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Private Solutions to Global Crises

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ARTICLES

PRIVATE SOLUTIONS TO GLOBAL CRISES

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INTRODUCTION

Courts of law are poorly equipped to hear allegations that a multinational corporation ("MNC") has transgressed human rights[1] or committed other global torts.[2] This is because most abuses occur in the developing world where local authorities lack the capacity and political will to prosecute western corporations.[3] In fact, some developing countries explicitly refuse to regulate

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[1] Human rights abuses are torts. Accordingly, this Article frequently uses the term "human rights" due to the topic's saliency and for the sake of simplicity. However, the discussion is not meant to be limited to only human rights abuses, considering that the same legal analysis is generally applicable to transnational torts. *See, e.g.*, Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014) ("Human rights violations are transnational torts. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. Federal law concedes as much . . . .").

[2] *See* Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L & POL. 307, 307 (2004) (discussing the difficulties associated with courts sanctioning corporate human rights transgressions, especially oil companies, in the developing world, difficulties that are due to the legal implications of state sovereignty and the relative power advantages enjoyed by oil companies over developing countries).

[3] *See* Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 GEO. WASH. INT'L L. REV. 939, 939–40 (2009) ("[Developing countries] hardly regulate the activities of transnational corporations ([M]NCs). In some instances, they do so on purpose in order to attract foreign direct investment. In other instances, a regulatory vacuum arises because of a nonfunctioning or corrupt government. Either way, vulnerable populations may fall victim to the practices of [MNCs].").

MNCs in hopes of attracting international business and investment.[4] Although victims and their families also file human rights lawsuits in European and North American courts, jurisdictional and sovereignty obstacles typically prevent western nations from adjudicating their claims.[5] The result is a landscape in which MNCs rarely suffer liability for their parts in human rights abuses[6]—and without the threat of liability, commentators assert that little encourages MNCs to adopt socially desirable behaviors.[7]

The historical record is replete with examples. Shell Oil allegedly helped the Nigerian government violently suppress local protestors,[8] and California's Occidental Petroleum Corporation contributed to the bombing of a Colombian village—both companies avoided liability.[9] In fact, human rights

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[4] *Id.* at 939.

[5] *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014) (ruling that general jurisdiction is only supported when a corporation is essentially "at home" in the forum court and "at home" typically refers to the state where the corporation has its principle place of business or is incorporated, or the specific incident must have sufficient contacts with the forum court); *see also* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 153–54 (2001) (noting that personal jurisdiction is largely grounded in the idea of physical presence in a state); Wouters & Ryngaert, *supra* note 3, at 946–47 (2009) (discussing that European Union countries will not hear a torts claim unless a sufficient "nexus" exists between the tort and forum court).

[6] Robert C. Bird et al., *Corporate Voluntarism and Liability for Human Rights in a Post-*Kiobel *World*, 102 KY. L.J. 601, 603 (2013–14) (stating that "the legal door [has] substantially closed on corporate liability" with respect to human rights abuses committed abroad).

[7] *See, e.g.*, Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1048 (2013) (detailing the ability of corporations to evade liability for human rights abuses, including trafficking and forced labor); *see also* Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 199–200 (1992); Mara Theophila, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After* Kiobel v. Royal Dutch Petroleum Co., 79 FORDHAM L. REV. 2859, 2862 (2011) (noting that considering the recent limitations imposed on the Alien Tort Statute, corporations will rarely face liability for their torts and crimes committed in the developing world).

[8] *See* Jena Martin Amerson, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 3–5 (2011) (recounting Shell Oil's role and legal status in Nigeria as the Nigerian government violently squelched local protests).

[9] Mujica v. AirScan Inc., 771 F.3d 580, 584 (9th Cir. 2014), *cert. denied sub nom.* Mujica v. Occidental Petroleum Corp., 136 S. Ct. 690 (2015) (noting that Occidental supplied material support for the Colombian government in hopes of protecting the

abuses are currently emerging in Qatar, implicating a number of companies building FIFA's 2022 World Cup stadiums.[10] Reports from Qatar suggest that low-skilled Indian and Nepalese laborers are enticed to work on the stadiums, forced to surrender their passports upon arrival.[11] Once trapped in the country, immigrant workers are subjected to treacherous labor conditions described as an ongoing human rights crisis by employment and construction companies.[12] Over 500 Indians have already died from work-related incidents[13] while another 4,000 are expected to perish before the World Cup begins.[14] But notably there is little chance that a court in Qatar, or any other country, will hear the victims' claims.[15]

While this legal vacuum has, and continues, to draw international outrage, arbitration is quietly emerging as perhaps the most effective means to redress torts and crimes committed by corporate entities.[16] The use of arbitration as a human rights tool is particularly counterintuitive considering the perception

company's oil pipeline and dismissing the plaintiffs' Alien Tort Statute claim due to a lack of jurisdiction and state law tort claims upon international comity).

[10] *See* Jeremy Stahl, *The Qatar World Cup Is a Human Rights Catastrophe. It's Time To Do Something About It.*, SLATE (May 14, 2014, 4:13 PM), http://www.slate.com/blogs/the_world_/2014/05/14/qatar_world_cup_migrant_worker_abuses_fifa_needs_to_do_something_about_the.html.

[11] *Qatar World Cup: Stadium Builders Working in 'Sub-Human' Conditions*, TELEGRAPH, Apr. 6, 2014, http://www.telegraph.co.uk/sport/football/10748171/Qatar-World-Cup-Stadium-builders-working-in-sub-human-conditions.html ("[There is] evidence of migrant workers being lured to the Gulf state by the promise of good salaries, only to have their passports taken away so they cannot return home.").

[12] *See* Nigel G. Crocombe, Note, *Building a New Future: The 2022 FIFA World Cup as a Potential Catalyst for Labor Reform in Qatar*, 37 SUFFOLK TRANSNAT'L L. REV. 33, 44 (2014) (reviewing the host of restrictions placed upon migrant workers).

[13] Owen Gibson, *More Than 500 Indian Workers Have Died in Qatar Since 2012, Figures Show*, GUARDIAN, (Feb. 18, 2014, 12:33 PM), http://www.theguardian.com/world/2014/feb/18/qatar-world-cup-india-migrant-worker-deaths (reporting the Indian Embassy's research that at least 500 Indian migrant workers constructing the World Cup stadiums have died, mainly due to poor working conditions).

[14] ITUC, THE CASE AGAINST QATAR 14 (2014), *available at* http://www.ituc-csi.org/IMG/pdf/the_case_against_qatar_en_web170314.pdf.

[15] So far, it does not appear that a credible lawsuit has been filed in Qatar or elsewhere seeking redress for deaths and injuries suffered by a migrant worker working on Qatar's stadiums. *See generally* Crocombe, *supra* note 12, at 35 (explaining the lack of legal protections and causes of action afforded to migrant workers in Qatar).

[16] ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH 2 (May 13, 2013), http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf [hereinafter BANGLADESH ACCORD] (noting that a "Steering Committee" is the first arbiter of disputes, and appeals must be submitted to binding arbitration).

that private dispute resolution is substantially biased in favor of business interests.[17] For instance, contracts of adhesion often include provisions obligating less sophisticated parties to arbitrate in tribunals manipulated by resourceful companies to exclude rules of procedural and substantive fairness.[18] Other times, the process completely divests victims of the right to seek redress from MNCs.[19] So if arbitration now offers a remedy to victims in the developing world, this Article asks not only what has changed, but also why might arbitration be better able than courts of law to resolve human rights cases.

Supported by interviews with prominent lawyers and practitioners, this Article finds that courts of law are rarely able to hear certain types of disputes, including human rights cases, over which arbitral tribunals may preside. This is because courts of law—by virtue of being branches of government—can undermine international peace and cooperation when ruling on matters involving another country's government, laws, and formal acts.[20] Arbitral tribunals, on the contrary, are private

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[17] *See, e.g.*, Anjanette H. Raymond, *It Is Time the Law Begins To Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 683 (2013) (discussing how companies use contracts of adhesion to trap consumers into private forums designed to benefit businesses).

[18] Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 158 (2006) (arguing that the economics of binding arbitration agreements, with respect to consumer credit cards, strips these companies of accountability arising from malfeasance); *see also* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 103 (2004); Bryon Allyn Rice, Comment, *Enforceable or Not? Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 218 (2008) (arguing that corporations "insulate themselves" from liability by drafting binding arbitration clauses that eliminate class action lawsuits).

[19] *See* LUKE ERIC PETERSON & KEVIN R. GRAY, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 6 (2003) (noting that pursuant to bilateral investment treaties, investor corporations operating in developing countries are often only amenable to international arbitration tribunals to remedy disputes and concluding that, since these tribunals rarely, if ever, provide legal standing to individuals, injured parties are virtually barred from seeking redress from multinational corporations ("MNCs")).

[20] *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (stating that the act of a domestic court ruling on matters that occur in, and primarily concern, a foreign nation can instigate substantial foreign policy problems); Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 459 (2001) ("[B]ecause courts are public rather than private actors, foreign direct liability can generate foreign policy tensions. The fundamental principle of

actors, mitigating most practical and political dangers implicated by courts of law.[21] In other words, private forums can act in certain areas where courts may not. And now a collection of international organizations—including the United Nations,[22] the International Labor Organization,[23] and the International Olympic Committee[24]—have enacted, or are in the process of discussing, contracts and agreements that promote human rights enforced by arbitration.[25] This Article details the untold story of how an effective model of human rights enforcement was innovated, where the rules of corporate responsibility are established by contract and noncompliance is sanctioned by private remedies.

The contribution of this Article is both theoretical and practical. Considering that MNCs rarely suffer liability abroad, this Article identifies an emerging, understudied type of international agreement able to hold MNCs responsible for torts in the developing world.[26] On a theoretical level, the research herein identifies situations in which arbitral decisions are superior to judicial rulings. This Article also advances the private dispute resolution literature, which has developed slowly

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territorial sovereignty underpins the right of host countries to regulate impacts and activities in their territory and prevents other states from interfering.").

[21] *See infra* Part IV (discussing how certain qualities of private dispute resolution allow it to resolve matters involving international political difficulties in a manner that public courts of law may not).

[22] *Infra* notes 201–03 and accompanying text (discussing a proposal in front of the United Nations to create a regime enforcing human rights with binding arbitration).

[23] *Infra* notes 177–94 and accompanying text (noting that the International Labor Organization is a party to the Bangladesh Accord on Fire and Building Safety which obligates apparel companies to certain labor standards, using international arbitration as an enforcement mechanism).

[24] *Infra* notes 196–99 and accompanying text (noting that Olympic host city contracts now include human rights clauses and that all disputes arising under an Olympics contract must be submitted to the Court of Arbitration for Sport).

[25] Claes Cronstedt, Remarks at the United Nations Annual Forum on Business and Human Rights (Dec. 3, 2014) (proposing a United Nations regime to enforce corporate human rights standards using international arbitration); Panel discussing an International Arbitral Tribunal on Business and Human Rights, Side Session at the United Nations Business and Human Rights Forum (Dec. 3, 2014) [hereinafter U.N. Business and Human Rights Panel].

[26] One article that provides substantial and meaningful insights was written by Professor Roger Alford, which considers how arbitration could be used to overcome the doctrine of foreign sovereign immunity in actions against national governments and other sovereign actors accused of human rights abuses. Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508 (2008).

due to arbitration's private and confidential nature.[27] The works that do discuss arbitration overwhelmingly assume that the process favors corporations, rarely mentioning arbitration's socially desirable qualities.[28] Thus, this Article offers a needed discussion of the advantages arbitration presents over courts of law, as well as the legal implications of litigating and arbitrating against MNCs.

Part I explores the law of suing western companies in the developing world, adding policy insights to the reasons why MNCs are largely immune from suit. Part II reviews the nature and efficacy of private remedies, which is accomplished by framing the arbitration debate from several perspectives. Part III offers a discussion of recent contracts and international agreements that use arbitration as a means to hold MNCs accountable. Then, Part IV discusses potential applications of such a mechanism, followed by the Conclusion.

I. THE FUTILITY OF SUING CORPORATIONS OVER FOREIGN ACTS

The legal framework governing international torts typically prevents courts of law from remedying, or even hearing, corporate human rights violations.[29] It is rarely mentioned, however, that this landscape resulted from global necessity. Indeed, for the sake of greater international security, western nations are impeded from regulating even their own corporations

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[27] *See* Stavros L. Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36 FORDHAM INT'L L.J. 745, 745 (2013) (stating that the scholarly community has produced little substantive work about the process of arbitration, limiting what is known about how arbitral panels resolve disputes).

[28] *See, e.g.*, Raymond, *supra* note 17, at 666–67 (discussing the unjust consequences of binding arbitration clauses).

[29] *See* Tawny Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1014–16 (2003) (explaining that enforcing sanctions against multinational corporations usually falls exclusively in the domain of the country located where the event occurred). However, since developing countries rarely prosecute MNCs, MNCs largely enjoy immunity for their international torts and crimes. Wouters & Ryngaert, *supra* note 3.

in the developing world.[30] The following outlines the legal framework frustrating human rights victims and the historical developments that necessitated it.

