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# The Limits of Corporate Rights Under International Law

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# The Limits of Corporate Rights Under International Law

Julian G. Ku\*

## Abstract

*For most commentators, the acceptance of corporate rights under international human rights law is part of a broader push to recognize corporations as subjects of international law. As subjects, corporations would not only enjoy some international legal rights, but they would also be liable for many international legal duties. In prior work, I have criticized the effort to impose international legal duties on corporations in the context of the Alien Tort Statute, arguing that there is insufficient international consensus to treat corporations as subjects of international law. In this Article, I criticize the parallel effort to treat corporations as subjects that enjoy international legal rights. I do not argue that corporations can never hold legal rights under international law. But the manner in which corporations have acquired rights in certain bodies of international law does not support the goal of recognizing corporations as “subjects” of customary international law. For these reasons, business corporations generally enjoy rights under international law when such rights are explicitly authorized through formal lawmaking processes such as international treaties or national statutes. There is very little support for recognizing such rights under general customary international law. In some limited cases, treaties without plain language granting corporate rights might still be interpreted to do so, but only if such protection were deemed necessary to protect the rights of natural persons.*

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### I. INTRODUCTION

Few US Supreme Court decisions have sparked as much controversy in recent years as *Citizens United v Federal Election Commission*,<sup>1</sup> which extended free speech guarantees under the US Constitution to business corporations, unions, and other legally created entities. The decision in that case to give business corporations free speech rights has been decried by President Obama as well as by numerous scholars and activists.<sup>2</sup> Indeed, the decision has proved so unpopular that one US congressman has even suggested impeaching Chief

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<sup>1</sup> 130 S Ct 876 (2010).

<sup>2</sup> See, for example, Laurence H. Tribe, *What Should Congress Do About Citizens United?* (SCOTUSblog Jan 24, 2010), online at <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/> (visited Oct 13, 2011).

Justice Roberts.<sup>3</sup> It is safe to say that the protection of corporations through individual rights provisions has been, and remains, a controversial question for US constitutional lawyers.<sup>4</sup>

It is therefore curious that the protection of corporations under public international law, even international human rights law, has drawn relatively little attention and almost no debate among international lawyers. Corporations have long enjoyed protection under international laws protecting foreign investors. Similarly, courts in Europe have long recognized that corporations enjoy many protections under the European Convention on Human Rights (ECHR).<sup>5</sup> The few scholars who have considered the question of corporate rights under international law have almost uniformly endorsed extending this approach to other international human rights instruments, such as the International Convention on Civil and Political Rights (ICCPR).<sup>6</sup>

For most of these commentators, the acceptance of corporate rights under international human rights law is part of a broader push to recognize corporations as subjects of international law. As subjects, corporations would not only enjoy some international legal rights, but they would also be liable for many international legal duties.<sup>7</sup>

In prior work, I have criticized the effort to impose international legal duties on corporations in the context of the Alien Tort Statute (ATS), arguing

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<sup>3</sup> Robert Barnes, *Impeachment Calls Part of Life for a Supreme Court Justice, But Few Get Very Far*, Wash Post A19 (Oct 31, 2010); John Nichols, *Congressman Considers Move to Impeach Chief Justice John Roberts*, (The Nation Oct 25, 2010), online at <http://www.thenation.com/blog/155545/congressman-considers-move-impeach-chief-justice-john-roberts> (visited Oct 14, 2011).

<sup>4</sup> Criticism of corporate constitutional rights has a long pedigree in US academic literature. See, for example, Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L J 577 (1990) (discussing why the Supreme Court only recently granted Bill of Rights protections to corporations and focusing specifically on domestic corporations); Larry May, *The Morality of Groups* 144–55 (Notre Dame 1987) (arguing that corporations are not entitled to the same human rights protections as individuals under the US Constitution because corporations are not equivalent to human beings, using the example of *First National Bank v Bellotti*, 435 US 765 (1978), though not discussing multinational corporations in much detail).

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 UN Treaty Ser 221 (1953) (ECHR).

<sup>6</sup> International Covenant on Civil and Political Rights, 999 UN Treaty Ser 171 (1966) (ICCPR). Only a few scholars have directly considered the issue of corporations' rights. See, for example, Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford 2006); Lucien J. Dhooze, *Human Rights for Transnational Corporations*, 16 J Transnatl L & Poly 197 (2007); Michael K. Addo, *The Corporation as Victim of Human Rights Violations*, in Michael K. Addo, ed, *Human Rights Standards and the Responsibility of Transnational Corporations* 187 (Kluwer 1999).

<sup>7</sup> See, for example, Dhooze, 16 J Transnatl L & Poly at 200 (cited in note 6); Addo, *The Corporation as Victim* at 189 (cited in note 6).

that there is insufficient international consensus to treat corporations as subjects of international law.<sup>8</sup> In this Article, I criticize the parallel effort to treat corporations as subjects that enjoy international legal rights. I do not argue that corporations can never hold legal rights under international law. But the manner in which corporations have acquired rights in certain bodies of international law does not support the goal of recognizing corporations as “subjects” of customary international law.

Importantly, corporate rights have almost always been granted as a result of specific textual authorization in a particular treaty or convention. There is little if any basis for deriving such rights from customary law and state practice.

Second, the corporate rights movement elides serious practical and functional challenges. The most serious problem is the determination of whether passive investors or management may assert such rights on behalf of the corporation. But claims of corporate rights also face difficulties in the sheer diversity of national laws under which corporations are registered and operated. This diversity is further complicated by the rise of different kinds of business associations—including limited partnerships, limited liability corporations, trusts, non-profit institutions, and professional corporations—that may or may not have the kind of legal personality typically required for corporate rights to exist. These problems can be handled better by a process of treaty-making, which allows states to make variations for particular rights, corporate forms, and other circumstances.

For these reasons, this Article argues that business corporations generally enjoy rights under international law only when such rights are explicitly authorized through formal lawmaking processes such as international treaties or national statutes. There is very little support for recognizing such rights under general customary international law. In some limited cases, treaties without plain language granting corporate rights might still be interpreted to do so, but only if such protection was deemed necessary to protect the rights of natural persons.

Ironically, this formal and perhaps restrictive approach to corporate rights is best exemplified by the area of international law perceived as the most friendly to and protective of business corporations: international investment law. Corporate rights under international law seem to have originated in treaties granting diplomatic protection to foreign investors. This tradition of making explicit and specific references to the protection of corporations is uniformly reflected in modern investment protection treaties. By contrast, international human rights treaties rarely make explicit reference to corporations or legal persons. Yet it is under these human rights laws that corporations have

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<sup>8</sup> See generally Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 Va J Int L 353 (2011).

increasingly sought (and received) protection and where academic support for corporate rights has been increasing.

