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Are Corporations "Subjects" of International Law? (uncorrected draft; final forthcoming in Santa Clara Journal of International Law 2010)

Abstract:

Courts and scholars often attempt to draw legal conclusions from the status of entities, whether states, international organizations or corporations. Debates concerning whether corporations are "subjects" of international law and the legal conclusions that supposedly follow from this are particularly vociferous within Alien Tort Claims litigation in U.S. courts. Using the Supreme Court's recent decision in Citizens United as a cautionary tale, the author argues that drawing legal conclusions from the fact of "subject-hood" is fraught with peril, particularly in the case of corporations. He argues that such top-down approaches are likely to lead to unintended consequences and that corporations, like international organizations, should more properly be seen as "participants" than "subjects."

José E. Alvarez[1]

In today's United States, and especially among U.S. human rights advocates, the answer to my titular question is a resounding "yes." If a "subject" is, as the International Court of Justice (ICJ) indicated back in 1949, an entity that international law treats as a person – that is, something that can affect and be affected by international law and can enforce international law by bringing at least some international claims,[2] a corporation seems as much a subject of international law as an individual and international organizations. This is certainly the answer suggested by Second Circuit judicial decisions under the Alien Tort Claims Act (ATCA) which have shown no patience with expert opinions to the contrary by old-fashioned positivists based in Europe such as James Crawford and Christopher Greenwood.[3] District Judge Schwartz in *Talisman Energy* had

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[1] Herbert and Rose Rubin Professor of International Law, New York University School of Law. This essay is based on a keynote address delivered at a conference on "Corporations and International Law" on March 12, 2010 at the Santa Clara University School of Law. The author is grateful for comments received during that conference, the research assistance of Eran N. Sthoeger, as well as the Fiomen D'Agostino and Max E. Greenberg Research Fund.

[2] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion, [1949] ICJ 174. See also infra at note (extensive description of *Reparation Case*).

[3] See Declaration of James Crawford S.C., Presbyterian Church of Sudan v. Talisman Energy Inc., Republic of Sudan, Civil Action No. 01-CV-9882 (AGS); Second Declaration of Christopher Greenwood,

no problem dismissing Crawford's and Greenwood's respective contentions that, outside of ATCA decisions by U.S. courts, corporations have generally not been found liable under international law and are not "subjects" of international law.[4] My contention is that focusing on whether or not a corporation is a "subject" under international law or an "international legal person" is at best a distraction and that affirmative decisions to this effect may be a very bad idea. Contrary to what many human rights advocates apparently believe, those who want to hold corporations accountable for international law violations should not be so quick to assume that they want corporations to be "subjects" of international law.

Judge Schwartz's 2003 opinion, part of lengthy saga that ultimately ended in dismissing the plaintiffs' claims for failure to prove their allegations,[5] affirmed in no uncertain terms that corporations, like any other private actor, are subject to *jus cogens* violations such as acts of genocide, rape, torture, summary execution, war crimes, and crimes against humanity and that corporations could be found liable, no less than individuals, at least in some cases as aiders and abetters, co-conspirators, or entities otherwise "complicit" in such acts or other human rights violations normally requiring state action.[6] Judge Schwartz, along with many other U.S. judges, have had no trouble

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Q.C., Presbyterian Church of Sudan v. Talisman Energy Inc., Republic of Sudan, Civil Action No. 01-CV-9882 (AGS), both on file with Journal.

[4] See declarations at supra note 3.

[5] *Presbyterian Church of Sudan v. Talisman Energy, Inc., Decided Oct. 2, 2009, US Court of Appeals, 2nd Cir.*.

[6] *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289 (S.D. N.Y. 2003). For a discussion of this case, see Douglas M. Branson, "Holding Multinational Corporations Accountable? An Achilles Hell in Alien Torts Claims Act Litigation" (this journal). Although the Second Circuit, in affirming the dismissal of this claim, narrowed the scope of conspiracy liability and required fulfillment of a high burden of "purpose" with respect to aiding and abetting, the essence of Judge Schwartz's ruling was left intact. Contemporary ATCA debates among U.S. courts now appear to be focused on second generation questions that presume that corporate liability might indeed be shown as a matter of international law but dispute the requisites needed to prove aiding and abetting, conspiracy, vicarious liability and other alleged connections between a corporation and a state when the underlying customary

drawing these conclusions even though nearly all the relevant precedents cited in U.S. our courts either impose human rights obligations directly only on states or impose criminal liability only on individuals or corporate officials but not on the corporation itself.[7] Nevertheless, the district court in *Talisman* saw itself as having no real choice on these matters since, as it pointed out, there was clear and consistent Second Circuit authority supporting its conclusions.[8]

That court, as have most under the ATCA, drew from international law's silence – the fact that it did not specifically distinguish between natural and juridical individuals – the logical conclusion that what is prohibited to other persons is presumptively also prohibited to their corporate associations.[9] The premise is that international law, including international criminal law, does not distinguish between natural and juridical purposes and that it is, as expert witness Prof. Ralph Steinhardt suggested to the *Talisman* court, "implausible" to protect a corporation that engages in slave trade or supplies Zyklon B to kill Jews.[10] The idea that has persuaded our courts to date is that corporations are merely groups of persons and that what is illegal for one individual to do should be equally illegal for a group of them, even when this group is formed to make a profit. Of course, no one involved in these cases, including the judges, actually believe

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norm requires state action. See, e.g., *re South African Apartheid Litigation, United States District Court, Southern District of New York, Apr. 8, 2009.*

[7] See declarations by Crawford and Greenwood, supra note 3.

[8] *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, at (pincite needed).

[9] In this respect these U.S. court decisions are not unlike those in European human rights bodies which have suggested, at least in dicta, that what states are individually barred from doing they are equally barred from accomplishing when they associate with one another, as when they use international organizations (IOs) to accomplish what none of them can do alone. Interestingly, in those cases, the European institutions appeared to be suggesting that it might be possible to pierce the IO veil in order to make the IO's members liable. These adjudicators did not suggest that the organization itself might be liable. See, e.g., *Application No. 13258/87 by M. & Co.*, European Commission of Human Rights; *Waite and Kennedy v. Germany*, ECHR, 30 EHRR 261 (18 Feb. 1999; *Matthews v. United Kingdom*, ECHR, 28 EHRR 361 (18 Feb. 1999). That latter step is taken, however, by the ILC's draft rules on IO responsibility. See discussion infra.

[10] *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, at 316 (quoting Steinhardt).

that corporations are the functional equivalent of persons. They are just finding that international law makes this leap. In doing so, they may be consciously or unconsciously influenced by the fact that under U.S. law, corporations have been found to be able to do nearly everything that natural persons can do: that is, they can sue and be sued, be taxed, own property, enjoy constitutional protections, contract, and be criminally prosecuted.[11] The fact that suing a corporate entity under the ATCA and not just a corporate official facilitates a finding of jurisdiction as well as a reach into a far deeper pocket for purposes of damages is hardly mentioned but is, of course, very much on the mind of ATCA litigants. Everyone involved – from the plaintiffs to the judges to the U.S. and other governments concerned with such cases -- is only too aware of the differences between suing an individual corporate official and suing powerful multinational corporations which, even if they manage to escape a monetary penalty commensurate with the harm they have allegedly caused, might be inspired, after some years of ATCA litigation, to put political pressure on the rogue governments in which they operate. Corporate ATCA litigation is the human rights advocate's answer to sovereign immunity: if you can't sue the government, go for the businesses that prop it up.[12] Small wonder then that for U.S. human rights advocates corporate subject/personhood is an idea whose time has come.

