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Arbitrating Human Rights

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While this willingness of the court to listen to the State Department's views has considerable merit, the somewhat haphazard process for issuing these statements of interest means that results in individual cases are uncertain.

As a closing example of how far changes have come in the past 20 years or so in the immunity area—i.e., more immunity and more confusion—consider the seminal Alien Tort Statute (ATS) case of *Filitariga v. Pena-Irala*.¹⁰ The defendant, Pena, was the inspector general of police in Asuncion, Paraguay, when he allegedly kidnapped and tortured Filitariga in Paraguay in 1976. In the successful ATS suit brought by Filitariga's family against Pena, the Second Circuit did not discuss whether Pena, a government official at the time of the torture, was protected under the then-new FSIA.

Former police official Pena might be immune under the FSIA today, though there would be a question of whether the torturing and death were within the scope of his authority and whether the FSIA applies to former government officials. However, if the FSIA applies, then the holding in *Argentine Republic v. Amerada Hess*¹¹ makes it clear that the FSIA would be the "sole basis" for obtaining jurisdiction over Pena, not the ATS.¹²

Given this complexity and lack of clarity, it might be useful to recall the immunity situation in the 1970s for foreign states. After the Tate letter of 1952, the U.S. State Department had been making decisions on immunity for foreign states, which the U.S. courts accepted. For various reasons, the practice was inconsistent, and the State Department was uncomfortable with its role. So, in 1976, with the State Department's encouragement, Congress passed the FSIA, which was designed to provide objective standards to be interpreted by the courts on whether or not a foreign state should be granted immunity.

Now, thirty years later, questions arise about the scope of the FSIA regarding the immunity of foreign officials, and there is continuing uncertainty about the head-of-state doctrine. It would seem timely for the academic community, the Executive Branch, and Congress to analyze these questions further.

First, what should be the appropriate standards for immunity for foreign officials? Part of this analysis should include careful research into the laws and practices of other countries—research that has not been done. For consideration of reciprocity and diplomacy, it would seem wise to know what other countries are doing as the United States moves forward.

Second, on the basis of the analysis recommended above, there should be an effort to develop a reasonably clear set of statutory standards regarding immunity for foreign officials who are not diplomats, standards that could amend or supplement the FSIA and might well override the common law head-of-state doctrine.

ARBITRATING HUMAN RIGHTS

*by Roger P. Alford**

Corporate liability is the current rage in human rights litigation. According to the Institute for Legal Reform, affiliated with the U.S. Chamber of Commerce, over forty cases are currently pending against corporations for alleged violations of the Alien Tort Statute or the

¹⁰ 630 F.2d 876 (2d Cir. 1980).

¹¹ 488 U.S. 428 (1989).

¹² The U.S. Supreme Court cited *Filitariga* with apparent approval in *Sosa*, 124 S.Ct. at 2764, but that was regarding the scope of the law of nations, not the scope of foreign officials' immunity.

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Torture Victims Protection Act. This controversial trend toward corporate responsibility may reflect a genuine concern about malfeasance in aiding and abetting the sovereign abuse of power. But more likely it reflects an abiding frustration that the principal perpetrators—sovereign entities—are beyond the reach of most victims. If victims cannot pursue claims against the principals, they will resign themselves to pursuing claims against those who aid and abet.

How have we come to this state of affairs, in which the accomplice is pursued while the principal evades punishment? The answer, of course, is sovereign immunity. With limited exceptions, under the Foreign Sovereign Immunities Act (FSIA), a foreign state is immune from the jurisdiction of the courts of the United States.

It is curious that no exception to the FSIA has proven successful in holding sovereign entities responsible for human rights abuses. Decades of litigation have developed one novel theory after another to fit human rights abuse into the FSIA exceptions. It is as though every plausible exception of the FSIA has been tried and each found wanting, except one.

If one were to ask which FSIA exception is the most promising to secure sovereign accountability for gross human rights violations, which exception would one choose? The commercial activity exception has been tried and repeatedly rejected. An implied waiver for *jus cogens* violations has not found favor. Torts within the United States might be a promising candidate, but most human rights abuses are extraterritorial. The terrorism exception is confined to a handful of rogue states. Two exceptions pertaining to real property are effective but quite narrow in scope. And the prospect of a new exception for human rights violations was raised and rejected in negotiations on the new convention on state immunities. But there remains one.

Although the least likely candidate for holding sovereign entities accountable for human rights abuses, the arbitration exception is the one that that may prove most promising. If, as many believe, corporate liability for human rights abuses is the new game in town, this initiative should not view corporations as the substitute for governments, but rather as the vehicle to secure government accountability. Through arbitration, sovereigns consent to be sued and consent to have arbitral awards enforced in foreign courts.

The arbitration exception provides that sovereigns shall not be immune from jurisdiction 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 ... may arise between the parties ... or to confirm an award made pursuant to such an agreement to arbitrate, if ... the agreement or award is or may be governed by ... [the New York Convention].”¹ Thus, this exception has by far the broadest U.S. nexus requirement of any FSIA exception, embracing within its sweep virtually all foreign conduct that implicates international arbitration.