A. The Legal Framework of Human Rights and Corporations

The most appropriate place to file a human rights lawsuit is wherever the underlying incident occurred, though most developing countries cannot or will not prosecute MNCs.[31] A poor second option is to file suit in Europe, where the courts usually lack both jurisdiction and the ability to enforce a judgment.[32] International authorities—including international governmental organizations and tribunals—are similarly limited.[33] While the American legal system appears to be the

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[30] *See* Michael J. Kelly*, Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 403 (2005) (noting that the traditional view considers sovereignty to be "an important source of international stability and had served as a foundation for peace, democracy, and prosperity").

[31] *See supra* note 3 and accompanying text.

[32] *See* Bridgeford, *supra* note 29; Shanaira Udwadia, Note, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359, 368–69 (2004) (explaining that American courts cannot exert jurisdiction over foreign defendants when all acts and events occurred abroad).

[33] International authorities are ineffective in this arena. Because international laws, organizations, and agreements receive their power from individual nations and governments, acts on behalf of the international community can, likewise, threaten a nation's sovereignty. For instance, the most well-known pact concerning business and human rights is the U.N.'s Guiding Principles, which is nonbinding and lacks the power to offer remedies to victims. Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 874–75 (2012); *see also* Daniel W. Drezner*, On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 330 (2001) (remarking that western nations often use international law to violate the sovereignty of other nations); Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT'L L. 329, 337 (2004) (explaining that certain acts on behalf of international organizations can effectively represent the acts of certain more powerful states). *See generally* Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT'L L. 1107, 1110, 1114 (2004) (reviewing the concept of states delegating sovereignty to international organizations but also the manner in which international organizations are representative of sovereign nations). The few international agreements addressing MNCs are entirely voluntary, powerless to punish noncompliance. *See, e.g.*, Karin Dryhurst*, Liability up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U. J. INT'L L. & POL. 641, 653 (2013) (noting that the Organisation for Economic Co-operation and Development's Guiding Principles for Business and Human Rights have only "symbolically" held

most receptive venue to bring suit over claims arising from foreign events,[34] attracting a number of human rights lawsuits since the early 1980s,[35] several principles and doctrines bar U.S. courts from exercising jurisdiction.[36] Despite this, enterprising

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corporations liable for transgressions, stating that there can only be "public recommendations for companies found in violation of the guidelines, but the recommendations are not binding"); *see also* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law,* 44 VA. J. INT'L L. 931, 946–47 (2004) (finding, with respect to the United Nations' Norms on the Responsibilities of Transnational Corporations and Other Enterprises, that while the pact "purport[s] not only to bind states, but also to place obligations on transnational corporations . . . . [,] [t]he Norms are, however, unclear as to how corporations could be held directly liable under international law for any breaches of these obligations"). Similarly, international law has chosen not to define MNCs as actors capable of violating the laws of nations. *See* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2170–71 (2012) (providing the limited framework under which a corporation may be liable for acts violating international law, which includes when a corporation acts "under the color of state authority," when the corporation violates a "universal concern," and aiding and abetting state actors); *see also* Amerson, *supra* note 8, at 2 (noting that transnational corporations have often escaped liability and scrutiny by clinging to the belief that they are not state actors under the traditional sense and thus are bystanders to human rights abuses committed by governments); William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT'L L. 1045, 1046 (2012) (mentioning that, for example, the United States Court of Appeals for the Second Circuit found that corporations are not susceptible to international law and that "no international tribunal of which we are aware has *ever* held a corporation liable for a violation of the laws of nations." (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 132, 145 (2d Cir. 2010)) (internal quotation mark omitted), *aff'd*, 133 S. Ct. 1659 (2013)); Kinley & Tadaki, *supra* note 33, at 935. In turn, both national and international forums have, so far, lacked the ability to hold MNCs accountable for atrocities committed in the developing world.

[34] Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 997 (2015) ("There are several reasons why a plaintiff would want to bring suit in a U.S. forum. First, U.S. substantive law is thought to be more generous than the laws of other countries. Second, U.S. procedural law—in particular, notice pleading, liberal discovery, and aggregate (class action) litigation—provides plaintiffs substantial leverage in pleading, proving, trying to a favorable verdict, and settling their cases. Third, U.S. damages law—especially punitive damages and substantial jury awards—present the potential for a windfall for plaintiffs or, at a minimum, significant leverage to force defendants to settle." (footnotes omitted)).

[35] *See* Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 259 (2012) (noting that, although the United States' willingness has recently waned, "[f]or several decades, the United States has acted as the global leader in imposing accountability on multinational corporations in the area of human rights").

[36] *See generally* John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90

lawyers continue to initiate human rights lawsuits in American courts, asserting a number of novel legal theories based upon criminal, contract, and tort laws.[37] But as this Section demonstrates, rarely do these lawsuits succeed, leaving few avenues for foreign parties to remedy corporate torts and crimes.

For example, a number of American statutes ostensibly support a cause of action over foreign acts.[38] The problem is that American laws are presumed to have a territorial reach extending only as far as the United States' sovereign borders.[39] That is, unless Congress has used express language to arrange otherwise.[40] Consider the most well-known human rights statute, the Alien Tort Statute ("ATS"). Congress enacted the ATS as part of the Judiciary Act of 1789,[41] providing that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[42] The ATS laid dormant for almost 200 years[43] until two Paraguayan citizens living in the United States successfully sued a former

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WASH. U. L. REV. 1707 (2013) (discussing the modern, limited extent of personal jurisdiction with respect to court's ability to adjudicate international torts).

[37] *See, e.g.*, Ebrahim v. Shell Oil Company, 847 F. Supp. 65, 67 (S.D. Tex. 1994) (ruling that an American worker who was injured in Syria may not sue his employer's parent company and other associated companies because, without piercing the corporate veil, the independent legal existences of the corporations may not be jettisoned); Theophila, *supra* note 7.

[38] United States v. Dawn, 129 F.3d 878, 882 (7th Cir. 1997) ("Generally speaking, Congress has the authority to apply its laws, including criminal statutes, beyond the territorial boundaries of the United States, to the extent that extraterritorial application is consistent with the principles of international law.").

[39] *See generally* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 2 (2014) ("The presumption against extraterritoriality has been applied in U.S. courts for more than a century, receiving perhaps its most prominent endorsement from no less than Justice Oliver Wendell Holmes, Jr.: '[A]ll legislation is *prima facie* territorial.' In the 1990s, Chief Justice Rehnquist reaffirmed this principle in its modern formulation: '[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' And in 2013, Chief Justice Roberts quoted Justice Scalia for the proposition that: 'When a statute gives no clear indication of an extraterritorial application, it has none.' " (footnotes omitted)).

[40] *Id.*

[41] *See generally* Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609 (2014) (providing an insightful review of the Alien Tort Statute).

[42] 28 U.S.C. § 1350 (2012).

[43] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013) ("Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years.").

Paraguayan police chief also living domestically, alleging that he tortured and murdered their family members.[44] After *Filartiga v. Pena-Irala*,[45] similar victims filed ATS cases, though questions persisted about the statute's effect over exclusively foreign incidents and parties.[46] The Supreme Court settled this debate in *Kiobel v. Royal Dutch Petroleum*,[47] ruling that a collection of Dutch, British, and Nigerian corporations could not be held liable in the United States for aiding and abetting the Nigerian government's campaign of "beating, raping, killing, and arresting residents and destroying or looting property" because such acts were perpetrated in Nigeria, outside of American jurisdiction.[48] While commentators fervently contest *Kiobel*'s result[49]—remarking that corporations now enjoy de facto immunity for acts in violation of international law—it must be noted that the Supreme Court ruled unanimously.[50]

In a similar fashion, the Victims of Trafficking and Violence Protection Act of 2000[51] ("Victims Act") imposes civil penalties on persons caught trafficking humans or profiting from their forced labor.[52] The law's reach was limited after a group of Liberian laborers in *John Roe I v. Bridgestone Corp.*[53] alleged that certain American corporations staffed the Firestone Rubber Plantation

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[44] *Id.* at 1675.

[45] 630 F.2d 876 (2d Cir. 1980).

[46] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 321–22 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (discussing the questions and issues involved with finding a corporation liable under customary international law and, thus, the Alien Tort Statute).

[47] 133 S. Ct. 1659.

[48] *Id.* at 1662–63.

[49] *See, e.g.*, Bellia & Clark, *supra* note 41, at 1611 (insisting that the Supreme Court has misinterpreted the Alien Tort Statute).

[50] *See Kiobel*, 133 S. Ct. at 1669 ("[A]ll the relevant conduct took place outside of the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

[51] 18 U.S.C. §§ 1589–1590 (2012).

[52] 18 U.S.C. § 1589(a) (2012) ("Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).").

[53] 492 F. Supp. 2d 988, 994 (S.D. Ind. 2007).

near Harleb, Liberia, with trafficked adults and children, procured from local chiefs.[54] The plaintiffs argued that the Victims Act overcomes the presumption against extraterritoriality because human trafficking inherently takes on an international dynamic, which Congress contemplated when enacting the statute.[55] The district court disagreed, ruling that the Victims Act lacks explicit language extending jurisdiction internationally, necessitating *Bridgestone*'s dismissal.[56]

Even when a statute creates extraterritorial jurisdiction, some laws pertain only to natural born humans as opposed to corporations and organizations. Had the plaintiffs in *Kiobel* established a sufficient nexus with the United States, questions would have remained about the ATS's application to corporations.[57] A similar example is the Torture Victims Protection Act[58] ("TVPA"), which permits injured parties to allege—despite a lack of contacts with the United States—that a foreign official in her formal capacity committed acts of extrajudicial killing or torture.[59] For instance, in *Doe VIII v. Exxon Mobil Corp.*,[60] the plaintiffs alleged that Exxon Mobil aided and abetted foreign officials who violated the TVPA when the company hired a local security force, known to have committed prior human rights abuses, to guard the company's

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[54] *Id.*

[55] *Id.* at 1001–02 ("The international dimensions of the problems of trafficking and forced labor do not support a departure from the usual presumption against extraterritorial application for section 1589.").

[56] *Id.* at 1000 ("[T]he court must be guided by the 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' ").

[57] *See* Sykes, *supra* note 33, at 2162–63 (discussing recent cases and United States appellate circuit courts that have found that the Alien Tort Statute does not govern corporations, but instead, only natural born humans, citing in particular the Second Circuit's holding in *Kiobel*. 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013)).

[58] 22 U.S.C. § 7101 (2012).

[59] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1992) ("Liability.—[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.").

[60] 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

Indonesian gas facility.[61] The plaintiffs claimed that this security team was under Exxon's exclusive control when it, again, engaged in a "systemic campaign of extermination" including "extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnaping."[62] The United States Court of Appeals for the District of Columbia Circuit found that only an "individual" could violate the TVPA, which excluded corporations from the statute's reach.[63] This decision barred the plaintiffs from establishing liability despite the severity of Exxon's alleged acts.[64] The U.S. Supreme Court affirmed the D.C. Circuit's TVPA interpretation in *Mohamad v. Palestinian Authority*,[65] ruling that Congress clearly sought to exclude corporations from the statute's scope.[66] Thus, in light of the presumption against extraterritoriality and other limiting principles, American statutes rarely redress parties injured abroad.[67]

Another strategy is to allege that the injured party and defendant company had a contractual relationship based upon events or circumstances arising in the United States.[68] This argument generally fails as well. Most western companies operating abroad create subsidiary or affiliated entities to undertake their foreign operations. The hitch is that a corporation's legal existence is considered independent from all

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[61] *Id.* at 15–16. *See generally* Brenner A. Allen, *A Cause of Action Against Private Contractors and the U.S. Government for Freedom of Speech Violations in Iraq*, 31. N.C. J. INT'L L. & COM. REG. 535, 560–61 (2005) (discussing the Torture Victims Prevention Act in greater detail).

[62] *Exxon Mobil*, 654 F.3d at 16 (internal quotation mark omitted).

[63] *Id.* at 57–58 ("Congress's use of the word 'individual' indicated that it did not intend for the TVPA to apply to corporations or other organizations. . . . [T]here is no basis in the statutory text for permitting vicarious corporate liability.").

[64] *Id.* at 73 (Kavanaugh, J., dissenting in part) ("[T]he TVPA does not allow corporate liability or aiding and abetting liability.").

[65] 132 S. Ct. 1702, 1710–11 (2012).

[66] *Id.* at 1710 ("Petitioners' final argument is that the Act would be rendered toothless by a construction of 'individual' that limits liability to natural persons. . . . We acknowledge petitioners' concerns about the limitations on recovery. But they are ones that Congress imposed and that we must respect.").

[67] *See* Kinley & Tadaki, *supra* note 33, at 939–40 (explaining extraterritorial jurisdiction and the difficulties of finding corporations responsible); Ward, *supra* note 20, at 454 (discussing the difficulties of holding corporations liable for acts committed abroad).