In Section II, I consider the academic literature on the status of corporations under international law and its relation to the recognition of corporate rights. In Section III.A, I turn to international law and trace the origins of international corporate rights in the law of diplomatic protection. In Section III.B, I trace the development of corporate rights under international investment treaties concluded after World War II. In Section IV, I then discuss the recognition of corporate rights under international human rights law.

I conclude in Section V that neither international investment law nor international human rights law supports the treatment of corporations as full, rights-holding subjects of general international law. Both bodies of law rely on formal textual indications to support corporate rights. Moreover, the development of corporate rights in these areas of law suggests that there are significant pragmatic and functional difficulties in recognizing corporate rights. The first relates to the difficulty of distinguishing between the rights of investors and of managers in a corporation. Second, I suggest that national laws creating corporations and other business associations vary too much to sustain an easy equivalence between corporations and natural persons. Both of these reasons counsel in favor of the formal approach and against the broader conception of full corporate subjecthood under international law.

## II. SUBJECTS, RIGHTS, AND DUTIES

### A. Subjects and International Law

It is axiomatic that traditional international law treats states as its exclusive subjects. In the view of this traditional conception, only states had international legal personality and the capability to assert rights and to bear duties under international law. As the Permanent Court of International Justice noted in the *Danzig Railway Officials* decision, “[i]t may be readily admitted that, according to a well-established principle of international law . . . an international agreement, cannot, as such, create direct rights and obligations for private individuals.”<sup>9</sup>

In this traditional conception, individual human beings and other non-state entities simply did not exist on the international plane. Their agreements with states were not governed by international law and they held no right to assert claims under international law. Only states, invoking their sovereign rights of diplomatic protection, could make claims on behalf of their nationals against

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<sup>9</sup> *Jurisdiction of the Courts of Danzig*, Advisory Opinion No 15, 1928 PCIJ (Ser B) No 15, 17 (Mar 3, 1928).

other states. On the other hand, non-state actors owed no duties under international law either. States could be held responsible under international law for the acts of their nationals, or at least those nationals acting on behalf of their states.

This clear but formalistic limitation on subjects began to break down in the twentieth century. According to Antonio Cassese, the first crack in the subjecthood wall occurred in the law of armed conflict, when individuals who violated the laws of war were held liable, regardless of their status as agents of their state.<sup>10</sup> Conversely, individual victims of war crimes acquired the “right” under international law *not* to suffer war crimes, regardless of their nationality.<sup>11</sup>

Eventually, the aftermath of World War II accelerated the rise of non-state players on the international plane. The three most important new characters in the “*dramatis personae*” were international organizations, individuals, and national liberation movements.<sup>12</sup> All of these new “subjects” of international law began gradually to acquire the power to interact with states on the international plane. For instance, in the *Reparations Case*, the International Court of Justice (ICJ) recognized that an international organization like the UN has the authority under international law to seek redress against states.<sup>13</sup>

Similarly, individuals won a wide variety of rights in a series of postwar international human rights treaties. International human rights law represented the most important conceptual shift in general international law. Not only did international human rights law allow individuals to invoke rights against certain kinds of treatment by foreign states, but such rights could be invoked against an individual’s own state as well.

The idea that an individual can have rights directly under international law, an idea dismissed in *Danzig Railway Officials*, had become conventional wisdom by the end of the twentieth century, even in areas of law outside of human rights. In the *LaGrand Case*,<sup>14</sup> the ICJ stated, without any discussion, that individuals are also subjects of international law for the purposes of invoking rights under the Vienna Convention on Consular Relations.<sup>15</sup>

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<sup>10</sup> Antonio Cassese, *International Law* 245–50 (Oxford 2002).

<sup>11</sup> *Id.* at 70.

<sup>12</sup> *Id.* at 168–85.

<sup>13</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ 174, 177–79 (Apr 11, 1949).

<sup>14</sup> *LaGrand Case (Ger v US)* 2001 ICJ 466 (June 27, 2001).

<sup>15</sup> Vienna Convention on Consular Relations, 21 UST 77, 596 UN Treaty Ser 261 (1963). *LaGrand Case*, 2001 ICJ at 494. See also Andrew Clapham, *The Role of the Individual in International Law*, 21 Euro J Intl L 25, 28 (2010).

To be sure, the importance of non-state actors to the international legal system continues to be debated. One leading authority, Ian Brownlie, has maintained that states remain the primary subject of international relations and that this would only change “if national entities, as political and legal systems, were absorbed in a world state.”<sup>16</sup> Moreover, even if non-state actors such as individuals have rights and duties, their ascendance to full “subjecthood” is not necessarily complete.<sup>17</sup>

Despite this skepticism, the status of non-state actors under international law and relations remains an area of substantial academic interest and public activity. In particular, focus has shifted beyond human beings, the “subjects” of international law in areas of armed conflict or human rights, and toward other non-state entities. As Philip Alston suggests, this includes “transnational corporations and other large-scale business entities, private voluntary groups such as churches, labour unions, and human rights groups, and [ ] international organizations including the United Nations itself, the World Bank, the International Monetary Fund, and the World Trade Organization.”<sup>18</sup>

## B. Business Corporations and International Law

Of these new characters on the international law stage, none have drawn more attention than transnational business corporations. The academic interest in the international status of corporations began as early as the 1970s, but accelerated in the 1990s with two important developments. First, corporations became subject to civil lawsuits in the United States under the Alien Tort Statute (ATS).<sup>19</sup> In these litigations, dozens of major corporations were alleged to have violated customary international law, usually under the theory that the corporation aided and abetted a government in the commission of humanitarian atrocities.<sup>20</sup>

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<sup>16</sup> Ian Brownlie, *Principles of Public International Law* 58 (Oxford 5th ed 1998), quoting Wolfgang Friedman, *The Changing Structure of International Law* 213 (Columbia 1964).

<sup>17</sup> Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in Philip Alston, ed, *Non-State Actors and Human Rights* 3, 19–20 (Oxford 2005).

<sup>18</sup> *Id* at 6.

<sup>19</sup> 62 Stat 934 (1948), codified at 28 USC §1350 (ATS). This provision was originally enacted as part of the Judiciary Act of 1789. In recent decades, it has been the basis for lawsuits in federal courts alleging violations of customary international law. See *Sosa v Alvarez-Machain*, 542 US 692, 712–13 (2004).