Awareness of the colossal harms that may result when corporate greed becomes aligned with government power helps to explain nearly all that is said on the subject of corporate "subjects" under international law on this side of the Atlantic. It certainly helps to explain the *Talisman* court's approving reliance on Louis Henkin's famous invocation

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[11] For a historical survey of how U.S. national law came to such conclusions, see David Millon, "The Ambiguous Significance of Corporate Personhood" (forthcoming in Stanford Agora: An Online Journal of Legal Perspectives), available at http://papers.ssrn.com/paper.taf?abstract_id=264141.

[12] See, e.g., Douglas M. Branson, "Holding Multinational Corporations Accountable? An Achilles Heel in Alien Torts Claims Act Litigation," supra note , at .

of the Universal Declaration of Human Rights, stating that "[e]very individual and every organ of society includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."[13] The desire to find *someone* accountable for atrocities that are beyond comprehension – in the *Talisman* case the horrors in Sudan over the last decade – helps to explain why that Court did not bother noting that Henkin was addressing merely the preamble of an instrument originally intended to be non-binding or that the Universal Declaration includes a number of "rights" that even the Court in *Talisman* affirms are not recognized by customary law.[14]

The desire to provide some modicum of justice for human rights victims may also explain the powerful slant in favor of a "yes" answer to my title's question in the most widely used international law casebook in the United States. That book, by Dunoff, Ratner and Wippman, is not your grandmother's international law text focused only as states as actors.[15] While the casebook devotes only a few pages to the status of corporations under international law, what it tells its readers is choice: namely, that corporations, at least since the Dutch East India Company, have long been major international law actors and have exerted considerable influence in the making of rules governing trade, investment, antitrust, intellectual property, and telecommunications; that they are indirect claimants in the WTO dispute settlement system and direct claimants in

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[13] *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, at 318.

[14] Compare Universal Declaration of Human Rights, Art. 17 ("(1) Everyone has the right to own property alone as well as in association with others. (2) "No one shall be arbitrarily deprived of his property.") with *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, at 324 ("confiscation of property without just compensation does not violate the law of nations") and id. ("while expropriation or property destruction alone may not violate the law of nations, the Courts finds that expropriation or property destruction, committed as part of a genocide or war crimes, may violate the law of nations").

[15] Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, International Law Norms, Actors, Process (2d ed. 2006).

investor-state arbitration; have long participated in "governmental" teams before international organizations forums; have had direct voting rights in the ILO; have played standard-setting roles in other organizations like the International Telecommunications Union; have been the de facto subjects of a large number of treaties dealing with everything from labor law to environmental protection;[16] have been the direct subject of Security Council decisions, including its sanctions regimes; and, of course, have been the subject of or participated in fashioning substantial "soft law" regulatory efforts, such as codes of conduct.[17] The intended message is clear: since corporations make and enforce law, only a formalist blind to reality would deny that they are "persons" or "subjects" of international law.[18] That casebook includes, for good measure, a lengthy excerpt from the 2003 work product of the UN Commission on Human Rights: its "Norms on the responsibility of transnational corporations and other business enterprises with respect to human rights."[19] As is well known, this wish fulfillment fantasy of human rights advocates everywhere goes far beyond relatively restrained decisions like *Talisman* to proclaim that corporations are directly liable under international law (albeit "within their

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[16] The teacher's manual on this point is quite revealing. Its suggested response to a question concerning the target of ILO conventions is to point out that while "traditional scholars" would say that such treaties create obligations only for states, "a more contemporary view is that the ILO was and is trying to regulate the companies and placed obligations on them, though the states are given the primary responsibility for ensuring compliance." Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, Teacher's Manual for International Law Norms, Actors, Process, at 40 (2d ed. 2006).

[17] Dunoff, Ratner and Wippman, supra note , at 216-234.

[18] See also Emeka Duruigb, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges," 6 NW. U. J. Int'l Hum, Rts. 222 (2008)(describing the challenges to the orthodox view that corporations are not subjects of international law); Jonathan I. Charney, "Transnational Corporations and Developing Public International Law," Duke L. J. 748 (1983) (summarizing literature on point and concluding that corporations ought to be permitted to participate in the making of international law but that it would be unwise to accord them "complete" international legal personality).

[19] Dunoff, Ratner, and Wippman, supra note , at 224; "Norms on the responsibility of transnational corporations and other business enterprises with respect to human rights," UN Comm'n on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2(2003).

respective spheres of activity and influence") for an extensive array of human rights obligations affirmed by a number of treaties and soft law instruments, irrespective of whether the sources cited impose their obligations solely on states or are legally binding. (These ill-considered "Norms," widely derided by the United States and a number of other governments, were, of course, the first victim of John Ruggie, who as UN Special Rapporteur on corporate responsibility and accountability, pronounced them a non-starter at the beginning of his tenure.)[20]

The laudatory zeal of human rights advocates also help to explain the most thorough-going attempt to advance bye way of prescription a theory of legal responsibility for corporations, by one of the co-authors of that casebook, Steven Ratner.[21] While, as will be addressed below, Ratner's approach does not rely on corporate "subjecthood," it has been widely interpreted as implying that conclusion. Indeed, that this conclusion is suggested by even the relatively cautious (and now dated) U.S. Restatement of Foreign Relations, which, even back in 1986, put the notion that corporations were not subjects of international law in the past tense, indicating that "[i]n the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of state, were not persons under (or subjects of) international law."[22] In this fashion, Louis Henkin, as chief rapporteur of that Restatement, softly denigrated the old-fashioned positivist conception of "subjects" of

[20] See Adefolake Adeyeye, "The Role of Global governance in CSR" and Larry Catá Backer, "the United nations' "Protect-Respect-Remedy" Project: Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations" (conference papers).
[21] Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," 111 Yale L. J. 443 (2001-2002).
[22] Restatement of the Law (Third), Foreign Relations Law of the United States, at 70 (1986).

international law in favor of an accordion like, flexible notion of international legal personality.

Andrew Clapham, writing in 2006, would appear to do the same but more boldly. Clapham writes about "limited international legal personality" rather than "subjects" but otherwise proudly embraces the circular reasoning of the ICJ's *Reparation Case*.[23] Like the ICJ, which determined that the UN was an international legal person because it acted like a legal person, Clapham argues that the fact that corporations (like individuals) enjoy certain international legal rights and privileges leads to the inescapable conclusion that they are international legal persons. "We need to admit," he writes, "that international rights and duties depend on the capacity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity."[24] We can draw international personhood, in other words, from the fact that corporations are already treated as persons; we can imply additional rights and obligations because they already have some. Clapham writes that:

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[23] Andrew Clapham, Human Rights Obligations of Non-State Actors, at 79 (2006). In the *Reparation Case*, supra note , the ICJ was asked by the General Assembly to give an advisory opinion on whether the UN could make a claim vis-à-vis a state for its own damages as well as damages suffered by relatives of one of the organization's agents, the Secretary-General's mediator (who had been killed by a car bomb in Jerusalem). Before answering the questions posed to it, the ICJ drew from the UN's enumerated powers to conclude some treaties, its capacity to enjoy privileges and immunities, its separate existence vis-à-vis states, and its ability to take certain actions, the inference that the UN was an "international legal person." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep. 174. The ICJ was careful to note that "[t]hat was not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of State . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its trights by brining international claims." Id, at . The ICJ decided in effect that the UN could take actions that were functionally necessary to fulfill its Charter purposes. The finding of personhood led the Court to conclude that the UN could present a claim for its own damages as well as that incurred by its agent's family. Id., at . Moreover, the Court found that the UN could assert these claims even with respect to a non-member of the UN, thereby suggesting that the UN's personhood and its capacity to engage in the functionally equivalent of diplomatic espousal was good against the world merely because "fifty states" had created the organizations. Id., at .

