corporation is accused of wrongdoing."<sup>24</sup> Likewise, Professor James Crawford put it succinctly: "Except where international law creates direct responsibility for specific acts, as it does for specified international crimes, it does not have its own system of responsibility for breaches of international law on the part of persons generally, still less its own

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21 For various views on the topic of corporate liability for human rights abuses, see generally HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999); NICOLA M.C.P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS (2002); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997); William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 368, 374-79 (1996).

22 1 OPPENHEIM'S INTERNATIONAL LAW 16 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

23 W. Friedmann, *General Course in Public International Law*, 127 RECUEIL DES COURS 39, 121 (1969).

24 Declaration of Christopher Greenwood at 8, Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (No. 01 CV 9882 (AGS)), available at [http://www.opiniojuris.org/files/Greenwood\\_Declaration.pdf](http://www.opiniojuris.org/files/Greenwood_Declaration.pdf).

system of corporate responsibility.”<sup>25</sup> And United Nations Special Representative John Ruggie recently has stated that recent efforts “to take existing State-based human rights instruments and simply assert that many of their provisions are binding on corporations” has “little authoritative basis in international law—hard, soft, or otherwise.”<sup>26</sup>

Today, however, there is little doubt that movement is afoot to modify this classic Westphalian understanding of international law. Judge Thomas Buergenthal has argued that

[w]hen we compare the position of individuals under international law as it existed before the Second World War with their status under contemporary international law, it is evident that a dramatic legal and conceptual transformation has taken place. This transformation has “internationalized human rights and humanized international law.” . . . Due to the humanization of international law, individuals as such now have internationally guaranteed human rights, and to that extent are subjects of international law.<sup>27</sup>

But despite the extension of international recognition to individuals, the precise role of corporations under international law remains elusive. Civil society is increasingly focusing on the role of corporations in promoting human rights. Addressing the role of businesses as social actors, over two hundred NGOs recently argued that “[a]n important role of international human rights law is to limit and govern the exercise of power. International human rights law must continue to develop to account for the growing power of actors other than states to affect individuals’, communities’ and peoples’ enjoyment of their human rights.”<sup>28</sup> Given that corporations have rights and duties under all domestic legal systems, the question is whether such artificial persons may have international responsibility.<sup>29</sup>

Scholars are filling the gap with arguments for extending international personality to corporations. For example, in one recent noteworthy article, Steven Ratner has argued for a theory of corporate

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25 Declaration of James Crawford at 12, *Presbyterian Church of Sudan*, 374 F. Supp. 2d 331, (No. 01 CV 9882 (AGS)), available at [http://www.opiniojuris.org/files/Crawford\\_Declaration.pdf](http://www.opiniojuris.org/files/Crawford_Declaration.pdf).

26 *Ruggie Interim Report*, *supra* note 3, ¶ 60, at 15.

27 Thomas Buergenthal, *International Law and the Holocaust*, in HOLOCAUST RESTITUTION 17, 21 (Michael J. Bazylar & Roger P. Alford eds., 2006) (footnotes omitted).

28 Letter from Action for Social Rights et al. to Professor John Ruggie, Special Representative on Human Rights and Transnational Corps. and Other Bus. Enters., Office of the High Comm’r for Human Rights 4 (Oct. 25, 2007), available at [http://www.escri-net.org/usr\\_doc/OpenLetter\\_Ruggie\\_FinalEndorsements.pdf](http://www.escri-net.org/usr_doc/OpenLetter_Ruggie_FinalEndorsements.pdf).

29 IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 1 (1987).

responsibility under international law.<sup>30</sup> While corporations have rights under international law, such as economic rights under investment treaties, he concedes that governments appear to remain “ambivalent about accepting corporate duties, [particularly] duties that corporations might have toward individuals.”<sup>31</sup> Ratner argues that international law must move beyond its current stage and prescribe law in this area in a coherent fashion through a theory of corporate responsibility for human rights under international law.<sup>32</sup> His strongest argument rests on a theory of corporate responsibility based on an entity’s ties to the government.<sup>33</sup> He argues that corporate duties to “protect human rights increase as a function of its ties to the government. If the corporation . . . knowingly and substantially aids and abets governmental abuses, carries out governmental functions and causes abuses, or . . . allows governmental actors to commit them, its responsibility flows from that of the state.”<sup>34</sup>

This is precisely the direction that litigation in the United States has taken shape, where claims under the Alien Tort Statute (ATS)<sup>35</sup> have proven fertile ground for testing the possibility of corporate responsibility under international law. In the landmark case of *Sosa v. Alvarez-Machain*<sup>36</sup> the Supreme Court addressed the legitimacy of claims for certain human rights violations under the ATS. The Court recognized that certain causes of action were cognizable under modern international law provided that “any claim based on the present-day law of nations” will “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>37</sup> While *Sosa* resolved the question of the continued viability of a certain category of human rights claims under the ATS, it did not resolve whether private actors such as corporations can be subject to such suits. The Court noted that the appellate courts are split on the question of whether “international law extends the scope of liability

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30 See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001). For a brief contrary perspective on corporate aiding and abetting liability, see Curtis A. Bradley et al., *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 924–29 (2007).

31 See Ratner, *supra* note 30, at 488.

32 See *id.*

33 See *id.* at 497–506.

34 *Id.* at 524.

35 28 U.S.C. § 1350 (2000).

36 542 U.S. 692 (2004).

37 *Id.* at 725.

for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>38</sup>

Since the Supreme Court’s decision in *Sosa*, lower courts have addressed numerous ATS claims against corporations, but surprisingly few have squarely addressed the question of whether corporations may be liable under international law.<sup>39</sup> Those courts that do address the question are split as to whether international law recognizes corporate liability for human rights abuses. For example, Judge Weinstein in *In re “Agent Orange” Product Liability Litigation*<sup>40</sup> conceded that there is “substantial support” for the position that corporations cannot be liable under international law,<sup>41</sup> but concluded that “[l]imiting civil liability to individuals while exonerating the corporation directing the individual’s action . . . makes little sense in today’s world. . . . A corporation is not immune from civil legal action based on international law.”<sup>42</sup> By contrast, in *Doe I v. Exxon Mobil Corp.*,<sup>43</sup> Judge Oberdorfer stated that grafting “color of law analysis onto international law claims would be an end-run around the accepted principle that most violations of international law can be committed only by states. . . . Indeed, the Supreme Court [in *Sosa*] suggested that only states, and not corporations or individuals, may be liable for international law violations.”<sup>44</sup>

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38 *Id.* at 732 n.20. For a more detailed and critical analysis of corporate liability under and in light of *Sosa*, see Bradley et al., *supra* note 30, at 924–29.

39 Most courts simply pass over the question with superficial analysis, *see, e.g.*, *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007) (passing over the question of corporate liability), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007), or conclude that *Sosa* does not alter previous holdings that corporations may be liable under international law, *see Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349341, at \*5 (N.D. Cal. Aug. 14, 2007) (refusing to extend *Sosa* to corporations); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 335 (S.D.N.Y. 2005) (same).

40 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

41 *Id.* at 54.

42 *Id.* at 58; *see Sarei*, 487 F.3d at 1241 & n.17; *Bowoto*, 2007 WL 2349341, at \*6; *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 284–85 (E.D.N.Y. 2007); *Presbyterian Church of Sudan*, 374 F. Supp. 2d at 335; *Wiwa v. Royal Dutch Petrol. Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at \*13 (S.D.N.Y. Feb. 28, 2002).

43 393 F. Supp. 2d 20 (D.D.C. 2005).

44 *Id.* at 26; *see also Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57–58 (D.D.C. 2006) (rejecting arguments of actionable claims under the ATS of plaintiff allegations of torture by private parties who were civilian employees of American corporations doing contract work for the U.S. military); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) (“[T]he Ninth Circuit has held that ‘[o]nly individuals who have acted under official authority or under color of such authority may violate international law.’” (quoting *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 501–02 (9th Cir. 1992))); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d

In one of the more significant examples of confusion in the courts, the Second Circuit recently held that “a plaintiff may plead a theory of aiding and abetting liability” to hold defendants liable under international law.<sup>45</sup> A two-judge majority of the court further held that the standard for aiding and abetting under the Alien Tort Statute was the international law standard applied by the International Criminal Court under the Rome Statute.<sup>46</sup> But then those two judges could not agree as to whether that standard should apply to corporations, leaving the lower court with a standard to apply but no clarity as to which defendants to apply it to.<sup>47</sup>

Notwithstanding these conflicting voices, one can anticipate that plaintiffs will continue to pursue claims in those jurisdictions that have upheld corporate liability for human rights violations under international law.<sup>48</sup> Indeed, the clear trend is to pursue international human rights claims against corporations. According to business groups who follow such litigation, over seventy-five percent of the claims filed under the ATS and/or the Torture Victim Protection Act (TVPA)<sup>49</sup> involve defendant corporations.<sup>50</sup> Many of these corporations are household names, such as Coca-Cola, Nestle, Pfizer, Daimler-Chrysler, Del Monte, Dow, Levi Strauss, Target, and Mitsubishi. Business groups have expressed concern that “[f]oreign plaintiffs are increasingly invoking U.S. laws such as the . . . Alien Tort Statute . . . to file lawsuits in U.S. courts. These foreign plaintiffs . . . use American courts to seek money extraction from international companies that operate in their homeland.”<sup>51</sup> Recent business commentators have

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10, 13–15 (D.D.C. 2005) (holding that torture by private government contractors is not actionable as a violation of the law of nations).

45 *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (addressing claims against corporations for allegedly aiding and abetting human rights abuses arising out of South African apartheid).

46 *See id.* at 275 (Katzmann, J., concurring); *id.* at 332 (Korman, J., concurring and dissenting).

47 *Id.* at 330–33 (Korman, J., concurring and dissenting).

48 *See Kiobel v. Royal Dutch Petrol. Co.*, 456 F. Supp. 2d 457, 463–64 (S.D.N.Y. 2006) (citing cases); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, at \*9 (N.D. Cal. Aug. 22, 2006) (citing pre- and post-*Sosa* cases holding corporations liable).

49 28 U.S.C. § 1350 note (2000).

50 The Institute for Legal Reform, *Global Forum Shopping Cases* (Jan. 31, 2007) (on file with author). This report reveals that of the sixty cases that recently have been filed under the ATS and TVPA, only fourteen did *not* involve a defendant corporation. *Id.*

51 Institute for Legal Reform, Issues Research Center: Global Forum Shopping, <http://www.instituteforlegalreform.com/issues/issuedetail.cfm?issue=GFS> (last visited Jan. 14, 2008).

argued that the “typical” ATS case is now one in which plaintiffs “contend that corporate defendants . . . have either violated international law, or have become legally responsible for the conduct or policies of foreign regimes.”<sup>52</sup>

The purpose of this Article is not to affirm or disaffirm this trend of holding corporations liable under international law. Rather its purpose is to recognize an observable trend in human rights litigation patterns and consider its ramifications. If corporations increasingly are subject to international responsibility, then this portends new avenues for holding sovereigns responsible for their share of the liability. If it is true that in many cases “plaintiffs are us[ing] corporations as proxies for what are essentially attacks on government action,”<sup>53</sup> then plaintiffs are targeting the wrong (or at least less culpable) party. But if such proxy litigation is targeting the wrong party, then that party can and should take action against the more culpable sovereign actor. One viable mechanism to do this is through contractual arbitration against the sovereign.