<sup>20</sup> The viability of these lawsuits against corporations has been rejected by one United States court. See *Kiobel v Royal Dutch Petroleum*, 621 F3d 111 (2d Cir 2010), cert granted *Kiobel v Royal Dutch Petroleum* (Oct 17, 2011), and upheld by three appeals courts, *Doe v ExxonMobil* (DC Cir 2011), *Flomo v Firestone* (7th Cir 2011), and *Sarei v Rio Tinto* (9th Cir 2011). The Supreme Court will decide



Second, the various organs of the UN began to facilitate a number of reports and studies on the duties and responsibilities of business corporations under international law. The two most noteworthy efforts are the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, released in 2003 by the UN Commission on Human Rights<sup>21</sup> and the *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, released in 2009 by the UN Secretary-General.<sup>22</sup> Both reports sought, in different ways, to promote norms and legal mechanisms to regulate the conduct of transnational corporations under international law. Although neither report purported to codify legal rules, both represented an important step in the process of considering whether and how to impose legal duties on corporations under international law.

The rise of corporate ATS litigation and the actions of the UN organs have been accompanied by a voluminous literature on corporate duties under international law. This literature has largely focused on the question of corporate duties and responsibilities.<sup>23</sup> As a starting point, most commentators observe that domestic regulation seems inadequate to regulate modern transnational corporations. International law therefore has become an important and necessary source of law to restrain and control them. Professor Jordan Paust, for instance, rejects the “pretense of exclusion” for all non-state actors, including business corporations.<sup>24</sup> Professor Ralph Steinhardt has conceptualized this whole trend as a new “*lex mercatoria*” of civil liability, national regulations, and

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the corporate liability issue in 2012. For a defense of this position, see generally Ku, 51 Va J Intl L 353 (cited in note 8).

<sup>21</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>22</sup> UN Human Rights Council, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/11/13 (2009).

<sup>23</sup> See, for example, Menno T. Kamminga and Saman Zia-Zarifi, eds, *Liability of Multinational Corporations Under International Law* (Kluwer 2000); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart 2004); Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002) (focusing on the human rights obligations of corporations and the avenues for enforcement and implementation of human rights norms with respect to corporations); Stephen Bottomley, *Corporations and Human Rights*, in Stephen Bottomley and David Kinley, eds, *Commercial Law and Human Rights* 47 (Ashgate 2002); Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 Colum J Transnatl L 131 (2003).

<sup>24</sup> Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 Va J Intl L 977, 987–89 (2011).

“soft” international norms.<sup>25</sup> Others have simply argued for requiring corporations to respect human rights law, or at least *jus cogens* norms, to the same degree as states must.<sup>26</sup>

A few commentators have also examined the related question of corporate rights under international law. Like the commentators on corporate duties, scholars have also been almost wholly in favor of corporate *rights* under international law.

Indeed, the main justification for corporate rights is closely linked to arguments in favor of corporate duties. Contemporary corporations operate on the international plane. They often engage in large-scale cross-border investments, often in partnership with sovereign governments. Given the tremendous economic size of many contemporary business corporations, their actions can be just as significant, if not more significant, than those of many sovereign governments. Because of modern corporations’ international scale and importance, scholars have argued that corporations deserve international legal personality.

Moreover, as a number of scholars have stressed, recognizing that corporations enjoy rights can have beneficial effects on the development of certain areas of international law. Professor Lucien Dhooge, for instance, has argued that “[c]oncurrent recognition of freedoms and guarantees imbues human rights law with enhanced standing. Such recognition is essential in convincing corporations to appreciate human rights and their responsibilities.”<sup>27</sup> Given the passion with which most scholars have argued in favor of imposing duties on corporations, it is not surprising that this justification for promoting corporate rights, especially under international human rights law, has drawn the most support. As Professor Harold Koh has written in an essay sharply criticizing opposition to the imposition of corporate duties, “[i]f corporations have rights . . . they must have duties” under international law.<sup>28</sup>

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<sup>25</sup> Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in Alston, ed, *Non-State Actors and Human Rights* at 177 (cited in note 17).

<sup>26</sup> See Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in Alston, ed, *Non-State Actors and Human Rights* at 235–40 (cited in note 17).

<sup>27</sup> Dhooge, 16 J Transnatl L & Poly at 200 (cited in note 6).

<sup>28</sup> Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J Intl Econ L 263, 265 (2004) (discussing several challenges to ATS corporate claims, particularly by conceptualizing the corporate person and the legal basis for liability in civil claims). See also Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 Brooklyn J Intl L 955, 958 (2008) (noting in the background section of the article that corporations enjoy rights within human rights treaties as well as under the North American Free Trade Agreement); Paust, 51 Va J Intl L at 985–99 (cited in note 24) (arguing that corporations have long been recognized as subjects of international law, carrying both duties and rights).

In sum, academic commentary has tentatively endorsed the recognition of corporations as subjects under international law. Such analysis is usually focused on questions of whether and in what ways corporations owe duties under international law. But there is also decided support for recognizing corporate rights under international law, especially under international human rights law. The main justification for such recognition lies in a slowly but discernibly growing consensus in favor of granting business corporations the status of “subjects” under general international law.

### III. THE ORIGINS OF INTERNATIONAL RIGHTS FOR CORPORATIONS

The tentative academic consensus in favor of corporate rights can point to some formal legal precedents for support. For instance, corporations have won direct rights in certain areas of international law. Most prominently, business corporations have long exercised rights granted under international investment treaties to arbitrate disputes with foreign sovereigns related to their investments and business operations. These rights originated in an earlier generation of claims settlement and “Friendship, Commerce, and Navigation” (FCN) treaties that recognized companies as a distinct set of individuals worthy of diplomatic protection. In this section, I trace the origins of corporate rights in this earlier generation of FCN treaties and then consider their further development in contemporary international investment treaties.

#### A. Business Corporations and the Law of Diplomatic Protection

Although business corporations have existed for hundreds of years, the modern corporation probably traces its origins back only to the mid-nineteenth century. Earlier corporations, such as those chartered by the British government to carry out state monopolies in trade or to establish colonies, were special dispensations from the government for specific purposes. In some ways, those corporations were understood to simply be privately financed arms of the state.<sup>29</sup>

By contrast, modern corporations are created through a formalistic registration process and are typically authorized to conduct any lawful business. Most importantly, modern business corporations are typically recognized as legal

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<sup>29</sup> See Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Personality* 5–6 (Oxford 1993); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U Chi L Rev 1441, 1452–53 (1987). See also Mark Bovens, *The Corporate Republic: Complex Organizations and Citizenship*, in Emiliós A. Christodoulidis, ed, *Communitarianism and Citizenship* 158, 160–64 (Ashgate 1998).

persons for the purposes of domestic law. As legal persons, modern business corporations can engage in legal transactions separately from their investors and managers.