[24] Clapham, supra note , at .

"The burden would now seem to be on those who claim that states are the sole bearers of human rights obligations under international law to explain away the obvious emergence onto the international scene of a variety of actors with sufficient international personality to be the bearers of rights and duties under international law. If The Sunday Times has sufficient personality and the capacity to enjoy rights under the European Convention on Human Rights, it might surely have enough personality and capacity to be subject to duties under international human rights law."[25]

Clapham is correct that traditional international lawyers have not been very good at explaining what a "subject" of international law is, even though all seem to agree that whatever it is, the concept is as fundamental as is the doctrine of sources of international law.[26] He is not the only one to see the incoherency of Ian Brownlie's affirmation that while states are the only true "subjects" of international law and we can expand that category to embrace international organizations because states have given IOs certain capacities, no other entity can enjoy that exalted status even when these also have been given the capacity to bring international claims in certain international regimes – as have corporations and individuals.[27] Small wonder then that well before Clapham, one of Brownlie's contemporaries, Dame Rosalyn Higgins, noted that international lawyers' conception of "subjects" and "objects" "erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint."[28] Higgins, a faithful student of the Yale School of International Law, argued that we replace those categories and talk only of "participants" in the international legal process.[29]

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[25] Id, at 82.

[26] Indeed, the significance of international legal subject/personhood seems apparent from the fact that virtually every international legal treatise over the past century accords the concept pride of place, alongside the sources identified in article 38 of the Statute of the ICJ.

[27] See Ian Brownlies, Principles of Public International Law, 4th ed. Pp. 58-70. Compare Nicola Jägers, Corporate Human Rights Obligations: In Search of Accountability, at 19-35 (2002) (rejecting subject/object dichotomy).

[28] Rosalyn Higgins, Problems and Process: International Law and How We Use It, at 49 (1994).

[29] Id. at 49-50 (noting that "the whole notion of 'subjects' and 'objects' has no credible reality, and, in my view, no functional purpose"). For Higgins "there are no 'subjects' and 'objects,' but only participants. Individuals are participants, along with states, international organizations . . . , multinational corporations,

But at least among European scholars, Higgins remains an outlier. Most of these continue to affirm, along with Crawford and Greenwood, that the only real subjects or persons in international law are states and their creations, namely organizations consisting of states as members such as those of the UN system.[30] On this side of the Atlantic, we most often hear the reverse. For those for whom positivism has lost some of its allure, international personhood tends to be a functional conception that can readily accommodate corporations.[31]

Given this range of choices, Higgins and others who resist the "subject"/"object" dichotomy appear to be more sensitive to real world practice. Calling corporations, NGOs, and individuals all "participants" seems strikingly sensible and accurate. A mere "participant" in the international legal process is less likely to carry the intellectual baggage that a "subject" of international law or certainly a "person" has. Seeing corporate (and other non-state) actors as "participants" is less likely to elicit misleading analogies between corporate persons, established under national law for distinct purposes, and natural persons, who, at least under international law, do not require national law recognition to be accorded at least some rights (even as stateless persons).[32] Calling a corporate entity, a "subject" or "object" of international law confuses more than enlightens. As Clapham argues, '[t]rying to squeeze international actors into the state-

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and indeed private and non-governmental groups." Id. at 50. For a comparable view, see Robert McCorquodale, "The Individual and the International Legal System," in Malcolm Evans, International Law at 307-332 (2nd ed. 2006).

[30] See, e.g., Greenwood Declaration, supra note , at paras. 10-12 (citing Oppenheim's International Law (9th ed. 1992)). Greenwood asserts in no uncertain terms that "while the law of human rights is regarded as conferring rights upon individuals, it still imposes obligations only upon States." Id., at para. 14.

[31] See, e.g., Jennifer A. Zerk, Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law, at 72-103 (2006).; Nocola Jagers, supra note ; McCorquodale, supra note .

[32] For a forceful defense of the natural rights of human persons as distinct from rights derived from the proposition that humans are legal persons, see Rafael Domingo, The New Global Law, at 126-31 (2010).

like entities box is, at best, trying to force a round peg into a square hole . . . ."[33] Moreover, the subject-object dichotomy implies that these are hermetically sealed categories such that mere "objects" are passive recipients of international rights and duties that are created by international law's "subjects," whereas the realities of contemporary international law-making processes are a great deal more complex. The designation of "participant" recognizes that today, thanks to increasing participation rights in a number of international forums for many non-state actors, corporations, alongside a number of non-state actors, are now involved in the making of international law, including, as is addressed below, in the making of international investment law through investor-state adjudication.

This essay addresses only a limited range of issues with respect to international subjects. It does not tackle the subject of subjects head-on but gives it only a glancing blow: that is, it attempts to warn human rights advocates, who are, in the United States and especially through ATCA litigation, driving this sea change in fundamental doctrine, of the need to think carefully about how much they want to rely on the attractive trope that corporations are international persons or subjects. It suggests the risks of deducing, from the fact of personhood or subject-hood, that corporations have certain rights and obligations in international law. It identifies some of the unintended consequences that may emerge when international lawyers argue in hierarchical fashion, top down, that corporations are international legal persons and are to be treated legally as the functional equivalent of either states or natural persons. My point is strikingly simple, even banal. It is that even in our progressive era, when scholars acknowledge that all legal concepts are constructed and can be de-constructed to suit distinct normative agendas, when

[33] Clapham, supra note , at 80.

corporations are designated as "persons," many, including judges and arbitrators, may treat this literally.[34] This essay argues that not all of the results will be progressive.

Personhood and its Discontents: *Citizens United*

My starting point, not surprisingly, is that masterstroke in finding that 'corporations are people' too: the U.S. Supreme Court's recent decision in *Citizens United v. Federal Election Commission*.[35] On January 21 of this year a 5-4 majority of the Court found unconstitutional a federal law that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech within 30 days of a primary election or that expressly advocates the election or defeat of a candidate.[36] The majority opinion, by Justice Kennedy, explicitly put corporations and individuals on the same plane. Like the *Talisman* court did in applying the ATCA, Kennedy described corporations as merely associations of persons that, like other groups, are entitled to the free exercise of political speech. Kennedy stressed that political speech does not lose First Amendment protection "simply because its source is a corporation."[37] His opinion repeatedly emphasized that corporations, as associations of persons like many others that U.S. law reveres, contribute to the discussion, debate, and dissemination of information and ideas that the First Amendment protects;[38] that the U.S. government lacks the power to ban corporations from speaking no less than it does with respect to individuals;[39] that corporate speech is no less indispensable to decision-making in a