### III. ARBITRATING WHO PAYS FOR HUMAN RIGHTS ABUSE

If the premise is correct that corporations will increasingly be held liable for international human rights violations, what are the implications of this development? Thus far the scholarship and jurisprudence have only focused on the relationship between the human rights victim and the corporate malfeasor. But a logical extension of this development is to explore the potential horizontal relationship between the corporation and the sovereign for their joint action in violating international law. If it is increasingly accurate to say that corporations are liable under international law if they aid and abet governmental abuses, then what recourse does the corporation have against the sovereign joint malfeasor? Corporations have legitimate concerns that they are being unfairly targeted because they are more vulnerable to suit, particularly vis-à-vis their sovereign partners. And they fear that corporate defendants will find it difficult or impossible to join other parties potentially responsible for alleged wrongdoing as a result of sovereign immunity.<sup>54</sup>

This Article suggests that the solution to this problem can be found in contract and arbitration law. If a corporation is engaging in

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52 JOHN H. BEISNER & JOHN F. NIBLOCK, U.S. CHAMBER INST. FOR LEGAL REFORM, *THE TEEMING SHORE* 15 (2004), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docid=751>.

53 Slaughter & Bosco, *supra* note 2, at 107.

54 See BEISNER & NIBLOCK, *supra* note 52, at 17.

joint action with government actors, then almost by definition the parties are acting pursuant to some contractual relationship. A brief perusal of the human rights claims that have been filed against corporations shows that they almost always are premised on some contractual agreement between the corporation and the sovereign. Pfizer allegedly contracts with the Nigerian government for the testing of experimental drugs on unsuspecting Nigerians.<sup>55</sup> Unocal and Burma are in a joint venture for the construction of a pipeline that allegedly resulted in displacement of villages and the use of forced labor.<sup>56</sup> Titan contracts with the United States for the detention and interrogation of prisoners at the Abu Ghraib prison in Baghdad.<sup>57</sup> Exxon Mobil is allegedly jointly and severally liable for human rights abuses allegedly committed by the Indonesian military assigned to protect gas production facilities in northern Sumatra.<sup>58</sup> The Colombian Air Force is alleged to have bombed Santo Domingo, Colombia, killing numerous villagers, in order to protect Occidental's pipeline.<sup>59</sup> Talisman Energy allegedly aided and abetted the ethnic cleansing of Christians by Islamic forces in Sudan by building roads and airports.<sup>60</sup> Dow Chemical manufactured and sold the herbicide "Agent Orange" to the United States government for use in the Vietnam War.<sup>61</sup> Texaco and Ecuador have a joint venture for the extraction of oil that allegedly leads to environmental damage in the Ecuadorian Amazon.<sup>62</sup> In these and similar cases, plaintiffs allege that international law violations resulted from joint action between the corporation and the sovereign pursuant to a contractual relationship.

If this is so, then the contract between the corporation and the sovereign may well govern the question of shared responsibility for third-party harms. The contractual relationship between the corporation and the sovereign is a significant component in human rights litigation, far more relevant than is currently reflected in academic commentary. A foreign investment agreement (or similar agreement)

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55 See *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 496–97 (S.D.N.Y. 2005); *Abdulahi v. Pfizer, Inc.*, No. 01 CIV. 8118, 2002 WL 31082956, at \*1 (S.D.N.Y. Sept. 17, 2002), *vacated in part*, 77 F. App'x 48 (2d Cir. 2003).

56 See *Doe I v. Unocal Corp.*, 395 F.3d 932, 936–40 (9th Cir. 2002).

57 See *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 55 (D.D.C. 2006); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12–13 (D.D.C. 2005).

58 *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

59 *Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1134, 1138–39 (C.D. Cal. 2005).

60 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296–302 (S.D.N.Y. 2003).

61 *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 15 (E.D.N.Y. 2005).

62 *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001).

between a corporation and a sovereign typically will include provisions addressing performance obligations, conditions, representations and warranties, affirmative and negative covenants, governing law, indemnifications, waiver of sovereign immunity, and provisions for arbitration.<sup>63</sup> Of these provisions, two are of particular importance to human rights claims: waiver of sovereign immunity and arbitration clauses.

A contractual provision in which the sovereign entity waives immunity is quite common in foreign investment agreements, as it is the most effective way to place a sovereign party on an equal footing with the private party.<sup>64</sup> A typical waiver of sovereign immunity clause provides that

the sovereign entity hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a tribunal constituted pursuant to this Agreement, including without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.<sup>65</sup>

Such an explicit waiver of immunity overcomes the traditional concerns of securing government accountability for noncompliance with contractual obligations. A broadly worded clause stipulating that the sovereign waives immunity for service of process, jurisdiction, enforcement, and execution is designed so that the sovereign will have no claim to immunity with respect to any aspect of a legal dispute with

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63 See, e.g., CTR. FOR INT'L LEGAL STUDIES, SALZBURG, AUSTRIA, *COMMERCIAL ALLIANCES IN THE INFORMATION AGE* 154–55 (Dennis Campbell & Susan Cotter eds., 1996); JAN PAULSSON ET AL., *THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR* 11–24, 95–105 (2d rev. ed. 1999).

64 PAULSSON ET AL., *supra* note 63, at 83.

65 *Id.* at 84; *see also* *Kensington Int'l Ltd. v. Republic of Congo*, 461 F.3d 238, 243 (2d Cir. 2006) (noting that the agreement with the sovereign provided that “[t]o the extent that [the Congo] may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process . . . [the Congo] agrees not to claim and waives such immunity to the full extent permitted by the laws of that jurisdiction intending, in particular, that in any proceedings taken in New York the foregoing waiver of immunity shall have effect under and be construed in accordance with the United States Foreign Sovereign Immunities Act of 1976”); ICSID MODEL CLAUSES cl. 15 (Int’l Ctr. for Settlement of Inv. Disputes 1993), *available at* <http://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/15.htm> (“The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.”).



the corporation, including the filing of noncontractual tort claims.<sup>66</sup> Significantly, the FSIA includes a specific exception for express waivers,<sup>67</sup> overcoming concerns of sovereign immunity in these contexts.

Likewise, an arbitration clause in an international agreement with a sovereign is an extraordinarily common vehicle to secure accountability for sovereign breaches or other illegal conduct arising out of or relating to the agreement. As with express waivers, the FSIA includes an exception to immunity for international agreements that include an arbitration clause and are subject to international treaty enforcement under the New York Convention.<sup>68</sup> Thus, with or without an express waiver of immunity, by agreeing to international arbitration pursuant to the New York Convention, a sovereign has waived immunity under the arbitration exception of the FSIA.

A typical arbitration clause provides that

any, dispute, controversy, or claim arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be finally resolved by arbitration under the Rules of [name of institution] in force at [the date

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66 See, e.g., *Gulf Res. Am., Inc. v. Republic of the Congo*, 370 F.3d 65, 72–73 (D.C. Cir. 2004) (interpreting breach of contract and tort claims as waived by virtue of a waiver clause); cf. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1163–64 (D.C. Cir. 2002) (holding that narrowly worded waiver of immunity clauses in two of four contracts permitted a claim of waiver for some, but not all, claims against the sovereign).

67 28 U.S.C. § 1605(a)(1) (2000) (stating that “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication”).

68 See *id.* § 1605(a)(6) (providing that “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable”). The most common international treaty to enforce foreign arbitration agreements and awards is the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

hereof/the date of the request for arbitration], which Rules are deemed to be incorporated by reference into this clause.<sup>69</sup>

The key point of these arbitration clauses is the scope of the clause. Using broad and inclusive terms in delineating jurisdictional authority will grant the arbitration tribunal authority over any dispute that broadly relates to the contract, including contractual claims, tort claims, and statutory claims.

Under the Federal Arbitration Act,<sup>70</sup> the Supreme Court has articulated an extremely liberal approach to interpreting the scope of arbitration clauses, requiring any doubt as to the scope of the clause to be construed in favor of arbitration.<sup>71</sup> For example, courts have construed broad arbitration clauses to require arbitration of such matters as workplace discrimination claims,<sup>72</sup> intentional torts,<sup>73</sup> invasion of privacy and harassment,<sup>74</sup> patent infringement,<sup>75</sup> tortious destruction of property from inadvertent missile launches,<sup>76</sup> and contribution claims by one joint tortfeasor against another.<sup>77</sup> Such matters are properly within the scope of a broad arbitration clause because they "relate to," "arise from," or are "connected with" the contract.<sup>78</sup>

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69 See PAULSSON ET AL., *supra* note 63, at 96; see also Int'l Trade Ctr., Model Clause: American Arbitration Association, <http://www.jurisint.org/doc/html/cla/en/2005/2005jiclaen5.html> (last visited Jan. 14, 2008) ("Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association."); Int'l Chamber of Commerce, ICC Standard and Suggested Clauses for Dispute Resolution Services, <http://www.iccwbo.org/court/arbitration/id4114/index.html> (follow "English" hyperlink under "Arbitration") (last visited Jan. 14, 2008) ("All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.").

70 9 U.S.C. §§ 1–16 (2000).

71 See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

72 See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33–35 (1991); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 746–54 (9th Cir. 2003).

73 See *Green Tree Fin. Corp. of Ala. v. Vintson*, 753 So. 2d 497, 504–05 (Ala. 1999).

74 See *Green Tree Fin. Corp. v. Shoemaker*, 775 So. 2d 149, 151 (Ala. 2000).

75 See *Innovative Eng'g Solutions v. Misonix, Inc.*, 458 F. Supp. 2d 1190, 1195–96 (D. Or. 2006).

76 See *McDonnell Douglas Corp. v. Denmark*, 607 F. Supp. 1016, 1019 (E.D. Mo. 1985).

77 See *Acevedo Maldonado v. PPG Indus.*, 514 F.2d 614, 616 (1st Cir. 1975).

78 See, e.g., *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 800 (8th Cir. 2005) (holding that an arbitration clause requiring arbitration of "any claim, controversy or dis-

Particularly relevant are those instances in which courts have ruled that contribution claims among joint tortfeasors are subject to arbitration under a broadly worded arbitration clause. For example, in *Acevedo Maldonado v. PPG Industries*,<sup>79</sup> residents of a Puerto Rico town brought negligence claims against PPG, the owner of a manufacturing plant, for injuries suffered from gas leaks.<sup>80</sup> PPG in turn brought a joint tortfeasor claim for contribution against Fluor, the designer and constructor of the plant.<sup>81</sup> Fluor moved for a stay of litigation pending arbitration.<sup>82</sup> The First Circuit ruled that the contract provided for arbitration of “any controversy or claim arising out of or relating to this Agreement” and that such broad language

covers contract-generated or contracted-related disputes between the parties however labeled: it is immaterial whether claims are in contract or in tort, or are couched in terms of the contribution owed by one tortfeasor to another. Fluor’s liability, if any, arises because it was PPG’s contractor and designer. Absent the contracts, there would be no occasion for a third-party claim.<sup>83</sup>

In a similar vein, a broad arbitration clause encompasses claims for indemnification from third-party liability. Thus, in *Ballard v. Illinois Central Railroad Co.*,<sup>84</sup> a plaintiff brought a tort claim against a Canadian company for injuries suffered during a railroad construction accident.<sup>85</sup> The Canadian railroad company brought indemnification claims against the contractors, and the contractors sought to

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pute arising out of or relating to Franchisee’s operation of the Franchised business under the Agreement” was “broadly worded” and has been “generally construed to cover tort suits arising from the same set of operative facts covered by a contract between the parties to the agreement”); *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 350 (4th Cir. 2001) (“[T]he arbitration clause . . . is a ‘broad’ one, covering as it does ‘any controversy or claim arising out of or related to’ that agreement. . . . [T]he reach of an arbitration clause is not restricted to those causes of action brought under the contract containing the clause, unless the parties draft a clause so restricted in scope.” (citations omitted)).