In a typical foreign investment agreement, corporations insist in their dealing with sovereign entities upon a broadly worded arbitration clause providing that any or all disputes arising out of or relating to the agreement shall be subject to arbitration in a neutral forum. Corporations also frequently have the bargaining power to require New York or English law as the governing law, and stipulate that this law shall apply notwithstanding traditional choice of law rules. Some agreements even go so far as to include an indemnification clause in which the sovereign holds the foreign investor harmless from any third-party claims.

¹ 28 U.S.C. § 1605(a)(6).

Any arbitration agreement or award is enforceable under the New York Convention in 135 signatory nations. This means that virtually all foreign investment arbitration agreements and awards are subject to court enforcement, including those involving sovereign entities. In short, most human rights abuses in the world that relate to a foreign investment agreement may trigger arbitration between the parties, and any award arising from such arbitration will be subject to enforcement in any New York Convention country, including the United States. One might say the mechanism to hold sovereign entities accountable for human rights abuses is hidden in plain view.

To illustrate how this would work in practice, I will divide the corporate world into three realms: the “malfeasant” corporations, the “benign” corporation, and the “beneficent” corporation.

We are familiar with the first variety. These entities are not good corporate citizens, do not subscribe to codes of conduct, and are willing to aid and abet sovereign human rights abuses in the name of shareholder value. This small cluster of corporations is the central focus of the new infatuation for corporate liability. We can anticipate that they will continue to be subject to litigation in the United States under the Alien Tort Statute.

Without judging the merits of this controversial movement,² one can anticipate that any corporation found liable for aiding and abetting sovereign human rights abuses will have the opportunity to pursue a claim of contribution against the sovereign joint tortfeasor. For example, a corporation that is marginally culpable but held joint and severally liable can reduce its exposure by arbitrating a contribution claim with the sovereign joint-venturer to pay its proportional share. Recently, a multinational energy corporation has taken precisely this approach in an indemnity claim against the Ecuador’s state-owned company to pay the alleged \$1 billion expense to clean up environmental contamination in the Amazon.³ Under this theory, the corporation can invoke arbitration because the question of relative culpability is a matter that relates to the joint venture agreement. Under governing laws of New York and England, there are detailed and well recognized rules for claims of contribution by one joint tortfeasor against the other.⁴ Any award against the sovereign can be subject to enforcement in virtually any New York Convention country, including the United States. To the extent the sovereign entity does not have assets in the United States, the corporation can invoke the guarantee agreement signed by the sovereign to secure enforcement. In short, plaintiffs who pursue claims in court against a corporate tortfeasor will have opened the door for the corporation to hold the sovereign tortfeasor accountable in arbitration. The malfeasant corporation can in effect be used as a vehicle to enforce human rights obligations against the sovereign.

The second category of corporations encompasses those entities that adhere to traditional shareholder primacy theories of corporate behavior. These corporations are not indifferent to human rights abuses, but they discount the role of corporations in advancing social justice out of fidelity to the policy of maximizing shareholder welfare. For these corporations, external pressure is often necessary to harness their power as agents for human rights. That

² For a recent discussion, see *In re Agent Orange Product Liability Litigation*, 2005 WL 729177, (E.D.N.Y. 2005). For references on the topic, see Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 *LAW & SOC’Y REV.* 635, 661–663 (2004).

³ See, <http://www.texaco.com/sitelets/ecuador/en/press_releases/2004-06-15_file_arbitration.asp>; <<http://www.globalexchange.org/countries/americas/ecuador/2021.html>>.

⁴ See Paul F. Kirgis, *Apportioning Tort Damages in New York: A Method to the Madness*, 75 *ST. JOHN’S L. REV.* 427 (2001) (discussing New York rule); Tony Weir, *All or Nothing?*, 78 *TUL. L. REV.* 511 (2004) (discussing English Civil Liability (Contribution) Act 1978).

external power comes in the form of lending and insurance institutions. The International Finance Corporation of the World Bank has recently issued policy statements (the Equator Principles) that address concerns such as involuntary resettlement, environmental protection, child and forced labor, and the rights of indigenous peoples.⁵ These principles have been adopted by the IFC and almost thirty major commercial banks representing over 75 percent of all development project financing, thus becoming the de facto standard for foreign direct investment. Likewise, corporations seeking political risk insurance from organizations such as the Multilateral Investment Guarantee Agency are subject to similar environmental and social policies.⁶ These institutions have compliance ombudsmen to ensure that their borrowers and policyholders abide by their contractual obligations. Thus, lending and insurance institutions impose obligations on corporate borrowers to secure government compliance with international standards on environmental, human rights, and social policy.

Human rights compliance is increasingly becoming a contractual obligation, and failure to comply constitutes a breach of the relevant agreements that may trigger arbitration. All of these agreements—the loan agreement, political risk insurance policy, the sovereign guarantee agreement, and the joint venture agreement—typically include arbitration as the standard dispute settlement mechanism, thereby ensuring that the aggrieved parties can enforce arbitral awards in foreign courts. In short, foreign investment begets human rights obligations that beget arbitral claims for breach of contract that beget enforceable awards in foreign courts. Benign corporations thereby become agents for holding sovereign entities accountable.

