Corporations in International Law

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A. Notion of the Corporation

1. The legal notion of a corporation refers to an entity that is legally separate from its members, and which enjoys its own personality and can hold rights and obligations in its own name. In this, a corporation is distinct from a partnership in which the members are jointly and severally liable for the acts of the partnership entity. The most widespread use of the corporate form is in relation to the establishment and operation of commercial enterprises. Indeed, the corporation of company law is the most common type of corporation, though the corporate entity is also found in other fields of law such as, for example, local government law where it forms the basis for the founding of municipal corporations, or in relation to international law, as the basis for the intergovernmental organization or the inter-State corporation (see further Seidl-Hohenveldern Part II).

2. In relation to company law, the corporate legal form consists of five main elements: legal personality, transferable shares, limited liability, centralized management, and investor ownership (Kraakman and others 5–15). The act of incorporation creates a legal person separate from the owners and managers of the underlying enterprise. This allows for the creation of a separate capital fund to be applied for the purposes of the corporation, in that the corporation acquires the right to own its own assets, to enter into contracts in its own name, to pledge its assets to creditors, and to be held liable for its actions. Separate legal personality for corporations has been recognized as a concept of international law by the → International Court of Justice (ICJ) both in the → Barcelona Traction Case (1970) (at paras 38–47) and the → Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo) (2007) (at para. 61).

3. Historically, the first types of enterprises to carry the name ‘company’ were the chartered trading companies of the 16th and 17th centuries (Carr; Gower; Schmitthoff). Here the act of incorporation served to provide a trading monopoly for the founders. It also granted them governmental power over the foreign trading territory in question without which they could risk criminal prosecution under the law of conspiracy (Tindall 2). This type of organization can be seen as the forerunner of modern corporations to the extent that it involves the creation of a legal entity separate from its membership. However, it is an entity designed to regulate trade and to confer public law powers upon the enterprise, so that it could perform governmental functions in the foreign trading territory, and so is a hybrid organization displaying both commercial and constitutional characteristics. This compounding of private and public law issues is a feature of early chartered trading corporations to the extent that it involves the creation of a legal entity separate from its membership. However, it is an entity designed to regulate trade and to confer public law powers upon the enterprise, so that it could perform governmental functions in the foreign trading territory, and so is a hybrid organization displaying both commercial and constitutional characteristics. This compounding of private and public law issues is a feature of early chartered trading corporations that may have some modern significance as more investments are made through → public private partnerships[5] (‘PPPs’). PPPs shift certain public functions, such as the provision of utility services, to a private entity formed of a joint venture between private foreign investors and the host country authorities. This is distinct from a purely commercial enterprise in that its functions involve more than just the making of a commercial profit but also the proper provision of public services. Such entities may be seen as ‘compound corporations’ governed by both private and public law.
Under company law the corporate form is a device for the raising and administration of capital required for the investment that the corporation has been set up to undertake. It is not therefore analogous to a ‘person’ as some theories mistakenly assert. Indeed there is much confusion in legal doctrine between the legal entity and the underlying economic enterprise (Foster). Confusing the legal ‘entity’ with the underlying ‘enterprise’ can lead to unjust results. For example, the principle of limited liability—which was developed to protect natural persons who invested in companies from personal ruin, which was a real possibility were they to be held accountable for all the debts of the company—has now allowed corporate groups to avoid legal liability in situations where a natural person would undoubtedly be liable. Thus, where a person has been injured as a result of the negligence of a subsidiary, they will be unable to sue the parent, unless they can show that the latter was directly involved in the acts leading to the injury. Normally this will be very hard to prove as the parent will argue that while it owns the subsidiary it does not control its daily actions. The parent will, in all probability, avoid direct liability and will be insulated by corporate separation against claims of indirect liability, even though the underlying enterprise undertaken by the parent and subsidiary is economically united. By this means, the parent externalizes the costs of running the unified enterprise by use of formal legal rules and shifts the risk of loss onto the injured person who may not be in a position to cover that risk as well as the corporate group (see Hansmann and Kraakman). Such an approach may hamper the development of effective rules of corporate liability for violations of international law. For example liability for violations of international environmental law (→ Liability for Environmental Damage) or → human rights law could be defended on the ground of corporate separation, leading to the avoidance of direct parent company liability for such infringements by subsidiaries, and to the possibility of avoidance of liability to suit on the basis of the jurisdictional implications of corporate separation (see further Muchlinski [2007] 530).

The development of the law relating to corporations under international law is taking place in a changing economic environment. The rise of international business as an aspect of → globalization has created large transnational business chains controlled by multinational enterprises (‘MNEs’). These may be organized within the MNE group itself, consisting of linked affiliates controlled by their parent company, or they may be composed of economically integrated but legally separate entities. In either case the legal notion of the corporation will have a role to play in the structuring of the underlying enterprise and the risks it carries. Traditionally, the notion of the corporation has been located within the order of municipal law. However the transnational character of modern corporations has raised questions as to whether international law also should develop rules pertaining to corporate actors. As will be shown in paras 6–10 below, historically this has been a restricted subject with few radical developments. However, more recently, new sets of claims have arisen relating to the accountability and liability of corporations for acts that may infringe international law. Equally, calls for a transparent, stable, and predictable investment environment have given rise to specialized rules of international law that offer protection to the assets of corporate investors among others.

B. Historical Evolution of International Rules on Corporations

The historical evolution of international rules on corporations can be approached from two perspectives. Initially, a strictly doctrinal and formalistic approach characterized international law, whereby corporations were not treated as → subjects of international law and so their claims would be limited to the field of → diplomatic protection. More recently, a more policy oriented approach has developed which allows for a measure of corporate rights and obligations under international law. The traditional formal approach has left a legacy of certain binding customary rules relating primarily to the admissibility of claims for diplomatic protection of corporations, while the latter has been focused on newer treaty based regimes and upon → soft law instruments, and has led to developments in relation to the protection of foreign investors and their investments (→ Investments International Protection), human rights accountability for corporations, and to new environmental liability rules that apply to corporations either indirectly through national law or directly through treaty obligations. In addition, the criminal liability of corporations under international law has been accepted for certain egregious violations of international crimes, such as → war crimes or → crimes against humanity, though corporations have been excluded from the jurisdiction of the → International Criminal Court (ICC) (see paras 48–50 below).