79 514 F.2d 614.

80 *Id.* at 615.

81 *Id.*

82 *Id.*

83 *Id.* at 616 (citations omitted); *see also* *Walter Oil & Gas Corp. v. Teekay Shipping*, 270 F. Supp. 2d 855, 863 (S.D. Tex. 2003) (holding that a vessel owner’s contribution and indemnity claim against a vessel charterer was subject to arbitration; charterer and owner were parties to a contract that included a valid provision to arbitrate, and owner’s claims for contribution and indemnity came within the provision’s broad scope).

84 338 F. Supp. 2d 712 (S.D. Miss. 2004).

85 *Id.* at 714.

compel arbitration.<sup>86</sup> The court granted the request, ruling that the third-party indemnification claims “fall under the broad arbitration provision of the Service Contract” and that “the arbitration provision is sufficiently broad to indicate that the parties intended to encompass all aspects of the relationship between them.”<sup>87</sup> Likewise, in *In re NBR Antitrust Litigation*,<sup>88</sup> the plaintiffs brought a class action alleging unlawful price fixing against one joint venturer, and the defendant cross-claimed against the other joint venturers seeking indemnification.<sup>89</sup> Upon a motion to compel arbitration, the Third Circuit concluded that the claim for indemnification was subject to arbitration between the joint venturers.<sup>90</sup>

If contribution and indemnity claims are subject to arbitration in the domestic context involving international parties, the question arises whether a similar result should obtain with international agreements involving multinational corporations and sovereigns. With a waiver of immunity and a commitment to arbitrate, the stage is set for an effective mechanism to resolve disputes over who pays for human rights abuses. The critical question is whether a corporation that is found liable in a domestic court for aiding and abetting human rights abuses can pursue an action in arbitration against the sovereign for contribution or indemnification pursuant to the contract. The answer should be yes.

This question of contribution and indemnification claims against sovereigns has been addressed in the domestic context under the Federal Tort Claims Act (FTCA).<sup>91</sup> Where the sovereign has immunity against the injured party but not against a joint tortfeasor, the Supreme Court has held that “[t]he Federal Tort Claims Act permits an indemnity action against the United States ‘in the same manner and to the same extent’ that the action would lie against ‘a private individual under like circumstances.’”<sup>92</sup> Applying that standard, the

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86 *See id.*

87 *Id.* at 715–16.

88 207 F. App’x 166 (3d Cir. 2006).

89 *See id.* at 168.

90 *See id.* at 171–72; *see also* *Questar Homes of Avalon, LLC v. Pillar Constr., Inc.*, 882 A.2d 288, 295–96 (Md. 2005) (holding that claims for indemnification or contribution are subject to arbitration where subcontractor and contractor have an arbitration agreement).

91 28 U.S.C. §§ 2671–2680 (2000 & Supp. IV 2004).

92 *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983) (quoting § 2674). In *Lockheed*, aircraft operated by the United States Air Force and manufactured by Lockheed crashed in Vietnam. *Id.* at 191. The United States paid death benefits to the deceased’s survivors and thereby was immune from suit by the injured party under the Federal Employees’ Compensation Act. *Id.* at 193–94. Plaintiffs sued

Court ruled that despite the inability of the deceased's survivors to pursue an action against the United States, there was no impediment to a third-party claim by the corporation against the United States for indemnification for damages paid by the corporation to the deceased's survivors.<sup>93</sup> The Court has held the same rule applies under the FTCA for claims of contribution by a joint tortfeasor against the United States.<sup>94</sup> The Court held that this is true even if two modes of adjudication—such as one jury trial and one bench trial—were required.<sup>95</sup>

These holdings are of great significance for claims against foreign sovereigns under the FSIA because the language in the FTCA that gives rise to these conclusions is identical to the language in § 1606 of the FSIA. Both the FTCA and the FSIA provide that for claims in which the sovereign is not entitled to immunity, the sovereign "shall be liable in the same manner and to the same extent as a private individual under like circumstances."<sup>96</sup> Thus, if a sovereign is not entitled to immunity under either the FTCA or the FSIA, it should be subject to indemnification and contribution claims in the same manner as a private party. In the absence of immunity, as with private parties, contribution and indemnity claims will be subject to arbitration pursuant

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Lockheed and Lockheed sought indemnification against the United States pursuant to the Federal Tort Claims Act. *See id.* at 191–98; *see also* 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .").

93 *See Lockheed*, 460 U.S. at 199.

94 *See United States v. Yellow Cab Co.*, 340 U.S. 543, 556–57 (1951); *see also* *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 718 (Fed. Cir. 1988) ("Since *United States v. Yellow Cab Co.*, it has been settled that in a private tort case, a person may bring in the United States as third-party defendant for indemnity or contribution if the United States was wholly or in part at fault." (citation omitted)).

95 In *Yellow Cab*, the Court held that if a jury is demanded, and separation of claims against the government tortfeasor and the corporate tortfeasor is required, then a court can order separate trials. *Yellow Cab*, 340 U.S. at 555–56 ("The possibility of such procedural difficulties is not sufficient ground for so limiting the scope of the [FTCA] as to preclude its application to all cases of contribution or even to all cases of contribution arising under third-party practice."); David A. Bagley, *The United States and International Nuclear Civil Liability*, 18 BROOK. J. INT'L L. 497, 573 n.322 (1992).

96 Compare Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (2000) ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . ."), with Federal Tort Claims Act, 28 U.S.C. § 2674 (2000) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .").

to international agreements between the corporation and the sovereign.

This principle is finding practical application in the current dispute that is unfolding between ChevronTexaco and the government of Ecuador over environmental damage caused in the Ecuadorian Amazon. In 1993 a private lawsuit was filed in New York alleging that ChevronTexaco polluted the rain forests and rivers of Ecuador in violation of various laws, including the Alien Tort Statute.<sup>97</sup> This lawsuit was dismissed on *forum non conveniens* grounds and a private lawsuit was subsequently brought in Ecuador alleging similar environmental damage.<sup>98</sup> Following the initiation of this lawsuit in Ecuador, in 2004 ChevronTexaco filed an arbitration claim before the American Arbitration Association (AAA) against the Ecuadorian oil company Petroecuador alleging a contractual right to indemnification for the total value of their costs, fees, and any adverse judgment rendered in the Ecuadorian lawsuit.<sup>99</sup>

The contractual history of the parties is quite complex, raising doubts as to whether ChevronTexaco could arbitrate its indemnification claims against Ecuador and Petroecuador.<sup>100</sup> Essentially, the 1965 joint operating agreement signed between a subsidiary, Texaco Petroleum, and a state-owned Ecuadorian oil company included a provision indemnifying Texaco from “all claims and demands which may be made against Operator [Texaco] by third parties due to, arising out of, or related to the performance by the Operator [Texaco] of its duties under this Agreement.”<sup>101</sup> The arbitration clause in the agreement provided that “[a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbi-

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97 See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

98 See *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 341–42 (S.D.N.Y. 2005).

99 *Id.* In the 1990s, while the federal lawsuit was ongoing, Texaco signed various agreements with Ecuador and state-owned Petroecuador in which Texaco agreed to undertake environmental remediation in exchange for a release of claims by Ecuador and Petroecuador. *Id.* In 2001 the *Aguinda* lawsuit was dismissed on *forum non conveniens* grounds, and the plaintiffs subsequently filed suit against Texaco in Ecuadorian courts in Lago Agria. *Id.* ChevronTexaco alleged that this Ecuadorian lawsuit was filed pursuant to Ecuadorian environmental laws that allow plaintiffs to assert public rights by acting as “private attorneys general” in violation of the various releases and indemnifications. See *id.*; *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001).

100 The contractual history of the parties is discussed at length in *Republic of Ecuador*, 376 F. Supp. 2d at 338–42.

101 *Id.* at 338–39 (quoting the joint operating agreement).

tration in accordance with the rules then obtaining of the American Arbitration Association.’”<sup>102</sup>

After ChevronTexaco filed for arbitration, Ecuador and Petroecuador moved to stay the arbitration.<sup>103</sup> In June 2007, the court ruled that the 1965 joint operating agreement was not signed by Ecuador or Petroecuador and that they were not bound as nonsignatories by operation of law.<sup>104</sup> Accordingly, the court held that arbitration against Ecuador and Petroecuador was not an available remedy pursuant to the arbitration clause in the 1965 joint operating agreement.<sup>105</sup>

Regardless of the court’s contractual ruling in *Republic of Ecuador v. ChevronTexaco Corp.*, the broader implications of the case are clear. The case illustrates the direct connection between domestic litigation against corporations alleging international law violations and arbitration proceedings between the corporation and the sovereign over the responsibility to pay for any adverse judgment.

The ramifications for international human rights litigation are profound. To the extent that corporations are increasingly subject to third-party claims for human rights violations arising out of or related to a contract with a sovereign, one can anticipate that in the future corporations will seek to shield themselves from this third-party risk by invoking the arbitration clause in the contract against the sovereign. In short, human rights litigation will lead to “who pays” arbitration.

This is not to suggest that the question of who pays is an easy one. Numerous factors will play into resolution of it, including legal questions such as interpreting contractual language, applying the governing law, and discerning international law principles of joint liability, contribution, and indemnification.<sup>106</sup> Factual questions will

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102 Demand for Arbitration and Statement of Claim at 4, *ChevronTexaco Corp. v. Empresa Estatal Petroleos del Ecuador* (quoting the joint operating agreement), available at [http://www.opiniojuris.org/files/Chevron\\_Texaco\\_Arbitration\\_Request.pdf](http://www.opiniojuris.org/files/Chevron_Texaco_Arbitration_Request.pdf).

103 See *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 457 (S.D.N.Y. 2007).

104 *Id.* at 458–69.

105 See *id.* at 469.

106 On the subject of international law principles of contribution, see Int’l Law Comm’n, *Report of the International Law Commission: Fifty-Third Session*, art. 39, at 275, U.N. Doc. A/56/10(SUPP) (Oct. 1, 2001) (“In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/81/img/N0155781.pdf?OpenElement>. The commentary to Article 39 states that “Article 39 deals with the situation where damage has been caused by an

also be critical, such as issues of joint liability and relative fault. But to recognize the difficulties in application is not to reject the validity of a theory of joint contribution or contractual indemnification in the international context.