This evolution in the status of corporations is reflected in their treatment in early treaties of the US. The first mention of “companies” or “corporations” can be found in FCN treaties. These agreements typically established preferential trading relationships to facilitate trade between nationals of the two states. Corporations were not at this time typically considered nationals needing protection, but more like agents acting on behalf of or under state authority.<sup>30</sup> As such agents of the states, their actions would be regulated to ensure they conformed to the preferential trading terms guaranteed by the treaties.<sup>31</sup>

The reconception of corporations as independent legal persons was confirmed in the US by the well-known Supreme Court decision *Trustees of Dartmouth College v Woodward*.<sup>32</sup> It is perhaps not surprising, therefore, that by the middle of the nineteenth century, treaties began to protect corporations in the same way that they sought to protect individual human beings. For instance, an 1853 treaty between the US and Great Britain explicitly recognized the ability of companies and corporations, as well as individuals, to bring claims against sovereigns due to injuries suffered during the War of 1812.

The High Contracting Parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of her Britannic Majesty, and all claims on the part of *corporations, companies*, or private individuals, subjects of her Britannic Majesty, upon the Government of the United States, which may have been presented to either government for its interposition with the other . . . and which yet remain unsettled, as well as any other such claims, . . . shall be referred to two commissioners.<sup>33</sup>

Corporations were no longer considered part of the government, but instead were seen as persons akin to private individuals. Like private individuals, corporations under the treaty were eligible for diplomatic protection by their

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<sup>30</sup> Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* 7–12 (Grotius 1987) (discussing diplomatic protection of corporations).

<sup>31</sup> See, for example, Treaty of Commerce and Navigation Between the United States of America, and his Majesty the Emperor of Austria, 8 Stat 398, Treaty Ser No 7 (1829); Treaty of Commerce and Navigation Between the United States of America, and his Majesty the King of Prussia, 8 Stat 378, Treaty Ser No 294 (1828); Convention of Friendship, Commerce, and Navigation, Between the United States of America, and the Free Hanseatic Republics of Lubeck, Bremen, and Hamburg, 8 Stat 366, Treaty Ser No 157 (1827).

<sup>32</sup> 17 US (4 Wheat) 518 (1819) (holding unconstitutional state interference with the contract of a corporation). See also Liam Séamus O'Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 Geo Wash L Rev 201, 206–16, 241–56 (2006) (discussing *Dartmouth College v Woodward*).

<sup>33</sup> Treaty with Great Britain, Art I, 10 Stat 988, Treaty Ser No 123 (1853) (emphasis added).

governments and could therefore present their claims to the commission. Similar language granting corporations protection under international law appeared in other treaties of this period.<sup>34</sup>

Eventually, US treaties began to address some of the complexities in defining companies and corporations. For instance, a 1911 treaty with Japan gave broad protection to “[l]imited-liability and other companies, and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either High Contracting party and domiciled in the territories of such Party.”<sup>35</sup> This language made clear that only corporations or associations organized under the domestic law of the state parties to the treaty could seek protection.

The solution to the problem of how to define corporate nationality was further developed during the first half of the twentieth century. The 1924 Special Claims Convention between the US and Mexico allowed claims for “damages suffered by any corporation company, association or partnership in which citizens of the US have or have had a substantial and bona fide interest.”<sup>36</sup> This extended the protection of the treaty to corporations organized under another country’s laws, but in which US investors held a substantial stake.

In any event, the pre-World War II practices of the US reflected the growing importance of corporations as subjects of protection. Treaties continued to single out corporations and other legal entities for protection specifically. Hence, in a series of agreements relating to the rights of nationals in East Africa, treaties specified that nationals of League of Nations members would enjoy rights and that such rights would “extend equally to companies and associations.”<sup>37</sup>

Shortly after World War II, the US began including boilerplate language in all of its FCN treaties, extending the protection of those treaties beyond natural

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<sup>34</sup> Convention between the United States of America and the Republic of Mexico, for the Adjustment of Claims, Art I, 15 Stat 679, Treaty Ser No 212 (1868); Convention with Peru, Art I, 16 Stat 751, Treaty Ser No 281 (1868); Convention between the United States of America and the Republic of Venezuela, Art I, 16 Stat 713, Treaty Ser No 370 (1866); Convention between the United States of America and the Republic of Ecuador, Art I, 13 Stat 631, Treaty Ser No 77 (1862).

<sup>35</sup> Treaty of Commerce and Navigation between the United States and Japan, Art VII, 37 Stat 1504, Treaty Ser No 558 (1911).

<sup>36</sup> Special Claims Convention between the United States and Mexico for the Settlement of Claims of American Citizens Arising from Revolutionary Acts in Mexico from November 20, 1910, to May 31, 1920, Art I, 43 Stat 1722, Treaty Ser No 676 (1923).

<sup>37</sup> Convention between the United States and Great Britain Relating to Rights in the Cameroons, Art 6, 44 Stat 2422, Treaty Ser No 743 (1925).

persons to “corporations and associations.”<sup>38</sup> The definition of this term became even more expansive, since it appeared to include partnerships, sole proprietorships, and even nonprofit organizations:

As used in this Treaty the term “corporations and associations” shall mean corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which have been or may hereafter be created or organized under the applicable laws and regulations.<sup>39</sup>

Such language eventually migrated to US treaties focusing on investment protection, as I will discuss below. For now, it is important to note that modern US treaty practice reflects a consistent trend of using explicit language to ensure the protection of corporations and offers diverse specifications regarding which corporate forms are to be eligible for protection.

## B. Business Corporations and International Investment Treaties

Although FCN treaties continued to remain important, the post-World War II era also saw the arrival of a new type of international agreement more tightly focused on questions of investment protection than on trade. Beginning with the 1959 German-Pakistani and German-Dominican Bilateral Investment Treaties (BITs),<sup>40</sup> such agreements have grown so ubiquitous that it remains difficult to estimate how many are in force today.<sup>41</sup>

BITs are primarily concerned with protecting the rights of foreign investors. A typical BIT includes:

guarantees of national treatment and most-favoured nation (MFN) treatment of investment, fair and equitable treatment, treatment in accordance with customary international law, a guarantee of prompt, adequate and effective compensation for expropriation, a right of free

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<sup>38</sup> See, for example, Treaty, Protocol, and Additional Protocol between the United States of America and Italy Respecting Friendship, Commerce and Navigation, Art II, 63 Stat 2255, TIAS No 1965 (1948) (US–Italy FCN); Treaty and Protocol between the United States of America and China Respecting Friendship, Commerce, and Navigation, Art III, 63 Stat 1299, TIAS No 1871 (1946) (US–China FCN).