The traditional doctrinal approach begins from the position that corporations of municipal law do not have international legal personality (Brownlie 66). Secondly, the nationality of a corporation is determined by the applicable municipal law. Such attribution of corporate nationality is significant because it may provide a reason for conferring certain rights under international law to the corporation under treaties which pertain only to nationals of the contracting States parties (Brownlie 418–21). Thus, a corporation that possesses the nationality of a State party to a Treaty of Friendship, Commerce and Navigation (‘FCN’; → Treaties of Friendship, Commerce and Navigation), or to a Bilateral Investment Treaty (‘BIT’) (→ Investments, Bilateral Treaties) will acquire rights under that treaty. Furthermore, corporations may enjoy certain rights of protection under human rights treaties. Thus, for example, corporations have successfully brought claims under the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (‘ECHR’) for a range of human rights violations (see further Emberland and paras 43–46 below). However, the recognition of locus standi before an international tribunal for a corporation is quite distinct from full international
The corporation has personality only for the purpose of the effective functioning of the specific tribunal. Such personality is derived from, and limited by, the applicable constitutive instrument. In addition, certain leading jurists have argued for the treatment of corporations as subjects of international law to the extent that they enter into agreements with foreign governments (Friedmann [1964] 221–31; Friedmann [1969] 121–24; Jenks 70; Ijalaye 221–46). There is some authority in international arbitral jurisprudence for the view that an investment agreement between a State and a foreign corporation is an international contract subject to international law (see Texaco Arbitration [1978]). This has been read as acknowledging at least a qualified international legal personality for the foreign corporation.

The more recent, policy oriented approach has been advocated by Judge Rosalyn Higgins. According to Judge Higgins, multinational corporations are participants in the process of international law. They make claims across State lines with the aim of maximizing certain values such as, for example, fairness and predictability in international business transactions (Higgins 50). To that extent, the lack of formal legal personality is irrelevant as the actions of these non-State actors result in real legal consequences at the international level. Thus the formal lack of legal personality in international law is no bar to the development of rules relating to corporate rights and obligations in international law. What matters is effectiveness: for example in relation to human rights any entity should be prohibited from violating such rights or from assisting States in perpetrating such violations. Its formal legal status is thus irrelevant (Clapham [2006] 80). Indeed, the idea of effectiveness can account for the fact that investor protection agreements have been concluded by States. The need for inward investment will require a good investment environment. A BIT, or other type of International Investment Agreement (‘IIA’) such as a free trade agreement with investment provisions, or a regional economic integration agreement that covers investment, can help to provide this by way of introducing binding international investor protection standards into a treaty concluded between the host and home country of the investor.

More recently, new claims have been made by civil society groups for an extension of corporate social responsibility rules to the international level as concerns over the extent of multinational corporate power, and lack of corporate accountability in the globalizing economy, have surfaced (Muchlinski [2007] Chapter 3). These build on the earlier attention paid to the role of foreign corporations in supporting the illegal apartheid regime in South Africa prior to its demise (Jägers 93), and upon the establishment, in principle, that a corporate actor could be liable for war crimes as in the case against IG Farben in the Nuremberg Tribunal (Clapham [2000] 166–71 and see para. 47 below). The development of concern over corporate social responsibility in international law has led to the adoption of ‘soft law’ instruments which will be considered further in paras 16–18 below.

Thus, although customary international law holds a narrow and formalistic view on the role of corporations in international law, their presence and importance as actors in the international system requires a creative response to their claims and to the claims of other persons or groups affected by corporate action at the international level. This has been provided by treaty law (Sources of International Law) as regards corporate claims for protection against injuries to their investments in host countries and in relation to claims for international corporate social responsibility by way of soft law instruments and draft instruments which, though non-binding, act as sources for the political articulation of such claims.

C. Corporations under Public International Law

This section will consider first the protection of corporate rights under customary international law. Secondly it will consider the extent to which States are bound to control the activities of corporations, given the increasing concern expressed over the impact of their activities.

1. Protection of Corporate Rights

In the absence of formal international personality for corporations, the only means open for the bringing of a claim against the respondent State under general international law is through the intervention of the State entitled to exercise diplomatic protection on behalf of the corporation. This is the State of which the corporation is a national. However, the possibility of diplomatic protection by the national State of the corporation is a remedy so replete with pitfalls that it is unlikely to be of much practical value as a means of settling an investment dispute with the host State. These difficulties stem from the discretionary nature of the remedy, and from several restrictions as to its availability which are exacerbated in the case of a corporate claimant (Muchlinski [2007] 705–7 on which the following account draws).

If the State takes up the claim of its subject, the claim becomes in effect the claim of the State. This may be regarded as a legal fiction, given that the primary right giving rise to the claim is a right of the individual protected by international law. However, behind this legal fiction lies the fact that international law endows the national State with discretion. That State has no obligation to pursue the claim or to vindicate the rights of its subject. At all times the claim will be subject
14 Secondly, before any right to diplomatic protection can arise, the claimant must exhaust all effective local remedies within the national legal system of the respondent State (→ Local Remedies, Exhaustion of). Only where such remedies are ineffective will the claimant be excused from this requirement. This rule emphasizes the contingent nature of diplomatic protection, and the supplementary role that international law in fact plays in the regulation of disputes between individuals, including foreign corporations, and host States.