The impact of this approach is twofold. First, it properly limits the exposure of the corporation. This limit may be total (as with an indemnification clause) or partial, as where the corporation pursues a contribution claim against the sovereign. This is wholly appropriate, because in the case of indemnification claims, the corporation should be able to invoke the benefit of the bargain it secured in the contract with the sovereign to limit its exposure to the third-party claims. And in the case of contribution claims, the corporation arguably should not be the sole malfeasor that is potentially liable for injuries that it may have only partially caused. Arbitrating the question of who pays closes the loop in those cases that essentially are proxy claims that would have been brought against the sovereign if they could.

The second impact is on the liability of the sovereign. Human rights litigation followed by “who pays” arbitration is a two-step process that overcomes the traditional immunity that sovereigns enjoy in human rights litigation. Thus far, human rights litigants have attempted to scale an impregnable wall of sovereign immunity by relying on awkward FSIA tools such as commercial activity or implied waivers.<sup>107</sup> But corporations have no such difficulties. They can invoke provisions in their contracts that were specifically drafted to fulfill the relatively straightforward FSIA exceptions of express waiver and arbitration.<sup>108</sup> Corporations typically cannot implead and cross-claim against the sovereign in the underlying litigation. But they can do the next best thing by arbitrating the question of who pays for the human rights abuses. Effectively, the arbitration procedure operates as a second-tier cross-claim by one malfeasor against the other.

What is particularly important about this paradigm shift is that heretofore human rights abuse has been a relatively cost-free enter-

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internationally wrongful act of a State, which is accordingly responsible for the damage . . . . Its focus is on situations which in national law systems are referred to as ‘contributory negligence’, ‘comparative fault’, ‘faute de la victime’, etc.” *Id.* As for international law principles of indemnification, see *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 487, 508 (June 27) (indicating that an injured state’s delay in asserting breach and instituting proceedings could be a factor in determining remedies against a breaching state).

107 See *supra* Part I.

108 See *supra* text accompanying notes 67–68; see also 28 U.S.C. § 1605(a)(1), (6) (2000) (“A foreign state shall not be immune . . . in any case . . . in which the foreign state has waived its immunity . . . [or] in which the action is brought . . . to enforce an agreement . . . to submit to arbitration . . .”).



prise for perpetrators, particularly sovereigns. Or at a minimum, one could say that certain sovereigns have calculated that the benefits of abuse often outweigh the costs. But with corporate liability that equation changes dramatically. To use Guido Calabresi's scheme of cost avoidance, monetary incentives are placed on corporations to change their conduct so as to reduce the number and severity of human rights violations.<sup>109</sup> But corporations may not be in the best position to modify their conduct so as to prevent these injuries from occurring in the future. It may be that sovereigns can best avoid certain injuries, despite the fact that they are relieved of the direct costs of liability for those injuries. By assigning the costs to the corporation, it is in a position to induce the sovereign to change its behavior.<sup>110</sup> And by imposing a cost on corporations that aid and abet sovereign abuse, those corporations will become cost avoiders. One logical way to avoid costs is to transfer some of the costs to the cheapest cost avoider, thereby enhancing the likelihood that the sovereign will decide against inflicting future injury. Holding corporations liable and then arbitrating who pays is a mechanism of imposing costs and then spreading the costs, resulting in the corporation and the sovereign becoming cost avoiders. By imposing and spreading costs to the secondary and primary perpetrators, greater fairness between the malfeasors is achieved and deterrence from human rights abuse is enhanced. Contractual arbitration between the corporation and the sovereign over who pays transfers costs imposed on the corporation and creates shared incentives to implement and enforce human rights obligations.<sup>111</sup>

#### IV. CONTRACTING FOR HUMAN RIGHTS

Thus far this Article has focused on a narrow category of corporations that are complicit in sovereign human rights abuse. It has suggested that these corporations can and should protect themselves from potential overexposure to human rights liability by initiating

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109 See GUIDO CALABRESI, *THE COST OF ACCIDENTS*, 144–52 (1970); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 379 (2005).

110 Cf. Goldberg & Zipursky, *supra* note 109, 379–80 (arguing that policymakers should assign costs of workplace accidents to management rather than workers because management “will be in a relatively good position to induce employees to change their behavior”).

111 Cf. CALABRESI, *supra* note 109, at 147–48 (discussing allocation of car-pedestrian accident liability); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2033 (2005) (“Second-order agreements affect who actually pays the costs of regulatory requirements and thus who has incentives to develop, implement, and enforce regulatory requirements.”).

arbitration claims against sovereign entities to resolve the question of who should pay for the unlawful conduct. But this concern is of little consequence to most corporations who in the main are good corporate citizens. Indeed, one might say that almost all multinational corporations observe almost all principles of international law almost all of the time.<sup>112</sup> For these corporations the question is not about their compliance with international norms, but rather how to leverage their power to promote compliance by their global contractors and suppliers. Increasing attention has been given to the role of multinational corporations because the corporate sector has “global reach and capacity and . . . is capable of acting at a pace and scale that neither Governments nor international agencies can match.”<sup>113</sup>

Corporations are promising vehicles to secure compliance with human rights norms when one considers their potential role in shaping behavior by contract. The previous discussion focuses on those corporations who are bad actors and will facilitate government responsibility through claims of contribution or indemnification. But of course many corporations have diverse and numerous incentives to comply with human rights norms. These corporations will seek to extend that compliance by imposing contractual obligations on government entities to abide by a set of social and environmental standards and then impose a dispute settlement mechanism that fosters compliance with those commitments. Corporations thus contract for human rights compliance, and secure that compliance through arbitration.

The potential for using contractual relationships to export human rights standards cannot be understated. As one labor rights activist has concluded, in many countries the sovereign cannot enforce labor laws and corporations are assuming the role of enforcing core labor standards. “In contrast to some governments, multinationals have the bargaining power and the resources to effect positive change in the factories that produce for them by requiring implementation of codes of conduct. This becomes a condition of their purchasing from factories throughout the supply chain.”<sup>114</sup>

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112 This is a paraphrase of Louis Henkin’s remark about nations. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (“[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”).

113 *Ruggie Interim Report*, *supra* note 3, ¶ 16, at 6.

114 Aurret Van Heerden, President, Fair Labor Ass’n, Human Rights and Brand Accountability: How Multinationals Can Promote Labor Rights, Testimony Before the Congressional Human Rights Caucus (Feb. 8, 2006), [http://www.fairlabor.org/all/news/Speeches/FLA\\_CHRC2006.pdf](http://www.fairlabor.org/all/news/Speeches/FLA_CHRC2006.pdf).

The sheer flow of international trade underscores the potential of outsourcing codes of conduct as a condition of doing business. According to the United Nations, there are 70,000 transnational corporations, approximately 700,000 subsidiaries, and millions of suppliers that span every corner of the globe.<sup>115</sup> In 2004, direct foreign investment outflows from Organization for Economic Co-Operation and Development (OECD) countries amounted to \$668 billion, with the United States accounting for one-third, or \$252 billion.<sup>116</sup> The United States alone exports over \$1 trillion in goods and services.<sup>117</sup> Such enormous international trade and finance flows create tremendous opportunities to export not simply goods, services, and investment, but also values. Increasingly, those values—particularly those that foster corporate responsibility and a positive public image—are embedded in contracts as conditions for doing business. Recent developments indicate that environmental and social standards have now, in the words of a senior advisor for the International Finance Corporation, “become the market standard for new project finance business.”<sup>118</sup>

Corporations have numerous incentives to engage in socially responsible behavior. Many corporations have internalized a code of conduct that embodies good corporate citizenship. In terms of what drives companies to embrace good corporate citizenship, the internal motivators of corporate tradition and business image may be far more important than external pressures such as consumer expectations, laws, and political pressure.<sup>119</sup> According to one survey, good corporate citizenship will include: (1) operating with ethical business prac-

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115 *Ruggie Interim Report*, *supra* note 3, ¶ 11, at 5.

116 Hans Christiansen & Ayse Bertrand, *Trends and Recent Developments in Foreign Direct Investment*, in *INTERNATIONAL INVESTMENT PERSPECTIVES* 11, 12 (Hans Christiansen ed., 2005), available at <http://www.oecd.org/dataoecd/13/62/35032229.pdf>.

117 See U.S. DEP'T OF STATE, *USA ECONOMY IN BRIEF* 36 (2006), available at <http://usinfo.state.gov/products/pubs/economy-in-brief/economy-in-brief.pdf>.

118 Kevin Godier, Int'l Fin. Corp., *The Changing View of Governance*, in *SUSTAINABLE INVESTMENT* 22, 24 (Jon Marks ed., 2004), available at [http://www.ifc.org/ifcext/publications.nsf/AttachmentsByTitle/SustainableInvestment2004/\\$FILE/SustainableInvestment2004.pdf](http://www.ifc.org/ifcext/publications.nsf/AttachmentsByTitle/SustainableInvestment2004/$FILE/SustainableInvestment2004.pdf).

119 See U.S. CHAMBER OF COMMERCE & BOSTON COLL., *THE STATE OF CORPORATE CITIZENSHIP IN THE UNITED STATES: 2003*, at 11 (2003), available at [http://www.uschamber.com/publications/reports/030714\\_ccc\\_survey.htm](http://www.uschamber.com/publications/reports/030714_ccc_survey.htm) (follow “Download and read the results of the survey” hyperlink). Of the 515 respondents to the survey, the following motivators were identified as driving corporate citizenship: traditions and values 75%; reputation/image 59%; customers and consumers 53%; business strategy 52%; recruit/retain employees 38%; expected in community 30%; and laws and political pressure 24%. See *id.*

tices; (2) treating employees well; (3) making a profit, paying taxes, and providing jobs; (4) providing safe and reliable products and services; (5) having a good environmental record; and (6) working to improve conditions in the community.<sup>120</sup>

But of course external pressure will often play a significant role in molding corporate behavior as well. Shareholders increasingly utilize socially responsible investment criteria, while corporations brand their products based on socially responsible behavior and seek to maintain their good reputation through independent social auditing of their business practices.<sup>121</sup> Every multinational corporation has numerous stakeholders from whom it must secure and maintain support. These stakeholders include shareholders, employees, suppliers, customers, governments, and local communities. As corporate commentators have recently put it,

In this era of globalization, supply chains are facing greater challenges than ever as products are sourced from a myriad of countries and factories, with different laws, customs, and standards. Better organized and more vocal stakeholder groups, reinforced by negative media coverage, are also pushing companies toward more responsible supply chain practices. Companies—in a wide range of industries that reach far beyond apparel and footwear—not only have to negotiate the geographic complexities of this new reality, they have to work out to what extent their responsible business practices can be enforced in third-tier supplier organizations.<sup>122</sup>

Significantly, in a globalized economy these stakeholders will often transcend national boundaries and regional cultural norms. Upstream supplier demands and downstream customer demands will often impose standards that exceed the legal requirements or social expectations of any given local environment. As a result, corporations both exert and succumb to tremendous external pressure for compliance with ethical practices. The global chain of supply and demand is a contagion that spreads an ethical behavior pattern from one corporate group to another through contractual commitments.