[34] For an interesting introduction to linguistic studies concerning the mental states commonly attributed to group agents such as corporations, see Joshua Knobe and Jesse Prinz, "Intuitions about Consciousness: Experimental Studies," available at http://www.unc.edu/~knobe/consciousness.pdf.
[35] *Citizens United v. Federal Election Commission*, 558 U.S. (2010).
[36] *Id.*.
[37] *Citizens United*, 558 U.S. at 26 (from slip opinion).
[38] Id., at
[39] Id., at

democracy than is any other form of speech;[40] that the contention that corporate speech can be limited because of the relative wealth of corporations is as illegitimate as any other argument based on the speaker's identity;[41] and that since the state cannot ban speech from wealthy individuals, it can no more "disfavor" the corporate form of wealthy speech; and that businesses, large and small, bring valuable expertise to bear on robust democratic debates.[42] Further, since media corporations accumulate wealth, a contention that corporate wealth is a reason to restrict speech rights is tantamount, argued Kennedy, to contending that media outlets or wealthy individuals may also have their rights restricted.[43] In any case, Kennedy argued, targeting corporations on the basis of wealth is overbroad given the millions of small businesses that exist with less than $1 million in receipts per year.[44] For these reasons, Kennedy concluded that Congress had in reality arbitrarily disfavored one particular type of association of persons.[45]

Citizens United never said one word about international law or international personhood or subjects of international law. Justice Kennedy's sole reference to anything remotely foreign consisted of two sentences noting that the federal act that the court was ruling unconstitutional applied equally to U.S. and foreign corporations and was overbroad, even if we assume "arguendo, that the Government has a compelling interest in limiting foreign influence over our political process."[46] Of course, the fact that the Court struck down legislation that affected foreign corporations as well as domestic ones lead to the memorable exchange between President Obama and Justice Alioto at the State

[40] Id., at
[41] Id., at
[42] Id., at
[43] Id., at
[44] Id., at
[45] Id., at
[46] Id, at 47 (slip opinion).

of the Union, where the President asserted, to Alioto's apparent disagreement, that the decision in *Citizens United* precluded speech limitations on foreign corporations.[47] Justice Stevens in dissent also criticized the majority's reasoning on this basis.[48] It would appear that even in our partisan times, everyone agrees that foreigners, including their corporations, are not "persons" at least constitutionally speaking.

Despite the parochial nature of *Citizens United*, both the majority and dissenting opinions in that case offer insights to international lawyers. The parallels in reasoning between *Citizens United* and international lawyers who would accord international personhood on corporations are striking. Justice Kennedy drew connections between media companies and other corporations – just as Clapham does in his reference to the *Sunday Times* case.[49] Moreover, many of the arguments raised by both the majority and the dissent in *Citizens United* are reminiscent of those made for and against the international legal regime that treats corporate interests most like real subjects of international law, namely the international investment regime.

United in Support of the International Investment Regime

The international investment regime consists of nearly 3000 bilateral investment treaties (BITs) and regional free trade agreements with investment chapters (FTAs) (such as the NAFTA) around the world.[50] This treaty network provides foreign investors of the respective treaty parties fair and equitable treatment, full protection and security, and other protections under customary international law such as the guarantees of the

[47] For reports (including video) of Justice Alioto's silent dissent during the State of the Union address, see Politico Live, "Justice alito mouths 'not true'," available at http://www.politico.com/blogs/politicolive/0110/Justice_Alitos_You_lie_moment.html.
[48] Citizens United, at
[49] See prior Clapham quotation, supra.
[50] For an overview of international investment treaties, see UNCTAD, "Recent Developmtns in International Investment Agreements (2008-June 2009)," ILA Monitor No. 3 (2009), available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf.

international minimum standard. Most of these investment treaties also include protections from violations of investors' investment contracts with host states, national and most favored nation treatment, prompt, adequate and effective compensation upon expropriation, alongside other rights. Under most contemporary investment treaties, foreign investors have the right to bring direct claims for violations of their treaty rights in various arbitral forums, including the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). Respondent states in investor-state disputes are under a treaty obligation to pay out any resulting arbitral awards against them and investors can seek direct enforcement of such arbitral awards in local courts.[51] The presumptive remedy in investor-state arbitration is full compensation in accordance with the *Chorzou Factory* standard[52] and not merely an award that encourages a state to remove an illegal national law, as is the case in the WTO which relies on authorized interstate trade retaliation. Moreover, unlike the interstate dispute settlement scheme of the WTO, governments cannot prevent private investors from bringing claims under such investment treaties and they cannot prevent investors from making particular arguments that might establish expansive arbitral precedents.

Under investor-state arbitration, therefore, states are mostly passive participants in a game controlled by corporate plaintiffs in which the latter play the jurisgenerative role that in the WTO and throughout much of international law is formally reserved to states. As students of the burgeoning investor-state arbitral caselaw attest, states have in effect delegated the making of international investment law to third party private attorney's

[51] For an overview of how investor-state arbitral awards are enforced, see Alan S. Alexandroff and Ian A. Laird, "Compliance and Enforcement," in Peter Muchlinski, et. al, ed., The Oxford Handbook of Interntional Investment Law, at 1171 (2008).
[52] Chorzów Factory, (Merits), 1928 PCIJ, Ser. A, no. 17, Jul. 26.

generals, namely the wealthy multinationals that can afford to bring the cases and generate the caselaw.[53]

If one applies the ICJ's (circular) reasoning from the *Reparation Case*, it is easy to conclude, based on the international investment regime, that corporations and other investors under BITs and FTAs, are international legal persons or subjects of international law to no less an extent than the Court found was true of the UN in that case. As does the UN Charter, which implicitly recognizes that the United Nations has a distinct personhood apart from its member states, investment treaties appear to recognize the distinct "personhood" of their third party beneficiaries, whose rights appear to be delineated in these treaties as distinct from those of the state parties to such treaties. And, as with respect to the UN Charter, which recognizes that the UN can conclude certain agreements under international law,[54] many BITs and FTAs' umbrella clauses explicitly "internationalize" investor-state contracts, thereby elevating such contractual assurances to the level of interstate pacts.[55] In addition, most BITs and FTAs, unlike the UN Charter which does not confer on the organization the capacity to sue, explicitly provide investors with the ability to pursue their claims vis-à-vis states at the international level. To the extent the ICJ concluded in the *Reparation* Case that the ability to act as a person is the principal determinant of personhood status, the same conclusion can even more

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[53] For a critical view of the resulting "global administrative law" that is produced in the course of investor-state arbitrations, see Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law," 17 EJIL 121 (2006). See also Benedict Kingsbury and Stepahn Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law," in El Nuevo Derecho Administrativo Global en América Latina (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980.

[54] See, e.g., UN Charter, Articles 43(3), 63, and 75.

[55] For an introduction to "umbrella clauses," see, e.g., Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, at 153-62 (2008). Even with respect to BITs and FTAs that lack umbrella clauses, comparable elevations of investor-state contracts might be achieved through other investor guarantees, such as their typical provision assuring "fair and equitable treatment." See id., at 140-42. See also discussion infra at .

readily be drawn with respect to corporations and other investors under the international investment regime.