15 A further difficulty concerns the establishment of a link of → nationality between the claimant and the protecting power. In the absence of such a link the protecting power has no right in international law to intervene on behalf of the claimant. This causes particular difficulties where the claimant is an MNE, given the possibility of its being linked to more than one country by reason of the international character of its operations, and given the differing nationalities of the parent company and its overseas subsidiaries. In addition, the international character of the shareholding in an MNE may create problems concerning whether the national State of that shareholder can bring a claim. This question is further developed in paras 19–24 below.

2. State Control over Corporations

16 Calls for greater corporate social responsibility have led, as noted above, to the adoption of ‘soft law’ instruments such as the → Organization for Economic cooperation and Development (OECD) Guidelines for Multinational Enterprises (2000) (→ Codes of Conduct), the → International Labour Organization (ILO) Tripartite Declaration of Principles on Multinational Enterprises and Social Policy (2006), as supplemented by the ILO Declaration on Fundamental Principles and Rights at Work (1998), and to the creation of certain draft instruments that retain illustrative and persuasive force such as the draft UN Code of Conduct on Transnational Corporations (1982) and the more recent draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (2003) (‘UN Norms [2003]’). A binding convention has been adopted only in one area of corporate responsibility. This is in relation to the prohibition of illicit payments to governmental officials by investors under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997). In addition, certain developments in the law of the United States, centred on the increased use of claims under the → United States Alien Tort Statute (1789) (‘ATCA’), have brought issues of the accountability of corporations under international human rights rules before national tribunals, including the development of a civil law standard of aiding and abetting liability for human rights violations (see further paras 31–37 below).

17 More recently the UN Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (‘The UN Special Representative’) in his Report to the UN Human Rights Council of April 2008 asserted that ‘international law provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction’ (at para. 18). This duty encompasses a number of factors: to foster corporate cultures in which respecting rights is an integral part of doing business; to work towards developing better means to balance investor interests and the needs of host States to discharge their human rights obligations in the course of international investment arbitration; greater international cooperation in supporting States in the discharge of the duty to protect; and increased home State support for investors operating in conflict zones to avoid human rights abuses (at paras 29–50). In his most recent Report of April 2009 the UN Special Representative has re-emphasized the States’ duty to protect as one grounded in international human rights law. He has also begun to explore the relationship between corporate law and human rights protection, and the possible impact of trade and investment agreements upon the States duty to protect human rights, especially in relation to the question of whether such agreements might unduly restrict the State’s right to regulate in this field. In addition, the role of ‘responsible contracting’, whereby human rights considerations could be incorporated into investment contracts, is being investigated as is the possible development of international cooperation in relation to the State duty to protect.

18 At a more abstract level, periodic calls have been made for international control over corporate activities not only by States but by the UN in return for international guarantees of investor rights (Seidl-Hohenveldern 22–26). In addition, the possibility of a global competition law regime has been debated (Dabbah; Bhattacharjea). However such ideas have not been politically attractive to States and nothing has come of them. Also the idea of a multilateral treaty controlling the corporate responsibilities and human rights obligations of companies has not been accepted by the UN Special Representative (Ruggie).
D. Nationality of Corporations under International Law

19 Determining the nationality of a company is not always easy. Usually, nationality is determined by reference to the place of incorporation. Domicile usually follows incorporation. However, nationality can also be determined by reference to the principal place of business (the seat), or to the nationality of the controlling interest. The application of these latter two tests has been rejected by the ICJ so far as international law is concerned. This situation has arisen in the two cases of the ICJ dealing with the admissibility of shareholder claims brought by their national State, namely, the *Barcelona Traction Case* (1970) and the *Diallo Case* (2007).

20 In the *Barcelona Traction Case* Belgium sought to claim compensation on behalf of Belgian shareholders in a Canadian owned power generation company whose principal assets were located in Catalonia. The Belgian claim was held inadmissible on two principal grounds. First, Belgium had no claim to make on the basis of municipal law analogies to rules of national company law which subsumed the rights of shareholders to the company where an unlawful act was directed against the latter. Only where the company had ceased legally to exist could the shareholders bring a claim in their own right. On the facts, the Barcelona Traction Company was still in existence and so the Belgian shareholders had no enforceable rights. Secondly, Belgium was not the State of incorporation of the company and so could not bring a claim in the company's name. Only Canada as the State of incorporation could do so. In coming to this decision the ICJ refused to accept a general effective link of nationality test, such as that applied to natural persons in cases of dual nationality in the → *Nottebohm Case* (1955), which would permit the 'lifting of the corporate veil' and to determine the nationality of the company by reason of the nationality of its controlling shareholders. This was even though the ICJ accepted that international law recognized the possibility of lifting the corporate veil in appropriate cases (*Barcelona Traction Case* para. 58). In the *Diallo Case* a right to diplomatic protection for shareholders was reaffirmed, and was held not to be an exception to the general rules of diplomatic protection (at para. 64). In practice this means that a direct international claim can be made on behalf of shareholders concerning unlawful State interference with the principal rights of shareholders in relation to the company. On the other hand, the ICJ expressly rejected the possibility of a further type of claim where the national State of the shareholder exercises diplomatic protection in substitution for the national State of incorporation by reason of equity. In the *Diallo Case* the ICJ remained unimpressed by the argument that a new right of protection by 'substitution' had arisen.