<sup>39</sup> US–Italy FCN, Art II:1 (cited in note 38); US–China FCN, Art III:1 (cited in note 38).

<sup>40</sup> See Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 UC Davis J Intl L & Poly 157, 168–69 (2005).

<sup>41</sup> A recent estimate places the number of BITs at 2,600 in 2008. See UN Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* 33, UN Sales No E.09.II.D.15 (2009).

transfer of payments related to investment, and provisions for investor-State and State-State dispute resolution.<sup>42</sup>

What makes modern BITs different from FCNs and the claims settlement treaties are their provisions for investor-state arbitration. These enforcement mechanisms authorize individual investors to bring actions directly against sovereign states. In the traditional claims settlement and FCN treaties discussed earlier, individual claims would be brought by the person's home state, which would formally seek damages from the offending state. The home state could then compensate the individual claimant. In the BIT framework, the home state has no formal role at all. The dispute is directly between the foreign investor and the sovereign state and any compensation is paid directly to the individual. Therefore, in an important sense, BITs grant individual investors the right to assert claims directly against sovereign states and to enforce them in binding arbitration tribunals.

1. Convention on the settlement of international disputes between states and nationals of other states.

Although most investment treaties are bilateral, the Convention on the Settlement of International Disputes Between States and Nationals of Other States (Convention)<sup>43</sup> creates a dispute settlement center to facilitate and unify the dispute resolution processes of its state parties. Under the Convention, state parties agree to have their investment disputes resolved in an arbitration tribunal and to respect and enforce any judgments issued by the tribunals of the International Centre for Settlement of International Disputes (ICSID). Importantly, ICSID member states agree to submit to the jurisdiction of these tribunals when foreign investors bring claims.<sup>44</sup>

The classic ICSID dispute, therefore, involves a foreign investor (a non-state actor) bringing a claim against a sovereign state. In the modern era, many foreign investors naturally take the form of corporate entities. The ICSID state parties, in drafting the convention, considered this problem in some detail.

From the outset, there was no doubt that the Convention drafters intended to grant the tribunals jurisdiction over legal persons as well as natural persons.

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<sup>42</sup> UN Conference on Trade and Development, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward* 11–12, UN Doc UNCTAD/ITE/IIT/2007/3 (2008).

<sup>43</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), 575 UN Treaty Ser 159 (Convention).

<sup>44</sup> There are currently 157 ICSID Convention signatories, of which 147 have deposited instruments of ratification. List of Contracting States and Other Signatories of the Convention (ICSID May 5, 2011), [online](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main) at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> (visited Oct 14, 2011).

The earliest version of the Convention provision on jurisdiction made clear that jurisdiction existed over “legal disputes between a Contracting State . . . and a national of another Contracting State.”<sup>45</sup> A “national of a Contracting State” was defined in the first preliminary draft as “a person natural or juridical possessing the nationality of any Contracting State.” The provision went on to specify that the term “National” includes “(a) any company, which under the domestic law of that State is its national, and (b) any company in which the nationals of that State have a controlling interest.”<sup>46</sup> In this first attempt to define the scope of the term “juridical person,” the Convention drafters immediately stumbled upon some of the complexities of granting rights to corporations.

First, the phrase “juridical person” or “legal person” encompasses many different types of legal entities. Corporations and companies are only one subset of this group whose importance justified an explicit reference. But what exactly is a “company”? The first Convention draft adopted a broad definition by simply describing it as “any association of natural or juridical persons.”<sup>47</sup> This extremely broad definition would have probably encompassed any legal entity, including partnerships and nonprofits. Probably for that reason, it was eventually dropped.

Second, the drafters wrestled with the problem that any juridical person is a creature of the law of a particular state, and as such it may not be recognized under the laws of another state. Hence, a company might be a legal person under US law, but have no such status under foreign law. The Convention’s initial draft dealt with this problem by simply allowing ICSID jurisdiction regardless of whether the company’s legal personality was recognized under the law of the state against which a claim was made.

Finally, the drafters of the first version wrestled with the problem of determining the nationality of juridical persons. The provision specified that the juridical person must have the nationality of “another Contracting State” to win jurisdiction. The general problem facing the negotiators was that, for a typical company, the nationality of the investors who control it might be different from the nationality of the company itself. Yet if the nationality of a company was limited to the place of its incorporation, foreign investors could be unable to acquire ICSID jurisdiction when suing the state where the company they control is registered.

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<sup>45</sup> Preliminary Draft (Doc 24), Art 2, 2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID 1968) (ICSID Preliminary Draft).

<sup>46</sup> *Id.* at Art 10.

<sup>47</sup> *Id.*



The first draft simply permitted states party to have “agreed [to] treat[]” a juridical person as a “national of another Contracting State.”<sup>48</sup> After further debate and discussion, a small majority of states party pushed through language to specify that this exception to the nationality rule only exists if there is foreign control of the claimant corporation.<sup>49</sup> The second version thus bolstered the nationality requirement for juridical persons but allowed some flexibility in allowing otherwise ineligible juridical persons to acquire jurisdiction. This second version was eventually adopted in what became Article 25(2) of the Convention.<sup>50</sup>

This brief review of Convention drafting history reveals a few important assumptions held by the state parties negotiating the treaty. First, although it was abundantly clear that corporations and other legal persons would likely be the majority of investor-claimants in ICSID proceedings, the drafters nonetheless felt compelled to specify that such non-natural persons could indeed acquire jurisdiction. Second, in making clear that juridical persons could bring claims, the drafters had to deal with the variety of juridical persons and the diversity of laws that create and recognize them. Finally, and perhaps most importantly, the drafters faced the problem that in a modern corporation, there is often a substantial difference between the investors who control or manage a corporation and its formal legal identity.

## 2. Model BITs.

The Convention is only one example of how the complexity of granting corporations rights in investment treaties was resolved. The underlying bilateral investment agreements that typically refer disputes to ICSID also recognized the complexities and sometimes resolved them in different ways.

For instance, the 2008 version of the German Model Bilateral Investment Treaty does not limit the investors who may seek protection to juridical persons with legal personality. Rather, “any juridical person and any commercial or other company or association with or without legal personality” may qualify under the treaty.<sup>51</sup> This broader scope of protection, however, is limited to entities that are

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<sup>48</sup> First Draft (Doc 43), Art 30, 1 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID 1968).

<sup>49</sup> Revised Draft (Doc 123), Art 28, 2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID 1968).

<sup>50</sup> Convention, Art 25(2) (cited in note 43).