Whether or not investors are seen as international legal persons, there is little doubt that, as Tillmann Braun has argued, the change from diplomatic espousal of aliens' claims to today's investor-state dispute settlement is a significant paradigm shift.[56] In the days of espousal, harms to the rights of aliens, including alien investors, were treated as harms to their nation states. Consistent with the idea that such harms constituted an injury to the dignity of the state, the home state of the alien, not the alien itself, was given the right to make a claim against the host state. Whether to bring such a claim was totally at the discretion of the host state; the alien was not "entitled" to be protected. Such claims were nonetheless conditioned on exhaustion of local remedies. In addition, the home state was entitled to reject, modify or settle its national's claim, including by entering into lump sum interstate agreements whereby the injured national's claim could be reduced to a pittance. In any case, even if the espousing state received compensation, it was under no duty to reimburse its injured national; it was after all, the state's claim, not the investor's.[57] Another obvious consequence was that the prospects for an injured corporation's claim to be pursued internationally turned on the willingness of its state of incorporation to do so; neither that company's shareholders nor those who had invested in a company registered in the host state enjoyed any distinct protection.[58]

BITs' and FTA's conferring of rights to investors to bring their own claims against host states overturned every one of these aspects of espousal. Commentators

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[56] Tillmann Rudolf Braun, "Globalization-fueled Innovation: The Investor as Subject of International Law," (forthcoming)(paper on file with author).
[57] Id.
[58] See, e.g., *Barcelona Traction, Light and Power (Belgium v. Spain)*, 5 Feb. 1970, ICJ Rep. 1970, 37, No. 47.

have described the significance of the change in different ways: as "privatization," "individualization," or "humanization."[59] For some the change from espousal to investor-state arbitration has meant that the underlying disputes have been "depoliticized" or "juridified;" others consider the change to be so fundamental as to imply the "constitutionalization" of this area of the law.[60] Most commonly, commentators have suggested that BITs and FTAs have transformed investors into empowered third party beneficiaries of treaties who are free to ignore the domestic jurisdiction of the courts in which they operate and are no longer dependent on their home states to assert their rights.[61] Some scholars and judicial or arbitral decisions have suggested that BIT and FTA claims vindicate the investor's *own* rights rather than those of its nation state.[62] This is one possible implication of the fact that under the ICSID Convention states are barred from extending diplomatic protection once their nationals have exercised their right to

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[59] See generally, Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration," 74 BYIL 151 (2003).

[60] On the "constitutionalization" of international investment law, see David Schneiderman, Constitutionalizing Economic Globalization (2007).

[61] See, e.g., Douglas, supra note . BITs, like post WWII FCNs, also overcome the hurdle imposed by the rule in *Barcelona Traction, Light & Power Co. Ltd. (Belg.v. Spain)*. 1970 ICJ 3 (Feb. 5), which severely restricted the states that could present international claims on behalf of those corporations that were controlled by their own nationals.

[62] Thus, Braun writes "insofar as modern bilateral investment treaties assure investors substantive rights along with associated formal enforcement procedures, they contribute to a fundamental change in international law – the individual or legal person in private law is assigned individual rights through a treaty in international law and this is upgraded to the status of a partial subject of international law." Tillman Rudolf Braun, "Globalization: The Driving Force in International Investment Law," in Michael Waibel, et. al, ed., The Backlash Against Investment Arbitration, at (citations omitted) (2010). See also Jan Paulsson, "Arbitration without Privity," 10(2) ICSID Review –Foreign Investment Law Journal 232, at 256; Thomas Walde, "Investment Arbitration under the Energy Charter Treaty," Vol. 1 Transnational Dispute Management Issue 2, May 2004, at 435-37, available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article224b.htm; *Occidental Exploration and Production Co. v. Republic of Ecuador*, English Court of Appeal, (2005) EWCA Civ. 1116, para. 20; *SGS v. Philippines*, Declaration by Arbitrator Crivellaro, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC658_En&caseId=C6. But see *The Loewen Group Inc. (Can.) v. United States, ICSID Case No. ARB(AF)/98/3, para. 233 (Award (2003*(suggesting that the NAFTA had replaced the traditional power of states to take international measures for wrongs done to their nationals by an "ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation" having nothing in common with private arbitral remedies for commercial wrongs).

submit a dispute to ICSID and that an investor and the respondent state are accorded equal status in that forum.[63] As Braun points out, under investor-state dispute settlement, states "are no longer the only guarantors responsible for law and order or, in other words, an international 'rule of law.'"[64]

One of the general rationales offered for establishing this innovative international regime is precisely that suggested by the majority in *Citizens United*: namely that corporations have a legitimate role to play in constructing the rule of law and democratic society and their rights as persons should be respected no less than others. The investment regime just takes this rationale one step further to argue that foreign businesses should be able to bring international claims against the home states in which they operate. Although the creators of the investment regime extend their view of the polity to foreign corporations – unlike the majority in *Citizens United* – their logic for doing so adheres closely to that Court's reasoning. As does the *Citizens United* majority, who draw connections among all groupings of persons and corporations, defenders of the investment regime point out that to the extent BITs and FTAs apply to individual investors and shareholders, the holder of these treaty rights may be as much a human being as anyone who files a complaint before a UN human rights treaty body or a regional human rights court. The principal difference between the majority in *Citizens United* and defenders of the investment regime, in short, is that the latter see foreign and not just domestic corporations as people too.

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[63] See ICSID Convention, 575 UNTS 159, reprinted in 4 ILM 532, article 27.

[64] Braun, supra note (Globalization-fueled innovation), at 44. Indeed, investor-state arbitrators appear to enjoy greater power than do most national courts. This is true to the extent that, for example, such arbitrators need not fear any plenary review authority, are not limited by national laws or even a national constitution, can opine on even national security issues subject to none of the usual abstention doctrines that may restrict a national court (such as the political question doctrine), and are not formally bound by prior rulings of any court or arbitral body.

And some of the more specific rationales for establishing the investment regime echo those of the majority in *Citizens United* as well. Sensitive to the fact that governments have restricted the political participation rights of foreign corporations in their midst and can not be trusted to provide fair, impartial justice to foreign companies in their local court, those who built the modern investment regime argue that foreign investors need to have direct access to effective international dispute settlement to compensate for their political disempowerment in the host states in which they operate. BITs and FTAs were established on the premise that foreign corporations, which are disabled from participating equally in the political process of the host states in which they operate, need more credible assurances of their rights than the potential intervention of their home states (through diplomatic espousal).[65] To those who negotiate BITs, diplomatic espousal and gunboat diplomacy are simply not sufficient guarantees – not in the age of globalization when neither is palatable to governments. Since foreign companies cannot vote or in most places exercise their political speech rights and cannot always count on their own politically motivated governments to espouse their claims, they need to be able to bring direct claims against host states that fail to treat them or their property fairly and equitably – no less than the UN did in the *Reparation Case* that discovered the UN's personhood.[66] The fact that most states have *not* affirmed the political rights (whether in terms of corporate speech or otherwise) of foreign

[65] See, e.g., Douglas, supra note ("The Hybrid Foundations of Investment Treaty Arbitration"), at 182 (stating that the *raison de'être* of the investment regime is to respond to the "inadequacies of diplomatic protection").

[66] Indeed, one of the rationales offered by the ICJ in the Reparation Case for why the UN could be assumed to have the capacity to bring an international claim on behalf of agents of the UN (and not merely claims for damages to the organization itself) was the Court's expressed dissatisfaction with diplomatic espousal as a vehicle to vindicate the UN's rights to have an independent civil service. Reparation Case, supra note , at . Of course, as noted, comparable dissatisfaction with the espousal, was the basis for the establishment of investor-state dispute settlement.

corporations is, ironically enough, one of the justifications for the emergence of BITs and FTAs.

Like the majority in *Citizens United*, advocates of the investment regime have argued that advancing corporate rights is fully consistent with, and indeed essential to, advancing democratic governance.[67] Defenders of the investment regime appeal, in short, to the same rule of law/human rights values that inspire ATCA plaintiffs. Thus, there is abundant literature contending that the investment regime promotes: the national rule of law, human rights-friendly views of fair process, and a virtuous circle in defense of both free markets and human rights.

(1) The National Rule of Law.