Multinational corporations in a globalized economy are able to maintain their corporate reputations by establishing business relation-

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120 See *id.* at 10. Over 80% surveyed listed the first four within the definition of good corporate citizenship, and 57% and 50% respectively identified having a good environmental record and working to improve conditions in the community as part of good corporate citizenship. *Id.*

121 See Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 288–93 (2005).

122 Guy Morgan & Melina Cataife, *Responsible Supply Chain Management*, IN FOCUS, June 2005, at 1, 1.

ships on their terms. This is facilitated by both the economic power large multinational corporations yield and by the ever-increasing consumer awareness present in the modern transparent economy. As one major textile company put it, "Our [Terms of Engagement] are an integral part of our business relationships. . . . [B]usiness partners understand that complying with our [Terms of Engagement] is no less important than meeting our quality standards or delivery times."<sup>123</sup> Suppliers throughout the world are subject to the demands of multinational corporations who are sensitive to their image as socially responsible corporate citizens. One prominent corporation has summarized its approach toward human rights in supply chain contracts in unequivocal terms:

We . . . understand that we operate in a world with many different cultures, countries and levels of economic development. Yet even in this diverse world, we believe there are some standards that cross borders, levels of development and cultures—and that meeting these standards is a condition of doing business with Dell. Dell's approach is drawn from a review of global best practices, management systems and acknowledged standards. Included among these are the United Nations Declaration of Human Rights, the U.N. Convention on the Rights of the Child, fundamental conventions of the International Labor Organization . . . as well as the benchmark of other corporations and [i]ndustries across the globe.<sup>124</sup>

Such reputational concerns reflect an understanding that corporations are increasingly expected not only to abide by a code of conduct, but also to impose a set of ethical standards on their business

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123 Levi Strauss & Co., Global Sourcing & Operating Guidelines 1, <http://www.levistrauss.com/Downloads/GSOG.pdf> (last visited Jan. 14, 2008). Numerous other corporations have imposed similar obligations on their suppliers. See, e.g., CHEVRONTEXACO, 2002 CR REPORT (2003), [http://www.chevron.com/GlobalIssues/CorporateResponsibility/2002/social\\_issues/human\\_rights/#a2](http://www.chevron.com/GlobalIssues/CorporateResponsibility/2002/social_issues/human_rights/#a2); Dow, CODE OF BUSINESS CONDUCT 8 (2003), available at [http://www.dow.com/about/aboutdow/code\\_conduct/ethics\\_conduct.htm](http://www.dow.com/about/aboutdow/code_conduct/ethics_conduct.htm) (follow "English" hyperlink); EXXONMOBIL, CORPORATE CITIZENSHIP REPORT 40–41 (2006), available at [http://www.exxonmobil.com/Corporate/ccr06/docs/ccr06\\_fullreport.pdf](http://www.exxonmobil.com/Corporate/ccr06/docs/ccr06_fullreport.pdf); NIKE, INC., CODE OF CONDUCT 2 (2007), available at [http://www.nike.com/nikebiz/nikeresponsibility/tools/Nike\\_Code\\_of\\_Conduct.pdf](http://www.nike.com/nikebiz/nikeresponsibility/tools/Nike_Code_of_Conduct.pdf); WAL-MART STORES, INC., STANDARDS FOR SUPPLIERS 1–2 (2005), available at <http://www.walmartstores.com/Files/SupplierStandards-June2005.pdf>; Coca-Cola Co., Around the World: Supplier Guiding Principles, [http://www.cokefacts.org/citizenship/cit\\_aw\\_supplier.shtml](http://www.cokefacts.org/citizenship/cit_aw_supplier.shtml) (last visited Jan. 14, 2008); Starbucks Corp., Supplier Code of Conduct, [http://www.starbucks.com/aboutus/supplier\\_code.asp](http://www.starbucks.com/aboutus/supplier_code.asp) (last visited Jan. 14, 2008).

124 Dell, Supplier Global Citizenship, [http://www.dell.com/content/topics/global.aspx/corp/sup\\_prince/en/index?c=us&l=en&s=corp](http://www.dell.com/content/topics/global.aspx/corp/sup_prince/en/index?c=us&l=en&s=corp) (last visited Jan. 14, 2008).

partners. This requirement is reflected in “sourcing guidelines” in voluntary corporate codes of conduct, which are often coupled with outside “social auditors” confirming compliance with these guidelines.<sup>125</sup> Multinational corporations are also establishing human rights hotlines to permit informed individuals the opportunity to provide confidential information in the event any employee, agent, consultant, or contractor is violating the company ethics code.<sup>126</sup> Indeed, in some cases company policies require any employee to inform the human rights hotline if a breach of the company code of ethics is occurring.<sup>127</sup>

However, not all corporations are so eager to adopt such proactive practices.<sup>128</sup> But there is movement to impose these obligations on reluctant corporations. A draft U.N. document on corporate responsibility has stated that “[e]ach transnational corporation . . . shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation.”<sup>129</sup> In the event their suppliers and contractors fail to meet such expectations, transnational corporations “shall cease doing business with them.”<sup>130</sup>

125 See Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 402 (2005). There are numerous examples of such sourcing guidelines and social audits. See, e.g., SCIENTIFIC CERTIFICATION SYS., C.A.F.E. PRACTICES GENERIC EVALUATION GUIDELINES, STARBUCKS COFFEE COMPANY (2004), <http://www.scs-certified.com/csrpurchasing/docs/CAFEPracticesEvaluationGuidelines110904English.pdf> (last visited Jan. 14, 2008); SCIENTIFIC CERTIFICATION SYS., STARBUCKS C.A.F.E. PRACTICES, <http://www.scs-certified.com/csrpurchasing/starbucks.html> (last visited Jan. 14, 2008); Coca-Cola Co., *supra* note 123.

126 See CHEVRONTEXACO, *supra* note 123.

127 See *id.*

128 For example, Laura Dickinson has examined the military and foreign aid contracts between the U.S. government and private contractors that do business in Iraq. Of the sixty publicly available Iraq contracts, she reports that none contain specific provisions requiring contractors to obey human rights, anticorruption, or transparency norms. See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 403–04 (2006).

129 U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Sub-Comm'n on Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art. 15, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?Opendocument>.

130 David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 911 (2003) (discussing commentary to the U.N. report). For a discussion of corporate criticism of the report, see Murphy, *supra* note 125, at 408.

The OECD is more cautious in its guidelines, calling on multinational corporations to “encourage . . . business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the guidelines.”<sup>131</sup> Such developments make explicit that transnational corporations should endeavor to include human rights norms in their contracts and that failure to abide by such contractual obligations may constitute a material breach that justifies termination of the business relationship.

There are numerous instances in which such recommendations are finding practical application. In particular, financial institutions are taking a leading role in imposing human rights obligations in their project finance contracts. One of the most significant developments regarding contractual commitments to comply with human rights norms are the so-called “Equator Principles,” established in 2003 and now adopted by over fifty major public and private commercial banks.<sup>132</sup> Equator Principle banks undertake to provide loans directly to projects only if the borrower has completed an environmental and social impact assessment and covenanted to comply with certain social and environmental commitments.<sup>133</sup> These commitments address, among other things, baseline social conditions, requirements under applicable domestic and international law, protection of occupational health and safety, land acquisition and land use, involuntary resettlement, and impacts on indigenous communities.<sup>134</sup> The Equator Principles represent the privatization of social and environmental issues, in which “informal networks are emerging that link influential nongovernmental organizations, giant corpora-

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131 ORG. FOR ECON. CO-OPERATION & DEV. [OECD], COMM. ON INT’L INV. & MULTINAT’L ENTERS., *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* pt. I, § II, ¶ 10, at 11 (2001), available at [http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg\(2000\)15-final](http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final) (follow the British flag hyperlink). The more cautious approach reflects the OECD’s recognition that “there are practical limitations to the ability of enterprises to influence the conduct of their business partners.” *Id.* at 13.

132 A complete list of adopting banks is available at The Equator Principles, <http://www.equator-principles.com/> (last visited Jan. 14, 2008). These banks comprise over 85% of international project financing. Kimberly Gaskin, *A Question of Principles*, *INFRASTRUCTURE MAG.*, June 2007, at 58, 60.

133 THE “EQUATOR PRINCIPLES” 2–4 (2006), available at [http://www.equator-principles.com/documents/Equator\\_Principles.pdf](http://www.equator-principles.com/documents/Equator_Principles.pdf). The Principles incorporate safeguard policies which set minimum environmental and social standards. These policies are promulgated by the International Finance Corporation, the private sector arm of the World Bank. For the full text of these policies, see INT’L FIN. CORP., WORLD BANK GROUP, *PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY* (2006), available at <http://www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards> (follow “English” hyperlink under “Performance Standards”).

134 *Id.*

tions and governments that want to solve social problems.”<sup>135</sup> Socially responsible financing is now becoming embedded in contractual commitments in project finance agreements.<sup>136</sup>

Finance agreements that incorporate Equator Principles thus become an important vehicle for private monitoring and implementation of human rights norms. Prospective borrowers have incentives to present a low-risk regulatory profile to lenders, and so they will self-monitor and implement human rights requirements. Borrowers also implement human rights directives in anticipation of or in response to lender monitoring and enforcement.<sup>137</sup> The effect of finance agreements with Equator Principles is “to provide lenders, which often have an interest in ensuring that debtors do not engage in . . . risky behavior, with the legal right to monitor and enforce their interests during the course of the loan.”<sup>138</sup>

The Equator Principles include a number of important provisions. First, they require independent third-party review of projects to ensure compliance with the principles.<sup>139</sup> Second, they require all Equator Principle Financial Institutions (EPFIs) to include covenants in financing documentation, including compliance with all relevant host country social and environmental laws and the “action plan” that has been developed to comply with applicable performance standards.<sup>140</sup> Third, they provide that failure to comply with these covenants may result in remedial action by the EPFIs.<sup>141</sup>

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135 David Ignatius, *Corporate Green*, WASH. POST, May 11, 2005, at A17.

136 William L. Thomas, *Equator—Risk and Sustainability*, in PROJECT FINANCE INTERNATIONAL YEARBOOK 10, 10–14 (2004).

137 Vandenberg, *supra* note 111, at 2053–54.

138 *Id.* at 2055.

139 See THE “EQUATOR PRINCIPLES,” *supra* note 133, at 4 (“For all Category A projects, and, as appropriate, for Category B projects, an independent social or environmental expert not directly associated with the borrower will review the Assessment, AP [Action Plan] and consultation process documentation in order to assist the EPFI’s due diligence, and assess Equator Principles compliance.”).

140 See *id.* at 4 (“An important strength of the Principles is the incorporation of covenants linked to compliance. For Category A and B projects, the borrower will covenant in financing documentation: a) to comply with all relevant host country social and environmental laws, regulations and permits in all material respects; b) to comply with the AP (where applicable) during the construction and operation of the project in all material respects . . .”).

141 See *id.* (“Where a borrower is not in compliance with its social and environmental covenants, EPFIs will work with the borrower to bring it back into compliance to the extent feasible, and if the borrower fails to re-establish compliance within an agreed grace period, EPFIs reserve the right to exercise remedies, as they consider appropriate.”).