<sup>51</sup> Model Bilateral Investment Treaty of the Federal Republic of Germany, Art I(3) (2008), online at <http://italaw.com/documents/2008-GermanModelBIT.doc> (visited Oct 14, 2011).

“founded pursuant to the law of a Member State of the European Union . . . and . . . organized pursuant to the law” of Germany.<sup>52</sup>

Other states, however, take a different approach. Some, like France, require the existence of legal personality recognized under the laws of the contracting state as well as the entity’s having its principal place of business (or head office) in that state.<sup>53</sup> Others, like Colombia or Norway, have a similar approach but only require that the legal person have “substantial business activities” in the territory of the contracting party.<sup>54</sup>

The US Model BIT offers what is likely the broadest and most generous definition of a protected corporation:

“[E]nterprise” means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

“[E]nterprise of a Party” means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.<sup>55</sup>

This definition, which appears in the US Model BIT and in the North American Free Trade Agreement (NAFTA),<sup>56</sup> attempts to account for the diversity of legal entities. Hence the many organizational forms that receive protection under US treaties.

### 3. Summary.

Perhaps no area of international law has dealt with corporations as rights-holders more than international investment law. Building upon the tradition of claims settlement and FCN treaties, international investment treaties have specified that companies and other legal persons are eligible for protection in certain circumstances and under certain conditions. The different formulations

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<sup>52</sup> Id.

<sup>53</sup> Model Bilateral Investment Treaty of France, Art I (2006), online at <http://italaw.com/documents/ModelTreatyFrance2006.pdf> (visited Oct 14, 2011).

<sup>54</sup> Model Bilateral Investment Treaty of Colombia, Art I (2007), online at [http://italaw.com/documents/inv\\_model\\_bit\\_colombia.pdf](http://italaw.com/documents/inv_model_bit_colombia.pdf) (visited Sept 23, 2011); Model Bilateral Investment Treaty of Norway, Art 1 (2007), online at <http://italaw.com/documents/NorwayModel2007.doc> (visited Nov 10, 2011).

<sup>55</sup> Model Bilateral Investment Treaty of the United States, Art I (2004), online at <http://italaw.com/documents/USmodelbitnov04.pdf> (Oct 14, 2011); North American Free Trade Agreement (1992), Art 201, 32 ILM 289 (1993) (NAFTA). See also Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Ch 8 Art II (2009), online at <http://www.dfat.gov.au/fta/aanzfta/aanzfta.PDF> (visited Oct 14, 2011).

<sup>56</sup> NAFTA (cited in note 55).

they have taken reflect some of the complexities of granting corporations and other legal entities rights. It is worth noting that resolving such complications has not been, by and large, the product of judicial interpretation or scholarly development. Rather, the rights of corporations generally have been drawn from formal treaty provisions.

#### IV. CORPORATE RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

International human rights law has also recognized the rights of corporations in some circumstances. But the manner in which it has done so is quite different from the development of corporate rights under international investment law. Absent the type of textual authorization found in international investment treaties, corporate rights have developed in significantly different ways.

##### A. European Convention on Human Rights

Without a doubt, the acceptance of corporate rights under international human rights law is most apparent in the jurisprudence of the European Court of Human Rights (Strasbourg Court) in its interpretation of the ECHR. Indeed, no other international tribunal authorized to interpret human rights law has protected corporate rights in a similar fashion, and few have even considered the possibility. For this reason, the ECHR is the best and most illustrative example of how contemporary human rights law has been invoked to protect corporations.<sup>57</sup>

For our purposes, it is useful to compare the development of corporate rights under the ECHR with the development of corporate rights under international investment law. Although the ECHR does have some textual basis for protecting corporate rights, that textual guidance is not quite as clear or as detailed as that typically found in international investment treaties. For this reason, judicial interpretations have proven to be key in the development of corporate rights under the ECHR.

##### 1. The textual basis for corporate rights under the ECHR.

The main substantive provisions of the ECHR do not specifically refer to legal or natural persons. Rather, they refer either to “persons” or simply to “everyone.” For instance, Article 1 requires states to “secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this

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<sup>57</sup> See Emberland, *The Human Rights of Companies* 2–4 (cited in note 6).

Convention.”<sup>58</sup> Other articles follow this language. Article 2 holds that “[e]veryone’s right to life shall be protected by law.”<sup>59</sup> Sometimes, the protections are phrased in the negative. Article 3, for instance, states, “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>60</sup> Still other provisions are phrased without any specific object of protection. Article 14’s non-discrimination requirement simply holds that the “enjoyment of the rights” of the ECHR “shall be secured without discrimination.”<sup>61</sup>

Article 10 does provide some textual basis for protecting certain kinds of business enterprises, at least by implication. In the course of ensuring that “everyone has the right to freedom of expression,” Article 10(1)’s last sentence ensures that such a right does not prevent states from licensing “broadcasting, television or cinema enterprises.”<sup>62</sup> If such media enterprises had no protection under Article 10, it seems unlikely that the last sentence carving out licensing would have been necessary.

One other provision of the Convention explicitly refers to the difference between natural and legal persons. Article 1 in Protocol 1 of the Convention states, “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”<sup>63</sup> It is perhaps unsurprising that the only provision of the ECHR to specify protection for legal persons is the legal right most closely linked to international investment law. Although phrased somewhat differently, the ECHR’s protection of “possessions” in Article 1 is analogous to the standard BIT provision protecting investor property against expropriation.

There is a third provision that does provide substantial textual support for the inclusion of companies within the ECHR. In Article 25, the ECHR grants the European Commission (and later the Court in amended Article 34) the right to receive petitions from “from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention.”<sup>64</sup> Although not explicitly granting a substantive right to legal entities, it plainly suggests that the

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<sup>58</sup> ECHR, Art 1 (cited in note 5) (emphasis added).

<sup>59</sup> *Id.* at Art 2.

<sup>60</sup> *Id.* at Art 3.

<sup>61</sup> *Id.* at Art 14.

<sup>62</sup> ECHR, Art 10 (cited in note 5).

<sup>63</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art 1, 213 UN Treaty Ser 262 (1952).

<sup>64</sup> ECHR, Arts 25, 34 (cited in note 5).

drafters expected petitions from victims seeking enforcement of the Convention to come from legal entities as well as from individuals.

In sum, two substantive provisions of the ECHR specifically refer to legal entities, but only one explicitly guarantees their inclusion within the Convention's protection. The other substantive provisions are generally phrased and do not specifically indicate an intent by the ECHR's drafters one way or the other with respect to legal persons. The inclusion of "non-governmental organizations" within the list of entities authorized to bring enforcement petitions under the ECHR does provide substantial textual support for the view that corporate entities should have rights under the agreement. Still, a strict reading of the text might limit the protection of legal entities to only a few or even a single substantive provision.