21 This stands in contrast to arbitral decisions made under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') by the → *International Centre for Settlement of Investment Disputes (ICSID)*. The rights of shareholders to bring independent claims based on the treatment of the companies in which they invest have been accepted in that a shareholding usually qualifies as a protected 'investment' within the meaning of the applicable BIT, thereby obviating the traditional notion of municipal law that only a corporation can bring a claim arising out of an injury to its interests (see for example *CMS v Argentinia* [2003] para. 51; see further Dolzer and Schreuer 56–59). In addition, a more flexible test of corporate nationality for the purposes of establishing the personal jurisdiction of the tribunal is applied. By Art. 25 (2) (a) ICSID Convention, a natural person must possess the nationality of a contracting State upon the date on which the parties consent to submit the dispute to the Centre, and on the date that the request is registered by the Secretary-General of the ICSID. This does not include any person who on either date also has the nationality of the contracting State party to the dispute (for examples of the application of this principle see *Champion Trading Company et al v Egypt* [2003] 288 and *Soufraki v United Arab Emirates* [2004] para. 83). As regards a juridical person, the nationality requirements are not as strict. By Art. 25 (2) (b) ICSID Convention the term 'national of another contracting state' means, for the purposes of Art. 25 (1):

\[
\text{any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another contracting state for the purposes of this Convention.}
\]

22 Thus it is possible for a company incorporated in the respondent State to bring a claim before the ICSID even though its nationality of incorporation is that of the respondent. There has to be express agreement on the part of the latter to treat the company as a national of another contracting State and that there is, as a matter of fact, foreign control (*Vacuum Salt v Ghana* [1994]). In a similar vein, the ICJ permitted the US to make a claim on behalf of US shareholders in an Italian subsidiary company in the → *Elettronica Sicula Case* (1989). That case is distinguishable from *Diallo* and *Barcelona Traction* on the ground that it concerned the rights of the US to bring such claims under the FCN Treaty concluded with Italy ([signed 2 February 1948, entered into force 26 July 1949] 79 UNTS 171) and so could not be seen as creating any new rights under general international law.
The issue of foreign control has recently caused controversy in a case where Ukrainian controlling shareholders of a Lithuanian incorporated company could bring a claim before the ICSID, through the company, against the Ukraine under the provisions of the Ukraine-Lithuania BIT. This conclusion was reinforced by the fact that the BIT defined an ‘investor’ of Lithuania under Art. 1 (2) (b) as an ‘entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations’. This method of defining corporate nationality was found by the ICSID Tribunal to be consistent with modern BIT practice and that it satisfied the requirements of Art. 25 ICSID Convention. Thus it was unnecessary to ‘lift the corporate veil’ to establish the nationality of the company (*Tokios Tokeles v Ukraine* [2004] para. 52). This decision was a majority decision with the ICSID Tribunal President giving a strong dissent arguing the BITs did not offer an avenue for shareholders possessing the same nationality as the respondent State to take advantage of ICSID procedures, which were aimed at disputes between foreign investors and host States (*ibid [Dissenting OpinionPresident Proper Weiil)). More recently, in *TSA Spectrum de Argentina SA v Argentine Republic*, the corporate veil was lifted by the Tribunal to reveal that the Dutch claimant company was in fact owned and controlled by an Argentine citizen for the purposes of Article 25(2)(b) of the ICSID Convention, and so the tribunal had no jurisdiction (*TSA Spectrum v Argentine Republic* [2008]). Thus the approach of the majority in the *Tokios Tokeles Case* is not uniformly followed.

Under → private international law the main issues that arise in relation to corporations concern the proper law governing the affairs of the corporation, jurisdiction over the activities of the corporation, and the service of process (→ Jurisdiction of States). At the heart of all of these issues are the matters of corporate nationality and corporate domicile in that, as noted by the editors of Cheshire and North's *Private International Law* ‘an association with a particular country must be assigned to a corporation in order that the different rights and obligations by which it is affected may be determinable by the appropriate system of law’ (North and Fawcett 171). In private international law, different countries take different approaches. The incorporation test is typical of the common law jurisdictions and the seat theory is dominant in civil law jurisdictions. In recent years, it has been suggested that certain issues of private international law have been subsumed into an overarching transnational legal regime referred to as the → lex mercatoria. However, this is not an uncontroversial concept and the fact remains that significant differences continue to exist between national laws on key substantive and procedural issues pertaining to the international operations of corporations.

**E. Contemporary Legal Problems**

Despite the rather limited approach to issues of corporate law in customary international law, as noted earlier, certain more recent developments, based primarily on treaty law and ‘soft law’ instruments are generating new areas of international law which impact directly on the rights and obligations of corporations. In particular, five such issues stand out for consideration: investor protection, human rights accountability, human rights protection for corporations, emerging corporate obligations in international environmental law (→ Environment, International Protection), and international criminal liability of corporations. Finally, a more established but highly important specific issue emerges in relation to the responsibility of States for the acts of State-owned corporations (→ State Responsibility). Though not a new question in international law, it has gained new urgency with the emergence of State-owned MNEs from countries such as Russia and China particularly in the natural resources field (*UNCTAD World Investment Report* [2007]).

**1. Investor Protection**

According to the ICJ, there exists no settled customary law in relation to the treatment of foreign investment. In the *Barcelona Traction Case* this was attributed to the ‘intense conflict of systems and interests’ that characterized the development of rules relating to the treatment of foreign investors and to the fact that bilateral agreements had been concluded to cover the protection of foreign investors (at paras 89–90; see also the *Diallo Case* para. 88). Thus the current international law regime of investor protection is to be found in the universe of IIAs. There are now around 2608 BITs with around 261 Preferential Trade and Investment Agreements (‘PTIAs’) (*UNCTAD World Investment Report* 2008 14; *UNCTAD ‘International Investment Rulemaking’* [2007] paras 3–5; Muchlinski [2007] 674–98). Typically, a BIT, the most common type of IIA, is a treaty between two States which grants rights to investors from the home contracting State by way of a duty on the host country to offer certain standards of protection to the investment once it has been made in accordance with the applicable laws on entry and establishment. Some agreements, notably those of the US and Canada and more recently Japan, go further and contain positive rights of entry and establishment which give foreign investors the right to admission into the host country on the basis of non-discrimination as regards domestic and other foreign investors in the same sector. However the bulk of agreements only apply to the post entry phase of the investment.