By including contractual commitments in loan agreements requiring borrowers to comply with environmental and social standards, major public and private banks have significant leverage to bring their borrowers to the table to negotiate mechanisms for resolving human rights concerns before and after they arise. While these banks do not have direct control over third parties participating in the project, they can secure commitments from multinational corporations to address major social concerns. These corporations in turn can address concerns raised by the banks by securing downstream contractual commitments from other parties involved in the project so that they will comply with Equator environmental and social standards.<sup>142</sup> In the event any of these other entities are sovereign instrumentalities, they will address immunity concerns either through a waiver of immunity or a broadly worded arbitration clause that achieves a similar effect. Human rights commitments in the loan agreements beget similar commitments from project finance partners, sovereign or otherwise.<sup>143</sup> Corporations have thus contracted for compliance with human rights standards.

It is anticipated that banks will expand the Equator Principles to other areas of finance, including corporate finance and retail banking, and broaden it to other types of financial institutions, including export credit agencies, bilateral agencies, and developing country banks.<sup>144</sup> The Equator Principles have set in motion a “movement towards globally recognized environmental and social standards.”<sup>145</sup> Large private business projects “must have adequate environmental and social safeguards to be viable financially” because “banks simply are not willing to take huge financial risks unless they are confident

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142 Interview with Suellen Lambert Lazarus, Senior Advisor to Vice President of Operations, Int'l Fin. Corp. (June 30, 2005).

143 Indeed, the more progressive Equator banks have stated the intent to pursue these downstream commitments in their publicly available annual Corporate Social Responsibility Reports. See MICHELLE CHAN-FISHEL, BANKTRACK, UNPROVEN PRINCIPLES 18–39 (2005), available at <http://www.banktrack.org/?show=86&visitor=1> (follow “banktrack on equator principles” hyperlink; then follow “Unproven Principles; the Equator Principles at year two” hyperlink); HSBC HOLDINGS, 2006 CORPORATE RESPONSIBILITY REPORT 18–19 (2006), available at [http://www.hsbc.com/1/PA\\_1\\_1\\_S5/content/assets/csr/2006\\_hsbc\\_cr\\_report.pdf](http://www.hsbc.com/1/PA_1_1_S5/content/assets/csr/2006_hsbc_cr_report.pdf).

144 See Suellen Lazarus, *Banking on the Future: The Equator Principles and the Project Finance Market*, at 7, available at [http://www.ifc.org/ifcext/equatorprinciples.nsf/AttachmentsByTitle/EuromoneySyndicatedLendingHandbook2005/\\$FILE/SyndLend-IFC02.pdf](http://www.ifc.org/ifcext/equatorprinciples.nsf/AttachmentsByTitle/EuromoneySyndicatedLendingHandbook2005/$FILE/SyndLend-IFC02.pdf) (last visited Jan. 14, 2008).

145 *Id.*

that other risks have been contained.”<sup>146</sup> It is clear from these developments that banks are taking human rights more seriously than ever. And the pressure to do so will only increase. Already civil society is threatening financial institutions with “complicity in human rights violations” if they do not take concrete steps to secure their borrowers’ compliance with core human rights obligations, including contractual covenants for compliance and the suspension or termination of the contract for breaches of those covenants.<sup>147</sup>

A similar initiative is underway in the retail context under the auspices of an international network called the Fair Labor Association (FLA). FLA has established a code of conduct that includes regulation of forced labor, child labor, harassment and abuse, nondiscrimination, health and safety, freedom of association, wages and benefits, and overtime compensation.<sup>148</sup> There are over twenty leading retail brand name companies<sup>149</sup> and over two hundred colleges and universities that are participating in FLA.<sup>150</sup> Every corporation that is a member of FLA agrees to abide by these core labor standards and commits to secure written agreements with company factories, contractors, and suppliers to submit to periodic inspection and audits for compliance with the workplace standards.<sup>151</sup> Likewise, every college or university that is affiliated with FLA requires its licensees to become members of FLA, thereby imposing strict codes of conduct on companies that manufacture products under the university license.<sup>152</sup> Labor experts have argued that these contractual obligations imposed by multinational corporations and universities are more effective than labor laws and regulations imposed by national governments or the International Labor Organization. “Governments are not able to legislate labor markets because globalization is outstripping the power of

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146 Peter Woicke, Int’l Fin. Corp., *Sustainable Business Is Good Business*, in SUSTAINABLE INVESTMENT, *supra* note 118, at 1, 3.

147 JAN CAPPELLE, BANKTRACK, HUMAN RIGHTS, BANKING RISKS 14–20 (2007), *available at* <http://www.banktrack.org/?show=86&visitor=1> (follow “banktrack on human rights” hyperlink; then follow “Human Rights, Banking Risks” hyperlink).

148 See Fair Labor Ass’n, FLA Workplace Code of Conduct (2005), <http://64.78.1.52/conduct> (last visited Jan. 14, 2008).

149 See Fair Labor Ass’n, Companies, Suppliers and Licensees, <http://64.78.1.52/participants/companies> (last visited Jan. 14, 2008).

150 See Fair Labor Ass’n, Colleges and Universities, <http://64.78.1.52/participants/colleges> (last visited Jan. 14, 2008).

151 FAIR LABOR ASS’N, MONITORING GUIDANCE & COMPLIANCE BENCHMARKS 56 (2007), *available at* <http://fairlabor.org/about/monitoring/compliance> (follow “click here” hyperlink following “To view the full report on Monitoring Guidance”).

152 Fair Labor Ass’n, About the Collegiate Licensee Program, [http://64.78.1.52/applications/licensee\\_program](http://64.78.1.52/applications/licensee_program) (last visited Jan. 14, 2008).

governments. . . . [As a result,] private actors are assuming state functions.”<sup>153</sup> The suppliers may not listen to the International Labor Organization, but they will listen to the brand name labels, which in turn are listening to consumer demand for social responsibility.<sup>154</sup>

The recent Caspian Sea pipeline project represents another important example of the implementation of social responsibility clauses. Opened in 2005, the \$3.6 billion pipeline carries oil from Baku, Azerbaijan, through Georgia, to Turkey’s Mediterranean coast.<sup>155</sup> It was financed by public and private banks that had adopted the Equator Principles.<sup>156</sup> These banks held multistakeholder forum meetings on the project, and a 120-day comment period on the environmental and social impact assessment was provided.<sup>157</sup> The International Finance Corporation published a detailed response to the comments and enlisted independent environmental and social specialists and engineers, working on behalf of the financial institutions, to evaluate all of the project work.<sup>158</sup> What is particularly encouraging is that social and environmental commitments are key components of the pipeline project and that these contractual undertakings are monitored by the contracting parties and independent NGOs, with the participating multinational corporations having direct recourse to arbitration mechanisms in the project finance agreement to facilitate dispute resolution over any failure to comply with the social responsibility clauses.<sup>159</sup>

The contractual rights of these corporations aptly illustrate the procedural mechanisms for overcoming claims of sovereign immunity for human rights violations in international agreements. For example, the petroleum corporations recognize that they will “be held responsible for the environmental, social, and technical commitments

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153 Online Extra, *A Lion for Workers’ Rights*, BUS. WK., Nov. 27, 2006, [http://www.businessweek.com/magazine/content/06\\_48/b4011010.htm](http://www.businessweek.com/magazine/content/06_48/b4011010.htm).

154 Cf. *id.* (“The most powerful force is when consumers demand social responsibility from labels.”).

155 Suellen Lazarus, *A Matter of Principal*, PROJECT FIN. MAG., Mar. 3, 2004, at 56, 58, available at <http://www.equator-principles.com/pfm2.shtml>.

156 *Id.*

157 *Id.*

158 See *id.* For an example of such a social impact assessment, see AETC LTD. & ERM, BP, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT, § 1, at 1-1 to 1-26 (2002), available at <http://www.bp.com/genericarticle.do?categoryId=9006634&contentId=7013340> (follow “Section 1—Executive Summary” hyperlink).

159 See, e.g., Host Government Agreement Between and Among the Government of the Republic of Turkey and [the MEP Participants] art. 18 & app. 5, Nov. 16, 1999 [hereinafter Turkey Agreement], available at <http://subsites.bp.com/caspian/BTC/Eng/agmt3/agmt3.pdf>.

made to the International Financial Institutions . . . and the public” and they “will be judged by whether the high standards they have established for the Project are in fact realized.”<sup>160</sup> In light of this, they have been forced to consider work stoppage on the recent Caspian Sea pipeline project to ensure that the Turkish governmental authorities in charge of the pipeline project fulfill the commitments they have made in their environmental and social impact assessments.<sup>161</sup> The contract imposes stringent environmental and social obligations on the contracting parties, including the obligation to “comply with good international Petroleum industry standards and practice” and to “use Best Endeavors to minimise potential disturbances to surrounding communities and the property of the inhabitants thereof.”<sup>162</sup> In the event there is a dispute, the agreement stipulates that “[a]ny dispute arising under this Agreement, or in any way connected with this Agreement . . . between (i) the Government, the State, any State Entity, and/or the Local Authorities . . . and (ii) one or more of the . . . Participants . . . may be submitted to arbitration.”<sup>163</sup> Further, each state entity “waives any claim to immunity in regard to any proceedings to enforce this Agreement . . . or any final award rendered by an arbitral tribunal constituted pursuant to this Agreement.”<sup>164</sup> The agreement thus authorizes the petroleum corporations to take appropriate measures to ensure compliance with international human rights norms embodied in the agreement, and the dispute settlement provisions of the agreement provide effective recourse against the sovereign entities in the event of contractual noncompliance.

As the Caspian Sea pipeline project illustrates, foreign sovereign immunity is a right that sovereigns have long been willing to forego in doing business with multinational corporations. When lucrative contractual opportunities are presented and contracting parties demand it, sovereign entities will relent and afford their business partners with an effective dispute resolution procedure. Foreign investment agreements have typically incorporated arbitration agreements and waiver of immunity clauses to guarantee that foreign investors will have legal recourse in the event of sovereign noncompliance. As discussed above, the demands of international business have established a

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160 CASPIAN DEV. ADVISORY PANEL, REPORT ON TURKEY AND PROJECT-RELATED SECURITY AND HUMAN RIGHTS ISSUES IN AZERBAIJAN, GEORGIA, AND TURKEY § VII, at 82–85 (2003), available at <http://subsites.bp.com/caspian/mediaLibrary/Download/59/CDAP%20Turkey%20Report%20Final.pdf>.

161 See *id.* § VII, at 85.

162 Turkey Agreement, *supra* note 159, app. 5, §§ 2.1, 4.1.

163 *Id.* art. 18.1.

164 *Id.* art. 18.11.

robust and effective procedure for resolving such international disputes. The novelty of the current movement is to expand the subject matter to which contractual obligations apply. By imposing social and environmental covenants in contracts with sovereign entities, corporations stand in the uniquely powerful position of imposing human rights obligations on sovereigns and having those commitments enforced through arbitration.

One of the most promising tools for the promotion of human rights is to leverage the power of corporations. Based on current trends, one can anticipate that many corporations will increasingly include core human rights and environmental standards as contractual covenants in their international agreements. These contracts will also include grievance procedures, including arbitration, as a common mechanism for dispute resolution. Serious noncompliance with substantive contractual obligations will trigger invocation of the dispute resolution provisions. Thus, by contracting for human rights as a substantive obligation and contracting for arbitration as a procedural guarantee, corporations throughout the globe can establish a firm basis for the promotion of human rights within their spheres of influence. International agreements that incorporate human rights commitments crystallize incentives and create explicit legal authority in private parties to monitor, enforce, and create human rights standards, thereby increasing pressure for compliance by contract.<sup>165</sup>

## V. THIRD-PARTY BENEFICIARIES AND HUMAN RIGHTS

The final frontier for arbitrating human rights claims is contractual empowerment of third parties. This approach takes general theories of contractual third-party beneficiary rights, applies it to the dispute resolution context, and then includes within its scope contractual claims for human rights violations. This approach suggests that there are legal mechanisms available to permit human rights victims or human rights organizations to monitor abuses and pursue remediation as third-party beneficiaries.