## 2. The jurisprudential development of corporate rights under the ECHR.

The Strasbourg Court has not hesitated to extend ECHR protections to corporations and other legal entities. Indeed, it has largely done so without bothering to offer extensive formal justifications.

For instance, in the 1984 decision *A v Austria*,<sup>65</sup> the Court noted simply that the "freedom of assembly under Art. 11 . . . can be exercised [ ] by the organizer of a meeting, even if it should be a legal person."<sup>66</sup> Such analysis was uncontroversial and apparently uncontested within the Court, even though Article 11 does not make any specific reference to legal entities or legal persons.

Similarly, the Court had little difficulty in finding that corporations, especially media corporations, enjoy the right of free expression under Article 10. In *Autronic AG v Switzerland*,<sup>67</sup> the Court opined:

[N]either Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article applies to "everyone", whether natural or legal persons.<sup>68</sup>

The Court went on to note that it had allowed similar claims by companies under Article 10 before without controversy, or even discussion.<sup>69</sup> Indeed, the idea that companies and other entities qualify for protection under the ECHR

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<sup>65</sup> App No 9905/82, 7 Eur HR Rep 137 (1985).

<sup>66</sup> Id at 138.

<sup>67</sup> App No 12726/87, 12 Eur HR Rep 485 (1990).

<sup>68</sup> Id at 499 (citations omitted).

<sup>69</sup> See *Groppera Radio AG v Switzerland*, App No 10890/84, 12 Eur Ct HR 321 (1990); *Markt Intern Verlag GmbH & Beermann v Germany*, App No 10572/83, 12 Eur HR Rep 161 (1989); *Sunday Times v United Kingdom*, App No 6538/74, 2 Eur HR Rep 245 (1979).

has been so accepted within the Strasbourg court's jurisprudence that there is literally no discussion on the question in court opinions. Even a leading commentator notes that the Court has "not developed a corporate theory for the ECHR."<sup>70</sup>

That being said, the ECHR has confronted at least one difficult problem that has also faced international investment law. In many circumstances, shareholders of a corporation have sought to assert rights even though the "victim," for the purposes of Article 34, is the corporate entity. In other words, the Court has been asked to "pierce the corporate veil" to allow shareholders to assert rights on behalf of the corporation.

The division of power between the shareholders and the corporation is similar to the problem Convention negotiators considered when determining whether foreign-controlled corporations could invoke jurisdiction. Unlike most international investment treaties, however, there is no guidance in the text of the ECHR itself on how to resolve this problem. In *Agrotexim v Greece*,<sup>71</sup> the Court refused to accept an application by six companies who were shareholders in another corporation that had suffered liquidation by the Greek government. The Court dismissed the application, finding that "disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation."<sup>72</sup>

The scope of *Agrotexim* has been questioned, since it is not clear whether it applies outside the context of Protocol 1 of Article 1. And it explicitly disagreed with the view of the European Commission, which argued that both the shareholders and the corporation should be able to bring petitions. But *Agrotexim* appears to continue to be followed, and the ECHR generally disallows "veil piercing" to benefit shareholders except in extraordinary circumstances.<sup>73</sup>

In sum, ECHR jurisprudence provides the richest example of corporate protection under international human rights law. The textual basis for corporate rights under the ECHR is fairly robust, and, as I will argue, unique compared to other international treaties. In any event, the modern interpretation of the ECHR has accepted corporate rights without any serious debate and has even

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<sup>70</sup> Emberland, *The Human Rights of Companies* at 66 (cited in note 6).

<sup>71</sup> App No 14807/89, 21 Eur HR Rep 250 (1996).

<sup>72</sup> Id at 284.

<sup>73</sup> See, for example, *GJ v Luxembourg*, App No 21156/93, 36 Eur HR Rep 750 (2003) (finding that extraordinary circumstances were met when a company was undergoing liquidation). See also Emberland, *The Human Rights of Companies* at 78–79 (cited in note 6).

begun to wrestle with some of the difficult questions regarding corporate shareholders already encountered by international investment treaties.

### 3. Other international human rights treaties.

As I noted earlier, the ECHR is the only international human rights treaty system that has explicitly recognized corporate rights. The other leading international human rights treaties have not followed the lead of the European Court of Human Rights.

Unlike the ECHR, the ICCPR does not have any specific references to legal persons or legal entities. In fact, several provisions of the ICCPR make reference to human beings in particular. Thus, Article 6 declares that, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."<sup>74</sup> Article 3's equal rights provisions similarly specify the "equal right[s] of men and women."<sup>75</sup>

Still, the language of some provisions does provide room for corporate protection. Article 19, for instance, protects the right of "everyone" to freedom of expression.<sup>76</sup> In at least one report on this provision, the Human Rights Committee (the Committee) of the ICCPR has argued that some corporate rights may be inextricably linked to an individual human being's right so as to qualify for protection: "The Committee notes that the Covenant rights, which are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person."<sup>77</sup>

On the other hand, unlike the ECHR, the ICCPR system for hearing petitions is limited to individuals only.<sup>78</sup> Thus, although certain ICCPR rights might protect corporate entities, no petitions can be raised by corporate entities in the ICCPR system. The American Convention on Human Rights (ACHR) allows collective entities to bring petitions, but only on behalf of a natural person.<sup>79</sup>

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<sup>74</sup> ICCPR, Art 6 (cited in note 6).

<sup>75</sup> *Id.* at Art 3.

<sup>76</sup> *Id.* at Art 19.

<sup>77</sup> UN Human Rights Committee, Communication No 455/1991, UN Doc CCPR/C/51/D/455/1991 at 8 (1994).

<sup>78</sup> UN Human Rights Committee, *A Newspaper Publishing Company v Trinidad and Tobago*, Communication No 360/1989, UN Doc Supp No 40 (44/A/40) at 310 (1989).

<sup>79</sup> See *Tabacalera Boquerón S.A v Paraguay*, OEA/Ser.L/V/II.98, Doc 6, Inter-Am CHR 225 (1997).

## V. THE LIMITS OF CORPORATE RIGHTS UNDER INTERNATIONAL LAW

As the prior discussion indicates, corporations have won rights under both international investment treaties and international human rights treaties. In this section, I argue that the development of corporate rights under these two bodies of law does not support treating corporations as full “subjects” of international law. Moreover, these bodies of law reveal some important complexities raised by the provision of corporate rights. Such complexities include the diversity of corporate forms and the division between investors and management. Resolving such complexities requires policy choices by international lawmakers for which there seems to be little consensus under international law.