Once established the investor and the investment—often broadly defined to cover any kind of asset owned or controlled by the investor (see further *UNCTAD* [1999])—will enjoy a range of rights over the host country authorities. In particular, most agreements will contain a non-discrimination standard based on most-favoured-nation treatment, which ensures the same or no less favourable treatment of foreign investors from different countries (→ Most-Favoured-Nation Clause),
and national treatment, which ensures the same in relation to domestic investors (→ National Treatment, Principle). In both cases the investors should be in like circumstances to benefit from protection. In addition, many agreements have a fair and equitable treatment provision which allows for a review of administrative action against an absolute standard of → good governance based on the investor's legitimate expectations as to the value of the investment, and of the treatment that it should receive.

28 The key historical standard of protection is that against expropriation without → compensation. Most of the disputes between investors and host countries during the 20th century involved the issue of the legality of nationalizations of foreign owned assets. Under customary international law, for a → nationalization or expropriation to be lawful it has to be for a public purpose, in accordance with law, non-discriminatory, and accompanied by full and effective compensation. Historically this standard has been opposed by newly independent post-colonial States (→ Colonialism) and → developing countries, giving rise to a contest of norms in this field (Lipson Part I). BITs may be seen as a response to this contest. Usually they contain a clear provision requiring full and effective compensation for any taking done in accordance with law, which must be for a public purpose and non-discriminatory. More recently such provisions have been used to protect investors and investments against regulatory takings in which the title to the asset has remained in the investor's hands but the economic value of the investment has been drastically reduced as a result of fiscal or other regulatory measures. Such regulatory takings have formed the basis of successful claims before the ICSID (see for example TECMED v Mexico [2003]; Metalclad v Mexico [2001]). Other standards of protection include protection against loss due to civil unrest or commotion, the free transfer of capital, and the duty to obey contractual obligations entered into with the investor. All of these standards can be enforced through the investor-State dispute settlement provisions of the BIT (→ Investment Disputes).

29 More recently, the orientation of BITs towards the imposition of obligations on host countries alone has been opened to debate. In particular, it has been suggested that investor responsibilities and home country obligations could be added to new generations of BITs to ensure a better balance of rights and obligations among the three main actors in the field of international investment law (UNCTAD [2003] Chapter VI; Muchlinski [2008]). One possible model for such a reformed agreement has been offered by a Canadian based non-governmental organization, the International Institute for Sustainable Development (IISD), which has drafted a Model International Agreement on Investment for Sustainable Development that seeks to redress the balance of rights and responsibilities between the host country, the home country, and the investor to ensure that the latter two actors also carry a fair measure of responsibilities (2006).

2. Human Rights Accountability

30 There has been an extensive philosophical debate concerning whether corporations can be the subject of human rights responsibilities. This is an aspect of the wider discussion concerning corporate social responsibility, which covers not only human rights issues but also wider concerns of good corporate citizenship and action (Zerk 29–32). It would appear that there exists a widening consensus that corporations should observe fundamental human rights standards. This can be supported by reference to the fundamental need to protect from assaults against human dignity regardless of whether their perpetrators are State or non-State actors (see further Ratner; Alston Part III; Clapham [2006] Chapter 6). Indeed the UN Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises has held that, in addition to the abovementioned State duty to protect human rights, corporations have a corresponding duty to respect human rights.

31 This is not the same duty as that which falls on States. It is rather a duty to act in a way that ensures compliance with human rights standards. To discharge this responsibility companies must act with → due diligence. This concept describes the steps a company must take to become aware of, prevent, and address adverse human rights impacts. That requires companies to adopt a human rights policy, to carry out human rights impact assessments, to integrate human rights issues into their operations, and to track their performance in this regard (UN Special Representative Report 2008 paras 59–64). More recently, in the light of discussions with stakeholder groups a number of further questions concerning corporate due diligence have emerged (UN Special Representative Report 2009 paras 71–84). First, the concept is not used in strictly transactional terms by the UN Special Representative but is a wider concept which focuses on the entire life cycle of a project or business activity aimed at avoiding and mitigating human rights risks. Secondly, not only the primary investor but also the bank or other lender financing the investment would have to undertake due diligence, though how this differs from the due diligence of the primary investor requires further clarification. Thirdly, small and medium sized enterprises and members of supply chains will also have to undertake due diligence although the precise scope and extent of this is yet to be determined. A fourth issue is how to integrate human rights concerns into the decision-making processes of the firm: if it is a free-standing procedure the firm may not achieve sufficient connection between corporate decisions and human rights concerns, while a fully integrated procedure may devalue the special qualities of human rights risk assessment. Finally, the issue of the relationship
between due diligence and liability remains open to concern. Some fear that this process could create the risk of new liabilities by providing otherwise unavailable information against the company. This concern is rejected by the UN Special Representative who feels that, to the contrary, a well managed due diligence assessment could avoid liability as it encourages a robust risk assessment, encourages positive action to mitigate known risks, and transparency about the state of the company's knowledge of the risk, avoiding accusations of misrepresentations and cover-ups. This approach appears to go beyond the UN Special Representatives earlier assertion that, given the lack of international legal personality of corporate actors, they cannot be directly bound by international law as such, and that, apart from certain narrowly drawn responsibilities in the field of international criminal law, corporations have no existing international obligations in the field of human rights as most codes are voluntary in nature and are addressed to States (UN Special Representative Report 2006 paras 60–65). It would appear that some limited general responsibilities along the lines stated above can be admitted, even if corporations are not full legal persons. It is an illustration of the effectiveness approach mentioned in paras 6–10 above toward the development of international legal obligations for corporations.