[68] *See, e.g.*, Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (stating that the plaintiffs sought to establish that they were third-party beneficiaries under contracts between Walmart and the companies operating the factories through which they contracted).

other companies, despite whether they share common shareholders and directors, or belong to a parent and subsidiary relationship.[69] Injured parties are thus impeded from holding corporations liable for acts committed by other legal entities with which they have contracted.[70] Proving otherwise requires a petitioner to pierce the corporate veil, which occurs only in the most extreme circumstances.[71] Take *Doe I v. Wal-Mart Stores, Inc.* for example.[72] There, the plaintiffs—a group of Asian, African, and Latin American factory workers—alleged that Walmart contracted factory work out to companies in the developing world that managed inhumane working environments.[73] But since independent factories employed the plaintiffs as part of Walmart's global supply chain, the laborers appeared to lack a contractual relationship with Walmart.[74] The plaintiffs sought to overcome this burden by noting that Walmart had enacted and ignored several internal policies governing contractee workplace conditions.[75] Because only a factory worker could benefit from these standards, the plaintiffs argued that they entailed third-party beneficiaries under Walmart's global supply contracts, which would give rise to liability in the United States.[76] The court disagreed though, ruling that Walmart

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[69] *See* Dryhurst*, supra* note 33, at 654–55.

[70] *See, e.g.*, Ebrahim v. Shell Oil Co., 847 F. Supp. 65, 66–67 (S.D. Tex. 1994) (ruling that an American hurt in Syria cannot sue affiliated and subsidiary companies of the company responsible since "[a] wholly-owned subsidiary of a company is a distinct legal entity, responsible for its own wrongs" and noting that, even if the plaintiff were suing the correct party, the plaintiff would still be unable to assert jurisdiction over the companies in an American court, considering the injuries and events all took place in Syria).

[71] *Id.*; *see* Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 137 (2013) ("However, for victims of human rights abuses, limited liability within the corporate group can present significant obstacles to obtaining tort-based remedies from the ultimate parent(s) of the corporate group. Courts have elected to 'pierce the corporate veil' and reach the assets of a corporate parent only in exceptional circumstances involving abuse of the corporate form where the separation between the corporation and its shareholders produces inequitable results.").

[72] 572 F.3d 677.

[73] *Id.* at 680.

[74] *Id.* at 680, 682 (noting that the workers were employed by companies contracted to supply Walmart with manufactured goods).

[75] *Id.* at 680.

[76] *Id.* at 681–82 ("Plaintiffs argue that Wal-Mart promised the suppliers that it would monitor the suppliers' compliance with the Standards, and that Plaintiffs are third-party beneficiaries of that promise to monitor.").

reserved only the right to monitor contractees, which is substantially different from creating a legal obligation.[77] Alternatively, since Walmart had not exacted an " 'immediate level of "day-to-day" ' control over [the] supplier's employees," the plaintiffs failed to demonstrate that their relationship amounted to an implied employment contract.[78]

Human rights victims are also seldom successful under American tort laws.[79] This is because courts must either dismiss international tort claims or apply the laws of the nation where the incident occurred. In *Bridgestone*, the Liberian rubber workers alleged that Firestone committed acts of negligence and recklessness, but their complaint ultimately failed to "articulate[] a viable basis for applying California law or Indiana law to the management of the Plantation in Liberia."[80] Likewise, the *Exxon Mobil* court found, pursuant to the Restatement of Conflict of Laws,[81] that "subject only to rare exceptions, the local law of the state where the conduct and injury occurred will be applied."[82] Indeed, this choice of law analysis often serves as a de facto barrier to liability since most developing countries lack the types of tort laws that can establish MNC liability.[83] Other

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[77] *Id.* at 682 ("Plaintiffs' allegations are insufficient to support the conclusion that Wal-Mart and the suppliers intended for Plaintiffs to have a right of performance against Wal-Mart under the supply contracts.").

[78] *Id.* at 683 ("Such supply contract terms do not constitute an 'immediate level of "day-to-day" ' control over a supplier's employees so as to create an employment relationship between a purchaser and a supplier's employees.").

[79] *See* Alford, *supra* note 1, at 1089 (discussing how the Supreme Court recently, and severely, limited the ability of U.S. courts to hear international torts claims and noting that "[a]s such, international human rights litigation as currently practiced in the United States is dead").

[80] John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007).

[81] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) ("When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.").

[82] Doe v. Exxon Mobil Corp., 654 F.3d 11, 70 (D.C. Cir. 2011) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145) (internal quotation mark omitted), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

[83] *See* Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulations of Transnational Corporations*, 88 DENV. U. L. REV. 183, 195, 198 (2010) (remarking that many foreign nations lack the judicial system to regulate MNCs,

times, American courts entirely dismiss tort claims arising out of foreign events; this is because the doctrine of international comity encourages judicial deference to whichever legal system bears the strongest connection to the complained of incident.[84] In *Mujica v. AirScan Inc.*,[85] for example, a Californian oil company helped the Colombian military bomb a Colombian village in hopes of protecting an oil pipeline.[86] When the victims filed suit in California—due to the Colombian government's refusal to prosecute—the United States Court of Appeals for the Ninth Circuit determined that Colombia's judicial system had the greatest relationship to, and interest in, the massacre.[87] Since Colombia's court system was considered adequate, the Ninth Circuit dismissed *Mujica*.[88] Other doctrines similarly encourage or require courts to reject lawsuits implicating another country's government, laws, or actions,[89] including the doctrine of foreign sovereign immunity,[90] the act of state doctrine,[91] and forum non conveniens.[92]

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and in fact, developing countries actually have incentives to avoid enacting and enforcing laws that require MNCs to abide by human rights).

[84] Carlee M. Hobbs, Note, *The Conflict Between the Alien Tort Statute Litigation and Foreign Amnesty Laws*, 43 VAND. J. TRANSNAT'L L. 505, 516 (2010) ("International comity is 'the recognition which one nation allows within its territory to the legislative, executive[,] or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.' " (quoting Hilton v. Guyton, 159 U.S. 113, 164 (1895)).

[85] 771 F.3d 580 (9th Cir. 2014), *cert. denied sub nom.* Mujica v. Occidental Petroleum Corp., 136 S. Ct. 690 (2015).

[86] Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1168–69 (C.D. Cal. 2005), *aff'd sub nom.* Mujica v. Airscan Inc. 771 F.3d 580.

[87] *AirScan*, 771 F.3d at 611–12.

[88] *Id.* at 613–14.

[89] *See generally* Steven A. Kadish*, Comity and the International Application of the Sherman Act: Encouraging the Courts To Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130 (1982) (providing a broad discussion of how these doctrines limit a plaintiff's ability to file suit in U.S. courts based upon, or involving, events occurring internationally).

[90] The modern view of sovereign immunity is the "restrictive" theory, which provides:

> [A] foreign state would enjoy immunity from the jurisdiction of national courts for its "sovereign" actions but not for its "private" acts. Importantly, application of this theory had the effect of transferring disputes involving foreign states from the diplomatic arena to adjudicatory forums—in particular, to litigation in national courts. In the words of one commentator, "The embrace of the restrictive theory of the immunity of foreign states around the globe is representative of the ongoing legalization of international relations."

And thus, when taking into account the limitations borne to American statutes and the protections afforded by corporate law, western companies are virtually immune from liability arising out of foreign torts and crimes—even when the alleged acts entail torture or murder. These harsh results, however, are the product of important, sage policies.

B. The Policies Underlying the Barriers to Human Rights Litigation

While this regulatory vacuum is the subject of much consternation, it is seldom discussed how it is rooted in global necessity.[93] After years of European fighting, the international community determined that international conflict is primarily caused by countries meddling in each other's affairs.[94] To ameliorate this danger, each state is considered sovereign, vested with plenary authority to promulgate rules and regulations in its own territorial borders.[95] Importantly, as the Supreme Court

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Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 820–21 (2012) (footnote omitted) (quoting JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 5 (2d ed. 2003)).

[91] *See generally* Michael J. Bazlyer, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986).

[92] Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*, 90 TEX. L. REV. 743, 743–44 (2012) ("American courts are often the forum of choice for foreign plaintiffs, who seek to take advantage of our liberal pretrial discovery rules; generous jury awards; and plaintiff-friendly liability laws, which allow both compensatory and punitive damages. To alleviate concerns about hearing cases with only a tenuous connection to the chosen jurisdiction, American courts have primarily employed the common law doctrine of forum non conveniens. Forum non conveniens allows a court, even though it has both personal jurisdiction over the parties and subject matter jurisdiction over the controversy, to decline to exercise this jurisdiction in favor of a more appropriate forum." (footnotes omitted)).

[93] *See* Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1085, 1088 (1996) (noting first, that the idea of Westphalian sovereignty minimized the power of the nation state and that, because sovereign states can only enact and enforce regulation in their sovereign borders, this allows MNCs to "relocate operations around the world with little trouble, remain[ing] largely beyond the reach of state regulators").

[94] *Id.*

[95] Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 27, 29–30 (2010) ("Westphalia's sovereignty principle has several components. First, states are formally equal. Each sovereign is the highest authority in its own jurisdiction, unable to judge other sovereigns, and, thus, is obligated to deal with other sovereigns as equals. . . . [Second,] [e]ach state is free to choose its own mode of governance, and that choice is entitled to respect and noninterference from other states. Third, states are the primary actors in the international system,

explained in *Kiobel*, this principle extends to courts of law, noting that the American legal system must refrain from exercising jurisdiction over foreign actors and events so as to not "imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[96] This principle "guards against our courts triggering such serious foreign policy consequences."[97] Thus, since national courts are branches of government whose formal acts can trigger international conflict,[98] they generally decline to hear matters involving the sovereignty and acts of other nations despite the harsh consequences that it may produce.[99]

This landscape is the result of public laws and forums, referring only to those rights and obligations derived from governmental bodies. Private laws and venues offer an alternative, contract-based source of authority, which has yet to be associated with human rights enforcement, presumably due to arbitration's embattled reputation.[100] But now several international agreements seek to use private dispute resolution as a mean to redress human right violations—and they seem to be doing so with actual success. So, in light of popular beliefs

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and it is on their consent that international order rests. These principles formed the basis of the international political, economic, and legal system for the subsequent three centuries.").

[96] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

[97] *Id.*

[98] Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 419 (2000) ("Nation-States have been the foundation blocks of the international legal system since the birth of international law in modern time. In the exercise of their national sovereignty, States created international law. The validity and effectiveness of international law depends on the continuing consent and support of nation-States, while the protection of national sovereignty and independence is contingent upon an effective international legal system that is founded upon nation-States. In contemporary conditions, neither States nor international law can exist without the other." (footnotes omitted)).

[99] Jennifer L. Czernecki, *The United Nation's Paradox: The Battle Between Humanitarian Intervention and State Sovereignty*, 41 DUQ. L. REV. 391, 392–93 (2003) (discussing that the United Nations enforced the modern idea of sovereignty with the primary goal of attempting to promote peace in the wake of the World Wars).

[100] *See, e.g.*, Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too*, 2010 J. DISP. RESOL. 235, 256–57 (2010) (finding that arbitration clauses tend to harm sophisticated parties as well as unsophisticated parties).

that arbitration is inconsistent with human rights enforcement, why might it now offer a remedy to victims in the developing world?

II. THE LAW AND PROMISE OF PRIVATE JUSTICE

This Article finds that private tribunals are better equipped than courts of law to redress international corporate torts, including human rights abuses, despite the perception that courts operate more fairly and equitably.[101] This is because courts of law—by virtue of being a branch of government—disfavor adjudicating disputes that implicate foreign actors, events, and subject matters.[102] The advantage of arbitration is that it operates independently from national governments and can preside over most conflicts without violating a state's sovereignty.[103] In fact, the reason why arbitral awards are rarely reviewable by courts of law is to make their enforcement as nonpolitical and independent from national governments as possible.[104] This gives arbitral tribunals the

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[101] *See* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1113–14 (2011) (noting that arbitration is derived from, and created by, contract, which gives the drafters of binding arbitration clauses the opportunity to contractually design their arbitral forums, oftentimes lacking procedural safeguards on par with courts of law); Charles W. Tyler, Note, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1572, 1589–90 (2013) (noting that if courts sought to capture arbitration's efficiency by limiting procedural safeguards, courts would likely be unable to render fair and balanced decisions). *See generally* Daniel Rainer, Note, *The Impact of* West Tankers *on Parties' Choice of a Seat of Arbitration*, 95 CORNELL L. REV. 431 (2010) (outlining the dynamics of arbitration agreements, specifically international arbitration).

[102] Simon v. Republic of Hungary, 37 F. Supp. 3d 381, 402–03 (D.D.C. 2014), *aff'd in part, rev'd in part*, No. 14-7082, 2016 WL 363365 (D.C. Cir. Jan. 29, 2016).

[103] SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 15 (1996); *see also* Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. INT'L L. & POL. 1, 3 n.4, 7, 17 (2006) (recounting theories of private law's apolitical nature, though providing a counterpoint).

[104] Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement*, 55 HARVARD INT'L L.J. ONLINE 45, 48 (2014), http://www.harvardilj.org/2014/01/online_volume-55_brower_blanchard/ ("States created the International Centre for the Settlement of Investment Disputes ("ICSID") and committed to other neutral arbitration fora for resolving foreign investment disputes precisely to remove such disputes from earlier politicized means of settlement, such as international diplomacy and potentially volatile domestic processes . . . ."); *see also* Charity L. Goodman, Comment, *Unchartered Waters: Financial Crisis and*

means to assert jurisdiction over international corporate torts without raising the practical and political dangers associated with public entities. In turn, arbitration is likely a superior forum to try human rights cases.