According to its defenders, the international investment regime is built upon and promotes common values of "good governance" increasingly expected of all rights-regarding states.[68] Some have put a more jurisprudential gloss on this contention. They have suggested that the investment regime, along with other contemporary human rights regimes, elaborate a cluster of common normative principles inspired by Lou Fuller's "inner morality of law."[69] It is pointed out that, like human rights regimes, BITs and FTAs require states (1) to respect the legal values of stability, predictability and consistency, (2) protect legitimate expectations, (3) grant procedural and administrative

[67] For criticism of this view, see Tom Ginsburg, "International substitutes for domestic institutions: bilateral investment treaties and governance," 25 Int'l Rev. of L. & Econ. 107 (2005). For some scholars, the investment regime is also the harbinger of the democratization of international law. See, e.g., Braun, supra note (Globalization: The Driving Force. . .), at 13 (arguing that the investment regime signals the end of the "monopolization of law by the state" and the "dawning of a much more inclusive and broader notion of public international law in which a reasonable balance exists between the rights of states and respect for the individual").

[68] See, e.g., Charles H. Brower II, "Corporations as Plaintiffs Under International Law: The Quest for Narratives about Investment Treaties," (summarizing some of these arguments).

[69] See Benedict Kingsbury and Stephen Schill, supra note .

due process and avoid denials of justice, (4) achieve transparency and (5) take only reasonable and proportionate actions.[70]

As does the majority in *Citizens United*, defenders of BITs and FTAs contend that when investors' rights are protected, others' rights tend to be as well. Versions of this argument range from the contention that free markets and respect for human rights usually go in tandem, to more specific (if controverted) contentions about the rule of law effects of investment treaties. Some argue that, for example, the implementation of investment treaty protections into local law leads to improvements in the functioning and independence of local courts, to the benefit of domestic investors as well as all citizens. It is postulated that investment treaties provide incentives for governments to improve the national rule of law generally, if nothing else to avoid instances where foreign investors have cause to file international complaints. Defenders of the investment regime also contend that a government that is capable of violating its word to foreign investors – and breaches its solemn promises to them – is capable of doing the same to its own citizens.[71]

(2) Fair process.

It is argued that to the extent investor-state arbitrators elaborate concepts such as "fair and equitable treatment," they are engaging in the same enterprise as do regional human rights courts that formulate ever more detailed conceptions of what "international

[70] Id. Given the fact that investor-state arbitrators have sometimes rejected investor claims where there is a serious allegation of corruption, finding that such acts violate "international public policy" or are not protectable investment made "in accordance with national law," the investment regime, along with sanctions imposed by entities such as the World Bank, might be seen as part of a interlocking set of global norms to sanction corporate corruption. For an example, see "Siemens Wiothdraws ICSID Claim Against Argentina," reported in Arbitration Newsletter, Oct. 6, 2009, available at http://www.um.edu.uy/_upload/_pdf_titular/web_titular_66_ArbitrationNewsletterPAGBAM.pdf.

[71] This contention is all the more plausible to the extent investor-state contracts are "internationalized" (as they arguably are under the umbrella clause of BITs) such that *pacta sunt servanda* is seen as applicable to them as well as to interstate pacts. For a survey of arbitral decisions enforcing investor contracts with host states even before the age of BITs, see Jason Webb Yackee, "Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality." 32 Fordham Int'l L. J. 1550 (2009).

due process" requires, including clarifications of what "the right to be heard" means. Consider an investor-state tribunal's now oft-cited standard for what FET requires of states. According to *TECMED v. Mexico*, FET requires a state

> "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."[72]

TECMID's expectations for government action could easily be applied by human rights advocates in non-investor settings.

(3) The Virtuous Circle.

As does the majority in *Citizens United* which puts the free expression rights of corporations and real persons on the same plane and suggests that free speech rights of all are enhanced through corporate speech, comparable positive synergies between corporate rights and human rights are asserted on behalf of the investment regime.[73] Proponents of the investment regime note the potential for overlap between the substantive rights given investors under investment agreements and those accorded to individuals under human rights law. Like the Universal Declaration of Human Rights and the European Convention on Human Rights, BITs and FTAs protect property rights no less than rights

[72] Tecnicas Medioambientales TECMED S.A. v. Estados Unidos Mexicanos, Award, 43 ILM 133, 174, para. 155 (interpreting the FET standard from a BI"t between Mexico and Spain).
[73] See, e.g., Charles H. Brower, "Corporations as Plaintiffs Under International Law: The Quest for Narratives about Investment Treaties," at 20 (noting the discernible shared emphasis in both the human rights and investment regimes on "the creation of zones of autonomy or freedom from governmental intervention").

to due process. The investment regime is similarly grounded in hoary doctrines of state responsibility to aliens, including the international minimum standard and the principles of denial of justice and full protection and security. It too seeks non-discriminatory and non-arbitrary treatment by government, equal access to national courts, and the vindication of settled expectations for its "persons."

For supporters of the investment regime all of this demonstrates that free markets and human rights historically go together and are part of a virtuous circle. As does Justice Kennedy in defense of the rights of Citizens United, defenders of BITs and FTAs point out that investment treaty guarantees accrue not only to the wealthy or the powerful but extend to small businesses as well and, depending on the text of the particular BIT, may include non-profits. They point out that investment treaties may benefit Amnesty International, for example, when it is threatened by the trend in some authoritarian regimes to regulate it (or other 'troublesome' NGOs) out of existence. It is suggested that progressive environmental, labor rights, and human rights NGOs all may find investor-state remedies of use.

And like the majority in *Citizens United* who invoke the right of listeners to be "enlightened" by corporate speech, defenders of the investment regime remind their critics that investor protections may encompass traditional human rights. They point out that some investor-state claims, such as those involving allegations of government harassment of employees or the kidnapping of family members of the owner of a foreign business, could easily have been recast as human rights claims if they had been asserted elsewhere.[74] As Lee Bollinger's recent book touting the benefits of global free speech notes, this may also be the case when the foreign investor is a publisher or broadcaster

[74] See, e.g., Brower, supra note , at 20-22 (discussing *Desert Line Projects v. Yemen*).

attempting to remain in business despite government efforts to silence its views.[75] In cases involving media investors, investor rights *are* free speech rights. And like the majority in *Citizens United* who invoke the plight of owners of small business, BIT defenders invoke the rights of majority or minority shareholders who may be injured in their personal capacity and who now may be entitled to bring claims (as under the NAFTA), such as Canadian claimant Raymond Loewen who faced an allegedly discriminatory jury in Mississippi.[76] In such ways the rights to corporate speech and the rights of foreign investors are assimilated and humanized.