It is well recognized that arbitration can be invoked by nonsignatories to the agreement provided the parties intend to grant such a right to third parties. The trend in many jurisdictions is towards greater recognition of third-party beneficiary rights to arbitrate disputes.<sup>166</sup> For example, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>167</sup> the

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<sup>165</sup> See Vandenberg, *supra* note 111, at 2095.

<sup>166</sup> James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 527 (2004) (discussing England, France, and the United States).

Supreme Court upheld a claim by a third-party brokerage house to arbitrate a dispute with a broker pursuant to an agreement embedded in the broker's registration with the New York Stock Exchange.<sup>168</sup> The provision stated that the parties agreed to arbitrate "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."<sup>169</sup> Thus, courts in the United States have embraced the use of third-party beneficiary rights to require arbitration between a contracting party and a noncontracting party of international disputes.<sup>170</sup>

While the concept of enforcing third-party beneficiary rights to arbitrate is not controversial, the application of that principle to the human rights context is in its infancy. The essential idea is that corporations can grant to a narrow category of constituents third-party beneficiary rights to address human rights concerns arising out of the contract. For example, granting employees or specific labor groups the opportunity to employ a dispute resolution procedure to resolve questions of violations of labor standards arising from a supply contract is a plausible possibility, far more so than, say, granting third-party rights to the larger community of persons who might be injured by environmental harms. As discussed in the previous Part, it also presumes that the agreement articulates contractually based human rights standards that must be satisfied by the parties.<sup>171</sup> The result would be to use international agreements as a means to empower a narrow set of third parties—such as employees or human rights organizations—with the right to challenge contractual human rights violations through an effective dispute resolution procedure.

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167 500 U.S. 20 (1991).

168 *See id.* at 23.

169 *Id.* (quoting NYSE Rule 347).

170 *See, e.g.,* Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1019–20 (2d Cir. 1993) ("In order to enforce the agreement as a third party beneficiary, CBV must show that 'the parties to that contract intended to confer a benefit on [it] when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to [it].' . . . [I]f CBV is found to be a third party beneficiary to the Charter Party, it may be proper for the district court to enforce the arbitration agreement against [government-owned] Novorossiysk." (citations omitted)). More generally, Restatement section 302 provides that a third party may be an "intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1979).

171 *See supra* Part IV.

One can rarely find examples of this approach in current practice. As suggested above, arbitrating human rights violations between contracting parties itself is novel, to say nothing of empowering third parties to do so. But there is no inherent reason why corporations may not wish to implement such procedures. A recent United Nations survey of Fortune Global 500 companies reported that “[m]ost companies indicate that they work with external stakeholders in developing and implementing their human rights policies,” with NGOs ranked as the most frequent partners.<sup>172</sup> There are also useful analogies from existing practice to suggest that corporations may be open to such third-party beneficiary rights. A number of rights—property rights, intellectual property rights, privacy rights—are subject to third-party international arbitration.<sup>173</sup> As the international arbitration law matures, the demand for such a third-party mechanism will grow, as is evident in its development in other contexts.

Undoubtedly the most important example of third-party arbitration relates to investment disputes. One can draw insights from the burgeoning public international practice of arbitrating third-party foreign investment disputes pursuant to bilateral investment treaties (BITs). In a typical BIT, the host country will authorize a national of the other contracting state to arbitrate claims for treaty violations relating to investment in that country. As the model United States bilateral investment treaty states, a private “claimant, on its own behalf, may submit to arbitration . . . a claim . . . that the [state party] respondent has breached . . . an [applicable treaty] obligation . . . or . . . an investment agreement.”<sup>174</sup> Investment arbitration has come into its own, with investor claims against sovereigns as one of the most important developments in the field of international arbitration. In the 1990s, there was a veritable explosion of BITs, with over 2000 signed and the overwhelming majority containing consents on the part of the states to submit investment disputes to arbitration.<sup>175</sup>

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172 *Ruggie Interim Report*, *supra* note 3, ¶ 37, at 10.

173 See, e.g., M. Scott Donahey, *Enforcement of Injunctive Relief and Arbitration Awards Concerning Title to and Enforcement of Intellectual Property Rights in Asia and the Pacific Rim*, 19 HASTINGS INT’L & COMP. L. REV. 727, 728–29 (1996).

174 U.S. Model Bilateral Investment Treaty art. 24 (2004), available at [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf).

175 José Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 AM. SOC’Y INT’L L. PROC. 94, 94 (2005) (“The emerging regime for foreign direct investment . . . consists of obligations imposed under some two thousand bilateral investment treaties (BITs), regional free trade agreements (FTAs), specialized multilateral treaties . . . and soft law instruments . . .”); Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT’L L. 35, 84 (2003) (“International invest-

So commonplace is the current practice of third-party foreign investor arbitration pursuant to an investment treaty that its novelty is often ignored. But in reality, this approach is a recent innovation that can be traced to the early 1980s. At that time, the United States decided to depart from its traditional approach of signing broad Friendship, Commerce, and Navigation (FCN) treaties and establish a new approach of negotiating model BITs with greater protections for foreign investors.<sup>176</sup> States are willing to grant third-party nationals such power because they recognize that it is in their interests to promote greater economic cooperation between the two countries. An agreed standard on the treatment to be accorded to foreign investment will stimulate the flow of private capital and economic development.<sup>177</sup> In short, contracting parties grant third-party constituents the right to arbitrate their investment disputes because it is an effective means to promote their own interests in economic development. Recognizing that ad hoc contractual guarantees may not be sufficient to achieve this result, contracting states impose an international minimum standard and empower private parties to bring claims against sovereign entities when that standard is breached.

But empowering foreign investors to directly arbitrate claims against the host sovereign also has the distinct advantage of depoliticizing investment disputes. The traditional approach of governmental involvement in private investment disputes inevitably complicates the conduct of foreign policy. The BIT approach establishes legal remedies and procedures for investment disputes that do not necessitate the involvement of the investor's own government.<sup>178</sup> Enhancing the rights of foreign investors not only frees them to pursue their specific claims, it frees the U.S. government to wash its hands of routine business disputes.

One could well analogize between the sovereign interest in facilitating dispute settlement for its constituents and the corporate interest in facilitating dispute settlement for its constituents. Both the state and the corporation represent a collective means of achieving the economic purpose of its members, who themselves constitute the reality

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ment protection has matured as the essentially unenforceable friendship, commerce, and navigation treaties have gradually been replaced by an increasing web of over two thousand BITs, which contain binding investor-state arbitration clauses.").

176 See K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 109-10 (1986).

177 See U.S. Model Bilateral Investment Treaty, *supra* note 174, pmbl.

178 Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 626 (1993).



behind it. A state achieves the ends of its members by contracting to afford their investments an effective mechanism against foreign sovereign abuse. Likewise, a corporation may wish to achieve the ends of its members by contracting to afford their endeavors with effective recourse against abuse. The corporation has a stake in the abuse of those in its supply chain because they are an integral part of its broader constituency.

From the perspective of the foreign investor, treaty-based third-party standing in the investment context was born out of necessity. As one commentator recently noted:

Prior to the advent of bilateral investment treaties, investors from developed nations often faced problems of expropriation without compensation by host states pursuing a protectionist economic policy. Resort to the national courts of the very same government that was infringing the investor's property interests often proved ineffective and deprived the foreign investor of a neutral forum. Nor was it feasible to resort to the investor's home state in light of doctrines that foreign sovereign immunity and separation of powers protected the host state from being prosecuted in the domestic court of another state. The doctrine of diplomatic protection, which is the traditional manner in which private rights of nationals are vindicated by home states at the state to state level, proved too inefficient and provided far too much discretion to the state of nationality in pursuing the claims of their nationals.

The point is that private party standing in investment disputes is the result of evolution from the lack of existing feasible alternatives.<sup>179</sup>

Likewise, one could say that employees working in foreign countries in connection with multilateral projects who are subject to labor violations may face a similar plight. Resort to national courts where the violation occurred will often be unavailing, and litigation in a foreign court may be unavailable or unduly cumbersome and expensive. Therefore, third-party empowerment to resolve labor abuses may well evolve because of the lack of effective alternatives.

One can see precisely such a contractual solution in the intellectual property context. While investor-state investment disputes are apt analogies for third-party beneficiary rights established by treaty, the most successful example of contractual third-party beneficiary rights to resolve disputes is in the context of domain names. In the early days of the Internet, domain names were registered on a first-come,

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179 Naveen Gurudevan, Comment, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399, 421 (2005) (citations omitted).

first-serve basis without regard to intellectual property claims.<sup>180</sup> Trademark holders who delayed registering their corporate names faced a dilemma: either sue a “cybersquatter” who held a domain name in a foreign court or accede to his demand for money to transfer the domain name to the rightful owner of the trademark. To address this concern, Internet registrars adopted new policies that included mandatory third-party arbitration in the registration agreements.<sup>181</sup> Every person or entity who owns a generic top-level domain name (i.e., “.com, .org, .net”) now agrees by contract to empower third-party intellectual property owners with the authority to challenge their rightful ownership of the registered domain name.<sup>182</sup>

An example of one such agreement used by Network Solutions provides that “[i]f you registered a domain name through us, you agree to be bound by our current domain name dispute policy that is incorporated herein and made a part of this Agreement by reference.”<sup>183</sup> Such a policy provides that each domain name holder is

required to submit to a mandatory administrative proceeding in the event that a third party asserts . . . that . . . (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith.<sup>184</sup>

The important point about the domain name dispute resolution process is that registration companies recognized the power of the registration contract to enable third parties to bring a complaint against those who abused the property right.

In this manner, third parties who possess intellectual property rights can initiate claims before the World Intellectual Property Organization (WIPO) for unlawful conduct against domain name holders and secure the transfer of the domain name. Since this new procedure went into effect in December 1999, WIPO has handled

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180 James Gleick, *Get Out of My Namespace*, N.Y. TIMES, Mar. 21, 2004, § 6 (Magazine), at 44.

181 See INTERNET CORP. FOR ASSIGNED NAMES & NOS., UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (1999), <http://www.icann.org/dndr/udrp/policy.htm> [hereinafter ICANN].

182 See *id.*

183 Network Solutions, Service Agreement, sched. A, § 5, [https://www.networksolutions.com/en\\_US/legal/static-service-agreement.jhtml](https://www.networksolutions.com/en_US/legal/static-service-agreement.jhtml) (last visited Jan. 14, 2008).

184 ICANN, *supra* note 181, ¶ 4.

over 10,500 disputes<sup>185</sup> involving parties from 145 countries.<sup>186</sup> On average, WIPO receives three new cases per day, and the complainant has succeeded over eighty percent of the time.<sup>187</sup> In short, domain name registration contracts grant third-party beneficiary rights to those injured by intellectual property violations, and an effective mechanism for dispute resolution has resolved what had been viewed as an intractable problem.