### A. Subjects and Rights

Although corporate rights have developed in both international investment law and international human rights law, the manner of their development offers limited support for corporate rights under international law.

As I discussed in Section III, the protection of corporations in international law coincided with the rise of independent corporations during the nineteenth century. Prior to the postwar BITs, corporations began to appear in treaties as subjects of protection alongside natural persons.

Importantly, the rights granted to corporations were not typically recognized until they were explicitly added to the text of treaties. Early claims settlement treaties allowed states to offer diplomatic protection to their nationals. Later, companies and corporations were added and came within the scope of a sovereign’s diplomatic protection.

International human rights law has a more complicated relationship with corporate rights. Unlike international investment treaties, the protection of corporate rights varies depending on the type of international human rights instrument. The only system that has fully embraced corporate rights is the ECHR. Unlike the international investment treaties, the basis of corporate rights under international human rights law has not been based entirely on explicit textual recognition. Although there is a sound textual basis for some corporate protection, the Strasbourg Court has also inferred corporate rights for some substantive provisions that lack the same textual basis.

Still, it is worth noting that only the ECHR system actually recognizes corporate rights, in contrast to all of the other international human rights treaty systems. The difference between the ECHR and other international agreements can be explained most easily by the lack of textual support in treaties like the ICCPR or the ACHR for corporate rights. This disparate treatment is suggestive



of the limited acceptance of corporate rights within international human rights law.

## B. The Practical Complexities of Granting Corporate Rights

The limited development of corporate rights under international law may also be explained in part by some of the complexities that must be overcome to recognize such rights. As both international investment and international human rights tribunals have realized, granting corporate rights requires the resolution of issues unique to corporations. There are two practical issues that any system of corporate rights must resolve.

### 1. The separation of ownership and control.

One problem that has been repeatedly faced by international tribunals when considering corporate rights has been the division of rights and interests between a corporation's shareholders and its management. This fundamental problem was considered in great detail by the International Court of Justice (ICJ) in the well-known *Barcelona Traction Case*.<sup>80</sup> In that case, the ICJ held that the nationality of the company, for the purposes of diplomatic protection, should be determined by the place of incorporation. The nationality of the shareholders, even that of the majority of the shareholders, could not determine the nationality of the corporation.<sup>81</sup>

As noted above, this approach has been followed by the European Court of Human Rights. The *Barcelona Traction* court, however, did leave itself the possibility of ignoring the corporate form in some extraordinary circumstances.<sup>82</sup> And many international investment law tribunals have seemed more willing to disregard the corporate form in favor of the shareholders' nationality when determining corporate nationality for the purposes of jurisdiction.

For instance, one ICSID tribunal allowed such a shareholder group to satisfy the tribunal's jurisdiction requirements, finding that there was nothing in "general international law" prohibiting treaties that allowed shareholders to bring claims, even shareholders who held only minority and noncontrolling stakes.<sup>83</sup> In an earlier proceeding of the same dispute, the tribunal held that recognizing shareholders' rights to bring a claim made sense so as to not have

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<sup>80</sup> *Case Concerning Barcelona Traction, Light & Power Co (Belg v Spa)*, 1970 ICJ 3 (Feb 5, 1970).

<sup>81</sup> *Id* at 38.

<sup>82</sup> *Id* at 39–40. Indeed, it appears to have done so *sub silentio* in a later judgment involving US shareholders in an Italian corporation. See *Case Concerning Elettronica Sicula S.p.A (ELSI) (US v Ita)*, 1989 ICJ 15 (July 20, 1989).

<sup>83</sup> *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Decision of Sept 25, 2007, 46 ILM 1136, 1144–45.

the corporate personality interfering with the protection of the real interests associated with the investment.<sup>84</sup> Other tribunals have reached similar results.<sup>85</sup>

## 2. Diversity of corporate forms.

Unlike humans, corporations and other legal entities come in various shapes and sizes for legal purposes. Within US domestic law, for instance, corporate entities might take the form of a standard corporation, a limited liability corporation, limited liability partnerships, limited partnerships, trusts, non-profit associations, sole proprietorships or other entities. Moreover, these forms may differ from state to state.

Such diversity is only compounded in the international context. Here, the structure and diversity of corporate forms is even greater. Globally, there are civil law and common law systems, post-socialist and developing states, among other varieties. Such diversity poses a problem when granting rights protection. It is not an insoluble problem, however. For instance, as we have seen, US BITs recognize a variety of corporate forms. The ECHR has even broader language recognizing petitions from any non-governmental organization.

Any general rule of international law recognizing corporate rights will have to determine what kind of legal persons can hold these rights. As we have seen, different areas of law have developed different approaches to resolving this question. But no uniform approach has emerged, further confirming the challenges facing a general rule favoring protection of corporate rights.

## VI. CONCLUSION

It has almost become conventional wisdom among international human rights scholars that corporations should be treated as full subjects under international law. This view has developed largely from the extensive academic literature examining corporate duties under international law. The argument for corporate duties is stronger if corporations can be considered full subjects of international law. But if they are subjects, then corporations should enjoy rights under international law as well.

This Article offers reasons to doubt the assumption that corporations have already achieved rights under general international law. Corporate rights under international law first emerged indirectly when states included corporate entities as nationals entitled to diplomatic protection in treaties. Corporations never

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<sup>84</sup> *CMS Gas Transmission Co v Republic of Argentina*, ICSID Case No ARB/01/8, Decision of July 17, 2003, 42 ILM 788, 794–95.

<sup>85</sup> See *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award of Mar 15, 2002, 41 ILM 867, 870–71; *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Proceedings of May 25, 1999, 41 ILM 881, 888–89.

achieved direct rights under international law until the postwar development of international investment law. Corporate rights were granted in such treaties by specific textual references and therefore never generated much controversy.

The story is similar when one looks to international human rights law. Only the ECHR has been interpreted to allow corporations to invoke rights, while other treaty systems have largely rejected the idea. Even the ECHR, however, bases most of its decisions to recognize corporate rights on specific textual provisions.

In any event, granting corporate rights requires policymakers to resolve numerous pragmatic and functional issues. Chief among these is dealing with the diversity of corporate forms and the separation of ownership and control, not only within a particular legal system but also among different legal systems. The BIT system, which contains by far the most detailed treatment of these and other questions, has not achieved a uniformly accepted approach on either of these issues.

For these reasons, there is little basis for the claim that corporations should presumptively bear rights under international law. In fact, such rights have emerged carefully, and largely with firm textual foundations in treaty agreements. Corporations may one day achieve subjecthood and presumptively exercise their rights on the international stage, but that day is still far off.