Dissenting from *Citizens United* and the Investment Regime

As might be expected, the dissenters' arguments in *Citizens United* are reminiscent of those made by the critics of the international investment regime. The essence of the dissenters' views was precisely that corporations were not like persons:

According to Justice Stevens:

"In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, our corporations are not actually members of it. They cannot vote or run for office. Because they may may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races."[77]

To the same end, Stevens pointed out that U.S. laws, including free speech laws, draws many distinctions based on the type of "person," from those of students to

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[75] Lee C. Bollinger, Uninhibited, Robust, and Wide-Open at 150-51 (2010).
[76] See Loewen, supra note . Of course, this highlights the contrast with the limits imposed under Barcelona Traction, supra note , where the underlying rights were seen only in terms of the rights of states and not those of natural persons (or shareholders).
[77] *Citizens United v. Federal Election Commission*, 558 U.S. at (Justice Stevens, Dissent, (slip opinion at 2)).

members of the Armed Forces to a company's own employees.[78] Stevens argued that limits on corporate speech are less worrisome because the speaker is not a natural person or a member of a political community;[79] that the absence of such limits accord undue influence to corporate views;[80] that corporate speech is readily distinguishable from individual speech as persons generally do not form corporations to facilitate expressive or associational ends;[81] and that those who drafted the bill of rights conceptualized speech in individualist terms.[82] Stevens also turned the majority's attempt to distinguish foreign corporations against it. "The Court all but confesses that a categorical approach to speaker identity is untenable," he writes, "when it acknowledges that Congress might be allowed to take measures aimed at "preventing foreign individuals or associations from influencing our Nation's political process." (citing the majority opinion at 46-47) . . . The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.""[83]

Critics of the investment regime, particularly human rights advocates, would find Stevens' arguments congenial. They also find the suggested analogy between investment and human rights treaties offensive precisely because they do not see how corporate

[78] Id., at
[79] Id., at
[80] Id., at
[81] Id., at
[82] Id., at
[83] Id., at (Stevens Dissent, slip opinion at 13, n. 51 (citations omitted). Stevens also quotes Professor Teachout's observations that a corporation might be analogized to a foreign power "inasmuch as its legal loyalties necessarily exclude patriotism." Id.

interests are, in any way, equivalent or comparable to the rights of natural persons.[84] Like the dissenters in *Citizens United* they also find the comparisons between corporations and real human beings absurd. Like them, they are not convinced that either "good governance" or "democracy" is enhanced when we privilege corporate interests or equate them with human interests. Like the dissenters, they find it hard to understand the argument that corporate interests are now so disempowered that they need greater rights or that everyone is better off when such greater rights are accorded.[85]

Stevens ends his dissent in *Citizens United* with the following memorable line: "While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."[86] Human rights critics of the investment regime would find his suggestion of misplaced priorities quite apt. The Canadian based International Institute for Sustainable Development, for example, advocates strongly that the investment regime needs to be re-calibrated to strike a better balance between corporate power and the power of the state to regulate in the wider public interest.[87] The contention that the investment regime privileges one over-privileged set of juridical entities to the detriment of the rights owed by all states to natural persons within their jurisdictions underlies all the other criticisms of the regime. Five of these criticisms can be briefly summarized.

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[84] See, e.g,, Brower, supra note , at 24 (noting the differences between most human rights claimants and investor-state claimants),

[85] Indeed, there is a long line of critical literature addressing the "inordinate" power deployed by foreign corporations, including within the United States, despite the formal limits imposed on their political participation, such as restrictions on lobbying. See, most famously, Raymond Vernon, Sovereignty at Bay (1971).

[86] *Citizens United*, 558 U.S. at .

[87] See, e.g., IISD, IISD Model International Agreement for Investment for Sustainable Development, available at http://www.corporate-accountability.org/eng/documents/2005/june_2005_iisd_model_international_agreement_on_investment_for_sustainable_development_negotiators_handbook_pdf_678_kb.pdf.

(1) Lack of equal access to the international rule of law.

For countries such as the United States that have not adhered to any human rights treaty that entails a binding pre-commitment to binding dispute settlement (such as the jurisdiction of the Inter-American Court of Human Rights) investment treaties, which permit foreign investors direct access to international arbitration, present an embarrassing lack of parity. At the same time, investor-state arbitrations, as under the NAFTA, are limited to examining foreign investors' rights and are not forums to adjudicate all the harms that a foreign investor might inflict on local populations, local consumers, or locally hired employees. A nation that permits itself and its laws to be subject to supranational adjudicative review when it comes to how it treats foreign investors but does not permit such independent impartial review with respect to its laws that may harm the human rights of others appears to be saying to the world that it values foreign investors' property rights more than it does any other civil, political, economic or social rights. The response that the United States has typically given – that its investors abroad need supranational scrutiny in order to secure their rights despite biased local courts but that no one – investor or natural person – needs such assurances when they enter rule of law states such as the United States, no longer satisfies critics of investment treaties such as the NAFTA's Chapter Eleven.[88] This is not a convincing answer in a world where the United States is the third leading respondent state in terms of investor-state claims against it and where much of the world has real reasons to doubt whether the United States rule

[88] Of course, agreements such as the NAFTA, which accord reciprocal rights to investors from all three NAFTA parties to bring claims against any NAFTA party, contradict the contention that the United States has uniformly dismissed the need for supranational scrutiny over its own actions. If Canadian investors can challenge the actions of U.S. courts, federal and state regulations or federal and state laws under the NAFTA, why shouldn't a Canadian national who is not an investor not be able to do the same before the Inter-American Court of Human Rights?

of law really protects all natural persons, from "unlawful belligerents" caught up in our "war on terror" to non-U.S. citizens embroiled in our Kafkaesque immigration procedures.[89] Much of the world thinks of the United States as no better than Europe when it comes to such matters, but whereas the Europeans have accepted supranational scrutiny on behalf of the rights of both foreign investors (as under their BITs and the Energy Charter Treaty) and natural persons (as under the European Convention on Human Rights), the United States has failed to equalize its exposure to international review.

The lack of equal access to an international remedy for human rights violations is problematic for those who would equate corporations with natural persons, for both political and legal reasons. This is especially the case when, for example, a foreign investor brings a claim against a state and that state cannot assert, even as a counterclaim before the same arbitral body, that the foreign investor has violated local laws relating to human rights, labor rights or the protection of the environment.[90] For many critics of the investment regime it is not an answer that local courts remain available to adjudicate such complaints. Local courts that are insufficient to protect the rights of foreign investors cannot be counted on to protect these other common values of the international (and local) community.

(2) Lack of equal remedies.

Even with respect to states that otherwise submit to international adjudication with respect to human rights and are, for example, parties to the Inter-American or European

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[89] See, e.g., David Cole, Enemy Aliens (2d ed. 2005).
[90] For criticisms of the investment regime along these lines, see, e.g., Peter Muchlinski, "Trends in International Investment Agreements: Balancing Investor rights and the Right to Regulate," in Karl P. Sauvant, ed., Yearbook on International Investment Law, at 35 (2008-09).

Conventions of Human Rights, there are awkward inequities with respect to the remedies available to foreign investors as compared to other rights-holders. While violations of human rights under human rights conventions are generally subject to exhaustion of local remedies, foreign investors under some BITs or FTAs, including those negotiated by the United States, do not face such a hurdle.[91] Further, investors are privileged in another sense: unlike human rights claimants, investors get to appoint one of their own judges to decide their arbitral claim.[92]

In addition, while international human rights remedies, including before regional human rights courts, tend to focus on preventing future harm by forcing the state to remove laws that offend human rights, the remedies given to foreign investors are intended to achieve the same result but are not so limited. Investor-state awards are not merely intended to get states to remove offending laws prospectively; they give retrospective relief which may involve multimillion dollar damage awards, often far in excess to any given by international courts even with respect to those who have suffered the most grievous harms to their human rights.[93] And, unlike global human rights regimes that are only subject to "mobilization of shame" enforcement techniques (such as

[91] See, e.g., Jacomijn J.Van Haersolte-Van Hof and Anne K. Hoffman, "The Relationship Between International Tribunals and Domestic Courts," in The Oxford Handbook of International Investment Law, supra note , 962, at 1000-01.

[92] Brower, supra note , at 24. As Brower notes, "investment treaties provide powerful remedies for powerful claimants." Id., at 25. See also Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law," 17 EJIL 121 (2006).