Having examined these analogies, can one identify instances of the establishment of third-party beneficiary rights to resolve disputes in the international human rights context? With respect to the Equator Principles, there are two provisions that begin to address the idea of third-party rights to monitor and enforce human rights. First, as noted above, the Equator Principles include a provision for third-party review of compliance with social covenants.<sup>188</sup> "The purpose of the review is to assist the EPFI [Equator Principle Financial Institution] in their [sic] due diligence of the development and operation of the project and in respect of [Equator Principle] compliance . . . ."<sup>189</sup> Second, EPFIs are required to ensure that "borrower[s] will . . . establish a grievance mechanism . . . [that] will allow the borrower to receive and facilitate resolution of concerns and grievances about the project's social and environmental performance raised by individuals or groups from among project-affected communities."<sup>190</sup> The purpose of these grievance procedures is to help ensure that "borrowers and [EPFIs] become more transparent and accountable to both the communities affected directly by such projects and civil society generally."<sup>191</sup> While there is no indication that this grievance procedure creates third-party rights to binding arbitration, it does go far in estab-

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185 See World Intellectual Prop. Org., UDRP Procedures for Generic Top Level Domains (gTLDs), <http://www.wipo.int/amc/en/domains/gtld/udrp/index.html> (last visited Jan. 14, 2008).

186 See World Intellectual Prop. Org., Geographical Distribution of Parties, [http://www.wipo.int/amc/en/domains/statistics/countries\\_a-z.jsp](http://www.wipo.int/amc/en/domains/statistics/countries_a-z.jsp) (last visited Jan. 14, 2008).

187 See Press Release, World Intellectual Prop. Org., WIPO Continues Efforts to Curb Cybersquatting (Feb. 18, 2005), *available at* <http://www.ipfrontline.com/depts/article.asp?id=2150&deptid=6>.

188 See THE "EQUATOR PRINCIPLES," *supra* note 133, princ. 7, at 4.

189 Memorandum from Paul Q. Watchman et al., LeBoeuf, Lamb, Greene & MacRae, to Clients, EP 2: The Revised Equator Principles 16 (Jan. 2007), *available at* [http://www.equator-principles.com/documents/ClientBriefingforEquatorPrinciples\\_2007-02-07.pdf](http://www.equator-principles.com/documents/ClientBriefingforEquatorPrinciples_2007-02-07.pdf).

190 THE "EQUATOR PRINCIPLES," *supra* note 133, princ. 6, at 4.

191 Memorandum from Paul Q. Watchman et al., *supra* note 189, at 17-18.

lishing a mechanism for third-party complaints to be seriously addressed by borrowers and financial institutions.<sup>192</sup>

Another good example comes from the international labor context, where multinational corporations are partnering with human rights NGOs to address concerns for core labor standards in global supply contracts. As discussed in the previous Part, the FLA has affiliated with over twenty multinational retail companies and over 194 colleges and universities to incorporate core labor standards in all agreements with their contractors, suppliers, and licensees.<sup>193</sup> But the FLA goes further than this and establishes relationships with twenty accredited monitors to audit compliance with labor standards.<sup>194</sup> Significantly, all companies that are members of the FLA are obligated to obtain "written agreement of Company factories . . . contractors and suppliers to submit to periodic inspections and audits . . . by accredited external monitors, for compliance with . . . workplace standards."<sup>195</sup> Affiliated companies are also required to establish a third-party complaint procedure in which any individual or group may file a third-party complaint with the FLA on behalf of one or more workers employed at a factory producing for FLA companies.<sup>196</sup> If the FLA verifies a violation of the code of conduct, it is empowered to engage with the relevant actors in the factories to pursue remediation and resolve the problem.<sup>197</sup> One such third-party complaint concerned rights to association at a Nike factory in Thailand. Following the complaint, the FLA mediated the dispute between the terminated employees and local management. The result was reinstatement of the employees, back pay, and an agreement with the local labor unions.<sup>198</sup>

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192 NGOs have expressed concern that the grievance procedure does not guarantee that the process will be fair, transparent, impartial, accessible, and responsive in reviewing project compliance and in reacting to and adequately addressing community concerns. See ANDREA DURBIN, BANKTRACK, EQUATOR PRINCIPLES II: NGO COMMENTS ON THE PROPOSED REVISION OF THE EQUATOR PRINCIPLES § 2.1, at 11 (2006), available at <http://www.banktrack.org/?show=86&visitor=1> (follow "banktrack on equator principles" hyperlink; then follow "Equator Principles II—NGO Comments" hyperlink).

193 See *supra* text accompanying notes 148–54.

194 See FLA Accredited Monitors, <http://www.fairlabor.org/about/monitoring/accredmon> (last visited Jan. 14, 2008).

195 Fair Labor Ass'n, Principles of Monitoring pt. I.A, [http://www.fairlabor.org/all/code/FLA\\_PRINCIPLES\\_OF\\_MONITORING.pdf](http://www.fairlabor.org/all/code/FLA_PRINCIPLES_OF_MONITORING.pdf) (last visited Jan. 14, 2008).

196 See Fair Labor Ass'n, Monitoring, <http://www.fairlabor.org/about/monitoring> (last visited Jan. 14, 2008).

197 See Fair Labor Ass'n, Third Party Complaints, <http://www.fairlabor.org/about/complaints> (last visited Jan. 14, 2008).

198 See FAIR LABOR ASS'N, 2006 ANNUAL PUBLIC REPORT 23–24 (2006), available at <http://www.fairlabor.org/all/2006PublicReport.pdf>.

This process is being replicated by other NGOs that are establishing partnerships between multinational corporations to empower third parties to monitor, intervene, and remediate core labor violations. For example, one such organization, Verité, has partnered with dozens of multinational corporations to conduct “social audits” of over 1300 factories in sixty countries to strengthen compliance with international labor standards.<sup>199</sup> Their recommendations include grievance procedures that incorporate employee arbitration as a dispute settlement mechanism.<sup>200</sup>

In all of these examples, the role of third parties is typically to secure prospective compliance, not compensate for past injuries. If corporations are convinced that third-party involvement can enhance compliance, then they may agree to grant a limited degree of third-party rights in the international agreements, rights such as helping monitor risks and remedy violations. Those third-party rights are unlikely to include binding arbitration to render monetary compensation against a contracting party. But a mechanism for monitoring and remediation of violations will go far toward compliance with contractual social responsibility norms.

Based on these early developments, one can hope that multinational corporations will find it increasingly in their interests to include contractual provisions in their international agreements that empower independent third parties to participate in the resolution of conflicts over core human rights standards arising from those agreements. In so doing, multinational corporations have the potential to be instrumental in enhancing the living and working conditions of its stakeholders. But thus far the experiments with third-party beneficiary rights pertaining to core labor standards in international agreements are insignificant. The patchwork of monitoring and compliance efforts lack scale, coordination, and sustainability.

### CONCLUSION

There is an ancient story about a prophet named Samuel who was called to the house of Jesse to anoint one of his sons to be king of Israel.<sup>201</sup> The prophet Samuel looked at the eldest son and thought to himself, “Surely this is the anointed one.” But the Lord said to Samuel, “Do not consider his appearance or his height for I have

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199 See Verité, Client Services & Programs, <http://www.verite.org/services/main.html> (last visited Jan. 14, 2008).

200 See VERITÉ, COMPREHENSIVE FACTORY EVALUATION REPORT 11 (2001), available at [http://www.nike.com/nikebiz/gc/mp/pdf/nike\\_verite\\_report.pdf](http://www.nike.com/nikebiz/gc/mp/pdf/nike_verite_report.pdf).

201 See 1 Samuel 16:1–13.

rejected him." Then one by one the other sons of Jesse passed before Samuel. And each one failed the test. After rejecting the final son, Samuel became exasperated and turned to Jesse and said, "Are these all the sons you have?" Jesse said, "Well there is still the youngest, David, but he is out in the field tending sheep." Jesse brought David to Samuel, and as soon as Samuel saw David, the Lord said to him, "This is the one." David was anointed, and soon thereafter slew the giant Goliath.

The same could be said today of sovereign immunity for human rights abuses. If one were to ask which exception to sovereign immunity is the most promising to secure accountability for human rights violations, which would one choose? Commercial activity? Implied waivers? Expropriated property? Noncommercial torts within the United States? Each of these exceptions to the FSIA was once thought to be quite promising, and each has been found wanting. But there is another option, another exception that is the great surprise. The arbitration exception is the inspired choice and the stealth weapon in the battle against the giant problem of sovereign abuse of human rights. By using the power of corporations to arbitrate human rights, sovereigns can be held accountable.

There can be little doubt that the issue of corporate liability for human rights abuse is gaining currency. International human rights are now part of the "frontier expectations" for multinational corporations, expectations that were nonexistent in past years but now are very much part of our shared presumptions of good corporate behavior.<sup>202</sup> This Article recognizes the looming reality that corporations increasingly will be held liable for international human rights violations. Thus far, the scholarly literature addressing the intersection of corporations and human rights has been decidedly and needlessly negative. This Article attempts to look at the issue from another perspective, and appreciate the possibilities that this trend might afford for more widespread compliance with human rights.

There are numerous responses that corporations might take to address this development. The current strategy appears to be a direct, frontal challenge to the imposition of liability. But if that battle is lost, a secondary approach is one of shared responsibility and cost avoidance. Corporations should entertain the option of arbitrating with

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202 "Companies have always had a contract with society. . . . Most multinationals in the United States, for example, are expected to maintain at least some labor standards along their global supply chains, even if they aren't legally required to do so. Violations of that semiformal contractual obligation can seriously harm a company's reputation as well as consumer demand for its products. . . ." Sheila M.J. Bonini et al., *When Social Issues Become Strategic*, MCKINSEY Q., May 2006, at 23.

sovereigns the question of who pays for human rights abuse in order to maximize fairness between malfeasors and to enhance the likelihood that the cheapest cost avoiders will prevent the human rights abuse. If corporations are to be held responsible for aiding and abetting sovereign abuse, they need not do so alone. They can mitigate their exposure and share the responsibility by invoking existing tools of contract law and arbitration against sovereign joint malfeasors.

As corporations increasingly recognize the importance of human rights in their global practices, they will become attuned to the role of deterrence and employ the tools of contract law and arbitration to facilitate that deterrence. Incorporating social responsibility covenants in international agreements is one of the best vehicles to enhance compliance with core human rights, and including effective dispute resolution procedures in turn fosters compliance with contractual commitments.

The final consideration in the use of contract law and arbitration concerning human rights is the possibility of granting third-party beneficiary rights. The role of third parties in international human rights is critical to foster a culture of compliance in monitoring and maintaining commitments and in remedying violations. By incorporating third parties' rights in international agreements, noncontracting parties can assist in conflict resolution over human rights abuses, minimizing the chances for abuses to go uncorrected.

With the advent of corporate liability for human rights violations, one need not resolve the perennial question of whether the role of multinational corporations is to participate in some grand vision of the good society or to remain steadfastly focused on shareholder wealth maximization. From either vantage point, corporations should seek to avoid the costs of human rights liability and share that cost with others. Arbitrating human rights is a vehicle to invest in a vision of the good society and maximize a corporation's return on its international investments.