32 While acknowledging that corporations cannot simply have the same obligations as States in relation to human rights, the UN Special Representative sees certain distinctive corporate obligations emerging around the concept of respect:

The corporate responsibility to respect exists independently of States' duties. Therefore, there is no need for the slippery distinction between ‘primary’ State and ‘secondary’ corporate obligations—which in any event would invite endless strategic gaming on the ground about who is responsible for what. Furthermore, because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. Finally, ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps—for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes (UN Special Representative Report 2008 para. 55).

33 What remains unclear from this approach is how far international law itself will set the normative content of corporate obligations. The UN Special Representative emphasizes the State duty to protect, the corporate duty to respect, and the joint duty to remedy. In the latter case both judicial remedies at the national level and non-judicial remedies are considered, though much still remains to be done. The international dimension could be used to develop further the State's duty to protect, and new initiatives such as an international ombudsman could be considered in the area of remedies (at paras 82–103), but the corporate duty to respect appears to be based mainly on self-regulation and national supervision.

34 Alongside the continuing discussions led by the UN Special Representative, much has been written to show that responsibilities for compliance with human rights standards can emerge from within international law (see Jägers; Kinley and Tadaki; Zerk; Muchlinski, [2007] Chapter 13). In addition, the Universal Declaration of Human Rights (1948) (‘UDHR’) is addressed both to governments and to other organs of society. Following this provision, the third recital of the Preamble to the UN Norms (2003) recognizes that,

even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights (emphasis added).

35 However, the legal status of the UDHR remains that of a non-binding declaration, and so this reference to the UDHR wording in the UN Norms (2003) may be no more than a statement of an ethical duty at best, reinforced by the fact that the UN Commission on Human Rights—now the Council on Human Rights—regards the UN Norms (2003) as a draft proposal that has no legal standing (see the discussion in Kinley and Tadaki 948–49 and see UN Commission on Human Rights [2004] 81–82 point (c)). In addition, as pointed out by the UN Special Representative, the reference to ‘organs of society’ is problematic as corporations are ‘specialised organs performing specialised functions’ and so their human rights obligations cannot merely be the same as those of States (Ruggie [2007] 827).

36 The precise content of the human rights obligations of corporations is open to considerable speculation. However, as the UN Special Representative points out, it is clear that corporate actors will not carry the same responsibilities as States. Some State responsibilities are simply impossible for corporate enterprises to carry out. Examples include: protecting rights of asylum, the right to take part in government, rights to nationality, and provision of rights of due process. Equally States, as public actors, do not themselves enjoy human rights protection, while corporations, as private actors, can possess rights that may need to be balanced against those of other non-State actors (Kinley and Tadaki 967 and see paras 38–42). Against this background the development of substantive obligations will require some adaptation of existing human rights standards. In addition, it may require a wider conception of what obligations may
Finally, at the level of US national law, a degree of direct responsibility for human rights violations on the part of corporate actors is being recognized through litigation brought by private claimants against the parent companies of affiliates operating in the claimants' countries (Joseph; Jägers 179–203). Under the ATCA, a claim can be brought by individuals against corporate actors who are not subjects of international law for alleged violations of international law on the basis that such a violation constitutes an actionable tort under the ATCA. Thus in the US District Court case of Doe v Unocal (1997) it was held, for the first time, that corporations could, in principle, be directly liable for gross violations of human rights under the ATCA. On appeal the US Court of Appeal for the Ninth Circuit held that a corporation may be liable even if it has not directly taken part in the alleged violation, but has given practical assistance and encouragement to the commission of the crime or tort in question—the actus reus of aiding and abetting, and has actual or constructive knowledge that its actions will assist the perpetrator in the commission of the crime or tort—the mens rea of aiding and abetting. Thus the US Court of Appeal accepts that a corporate actor can be complicit in a human rights violation even where there is no direct involvement on the basis of the law relating to aiding and abetting (Doe v Unocal [2002]). However, there are a number of limitations upon the availability of an ATCA claim based on United States procedural requirements and international comity that limit the availability of such a claim. This includes a duty to exhaust local remedies in the country where the alleged violation has occurred where an effective remedy exists, and the link to the United States forum is tenuous (Sarei v Rio Tinto USCA for the Ninth Circuit [2008]).

3. Human Rights Protection of Corporations

It is clear from both national and international legal practice that corporations may enjoy the protection of human rights standards (Muchlinski [2007] 509–14 on which this section draws). However, two issues stand out which distinguish the protection of natural persons and corporate entities. First, given the legal form of the corporation, embedding a separation between the corporate entity and its owners, who should be regarded as the 'victim' of a human rights violation? Second, given that corporate regulation often pursues essential public policy objectives, how might this modify the extent to which a corporate person, as opposed to a natural person, can enjoy protection?

In relation to the first issue, a human rights tribunal must determine whether the corporation itself has suffered a human rights infringement or whether it has also affected the rights of shareholders, and/or other stakeholders in the company. Under general principles of company law it would be rare for the corporate veil to be lifted and for the shareholders to have direct rights of action where the corporation was the principal entity affected by the alleged harm. It would be for the corporation to bring the claim, and for the shareholders to deal with the corporation itself as regards their claims. However, human rights claims are different. The nature of the harm may be such that the principal victims are in fact the natural persons that stand behind the corporate form. Accordingly, in human rights cases they may be allowed to bring direct claims alongside the company or in its place. Thus, under the ECHR, the European Commission of Human Rights was ready to regard the corporation as a mere 'vehicle' through which a shareholder does business, and to allow a direct claim provided that the shareholder was a majority shareholder and that they had a direct interest in the subject-matter of the claim (Yarrow v United Kingdom [1983]; Pine Valley Developments Ltd v Ireland [1991]; Agrotexim Hellas SA and Others v Greece [1992]; Dignam and Allen 180–81 and Emberland 99–104). However, in relation to claims made under Art. 1 First Protocol to the ECHR, protecting peaceful enjoyment of possessions, the European Court of Human Rights (ECtHR) has restricted this approach and has refused to lift the corporate veil in favour of the shareholders where the proprietary interests of the company itself have been harmed (Agrotexim and Others v Greece [1995]). There is also more recent case-law suggesting that, in relation to other rights protected by the ECtHR, identification of corporate and shareholder claims will not be permitted (Emberland 77–79). However, in two cases shareholders may still bring an action. The first is where it is impossible for the company to bring a claim (Agrotexim and Others v Greece [1995] para. 66). This covers cases where the company is in liquidation, receivership, or subject to a court order. The second is where the degree of identification between the shareholder and the company is so great on the particular facts of the case that they are virtually one and the same, as where the shareholder is a sole shareholder or owns an overwhelming percentage of the shares (Emberland 95–96).