But despite arbitration's advantages, most observers perceive—for very good reasons—that private forums overwhelmingly favor MNCs to the detriment of less sophisticated individuals, including human rights victims.[105] Critics point out that arbitration rarely gives private citizens legal standing to assert human rights claims or even considers human rights relevant to a hearing.[106] It thus matters little whether arbitration can conceivably promote human rights if the historical record suggests otherwise. So, in light of arbitration's theoretical advantages yet practical limitations, why is it now likely to emerge as a tool for human rights? The following sheds light on this issue by examining the manner in which both the American and international forms of arbitration interplay with human rights.

A. The Flawed Nature of American Arbitration

Arbitration in the United States is much maligned.[107] As background, arbitral jurisdiction is ostensibly grounded in consent.[108] While injured parties have a right to pursue legal remedies in a court of law upon a colorable legal claim,[109] access

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Enforcement of ICSID Awards in Argentina, 28 U. PA. J. INT'L ECON. L. 449, 468–69 (2007) (explaining that parties almost always voluntarily comply with arbitration awards due to overwhelming political considerations).

[105] *See* Kevin Short, *5 Reasons American Companies Refused To Sign Bangladesh Safety Accord*, HUFFINGTON POST, (July 11, 2013, 5:36 PM), http://www.huffingtonpost.com/2013/07/11/rival-bangladesh-factory-safety-plans_n_3574260.html (noting that several major American companies have, so far, refused to sign the Accord because of its binding arbitration process and its ability to actually compel payment of damages).

[106] *See, e.g.*, Peterson & Gray, *supra* note 19, at 18.

[107] *See Forced Arbitration Rogues Gallery, Expose Corporations That Are Rigging the Justice System Against Consumer*s, PUBLIC CITIZEN, http://www.citizen.org/forced-arbitration-rogues-gallery (last visited Mar. 1, 2016) (presenting a variety of specific arbitration clauses used by large companies that, arguably, limit consumer justice). *See generally* Raymond, *supra* note 17 (discussing the problems of arbitration clauses in consumer contracts).

[108] *See* W. Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration*, 73 LAW & CONTEMP. PROBS. 335, 335–36 (2010).

[109] *See generally* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169 (2012).

can be limited by contract.[110] For instance, disputing parties may either arbitrate a ripe dispute or agree ex ante to send later arising conflicts to private dispute resolution.[111] Subsequent arbitral rulings are presumptively enforceable and unreviewable by courts of law.[112] In fact, these decisions are rarely reviewable by anyone, considering that most arbitral hearings are conducted in private, produce few written opinions, and leave sparse clues about the methods used to reach a decision.[113]

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[110] *See* Laura K. Bailey, Note, *The Demise of Arbitration Agreements in Long-Term Care Contracts*, 75 MO. L. REV. 181, 188 (2010) ("Since an arbitration provision is part of a contract, typical contract principles govern the agreement, and a person cannot be compelled to arbitrate unless he has consented to do so.").

[111] *See* Ashley M. Sergeant, Comment, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 163 (2012) (mentioning that parties can choose to arbitrate either before or after a conflict arises).

[112] Only very limited circumstances allow a U.S. court to review an award, much less upset an arbitral award:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2012); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582 (2008) ("Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one."); *see also* Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 189 (2007) ("Once an arbitration process is concluded, courts will almost always enter an order confirming the award rendered by the panel and ordinarily do not review the merits of the decision.").

[113] *See* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1138 (2012) (finding that little is known about how arbitrators reach their decisions, as opposed to how they validate their decisions, considering that arbitrators are not bound to legal precedent) ("[I]t is equally fair to wonder why [arbitral] activities—so like judges in one sense—should be effectively immune from judicial review."); *see also* Raymond, *supra* note 17, at 667 ("Businesses are accused of using arbitration as a private dispute resolution system that shields their transgressions from public scrutiny . . . .").

For these reasons, American courts historically disfavored enforcing binding arbitration clauses; that was until Congress, noting arbitration's efficiency,[114] enacted the Federal Arbitration Act of 1925 ("FAA"), requiring the strict enforcement of contractual arbitration clauses.[115] Although the FAA was initially interpreted as pertaining only to the federal courts,[116] *Southland Corp. v. Keating*[117] expanded the FAA's scope sixty years later. In *Keating*, the Supreme Court ruled that the FAA preempts state law, stripping both state courts as well as federal venues of discretion to invalidate troublesome arbitration clauses.[118] Then, in *Gilmer v. Interstate/Johnson Lane Corp.*,[119]

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[114] *See* Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2348 (2012) ("Mandatory arbitration offers the potential for a faster and less costly means of dispute resolution. It holds out the promise of a process that is more efficient and accessible for plaintiffs . . . ."); *see also* Darrick M. Mix, Note, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism*, 12 OHIO ST. J. ON DISP. RESOL. 463, 476 (1997) (discussing the efficiency of alternative dispute resolution mechanisms in the construction industry and noting that it is "quick and efficient").

[115] 9 U.S.C. §§ 1–307.

[116] *See* Ramona L. Lampley, *The Price of Justice: An Analysis of the Costs That Are Appropriately Considered in a Cost-based Vindication of Statutory Rights Defense to an Arbitration Agreement*, 2013 B.Y.U. L. REV. 825, 832 (2013) ("The FAA declares that all 'contract[s] evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' As courts have echoed since its enactment in 1925, the FAA was passed 'in response to widespread judicial hostility to arbitration agreements.' Thus, it reflects Congress's 'liberal federal policy *favoring* arbitration.' " (alterations in original) (footnotes omitted)); *see also* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns*, 72 TUL. L. REV. 1, 22–23 (1997) (stating that "[t]he FAA provides that arbitration clauses may be voided 'upon such grounds as exist at law or in equity for the revocation of any contract,' " implicating defenses such as unconscionability).

[117] 465 U.S. 1 (1984).

[118] The Court found that the legislative record suggests Congress intended the FAA to control more than arbitration disputes in federal courts. Because Congress likely meant to include state courts into the FAA's scope, the FAA displaces state law. *Id.* at 13, 21 ("We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the Act, can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government. I find no evidence that Congress intended such a double standard to apply, and I would not lightly impute such an intent to the 1925 Congress which enacted the Arbitration Act.").

[119] 500 U.S. 20 (1991).

the Supreme Court reviewed judicially created carve outs that exempted certain industries and subject matters from the FAA's scope.[120] Employment contracts, for example, traditionally received greater scrutiny due to the power imbalances underlying most employment relationships.[121] However, the Court ruled that unless Congress has used express language to immunize a specific industry or contract type,[122] courts lack authority to carve out subject matters from the FAA.[123] As a result, nearly all binding arbitration clauses today are strictly enforced.

This landscape began to draw ire soon after it became apparent that arbitration lacks safeguards on par with public venues.[124] These criticisms grew louder in the 1990s when companies sought to reduce litigation costs using particularly skewed forms of arbitration.[125] For example, most arbitral tribunals operate confidentially, free to stray from legal precedent and rules of law.[126] And because arbitration is derived from contract, resourceful litigants can design the process to omit rules of evidence, discovery, and other standards of procedural

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[120] *See* Imre Stephen Szalai, *More Than Class Action Killers: The Impact of* Concepcion *and* American Express *on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 40 (2014) (stating that certain states carved out, for instance, employment contracts from FAA enforcement).

[121] *See* John-Paul Motley, *Compulsory Arbitration Agreements in Employment Contracts from* Gardner-Denver *to* Austin: *The Legal Uncertainty and Why Employers Should Choose Not To Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 692 (1998) (explaining how some courts viewed the FAA as, in various ways, inapplicable to employment contracts).

[122] *Gilmer*, 500 U.S. at 26 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)) (internal quotation marks omitted)).

[123] *See* Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 15–16 (2014) (stating, for example, that arbitration decisions arising out of employment contracts are rarely reviewable by public courts despite whether the arbitrator misunderstood the law or facts).

[124] *See* Raymond, *supra* note 17, at 666–67 (discussing the procedural problems and lack of safeguards to create a "biased" resolution forum).

[125] *See* Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 966 (2014) (noting that "[f]ranchise lawyers were among the very first to recognize that an arbitration clause could reduce their clients' risks of facing class actions," prompting a host of later litigation including *Concepcion* and *Amex*).

[126] Comsti, *supra* note 123, at 10 (mentioning that arbitration is often conducted in private); *see also* Weidemaier, *supra* note 113, at 1092–93 (discussing the use and creation of precedent in arbitral rulings, noting that it does not create precedent and courts are free to ignore it).

fairness.[127] Accordingly, companies insert binding arbitration clauses into employment, consumer, and other contracts of adhesion,[128] limiting relief options available to those with little exposure to, or knowledge of, the judicial process—much less arbitration.[129] Some scholars note that, since arbitration clauses provide corporations with the right to choose the arbitrator, private jurists overwhelmingly favor corporations in hopes of

[127] Comsti, *supra* note 123, at 9 ("Arbitral procedures frequently do not conform to minimum standards of fairness as guaranteed in a court of law. In forced arbitration, discovery is nonexistent or limited, the Federal Rules of Civil Procedure and Evidence do not apply, and there is no right to appeal. . . . [In turn,] [f]orced arbitration stacks the decks . . . ."). Professor Comsti explains that arbitration varies from public forums because litigants—and businesses in particular—may exploit the lack of procedural and fairness safeguards and protect company reputations by litigating in a confidential, private venue. *Id.* at 9–10 (stating that, in the employment contract context, the lack of procedural and fairness safeguards in arbitration terms often leads to contracts substantially favoring the more powerful drafting party).

[128] *Lost in the Fine Print*, ALLIANCE FOR JUSTICE, http://www.afj.org/multimedia/first-monday-films/films/lost-in-the-fine-print (last visited Mar. 2, 2016); *see also* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) ("By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."). The states must follow the FAA's lead in harboring a public policy favoring arbitration since the Supreme Court found that the FAA preempts state law. *See* Raymond, *supra* note 17, at 667 (noting that while arbitration can provide many advantages, it would be wise to limit the use of arbitration clauses in adhesion contracts where they are commonly found). *See generally* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013) (broadly describing the FAA's preemption of state law).

[129] *See* Jennifer Schulz, Comment, *Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe*, 44 LOY. L.A. L. REV. 1269, 1282 (2011) ("Arbitration has traditionally been agreed to by two knowing business entities of presumably comparable strength. Parties to employment and consumer contracts, however, almost always have unequal bargaining power. These employees and consumers are often presented with take-it-or-leave-it contracts of adhesion that leave little room for negotiation . . . ."). Schulz found that the use of arbitration provisions in consumer adhesion contracts produces a "one-sided" dispute resolution process, favoring the company. *Id.*; *see also* Nantiya Ruan, *What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1125–26 (describing how employers often use arbitration clauses inserted into employment contracts to limit their employees to file suit, join class actions, and harness statutory rights); *Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170, 1170–71 (2009) [hereinafter *Mandatory Arbitration Clauses*] (mentioning that companies often bind unsophisticated parties to arbitration agreements by inserting such clauses deftly and subtly into contracts of adhesion).

garnering repeat business.[130] Empirical and anecdotal studies indicate the same: Arbitrators who impose penalties on companies are rarely selected again while those favoring companies are used consistently.[131]

Although the FAA ostensibly includes a savings clause allowing courts to strike down unconscionable provisions, several recent Supreme Court cases suggest that even deeply flawed arbitration clauses are unlikely to be voided.[132] In *AT&T Mobility v. Concepcion*,[133] the Court reviewed California's public policy against enforcing arbitration clauses that limit a party's right to join a class action lawsuit.[134] The State argued that restricting class actions would dissuade injured parties from litigating small claims, encouraging companies to exploit unsophisticated parties when the stakes are low.[135] Class action lawsuits resolve this problem by providing a means to combine claims into a single lawsuit.[136]

The Supreme Court ruled, however, that courts must strictly enforce binding arbitration clauses, essentially reducing the frequency in which injured parties will seek redress from

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[130] *Mandatory Arbitration Clauses*, *supra* note 129, at 1174–75 (finding that arbitrators who hope to receive compensation to arbitrate disputes have significant incentives to favor the business clients, which often choose their preferred arbitrator and employ them); *see also* Weidemaier, *supra* note 113, at 1138 ("What is undeniable . . . is that arbitrators are private actors who are chiefly accountable to the parties who pay their fees.").

[131] *Mandatory Arbitration Clauses*, *supra* note 129, at 1174–75 (providing examples of arbitrators who lost business after finding in favor of private individuals over companies and citing another California study that showed 89.5% of California arbitrations were presided over by the same twenty-eight arbitrators and that companies usually win 94% of the time, suggesting that arbitrators respond to incentives favoring business interests).

[132] *See, e.g.*, Sternlight, *supra* note 128 (describing how *Concepcion* "impedes access to justice").

[133] 563 U.S. 333 (2011).

[134] *Id.* at 356–57 (Thomas, J., concurring).

[135] *Id.* at 340 (majority opinion) ("[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (alterations in original) (quoting Discover Bank v. Superior Court, 36 Cal 4th 148, 162–63 (2005)) (internal quotation marks omitted)).