The third category of corporations is at the vanguard of the movement for corporate responsibility. These corporations may be instrumental in the final frontier of human rights compliance: empowering the victims to pursue claims against sovereigns through enforceable dispute settlement procedures. This is done through employment agreements and third party beneficiary rights in investment agreements. Mandatory employment arbitration in the United States is controversial as a perceived means to transfer employment disputes from effective public courts into the more private, party-controlled arbitration. But in the international context where public courts of host countries often offer little hope for the vindication of labor rights, the prospect of arbitrating employment disputes over labor standards is a promising alternative. For example, one U.S. nongovernmental organization, Verité, has partnered with dozens of multinational corporations to conduct “social audits” of over thirteen hundred factories in sixty countries to strengthen compliance with international labor standards.⁷ Their recommendations include grievance procedures that incorporate employee arbitration as a dispute settlement mechanism.⁸ Any award brought by an employee for violations of labor standards would be subject to enforcement under the New York Convention and enforceable in court.⁹ As for those victims who lack contractual privity, one can envision a future in which third-party beneficiary rights are accorded to arbitrate certain human rights abuses.

Just as bilateral investment treaties empower third-party constituents to arbitrate disputes against the host country, certain corporations may wish to grant third-party beneficiary rights in a joint venture agreement to certain constituents to pursue grievances and perhaps even

⁵ See <www.equator-principles.com>.

⁶ See <<http://www.miga.org/screens/policies/safeguard/background.htm>>.

⁷ See <<http://www.verite.org/services/main.html>>.

⁸ See <http://www.nike.com/nikebiz/gc/mp/pdf/nike_verite_report.pdf>.

⁹ Ian H. Eliasoph, *A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms*, 10 *NEW ENG. J. INT'L & COMP. L. ANN.* 83 (2004).

arbitration. More than an indemnification clause, this approach could remove corporations from the liability loop and permit victims to directly pursue claims against the sovereign tortfeasor.¹⁰ Such an approach would authorize nonparties to invoke arbitration against the sovereign for human rights violations relating to the joint venture. There is precedent for this in the intellectual property context with the arbitration of third-party beneficiary claims relating to domain name disputes.¹¹ Likewise, third-party beneficiaries can arbitrate privacy violations in data transfer agreements under European Union data collection law.¹² There is no legal obstacle to granting similar contractual rights to third parties in the human rights context. Indeed, some universities have adopted a crude version of this in their license agreements.¹³ Another nascent version is employed by the Fair Labor Association, an organization that has partnered with major corporations and utilizes a third-party complaint procedure to uncover instances of noncompliance with labor standards.¹⁴ In short, employment agreements and third-party beneficiary rights in international agreements are innovative means to harness the power of corporations to ensure sovereign accountability for human rights violations. Beneficent corporations can offer significant benefits to the cause of human rights through the mundane vehicle of international arbitration.

**ACCOUNTABILITY AND IMMUNITY: THE UNITED NATIONS CONVENTION ON
JURISDICTIONAL IMMUNITY OF STATES AND THEIR PROPERTY AND THE
ACCOUNTABILITY OF STATES**

*by Gerhard Hafner**

To a large extent, accountability of governments is conceived as an obligation imposed upon states to answer to individuals for injuries inflicted upon individuals. This concept corresponds to the concept of public accountability of government officials and civil servants of the United States as understood by Allan Rosenbaum,¹ and as developed more than 220 years ago. Viewed from a more general perspective, this concept of accountability entails two questions: on the one hand, the question of identifying the injuries for which a state may become answerable to individuals and, on the other, of determining how this accountability of a state can be assured or invoked by the individuals.

The latter aspect also raises the issue of whether and to what extent individuals can institute judicial proceedings against states. States are widely protected by their state immunity against proceedings instituted by individuals before foreign courts. In such cases, individuals depend on the willingness of their own states to exercise diplomatic protection.

Individuals have two possibilities for ensuring the accountability of a foreign state: either through international institutions such as human rights courts or the International Centre for the Settlement of Investment Disputes, or through a restriction of immunity.

State immunity is certainly a classical topic of international law, pertaining to the delimitation of power among states. Its objective is the protection of one state against the exercise

¹⁰ See 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, 510–529 (2004).

¹¹ See <<http://www.icann.org/dndr/udrp/policy.htm>>.

¹² See <http://www.iccwbo.org/home/e_business/ICC_model_clauses_FAQs.pdf>.

¹³ See <<http://www.sweatshopwatch.org/swatch/codes/code.html>>.

¹⁴ See <<http://www.fairlabor.org/all/complaint/index.html>>.

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¹ ALLAN ROSENBAUM, GOOD GOVERNANCE, ACCOUNTABILITY AND THE PUBLIC SERVANT 2.