Turning to the issue of balancing between corporate rights and the pursuit of essential public policy goals, under the ECtHR, a degree of national discretion is preserved in the application of certain human rights even in relation to natural persons. Applying this approach the ECtHR held in Markt Intern and Beerman v Germany (1989) that, in relation to a complaint of a violation of Art. 10 ECHR, arising out of the prohibition of certain commercial reports in a trade journal on the grounds that these contravened German competition laws, the Contracting State had a certain margin of appreciation. It explained:
According to Emberland, this entails a more lenient approach to the control of governmental discretion than might be encountered in claims brought by natural persons. The ECtHR is only concerned with whether the national authorities have undertaken the necessity/proportionality test, and will not judge on the substantive subject matter of the policy, a matter within the States' margin of appreciation (at para. 33).

From the foregoing brief review of ECHR law, it can be seen that human rights based claims by corporations are possible. They need not be seen as a threat to the underlying principles of human rights law. These types of claims will, by their very character, involve only certain aspects of human rights protection. In addition, given the commercial nature of the claimant, and the public interest in governments remaining free to regulate the economy as they see fit, considerable latitude is accorded to States in this process. On the other hand, even corporate citizens should be entitled to expect due process and legality to attend the regulatory practices of the countries in which they operate. To this end, the possibility of human rights based claims would appear beneficial.

**4. Corporate Obligations in International Environmental Law**

At present there are no detailed international rules or procedures for the environmental regulation of corporations. Therefore, corporations cannot be held liable for environmental harm (→ Environmental Accidents) under international law as such, only under applicable national laws. On the other hand, there exist a number of international instruments that create non-binding commitments for corporations in this field coupled with certain mandatory provisions of Multilateral Environmental Agreements (‘MEAs’ → Environment, Multilateral Agreements) which, though addressed to the State contracting parties, have regulatory consequences for corporations in that the State contracting parties must pass regulatory legislation that applies the MEA standards to individuals and corporations under national law (UNTCMD [1993]; Muchlinski [2007] 566–74).

Turning first to non-binding ‘soft law’ instruments, two voluntary codes are particularly important. These are → Agenda 21 (UN Conference on Environment and Development [1992]), whose continuing importance in this area was reaffirmed at the World Summit on Sustainable Development in Johannesburg in 2002, and the OECD Guidelines on Multinational Enterprises. Both instruments emphasize, in essence, the furtherance of → sustainable development through the transfer of environmentally sound technology and management practices.

Apart from such ‘soft’ responsibilities, corporations may find themselves subjected to ‘hard’ obligations arising out of the contents of MEAs, as a result of the implementation of international obligations into national laws by the States that are parties to these agreements. Perhaps the most significant is the → Clean Development Mechanism (‘CDM’) established by Art. 12 Kyoto Protocol to the UN Framework Convention on Climate Change (1997). The CDM allows for developed countries (Annex I [Parties]) to enter into investments aimed at reducing carbon emissions in developing countries (Annex II [Parties]) and credit these to their emission limitation and reduction commitments under Art. 3 Kyoto Protocol. Art. 12 (9) Kyoto Protocol makes clear that participation in CDM projects may involve private and/or public entities, and is to be subject to ‘whatever guidance may be provided by the executive board of the clean development mechanism’. Thus corporations may be directly involved in such activities and will find themselves subject to the regulatory control of the home and host country, as parties to the Protocol. In addition to the CDM, other MEAs have established civil liability rules that apply directly to private actors involved in the conduct of a potentially harmful environmental activity. Thus the 1999 Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from Transboundary Movements of Waste and Their Disposal provides a comprehensive regime for liability and compensation placed upon any person who is in operational control of the waste (→ Hazardous Wastes, Transboundary Impacts). It is yet to enter into force. A further example arises out of the various conventions dealing with civil liability for oil pollution that set direct liabilities upon ship owners, subject to limits on recovery, establish funds from which compensation can be paid, and which require owners to carry adequate insurance (Brussels International Convention on Civil Liability for Oil Pollution Damage [1992]; Brussels International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage [1992]; → International Oil Pollution Compensation Funds; → Marine Pollution from Ships, Prevention of and Responses to). Such government-led initiatives have been shadowed by industry-based agreements establishing compensation schemes.
The possibility of mandatory legal obligations being imposed on the activities of corporations, through governmental regulation based on MEAs, may give rise to issues concerning the relationship between the investor/investment protection provisions of IIAs and such MEA-based obligations. In order to avoid such clashes, IIAs may include provisions that privilege MEA obligations. Thus Art. 104 → North American Free Trade Agreement (1992) states that MEA obligations, listed in that provision, ‘shall prevail’ provided that where there is a choice of policy options to fulfil the obligation that party chooses the least NAFTA inconsistent option. In addition, an IIA could make clear that ordinary environmental regulation based on MEA standards will not constitute a regulatory taking, building on general provisions of this kind already in existence in certain BITs. These refer only to non-discriminatory regulatory actions applied to protect legitimate public welfare objectives such as environmental protection (see for example US-Uruguay BIT [2004]).