[136] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, 785 (2011).

companies for small claims.[137] Even in *American Express Co. v. Italian Colors Restaurant*[138]—where it was established that certain arbitration clauses make pursuing claims economically irrational—the Court held that Congress overwhelming created a national policy favoring arbitration which only additional federal legislation can overcome.[139] And now after *Concepcion* and *Amex*, it is hard to envision a clause so lopsided as to violate the FAA.[140] While international arbitration wields a stronger reputation, most commentators suggest that it, likewise, poorly contemplates human rights.

B. International Arbitration

Despite being procedurally superior to American arbitration, critics assert that international arbitration is unable to promote global human rights and may even render detrimental effects.[141] As background, international arbitration emerged as a global imperative after World War II when foreign direct investment and trade began to boom.[142] But despite the benefits of transnational commerce, the system almost collapsed under

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[137] *Concepcion*, 563 U.S. at 352. *See generally* Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012).

[138] 133 S. Ct. 2304 (2013).

[139] *Id.* at 2315–16; Rutledge & Drahozal, *supra* note 125, at 971 (reciting that the plaintiffs alleged that American Express's arbitration agreement violated antitrust laws and that it was economically unfeasible for individual litigants to try the matter).

[140] *See* Szalai, *supra* note 120, at 39–40 (asserting that courts are increasingly perceiving that arbitration clauses are de facto valid after *Concepcion* and *Amex*).

[141] James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 77 (2007) ("[C]ommentators generally agree that international investment law and arbitration have an adverse impact on the promotion and protection of human rights.").

[142] Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L L.J. 359, 362 (2008) (reviewing the growth of trade and investment, and the increase of international investment and noting that "[i]nternational commercial arbitration grew from the need to find a suitable dispute resolution system for parties in the international trade, commerce, and investment that blossomed after the conclusion of World War II"); *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524 (describing foreign investment as a vital tool).

the weight of investor anxiety.[143] This is because foreign investors feared that host nations would nationalize their invested assets.[144] Upon such a seizure, an investor could only bring suit in the host country's court system, which rarely ruled in favor of alien interests.[145] Thus, the historical landscape put investors at the practical and legal mercy of host countries.[146]

This inspired a couple of international agreements which each sought to resolve international investment disputes better than courts of law.[147] For example, during the mid-twentieth century, the World Bank enacted a regime known as the International Centre for Settlement of International Disputes ("ICSID"), governing investment disputes between host countries and foreign companies.[148] The ICSID's authority is derived from investment pacts called bilateral investment treaties ("BITs"), which grant foreign investors a level of protection in their host countries.[149] Upon a BIT violation, an investor and host nation must submit to binding arbitration, bypassing each party's national court system.[150] However, an additional problem arose since arbitral judgments do not, by themselves, compel payment.[151] Historically, the act of fulfilling an award required a victorious party to seek enforcement in some place where the

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[143] *See* Victor R. Salgado, Comment, *The Case Against Adopting BIT Law in the FTAA Framework*, 2006 WIS. L. REV. 1025, 1031 (providing a historical account of the creation of BIT law and noting that, previously, foreign investors had few remedies when foreign nations expropriated or nationalized an investor's property).

[144] Jacobs & Paulson, *supra* note 142 (asserting that international commercial arbitration arose to, in part, mitigate anxiety that local courts are biased against foreign litigants).

[145] *Id.*

[146] *See* Salgado, *supra* note 143. *See generally* LOUIS T. WELLS & RAFIQ AHMED, MAKING FOREIGN INVESTMENT SAFE: PROPERY RIGHTS AND NATIONAL SOVEREIGNTY (2007) (describing the insecurities of foreign investors).

[147] Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 834 (2011) (discussing how ICSID awards have the "purported benefit of avoiding arguable bias by national courts, which render decisions against co-equal branches of their own national governments").

[148] *Id.* at 837–38 (discussing how the ICSID was originated in 1965 by the World Bank but came into prominence in 1978 when the convention was expanded to cover more disputes and provide fact finding).

[149] *See* Born, *supra* note 90, at 831–32.

[150] *Id.*

[151] *See* Kate M. Supnik, Note, *Making Amends: Amending the ICSID Convention To Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 354–55 (2009).

loser held assets. But, as before, local courts tend to treat foreign parties with hostility, refusing to honor awards against their own or allies' property.[152]

A critical solution was pioneered by the ICSID[153] and the United Nations' Convention on the Enforcement of Foreign Arbitral Awards[154] ("New York Convention"), which cleverly sought to strip national courts of discretion to review arbitral judgment.[155] For example, ICSID awards can only be overruled by the ICSID's review panel upon finding that the issuing tribunal violated certain limited procedural safeguards.[156] Likewise, the New York Convention—which governs the enforcement of international arbitral awards—requires signatory states to honor foreign awards with the same respect given to "domestic sister-state judgment[s]."[157] This means that enforcing parties are entitled to payment in any country that has ratified the New York Convention.[158] Honoring states have little authority to review an award's merits even despite most errors of fact or law.[159] In fact, nearly all member states blindly adhere to

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[152] In the case that a losing party refuses to honor a judgment, the victorious party must seek enforcement using an authority located where the loser possessed property. *Id.* at 344; *see also* Jacobs & Paulson, *supra* note 142 (explaining the arbitral process created to alleviate the fears derived from hometown litigation).

[153] *See* Michael H. Strub Jr., Note, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031, 1034–35 (1990) (describing the situation whereby a party wins an arbitral award but must then find a means to enforce it); *see also* Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles That Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53, 54 (2004); Born, *supra* note 90, at 837.

[154] *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 95 (2000) (describing the New York Convention as the most important pact enforcing arbitral agreements).

[155] *See* Strub, *supra* note 153, at 1031–32 (noting that the New York Convention is paramount to promoting an effective international arbitration system).

[156] Franck, *supra* note 142, at 1547.

[157] Strub, *supra* note 152, at 1041–42.

[158] *See* Goodman, *supra* note 104, at 468–69 (explaining in the ICSID context that for legal and political reasons, arbitration awards are almost always enforceable because claimants have neither the right to seek appellate review in a national court nor do they have the ability to, ex ante, remove the dispute to a court of law).

[159] *See* Drahozal, *supra* note 154, at 104 ("In countries that are party to the New York Convention, the arbitral situs, and no other country, can vacate an arbitration award."); Franck, *supra* note 141, at 1555.

the New York Convention, as the system's efficacy is almost universally beneficial while contravening the convention is tantamount to a treaty violation.[160] And because nearly every country has adopted the New York Convention,[161] including the United States,[162] arbitral awards are generally enforceable without disruption.[163] The result is a system structured by sophisticated parties to resolve disputes more fairly than local courts in contrast to domestic arbitration.[164]

However international arbitration's ability to redress human rights violations appears limited despite its structural advantages.[165] Recall that arbitration must have consent to hear a dispute—and once a forum's jurisdiction is established, it may only rule on issues to which the parties have agreed.[166] A MNC is thus unlikely to ratify a human rights agreement authorizing and consenting to arbitration; otherwise, the threat of liability would be established where none currently exists. For example,

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[160] *See* S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 521 (2013) ("Although contemporary commentary often overlooks the public international law attributes of international commercial arbitration, several international authorities have nevertheless indicated that the New York Convention should be interpreted 'in accordance with the rules of interpretation of international law, which are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.' ").

[161] Strub, *supra* note 153, at 1031–32.

[162] 9 U.S.C. § 201 (2012).

[163] *See, e.g.*, Karaha Bodas Co., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 294–95 (5th Cir. 2004) (stating that courts have few avenues through which they may overrule an arbitral award) ("Under Article V(1)(d) of the New York Convention, a court may refuse to enforce an arbitration award if '[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.' ").

[164] Jacobs & Paulson, *supra* note 142 ("Accordingly, the desire of each party to avoid having a dispute determined by a foreign judicial forum fueled the growth of international commercial arbitration.").

[165] Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 579 & n.25 (2011) (noting that the "present architecture" of international investment arbitration is improperly situated to handle human rights considerations).

[166] Ursula Kriebaum, *Privatizing Human Rights: The Interface Between International Investment Protection and Human Rights*, *in* THE LAW OF INTERNATIONAL RELATIONS—LIBER AMICORUM HANSPETER NEUHOLD 165, 187 (A. Reinisch & U. Kriebaum eds., 2007) ("Investment tribunals will not be able to hear direct claims of violations of human rights. They must usually restrict themselves to considering allegations of violations of the instruments over which they have jurisdiction.").

the primary reason why MNCs favor signing international investment treaties is because they protect MNC assets while neither providing individuals with standing to arbitrate nor creating a duty to observe human rights.[167] This caused the tribunal in *Biloune v. Ghana Investments Centre*[168] to express regret, remarking that "all individuals, regardless of nationality, are entitled to fundamental human rights . . . . [But] it does not follow that this . . . [t]ribunal is authorized to deal with allegations of violations of fundamental human rights."[169]

Therefore, on the one hand, the efficient manner by which international arbitration resolves investment and commercial conflicts suggests the process is applicable to human rights enforcement. This seems especially possible considering arbitration's ability to overcome most of the political dangers associated with courts of law. On the other hand, it also seems that, not only has international arbitration failed to benefit human rights victims, but it also might actually encourage MNCs to commit global atrocities.[170] Overcoming this hurdle is what makes recent enactments of certain international agreements so innovative.

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[167] Jernej Letnar Cernic, *Corporate Human Rights Violations Under Stabilization Clauses*, 11 GERMAN L.J. 210, 225 (2010) (explaining that MNCs enjoy provisions in their agreements and BITs allowing them to bring claims against their host countries, yet "no international mechanism exists where individuals could bring complaints against investors"); Peterson & Gray, *supra* note 19 (mentioning that BITs do not provide a right for individuals to bring MNCs to arbitration).

[168] UNCITRAL Arb. (Oct. 27, 1989).

[169] *Id.*; Luke Eric Peterson, *Selected Recent Developments in IIA Arbitration and Human Rights*, IIA MONITOR NO. 2 1, 2 (2009) ("[H]uman rights issues have been relatively slow to arise in the [international investment] arbitration context. Indeed, IIAs themselves are generally silent with respect to human rights matters, and do not expressly reference human rights-related obligations of States, much less seek to introduce any new human rights duties or obligations for governments or investors.").

[170] Peterson & Gray, *supra* note 19, at 5 (noting that there are "no *known*" instances where arbitration has been used to promote human rights); *see also* Peterson, *supra* note 169, at 12 ("[A]t least to date, there have been no awards which address [human rights] to a meaningful degree.").

III. THE REALITY AND APPLICATION OF INTERNATIONAL ARBITRATION IN HUMAN RIGHTS LITIGATION

Despite the perception that international arbitration is inconsistent with human rights litigation,[171] this landscape is radically changing. In the last decade, a handful of international agreements have sought to include both binding arbitration and human rights terms, suggesting that such an arrangement could be successful. This development went largely unnoticed because the first generation of agreements incorporated human rights symbolically with sparse practical or legal effect. But then, in 2014, a number of international agreements began employing binding arbitration clauses with—for the very first time—the legal capacity to sanction MNCs for transgressing human rights. These agreements' early success inspired segments of the international community, including the United Nations, the International Olympic Committee, and the International Labor Organization, to employ, or consider using, similar arbitration clauses. This, indeed, was never before thought possible.

A. The Recent History of Arbitration in International Contracts and Agreements

One of the first agreements to incorporate human rights and arbitration was ratified nearly a half century ago by a collection of African nations, forming the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa[172] ("African Refugee Agreement"). But since the African Refugee Agreement binds only sovereign states, not MNCs or individuals, it lacks the authority to regulate corporate behavior. Similarly, in 1973, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents was enacted, suffering from the same limitations as the African Refugee Agreement, unable to

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[171] Peterson & Gray, *supra* note 19, at 33 (finding that no international arbitral tribunals have ever found in a way that enforces human rights concerns).

[172] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. IX, Sept. 10, 1969, U.N.T.S. 14691.

subject corporations to its binding arbitration provision.[173] These agreements foreshadowed the use of arbitration in today's more socially conscious international agreements.

In 2003, Singapore and a small European conglomerate, comprised of Ireland, Liechtenstein, Norway, and Switzerland, enacted the EFTA-Singapore Free Trade Agreement[174] ("EFTA-Singapore Agreement"). The EFTA-Singapore Agreement is an investment treaty creating certain obligations among its signatory countries as host nations and their national companies as investors. Since the agreement is an international investment treaty, its arbitration clause extends beyond the pact's signatory countries, binding the investor corporations pursuant to the ICSID.[175] The novelty of the agreement is found in the preamble, which affirms each party's commitment to human rights. But, in addition to most preambles being legally benign, the probability that a global atrocity will arise out of trade between, for example, Lichtenstein and Singapore is quite low. While the EFTA-Singapore Agreement creates a relationship between investment and human rights, the arbitral mechanism is unlikely to sanction conduct or amend corporate behavior. Instead the human rights clause is symbolic, publicly suggesting a means for future agreements to enforce global standards using private forums. In a similar fashion, the Canada-Colombia Free Trade Agreement's preamble affirms a commitment to human rights, including in the greater agreement a binding arbitration provision, though the pact also governs only investment disputes, excluding human rights violations from the scope of the enforcement process.[176] While these international agreements importantly suggest that arbitration is consistent with human rights enforcement, an actual accord employing arbitration in a manner altering behavior and sanctioning corporate conduct would not be enacted until 2014.

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[173] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 13, Dec. 14, 1973, 1035 U.N.T.S. 167.

[174] Free Trade Agreement, EFTA-Sing., June 26, 2002, http://wits.worldbank.org/GPTAD/PDF/archive/EFTA-Singapore.pdf.

[175] *Id.* art. 48.

[176] *See* Free Trade Agreement, Can.-Colom., pmbl., ch. 21, Nov. 21, 2008, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng.

B. International Arbitration and Human Rights Since 2014

Importantly, several international organizations have ratified, or are considering, agreements using arbitration to promote corporate standards of human rights. As background, the promise of arbitration as a human rights tool is largely attributable to western universities, which have long sought for a means to regulate the apparel industry.[177] In the early 1990s, media reports publicized working conditions in international garment factories, otherwise known as "sweatshops."[178] It soon became apparent that an area in which universities wielded leverage over the clothing industry was in the business of school-licensed apparel.[179] Since apparel companies need universities more than the schools rely upon any one manufacturer, several institutions began contractually requiring their apparel partners to use only factories abiding by certain labor standards.[180] But despite subsequent lawsuits—including the University of Wisconsin's action alleging that Adidas manufactured school apparel with substandard Indonesian factories[181]—the abuses continued.

The watershed moment occurred after a series of fires destroyed garment factories in Bangladesh, one of which alone killed over a thousand workers.[182] Compounding the tragedy was Bangladesh's lack of tort law, preventing victims from seeking a

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[177] *See, e.g.*, Michelle Gillingham, *Diag Protestors Target Sweatshop*, MICH. DAILY (Mar. 21, 2013), http://www.michigandaily.com/news/group-advocating-against-sweat-shops-protests-diag. For instance, a popular university group at over 150 colleges and universities is the United Students Against Sweatshops. UNITED STUDENTS AGAINST SWEATSHOPS, http://usas.org/ (last visited Mar. 4, 2016).

[178] *See, e.g.*, Gillingham, *supra* note 177.

[179] *See* Chris Smith, *College Football's Most Valuable Teams 2013: Texas Longhorns Can't Be Stopped*, FORBES (Dec. 18, 2013, 10:28 AM), http://www.forbes.com/sites/chrissmith/2013/12/18/college-footballs-most-valuable-teams-2013-texas-longhorns-cant-be-stopped/ (noting that the University of Texas's team alone is worth $139 million).

[180] *See* Sarah Blaskey & Phil Gasper, *Campus Struggles Against Sweatshops Continue*, DOLLARS & SENSE http://www.dollarsandsense.org/archives/2012/0912blaskeygasper.html (last updated Dec. 2012).

[181] Complaint at 3–4, Bd. of Regents of the Univ. of Wis. Sys. v. Adidas Am., Inc. (Wis. Cir. Apr. 10, 2013) (No. 12CV2775).

[182] *See generally U.S. Clothing Retailers Adopt Factory Safety Plan for Bangladesh*, 107 AM. J. INT'L. L. 918 (2013); Jim Yardley, *Justice Still Elusive in Factory Disasters in Bangladesh*, N.Y. TIMES, June 30, 2013, at A1.

legal remedy;[183] due to sovereignty issues, national and international authorities were unable to establish jurisdiction, largely shielding western apparel companies from liability.[184] However, the ensuing publicity inspired the Bangladesh Accord on Fire and Building Safety ("Bangladesh Accord"), which most apparel companies ratified in October 2013 out of fear of losing university business.[185] The Bangladesh Accord currently obligates western apparel companies to improve factory standards[186] as well as repair high-risk dangers at potentially sizeable costs.[187]

The Bangladesh Accord's key innovation lies in its dispute resolution process.[188] Initial conflicts are settled by the Bangladesh Accord's "Steering Committee," appeals of which are submitted to binding arbitration.[189] Considering that national

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[183] *See generally* MAHMUDUL MURSALIN, APPLICATION OF TORT LAW IN BANGLADESH: PROSPECTS & CHALLENGES (2014) (explaining the complete lack of tort law in Bangladesh).

[184] *See* Naima Farrell, Note, *Accountability for Outsourced Torts: Expanding Brands' Duty of Care for Workplace Harms Committed Abroad*, 44 GEO. J. INT'L L. 1491, 1499 (2013) ("[C]ontracted workers likely cannot enforce existing labor standards in their home-states through litigation. First, the workers may have difficulty bringing the foreign brand to court in the workers' home jurisdiction. Second, the workers' direct employer—the supplier—may be judgment-proof, meaning that satisfaction of a judgment against the employer in the workers' home-state courts would be difficult or impossible . . . .").

[185] *See, e.g.*, *Cornell University Severs Business Ties with JanSport*, CORNELL CHRON. (Oct. 17, 2014), http://www.news.cornell.edu/stories/2014/10/cornell-university-severs-business-ties-jansport.

[186] BANGLADESH ACCORD, *supra* note 16, at 1–2 ("The agreement covers all suppliers producing products for the signatory companies. The signatories shall designate these suppliers as falling into the following categories, according to which they shall require these supplier to accept inspections and implement remediation measures in their factories according to the following breakdown: 1. Safety inspections, remediation and fire safety training at facilities representing, in the aggregate, not less than 30%, approximately, of each signatory company's annual production in Bangladesh by volume ("Tier 1 factories"). 2. Inspection and remediation at any remaining major or long-term suppliers to each company ("Tier 2 factories"). Together, Tier 1 and Tier 2 factories shall represent not less than 65%, approximately, of each signatory company's production in Bangladesh by volume. 3. Limited initial inspections to identify high risks at facilities . . . .").

[187] *Id.*

[188] Skype Interview with Rob Wayss, Executive Director of Bangladesh Operations (Feb. 12, 2015) (on file with author).

[189] BANGLADESH ACCORD, *supra* note 16 ("Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the [Steering Committee], which shall decide the dispute by majority vote of the [Steering Committee] within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the [Steering

courts are unable to review arbitral judgments pursuant to the New York Convention, awards arising out of Bangladesh Accord violations are globally enforceable.[190] And since the Bangladesh Accord prevents companies from shielding themselves behind the international supply chain, as it expressly binds companies to the acts of "all suppliers producing products,"[191] the Bangladesh Accord offers the first effective method to hold corporations liable for torts and other acts in the developing world.[192] The efficacy of the Bangladesh Accord is inferable from how several apparel companies reluctantly signed it,[193] some of which, such as the Gap, advocated for an alternative, substantially similar resolution that conspicuously lacked an arbitration clause.[194] Considering the large-scale adherence to the Bangladesh Accord, this agreement appears to mark the first instance in which arbitration is altering corporate behavior for the sake of human rights.[195] It, thus, seems possible that the

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Committee] may be appealed to a final and binding arbitration process. . . . The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).").

[190] *Id.* ("Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to . . . The New York Convention."); *see* Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 51 (2002) (stating that courts have "limited" abilities to review an arbitral award's merits under the New York Convention).

[191] BANGLADESH ACCORD, *supra* note 16, at 1.

[192] *See* Telephone Interview with Robert C. Thompson, Former Partner, LeBoeuf, Lamb, Greene & MacRae (Feb. 27, 2015) (on file with author) (noting that possibly the most difficult hurdle to enacting an effective corporate human rights regime is overcoming the global supply chain whereby corporations have limited liability for acts committed by subsidiaries and contracted companies).

[193] *See* Steven Greenhouse, *Major Retailers Join Bangladesh Safety Plan*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/business/global/hm-agrees-to-bangladesh-safety-plan.html?_r=0 ("Gap has resisted signing on, objecting to its legally binding nature and saying it was already doing a lot on its own, having hired a fire inspector and promised $22 million in loans for factory improvements.").

[194] *See* Brad Plumer, *U.S. Retailers Aren't Signing a New Safety Agreement for Bangladesh. Here's Why.*, WASH. POST (May 16, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/16/u-s-retailers-arent-signing-a-new-safety-accord-for-bangladesh-heres-why/.

[195] Skype Interview with Rob Wayss, *supra* note 188 (remarking that the Bangladesh Accord has experienced no problems with the willingness of apparel companies to comply with the agreement).

Bangladesh Accord's value extends beyond Bengali laborers, serving as a powerful example for other industries rife with human rights abuses.

Indeed, the International Olympic Committee ("IOC") soon followed suit, partly due to criticisms directed at the IOC for human rights violations allegedly committed by host nations and MNCs contracted to operate past Olympic Games.[196] For instance, media coverage publicized anti-LGBT laws enacted by the Russian government in the months preceding the Sochi Olympics.[197] Accusations also targeted MNCs for possibly violating the rights of low-skilled labor.[198] In 2014, the IOC responded by declaring that all future Olympic host city contracts would include provisions obligating signatories to uphold human rights.[199] Jurisdiction to hear such disputes is vested in the Court of Arbitration for Sport, bypassing national courts.[200] Naturally then, any award rendered by this arbitral

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[196] *See, e.g.*, Hanna Kozlowska, *An Appalling List of Human Rights Abuses Last Year in Putin's Russia*, QUARTZ (Jan. 30, 2015), http://qz.com/336047/an-appalling-list-of-human-rights-abuses-last-year-in-putins-russia/ ("Hundreds of people participating in peaceful protests during the Sochi Winter Olympics and after Russia's occupation of Crimea were arrested. You can now get up to 15 years in prison for 'mass rioting.' Authorities also 'harassed and intimidated organizations, individuals, and journalists' in the run-up to the Sochi Olympics, and mistreated the families evicted to make way for the Olympic facilities."); *Russia's Olympian Abuses*, HUM. RTS. WATCH (Apr. 8, 2013), http://www.hrw.org/russias-olympian-abuses.

[197] *See* Owen Gibson & Shaun Walker, *Olympians Urge Russia To Reconsider 'Gay Propaganda' Laws*, GUARDIAN (Jan. 30, 2014), http://www.theguardian.com/sport/2014/jan/30/olympic-athletes-russia-repeal-anti-gay-laws.

[198] *Russia: Migrant Olympic Workers Cheated, Exploited*, HUM. RTS. WATCH (Feb. 6, 2013), http://www.hrw.org/news/2013/02/06/russia-migrant-olympic-workers-cheated-exploited ("In several cases documented by Human Rights Watch, employers retaliated against foreign migrant workers who protested abuses by denouncing them to the authorities, resulting in the workers' expulsion from Russia. Cases like this highlight the vulnerable situation for migrant workers in Russia, particularly those without contracts to document their employment . . . ."); *see* Max Strasser, *Corporate Sponsors Faulted for Sochi Participation*, AL JAZEERA AM. (Jan. 31, 2014, 7:00 AM), http://america.aljazeera.com/articles/2014/1/31/olympics-sponsorsfaultedforgoingtosochi.html.

[199] *Olympics: Host City Contracts Will Include Rights Protections*, HUM. RTS. WATCH (Oct. 22, 2014), http://www.hrw.org/news/2014/10/22/olympics-host-city-contracts-will-include-rights-protections.

[200] INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER 105 (2015) By implication, IOC contract disputes are resolved by international arbitration: "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration." *Id.*; *see also* Ryan Gauthier, *The New Olympic Host City Contract: Human Rights à la Carte?*, ASSER INT'L SPORTS L. BLOG

body would be redeemable worldwide pursuant to the New York Convention. Thus, similarly to the Bangladesh Accord, the emergence of political fortitude, combined with the efficacy of international arbitration, produced a legally enforceable human rights instrument able to bind MNCs.

Perhaps the most significant development concerns the willingness of the United Nations to consider human rights proposals potentially modeled after the Bangladesh Accord. In December 2014, the U.N.'s Business and Human Rights Forum first heard details of a potential international agreement using international arbitration as a means to bind MNCs to global codes of conduct.[201] The proposal established that the U.N.'s Guiding Principles on human rights could serve as the governing standard by which MNCs must abide.[202] Notably, the panel also asserted that MNCs might favor such an agreement, considering the growing demands for improved corporate behavior.[203] The recent popularity of public benefit corporations, in addition to several more traditional companies, which have made social consciousness a corporate objective,[204] suggests as much.[205] Some observers assert that a number of MNCs endeavor to improve global conditions but harbor fears of becoming competitively disadvantaged relative to those transgressing human rights.[206]

(Nov. 17, 2014), http://www.asser.nl/SportsLaw/Blog/post/the-new-olympic-host-city-contract-human-rights-a-la-carte-by-ryan-gauthier-phd-researcher-erasmus-university-rotterdam.

[201] Claes Cronstedt, Remarks on the Int'l Arb. Tribunal on Bus. & Hum. Rts. (Sept. 29, 2014).

[202] *Id.*

[203] *See* Claes Cronstedt et al., *An International Arbitration Tribunal on Business & Human Rights—Enhancing Access to Remedy* 10 (Bus. & Hum. Rts. Resource Centre, Working Paper No. 4, 2014) (suggesting that companies often respond to consumer bases that advocate for socially responsible corporate behaviors, that it may be necessary for certain companies to ratify meaningful human rights agreements, and that since some companies lose business to those companies transgressing human rights, such an agreement would reduce this competitive advantage).