5. Criminal Liability of Corporations in International Law

International law recognizes individual criminal liability for certain international crimes including → slavery, → genocide, other crimes against humanity, → war crimes, and torture (Clapham [2006] 244). Corporate actors were held liable for certain war crimes by the US Military Tribunal in Nuremberg in the IG Farben Case, where the German company IG Farben was treated as a legal person capable of violating the laws of war by its actions (Clapham [2000] 167; → International Military Tribunals). On the other hand, after extensive debate on the question, the Rome Statute on the ICC dropped a draft provision that would have subjected juridical persons to the jurisdiction of the Court (Clapham [2000] 146–72 and [2006] 245–46). However, there are in existence certain international treaties that do provide for the criminal liability of legal persons. For example Art. 9 European Convention on the Protection of the Environment through Criminal Law of 1998 provides for corporate criminal liability under the national law of the contracting States, as does Art. 12 UN Convention on Corruption of 2003 (→ Corruption, Fight against). Other examples include the 1999 UN Convention on the Suppression of the Financing of Terrorism (→ Terrorism) and the 2000 UN Convention against Transnational Organized Crime (Clapham [2006] 249–51; → Transnational Organized Crime). Thus there is some precedent for developing criminal liability for corporations which could be used in other fields where criminal sanctions might be considered necessary to ensure effectiveness (see further International Commission of Jurists [2008]).


In general, the activities of State-owned corporations do not subject the State of ownership to international legal responsibility. This is because international law recognizes the doctrine of corporate separation and will only lift the corporate veil in cases of fraud or evasion (Barcelona Traction paras 56–58). However, according to Art. 8 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts 'the conduct of a person or group of persons shall be considered as an act of a State under international law if the person or group of persons is in fact acting on instructions of, or under the direction and control of, that State in carrying out the conduct'.

Thus if a State-owned corporation acts inconsistently with the international obligations of the State that owns and controls it, the State may be responsible provided that it has actually authorized the conduct in question as a result of its capacity to direct and control the actions of the corporation (Crawford 112–13).

The exercise of public powers by the corporation may give rise to a claim of → State immunity. Normally the law of State immunity is inapplicable to the operations of State-owned corporations as they are entities which are legally distinct from State organs which operate in a commercial capacity. However, certain specific exceptions exist to this general rule. In particular where the State-owned corporation acts in an official capacity and undertakes activities in pursuit of sovereign authority (→ Sovereignty), and those acts take place in circumstances in which a State would be immune, then sovereign immunity can extend to the corporation (Section 14 (2) United Kingdom State Immunity Act 1978). This is an issue of fact in each case. The essential test is one of function and control. The function must be one of a governmental nature, and of a kind that normally attracts sovereign immunity, and the government must have a controlling interest in the corporation. Accordingly no immunity is possible in relation to the ordinary commercial activities of the corporation. Only those acts that can qualify as sovereign acts will be immune from suit (→ Trendtex Trading Corporation v Central Bank of Nigeria Case [1977]; Kuwait Airways Corp v Iraqi Airways Co and Others [1995]; Brownlie 337–339).

F. Conclusion

The development of rules relating to corporations in international law is still far from complete. There is no general international corporate law as such. Rather, corporate law analogies have been applied to situations in which claims made by corporations, or their shareholders, have been the subject of diplomatic protection. Such a remedy is all that is open to use for the protection of corporate foreign investors and their investments under general international law. As noted above, this is a highly unsatisfactory situation which fails to address the concerns of foreign investors. The
result has been the rise of an international regime of binding foreign investment rules based on IIAs, and on institutional investor–State dispute settlement mechanisms, of which ICSID is pre-eminent. This has rejected the narrow ‘entity’ based approach to corporations used in the *Barcelona Traction* and *Diallo* cases, and a move towards an enterprise based approach, as exemplified by the wide definition of investor and investment, which allows for direct claims by shareholders even where they suffer an indirect injury as a result of the treatment of the company in which they have invested on the part of the respondent host state. In addition, as noted above, under Art. 25 (2) (b) ICSID Convention, a claim may be made against the host country by the controlling interest in a locally incorporated subsidiary, even though the latter possesses the nationality of the respondent host State. This is a clear exception to the reasoning adopted by the ICJ in the *Barcelona Traction* and *Diallo* cases in relation to corporate separation and the inapplicability of control based tests of *locus standi* in international investment disputes.

52 Claims for international corporate social responsibility have resulted in growing concern over labour rights, human rights, and environmental accountability as well as for anti-corruption measures. Here, non-binding mechanisms prevail, with the notable exception of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. One may ask whether such a difference in the legal status of rules protecting corporate investors as compared to those emergent rules requiring corporate responsibility should remain, or whether new binding rules on corporate responsibility, and indeed home country responsibility, may not need to be included in future IIAs so as to rebalance the distribution of rights and responsibilities thereunder. Furthermore, in this area the logic of corporate separation could be used to limit access to judicial remedies before national courts as where the parent company might resist a claim of involvement in human rights violations on the part of its overseas subsidiary through an appeal to the separate corporate identities of each entity.

53 Finally, the logic of corporate separation may cause difficulties in relation to State responsibility for the actions of entities that are legally separate from the State, but which are engaged in actions for which the State may be liable. Again, the formal separation of such an entity from the State may need to be disregarded and the underlying enterprise be examined to show how that enterprise consists of the State and its legally separate agent.

54 In all of the above cases much depends on whether international law will develop a distinctive doctrine of ‘lifting the corporate veil’ based on the principles and policies underlying international law itself. However, the usual practice in relation to principles of corporate law has been to rely on analogies from municipal law. Currently the national laws of many jurisdictions are taking an increasingly restrictive approach to the lifting of the veil of incorporation (Muchlinski [2007] 312–21). Whether such reliance on municipal law will prevent the adoption of a more permissive doctrine of lifting the veil in international law remains one of the most important questions facing the future development of international law in this field.

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