[204] *See, e.g.*, *Oliberte's Factory in Addis Ababa, Ethiopia: The World's First Fair Trade Certified Footwear Manufacturing Factory,* OLIBERTE, http://www.oliberte.com/pages/fair-trade-certified (last visited Mar. 5, 2016) (explaining that the company's mission is to benefit workers in Ethiopia).

[205] *See generally* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 347–49 (2014) (outlining the history and emergence of social enterprise and public benefit corporations).

[206] *See* Travis Robert-Ritter, Note, *Achilles' Heel: How the ATS and NAFTA Have Combined To Create Substantial Tort Liability for US Corporations Operating*

MNCs might also enjoy a means to heal reputational damages levied from misdirected blame.[207] Therefore, considering the influence of the U.N. in tandem with the emerging social consciousness of both corporations and international audiences, the possibility of such an arbitral U.N. regime is becoming increasingly likely.

This Article suggests that the value of the Bangladesh Accord, IOC contracts, and other prior agreements are monumental since they offer powerful examples of how arbitration can be used to bind corporations to human rights. In fact, these international agreements strongly suggest that this trend is taking force. In light of the rapid emergence of socially conscious businesses and consumer bases,[208] other industries harboring the necessary political will and leverage are likely to advocate for a similar pact. Indeed, this was the case in the apparel industry landscape, where contempt for sweatshops and the buying power of universities pushed apparel leaders to abide by standards of conduct enforced by the New York Convention. Now, it seems that the international community is likewise responding by proposing a variety of means to promote human rights with arbitration.

IV. THE FUTURE OF HUMAN RIGHTS ARBITRATION

There are numerous means by which such an arbitral mechanism could be inserted into future contracts and agreements. Considering the recent growth of arbitration in human rights litigation, as well as its unfulfilled potential, this relationship may become the preferred method to promote socially responsible corporate behavior. However, there are also a number of obstacles suggesting that the merging of arbitration

in Mexico, 42 U. MIAMI INTER-AM. L. REV. 443, 444 (2011) (remarking that enforcing labor and environmental laws, for example, puts developing nations at a competitive disadvantage relative to countries that refuse to enforce such regulations).

[207] Cronstedt, *supra* note 201.

[208] *See generally* J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 6–14 (2011) (describing the rise of the public benefit corporation, which incorporates the dual objectives of creating profit for shareholders as well as achieving a public benefit that is oftentimes charitable in nature).

and human rights could face tension. The following discussion forecasts the future of human rights litigations, investigating possible applications as well as obstacles to implementation.

A. Possible Future Applications

The most promising mediums to promote human rights include BITs and other similar investment treaties;[209] this is because, pursuant to ICSID, jurisdiction over investment disputes already belongs to international arbitration.[210] More importantly, since sovereign nations ratify BITs, their consent effectively binds investor corporations without requiring MNCs to also assent.[211] This means that new BITs could be drafted, or current ones modified, to include human rights and arbitral terms. Already, ICSID panels have relied upon, and considered, human rights decisions from venues such as the European Court of Human Rights, but have lacked authority to hear allegations that an investor company violated human rights due to a lack of operative BIT language.[212] The key then is that the more influential nations must agree to only BITs with human rights clauses as a matter of course to initiate an international trend. This seems especially possible in light of certain BITs, including the EFTA-Singapore and Canada-Colombia free trade agreements, which already have symbolically incorporated such provisions.[213]

In fact, it appears that the necessary political will needed to interject human rights into commercial treaties is mounting.[214] For example, the United Nations Commission on International Trade Law ("UNCITRAL"), which is the current framework promoting international trade, uses a particularly respected form

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[209] *See, e.g.*, Patrick Dumberry & Gabrielle Dumas-Aubin, *How To Impose Human Rights Obligations on Corporations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs*, *in* Y.B. ON INT'L INVESTMENT L. & POL'Y 570–71, 600 (Karl P. Sauvant ed., 2011–12) (offering a proposal regarding how to include human rights into BITs).

[210] *Supra* notes 153–57 and accompanying text.

[211] *Id.*

[212] Fry, *supra* note 141, at 84 (noting the long history of human rights in investor arbitration and that "[a]nother clear case of such reliance on human rights jurisprudence is the [ICSID] tribunal in *Técnicas Medioambientales S.A. v. Mexico*").

[213] *See, e.g.*, Free Trade Agreement, EFTA-Sing., *supra* note 174.

[214] *See, e.g.*, Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 432–33 (2013) (providing a middle group approach to help incorporate human rights into investor treaties).

of arbitration.[215] The organization has received proposals to incorporate human rights into its general charter and also within the scope of its dispute resolution.[216] When considering that Canada and other nations are already ratifying these types of investor treaties,[217] a possibility exists that international commercial treaties could advance human rights using ICSID or UNCITRAL.

There are also a number of areas that could, or are likely to, generate industry-specific agreements mimicking the Bangladesh Accord. Since the primary catalyst of an effective international regime is a combination of outrage and buying power, the mineral extraction industry seems particularly amenable. Observers note that corporate human rights abuses are prominent in this field,[218] producing a number of Alien Tort Statute disputes and other human rights conflicts.[219] Perhaps the most infamous resource extraction dispute, *Aguinda v. Texaco, Inc.*,[220] involved accusations that Texaco environmentally contaminated isolated Ecuadorean villages for over thirty

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[215] For instance, the Bangladesh Accord expressly models its arbitration process after UNCITRAL's model. BANGLADESH ACCORD, *supra* note 16.

[216] Julia Salasky, *The New UNCITRAL Rules and Convention on Transparency*, LSE HUM. RTS. (Aug. 6, 2014), http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency (reporting that John Ruggie, the then Special Representative of the U.N. Secretary-General on Business and Human Rights, spoke to UNCITRAL about the reasons supporting, and the manner in which, the organization could incorporate human rights into the regime); Meetings Coverage, General Assembly, Draft Transparency Convention 'a Powerful Instrument' in Treaty-Based Arbitration United Nations International Trade Law Body Tells Sixth Committee, U.N. Press Release GA/L/3479 (Oct. 13, 2014) (indicating, as an example, the Permanent Observer from the Holy See suggested that UNCITRAL should consider defining the rule of law by incorporating human rights into the concept).

[217] Free Trade Agreement, Can.-Colom., *supra* note 176, at ch. 8.

[218] *See generally* Gare A. Smith, *An Introduction to Corporate Social Responsibility in the Extractive Industry*, 11 YALE HUM. RTS. & DEV. L.J. 1 (2008) (introducing a symposium detailing and discussing the corporate human rights issues that are rife in the extractive industry).

[219] Gregory G.A. Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 362 (1999) ("[A] few Alien Tort suits have been filed against [MNCs], primarily in extractive industries, for torts in violation of civil and political rights and, in some cases, of international environmental law.").

[220] 303 F.3d 470 (2d Cir. 2002).

years.[221] Another notable case is *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[222] where Sudanese villagers claimed a Canadian oil company conspired "to commit gross human rights violations, including extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and enslavement" with the Sudanese government.[223] "Collectively, plaintiffs claim[ed] that these activities amount[ed] to genocide."[224] Likewise, in *Sarei v. Rio Tinto*, *PLC*,[225] a conglomerate of international mining companies headquartered in London supplied the government of Papau New Guinea with helicopters and other militarized vehicles to suppress a local uprising, culminating in the St. Valentine's Day Massacre.[226] Then, in Papau New Guinea's ensuing war, the mining companies allegedly perpetrated additional human rights abuses including the acts of "prevent[ing] medicine, clothing and other essential supplies from reaching the people."[227] The Red Cross estimated that over 2,000 children died due to the lack of medicine and other vaccines.[228] American courts declined to hold the companies in *Talisman* and *Rio Tinto* liable, ruling that

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[221] Lucien J. Dhooge, Aguinda v. ChevronTexaco*: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 J. TRANSNAT'L L. & POL'Y 1, 2 (2009); Alexander Zaitchik, *Sludge Match: Inside Chevron's $9 Billion Legal Battle with Ecuadorean Villagers*, ROLLING STONE, (Aug. 28, 2014), http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828 (detailing the history and legal battle of Chevron's alleged atrocities committed in Ecuador).

[222] 582 F.3d 244 (2d Cir. 2009).

[223] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

[224] *Id.*

[225] 671 F.3d 736 (9th Cir. 2011), *cert. granted, judgment vacated*, 133 S. Ct. 1995 (2013).

[226] Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116, 1125–26 (C.D. Cal. 2002), *aff'd*, 456 F.3d 1069 (9th Cir. 2006), *opinion withdrawn and superseded on reh'g in part sub nom.* Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008), and *aff'd in part, vacated in part, rev'd in part sub nom.* Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), and *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008), and *aff'd in part, rev'd in part sub nom.* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011), *cert. granted, judgment vacated*, 133 S. Ct. 1995 (2013).

[227] *Id.* at 1126 (internal quotation mark omitted).

[228] *Id.*

sovereignty and jurisdictional issues necessitated their dismissal.[229] Indeed, this type of accountability is rarely imposed by courts of law.[230]

In light of the extractive industry's atrocities, nongovernmental organizations and concerned industry leaders have already enacted a few international agreements, ostensibly setting standards by which MNCs must follow. For instance, forty-nine countries have ratified the Extractive Industries Transparency Initiative[231] ("EITI Standard"). This agreement encourages signatories to increase industry openness, which some commentators suggest shames nations into abiding by acceptable standards.[232] The agreement binds only nation states, not MNCs, and has been criticized for lacking enforcement mechanisms that can obligate parties to adhere to their commitments.[233] Indeed, the EITI Standard omits an arbitration clause, or any similar mechanism, with the capacity to sanction transgressions. Similarly, the Organisation for Economic Co-operation and Development ("OECD") offers guidelines for responsible mineral extraction,[234] and the Kimberley Process counters the illegal diamond trade, but each fails to either punish

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[229] Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 260 (2d. Cir. 2009) (dismissing the plaintiffs' claim that Talisman Energy conspired to commit human rights violations because, in part, the plaintiffs had failed to establish that international law provides a cause of action for conspiracy); Sarei v. Rio Tinto, PLC, 722 F.3d 1109, 1110 (2013) (dismissing the complaint in light of the Supreme Court's holding in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), that the Alien Tort Statute is presumed to have effect only as far as the United States' sovereign borders).

[230] *See supra* notes 41–50 and accompanying text.

[231] *EITI Countries*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org/countries (last visited Mar. 5, 2016).

[232] Roya Ghafele & Angus Mercer, *'Not Starting in Sixth Gear': An Assessment of the U.N. Global Compact's Use of Soft Law as a Global Governance Structure for Corporate Social Responsibility*, 17 U.C. DAVIS J. INT'L L. & POL'Y 41, 51 (2010) (finding that the Extractive Industries Transparency Initiative's success is based upon "[n]aming and shaming" and that the companies that notably refuse to sign the agreement likely operate unsavory extractive industries, while those which voluntary comply with transparency receive reputational benefits).

[233] *Extracting Oil, Burying Data: Energy Companies Are Fighting Efforts To Reveal Payments to Governments*, ECONOMIST (Feb. 25, 2012), http://www.economist.com/node/21548214 (restating criticism that the EITI "lacks bite" and that companies in the extractive industry seem to praise the agreement because it is "toothless").

[234] OECD, *Stakeholder Engagement Due Diligence in Extractive Industries: Overview of Draft User Guide*, GLOBAL F. ON RESPONSIBLE BUS. CONDUCT 1 (2014).

violators or encourage compliance.[235] Thus, considering the concentration of extractable resources in the developing world, the propensity of these corporations to violate human rights has been troubling.[236]

But, it now appears that the extraction industry has become an especially ripe place for a human rights accord using international arbitration to resolve disputes. The problem has been the "race to the bottom."[237] So long as there is a lack of meaningful ways to enforce labor and environmental standards, developing nations will continue to compete for international business by declining to enforce such regulations,[238] though without doubt, few countries relish diminishing their quality of life to generate business.[239] Considering that developed nations—whose consumer bases are the primary purchasers of extractive resources—are forming a groundswell of support in light of notable atrocities, the demand for such an extractive industry agreement appears present.[240]

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[235] *See* Theo Leggett, *Global Witness Leaves Kimberley Process Diamond Scheme*, BBC NEWS (Dec. 5, 2011), http://www.bbc.co.uk/news/business-16027011 (recounting the decision by Global Witness to leave the Kimberley Process due to its ineffectiveness).

[236] *See* Tzeutschler, *supra* note 219, at 361–62.

[237] Chelsea M. Keeton, Comment, *Sharing Sustainability: Preventing International Environmental Injustice in an Age of Regulation*, 48 HOUS. L. REV. 1167, 1171–72 (2012) ("The theory realizes that, as regulation heightens, costs of production also increase. Therefore, countries with less environmental protections (usually developing countries) gain a comparative advantage in production costs over more-developed countries with stricter environmental standards and enforcement. Developing countries are thus deemed 'pollution havens' for 'dirty industries.' This occurrence is also known as the 'race to the bottom . . . .' " (footnotes omitted)).

[238] *Id.*

[239] *See* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1343–44 (2008) (asserting that developing nations better compete for global scarce resources by improving environmental and labor standards and that most nations are endeavoring to "race to the top," as opposed to the bottom, raising minimal standards of living).

[240] For example, publicized atrocities in the extractive industry by Canadian corporations prompted Canada to enact a free trade agreement with Colombia, authorizing annual reports detailing whether subsequent trade abides by, or transgresses, human rights. *See Annual Report Pursuant to the Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia*, EMBASSY OF CANADA TO COLOMBIA, http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/AnnualReport_RapportAnnuel-2013.aspx?lang=eng (last updated May 16, 2014); *see also Canada/Colombia Free Trade Deal: Meaningless Consultation Process Sells Human Rights Short*, AMNESTY INT'L (Mar. 24, 2014), http://www.amnesty.ca/news/news-rel

Another area concerns international water. Oftentimes, MNCs operating in the developing world privatize local supplies, harming regions already suffering from a dearth of available water.[241] In fact, MNCs often demand ownership of local waterways as a condition precedent to foreign direct investment, pitting the willingness of developing nations against each other to relinquish control over drinkable water.[242] The problem is that earmarking water for private industry reduces access and raises the cost of the remaining supplies, creating crises when local populations cannot access or afford what is left.[243] This industry also harms agriculture that depends upon the availability of water,[244] killing 2.2 million people each year, the majority of whom being children.[245] In fact, the International Labor Rights Forum circulated a list of the fourteen worst corporate human rights offenders; notably, two of the companies were identified for privatizing water in developing nations.[246] For example, subsidiaries of Coca-Cola allegedly harmed agriculture and

eases/canadacolombia-free-trade-deal-meaningless-consultation-process-sells-human (noting abuses by Canadian companies in the extractive industry, operating in the developing world).

[241] *See generally* Itzchak Kornfeld, *A Global Water Apartheid: From Revelation to Resolution*, 43 VAND. J. TRANSNAT'L L. 701 (2010) (providing a detailed treatment of the nature of, and problems arising from, the privatization of water by MNCs).

[242] *See* Jennifer Naegele, *What Is Wrong with Full-Fledged Water Privatization?*, 6 J.L. & SOC. CHALLENGES 99, 106 (2004) ("[C]ountless nations and municipalities face pressure to privatize. Nations facing financial crises are often the most vulnerable to these pressures: desperate to stop the drain on state coffers of a failing water infrastructure, states are persuaded to privatize by private bidders and international lending institutions promising long-term investment, lower costs and access for all." (footnote omitted)).

[243] *See* Kornfeld, *supra* note 241, at 710 (noting that in South Africa, the privatization of water has led to increased prices for water and that the populations that cannot afford the now more expensive water often turn to drinking water from lakes and rivers, increasing the rate by which South Africans are contracting cholera and other communicable diseases).

[244] Melina Williams, Note, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT'L L. 469, 469–70 (2007) (describing the need for drinkable water, its impact on agriculture, and the consequences rendered by water privatization).

[245] Naegele, *supra* note 242, at 99.

[246] *The 14 Worst Corporate Evildoers*, INT'L LAB. RTS. F. (Dec. 12, 2005), http://www.laborrights.org/in-the-news/14-worst-corporate-evildoers.

reduced clean water supplies in India,[247] mirroring allegations directed at the French corporation Suez-Lyonnaise Des Eaux for acts in Latin America[248] and South Africa.[249]

Contributing to this problem is the absence of a legal regime—effective or otherwise—governing water rights. While a handful of international human rights treaties mention access to water, including the Convention on the Rights of Children and the Convention on the Elimination of All Forms of Discrimination Against Women, none contemplates acts by MNCs.[250] Since corporations are rarely subject to international law, MNCs cannot violate an individual's right to water in the unlikely chance that such a standard even exists.[251] Thus, considering that only states might have a duty, albeit an unenforceable one, to provide clean drinking water, private actors are largely free to privatize supplies in developing countries despite the consequences.[252]

However, considering the buying power of western consumers and growing concerns raised by water privatization, the water industry seems to be an appropriate industry for regulation. Since water depletion is often caused by the bottled water industry—as exemplified by Coca-Cola and Suez—the primary purchasers are generally wealthy westerners. This has prompted the growth of socially conscious bottled water companies, indicating that political will and buying power is forming.[253] For example, Starbucks sells Ethos Water, whose corporate mission includes providing clean drinking water to developing countries.[254] It, thus, appears that the publicity

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[247] *Id.*

[248] *Id.*

[249] Kornfeld, *supra* note 241, at 710–11.

[250] *See* Williams, *supra* note 244, at 472.

[251] *Id.* at 488–89.

[252] Tara Pistilli, Note, *Women, Water & Privatization: A Human Rights-Based Approach to Global Water Governance*, 20 CARDOZO J.L. & GENDER 797, 800 (2014) (remarking that the United Nations Office of the High Commissioner for Human Rights is advocating for modern human rights regimes and scholarships to include access to drinking water into the framework).

[253] Brenda Keener, *Socially Conscious Bottled Water,* INSPIRED ECONOMIST, http://inspiredeconomist.com/2008/12/19/socially-conscious-bottled-water/ (last visited Mar. 5, 2016).

[254] *Ethos Water Fund*, STARBUCKS, http://www.starbucks.com/responsibility/community/ethos-water-fund (last visited Mar. 5, 2016) ("Ethos Water was created to help raise awareness about this terrible crisis and provide children with access to clean water. Every time you buy a bottle of Ethos Water, you contribute $.05US

surrounding water privatization has unsettled the water industry, which could further inspire an international agreement among general drink retailers or specified countries or regions.

B. Obstacles and Concerns Possibly Impeding Arbitration

However, there are a number of obstacles that could prevent arbitration from becoming more prominent in human rights litigation. The first concerns whether these tribunals will be willing or even adequate. Recall that arbitral tribunals have yet to rule in a manner promoting human rights.[255] This could be because arbitrators harbor doubts about whether they have the capacity or knowledge to resolve such disputes,[256] or they could even lack the desire to do so.[257] Especially considering that most international tribunals hear primarily commercial disputes, these misgivings may prove accurate. The Bangladesh Accord could alleviate these concerns by resolving its initial disputes effectively, though the agreement's arbitration mechanism has yet to be invoked.[258]

Another hindrance could stem from opposition mounted by influential parties. While voters, market bases, and human rights observers are likely to consent to more stringent human rights mechanisms, more may be needed. For instance, MNCs are likely to oppose efforts to create greater business liability,[259] and developed nations could follow suit.[260] Since developing nations seldom enforce environmental and labor standards as a means to attract foreign business and investment,[261] some are

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($.10CN in Canada) to the Ethos Water Fund . . . . So far more than $12.3 million has been granted to help support water, sanitation and hygiene education programs in water-stressed countries—benefiting more than 500,000 people around the world.").

[255] Peterson & Gray, *supra* note 19, at 5, 34–35 (noting that there are "no known" examples of an arbitral panel enforcing human rights).

[256] Email Interview with Michael D. Goldhaber, Senior International Correspondent, The American Lawyer (Feb. 27, 2015) (on file with author) (mentioning that international arbitrators are largely unfamiliar with human rights enforcement, considering they primary operate in other areas of law).

[257] *Id.*

[258] Skype Interview with Rob Wayss, *supra* note 188.

[259] *Id.*; Telephone Interview with Robert C. Thompson, *supra* note 192.

[260] Email Interview with Michael D. Goldhaber, *supra* note 256.

[261] *See supra* notes 237–39 and accompanying text.

likely to prefer the status quo. While dissenting parties are unlikely to obstruct bilateral and other smaller-scale agreements, they could frustrate greater international regimes.

The concept of human rights must also be better defined.[262] A frequent issue arising in alien tort statute cases concerns whether an act constitutes a human rights violation under international law.[263] Considering that most international agreements define human rights rather broadly and without much description, it can be difficult to determine which behaviors are proscribed. MNCs, in turn, are likely to contest contract terms creating liability without knowing whether an act transgresses the agreement.[264] Thus, for this proposed contract mechanism to become more popular, it is imperative that future accords incorporate a more nuanced definition of human rights.

In sum, the absence of prior accords merging arbitration and human rights is likely due to a perception that this development was impossible. However, upon the Bangladesh Accord becoming the first effective representative agreement, the possibility, or even likelihood, that other industries sharing critical similarities with the apparel industry—including political will and buying power—could produce comparable agreements. While this Article lists the mineral extraction and water industries as potential industries, other possibilities include the private security,[265] migrant agriculture,[266] and pharmaceutical

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[262] Email Interview with Michael D. Goldhaber, *supra* note 256.

[263] *See, e.g.*, Doe I v. Liu Qi, 349 F. Supp. 2d 1258, 1277 (N.D. Cal. 2004) (seeking a framework to determine which conducts violate the law of nations actionable under the Alien Tort Statute).

[264] Email Interview with Michael D. Goldhaber, *supra* note 256.

[265] *See, e.g.*, Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 417 (2013) ("As governments around the world increasingly turn to contractors to provide government services in the sphere of military and foreign affairs, significant problems of accountability arise. Traditional public governmental mechanisms of regulation and accountability, as well as accountability through litigation, are often inadequate or unavailable. International legal instruments similarly offer only minimal enforcement of human rights or other public-regarding norms, and in any event they may not always apply to nonstate actors."); Charis Kamphuis, *Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru*, 37 BROOK. J. INT'L L. 529, 529 (2012).

[266] *See, e.g.*, Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131, 182 (2006) ("[A]gribusiness transnational corporations exert an enormous amount of influence on land concentration and agricultural commodities prices. . . . [T]hey conspicuously control agricultural trade, processing and marketing. Global commodity markets are

industries,[267] all of which have been accused of violating human rights. That said, numerous obstacles could frustrate this development, including the malleable definition of human rights, the opposition of influential actors, and a lack of ability of political will from arbitral tribunals.

CONCLUSION

This Article seeks to accomplish both theoretical and practical goals. On a practical level, this Article endeavors to explain a highly counterintuitive legal development. MNCs are largely immune from tort lawsuits—including human rights abuses—committed in the developing world. This is because courts in developing countries are often unable or unwilling to hold MNCs accountable, and western courts cannot assert jurisdiction due to a number of sovereignty and jurisdictional issues. But despite this landscape, arbitration seems ready to become the preferred means to impose human rights standards on corporate actors. This development may revolutionize the manner in which MNCs conduct business abroad, considering that never before recently has there been a process to legally encourage or demand corporation respect human rights in the developing world.

Furthermore, the promise of arbitration in human rights litigation is no longer just theoretical. Without much notice, several recent international agreements incorporated both arbitration and human rights terms, though it was not until the Bangladesh Accord that an agreement actually used a structure

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increasingly dominated by fewer global [MNCs] that have the power to demand low producer prices, while keeping consumer prices high, in turn increasing their profit margins. A World Bank study found that since 1974, agricultural commodity prices have fallen while consumer prices have increased, suggesting unfair trade in world commodity markets." (footnote omitted)).

[267] *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009). After American doctors working for Pfizer sought to test an experimental drug on one group of Nigerian children while giving a second group a control drug, appellants filed suit. *Id.* "Appellants contend that Pfizer knew that Trovan had never previously been tested on children . . . . Pfizer allegedly concluded the experiment and left without administering follow-up care. According to the appellants, the tests caused the deaths of eleven children, five of whom had taken Trovan and six of whom had taken the lowered dose of Ceftriaxone, and left many others blind, deaf, paralyzed, or brain-damaged." *Id.*; *see also* Fazal Khan, *The Human Factor: Globalizing Ethical Standards in Drug Trials Through Market Exclusion*, 57 DEPAUL L. REV. 877, 880–82 (2008) (outlining the history of unethical drug testing, oftentimes constituting human rights abuses).

altering corporate behavior. Considering that MNCs are in general compliance with the agreement, it seems that this enforcement mechanism is a success.[268] Other organizations, groups, and industries are taking notice, foreshadowing a future in which private remedies become the most common means to promote human rights. For instance, the United Nations recently discussed proposals about a corporate human rights regime using arbitration as a means to make it legally binding. Likewise, Olympic host nation contracts now include human rights clauses, enforced by binding international arbitration. And, pursuant to the Bangladesh Accord, other socially conscious industries and enterprises are likely to leverage companies into similar accords and agreements. Accordingly, victims of human rights abuses may finally be able to seek relief using the least likely of mechanisms.

This Article also contributes to the arbitration literature. General perceptions of private venues conceive it as a tool for corporations to take advantage of less sophisticated parties. Included herein is a more nuanced discussion of both domestic and international arbitration, explaining why the latter is amenable to human rights litigation. It seems that due to the efficacy of the New York Convention, international arbitration probably represents the sole avenue which can incentivize corporations to adopt socially responsible behaviors in the developing world; this is in stark contrast to arbitration's popular reputation.

The theoretical contribution involves understanding why the arbitral process is superior to courts of law. Indeed, the perception is that courts of law lack the ingenuity or political will to draft laws creating international human rights standards. The reality is that the courts must avoid adjudicating these types of disputes because they may threaten another nation's sovereignty and, thus, spark international conflict. In other words, political and practical concerns make courts of law particularly poor venues to try human rights claims, as well as other foreign corporate torts. But, since arbitral tribunals are private actors—able to act without threatening the same

[268] Skype Interview with Rob Wayss, *supra* note 188.

international crises—they can hear certain disputes that courts may not. Thus, arbitral awards are, at times, superior to judicial rulings.