[93] Compare Gus Van Harten, Investment Treaty Arbitration and Public Law (2007)(suggesting that investor-state arbitrations generally result in multimillion dollar awards and contending that that this demonstrates the pro-investor bias of its arbitrators) to Susan D. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration," 80 N.C. L. Rev. 1 (2007)(concluding, after an empirical survey, that most of the publicly available arbitral awards result in either a win for the respondent state or relatively small awards for the investor and suggesting that the evidence does not support a pro-investor bias).

the issuance of non-binding opinions by UN human rights treaty bodies), investor-state arbitral awards are legally binding and generally result in compliance.[94]

(3) Threats to human rights remedies.

A third type of concern arises from the potential some investment treaties have to prevent states that are hosts to foreign investment from taking remedial measures to advance widely accepted human rights values. Government affirmative action type programs that, for example, require all employers to prefer certain minorities in hiring may be challenged as a violation of BITs' or FTAs' national treatment provisions. Indeed, the threat posed to South Africa's Black Economic Empowerment Act has led that state to modify its more recent BITs to expressly permit such actions.[95] Of course, some international treaties, such as the Convention Eliminating All Forms of Discrimination Against Women (CEDAW) anticipate that such affirmative actions programs may not only be legal but may be required to promote equality.[96] Other governmental measures intended to correct inequities in income or job distribution, such as requirements on foreign investors to hire local workers, locate in disadvantaged regions, or transfer advanced technology, might also be deemed inconsistent with

[94] Argentina's recent failure to pay a number of outstanding investor-state awards that have been issued against it is the outlier. Even in that situation, it is not clear how long Argentina will be able to defy compliance with the international arbitration system. The duty to pay commercial or investor-state awards under treaties such as ICSID or the New York Convention on the Enforcement of Arbitral Awards is subject to a number of formal and informal enforcement tools. Among the most effective is the market for capital. Commercial risk insurers and global suppliers of capital – from the IMF to regional development banks to other foreign investors contemplating entry – are likely to extract a serious economic penalty over time on states that renege on their treaty commitments to comply with arbitral awards.

[95] See, e.g., Luke Eric Peterson, "South Africa's Bilateral Investment Treaties," Nol 26, Nov. 2006, available at http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf. See also Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties," at , available at http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf.

[96] Convention on the Elimination of All Forms of Discrimination against Women, art. 4.

investment treaty prohibitions on performance requirements or bans on "discriminatory" treatment.[97]

(4) Alleged conflicts with other fundamental rights.

To the extent BITs and FTAs protect the rights of foreign investors who have taken over formerly government-owned utilities, and are now supplying basic commodities such as water or gas to large portions of a nation's citizens, protecting the rights of such privatized utilities may conflict with evolving affirmative international obligations to respect, protect and fulfill under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[98] Thus, a number of BIT claims involving privatized utilities have drawn considerable criticisms from civil society and are seen as posing problematic conflicts between investors' treaty rights and emerging international law rights with respect to access to water, food, or health.[99]

(5) Alleged conflicts with the residual sovereign right to regulate.

As the preceding suggests, investment treaties and their interpretations by arbitrators are seen as imposing constraints on a nation's general ability to regulate in the public interest. To the extent, for example, that investor guarantees ensuring "fair and equitable treatment" (FET) are interpreted broadly – as under the interpretation of that right given in TECMID – the result may hinder the ability of governments to respond to the needs of their citizenry in ways that are comparable to those imposed under controversial

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[97] See, e.g., NAFTA, art. 1106 (performance requirements).

[98] See, e.g., Economic, Social and Cultural Rights Committee, General Comment 12, UN Doc. E/C.12/1999/5 (1999)(discussing states' duties to respect, protect and fulfil with respect to the right to food).

[99] See, e.g., Aguas del Tunari, S.A. v. Bolivia, ICSID, ARB/02/03 (Petition of La coordinadora Para La Defensa Del Agua y Vida, et. al), available at http://www.earthjustice.org/library/legal_docs/Bechtel.pdf. For a survey of this and other human rights concerns involving the investment regime, see, e.g., Peterson, supra note .

stabilization clauses contained in imbalanced investor-state contracts.[100] To the extent a standard such as that in TECMID protects foreign investors from regulations that change over time because of changing information about health risks or changes in a government's capabilities or willingness to respond to such concerns, such protections of investors' "legitimate expectations" are controversial. Investment treaties are particularly likely to be seen as unjust to the extent that they prevent governments from taking any of a number of actions – to regulate the environment, protect against child labor, insure labor rights, and so on – that are increasingly expected of all governments and may even be required by other international legal regimes.[101] And even to the extent such conflicts between international obligations do not occur, poorer states may find the high expectations for the transparency and predictability of government action implicit in the TECMID standard impossibly difficult to satisfy.

The Risks of Corporate Personhood

Human rights advocates have paid little attention to the fundamental contradictions of insisting that corporations are "international legal persons" or "subjects" for purposes of imposing obligations on them (as in ATCA litigation) and resisting that outcome when it comes to finding international rights for corporations (as in the investment regime). The principal lesson to take from decisions like *Citizens United* is simple: beware the consequences of equating corporations to persons.[102]

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[100] For a case study involving stabilization clauses, see, e.g., Paul Kuruk, "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," 13 Mich. J. Int'l L. 43 (1991-92). For a more recent survey of the continuing use of stabilization clauses, see International Finance Corporation, "Stabilization Clauses and Human Rights," Research Project, released on Mar. 11, 2008. Of course, such stabilization clauses may receive treaty protection under some BITs' and FTAs' umbrella clauses.

[101] See, e.g., Brower, supra note , at 26.

[102] It is not as if today's ATCA litigants have not been given fair warning. From Wolfgang Friedman to Andrew Clapham, a number of international lawyers have reiterated the risks of seeing corporations as

The following are some of the possible implications within the investment regime of seeing corporations as international legal persons or subjects.

Espousal or New Dispute Settlement Mechanism?

If foreign businesses are, within the context of BITs and FTAs, really subjects of international law because they are given the ability to make claims directly against host states, arguably the investment regime is not just a particularlized application of traditional espousal practice. If, as some scholars and arbitral decisions are beginning to suggest,[103] investor-state arbitration is a wholly new mechanism designed to permit a new subject of international law to have equal standing alongside an old (state) subject of international law, a number of legal consequences could emerge. If the right of this new subject of international law is no sense derivative of the right of its home state as it was under espousal practice, it could follow that home states no longer retain the right to waive the right of their investors to file a claim. Alternatively, the personhood of investors could mean that only they get to waive their rights if they so choose, even if in a particular instance their home states wants to press a claim in order to establish a beneficial precedent or embarrass a rival government. Personhood could also encourage arbitrators to be more willing to find implicit limits on whether or when state parties to investment agreements (or to treaties facilitating investor-state arbitration such as the ICSID Convention) can terminate or restrict their previous treaty commitments, at least with respect to investors who have acquired rights under these treaties. While under traditional international law, the state parties to a bilateral treaty are usually free to

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"subjects" of international law over the years. Thus, Friedman was prescient when he reminded us, long ago, that "[i]t would be as dangerous to uncritically accord subjectivity to the private corporation in international law as it would be to deny its factual participation in the evolution of public international law." (quoted in Duruigbo, supra note , at note 181); see also Clapham, supra note , at 78-80. .

[103] See supra note .

change their minds through formal amendment or even mutual subsequent practice, such rules might be seen to apply only with respect to the state parties' obligations *inter se*, but not with respect to the obligations of another subject of international law, namely these treaties' third party beneficiaries.[104] Moreover, if corporate personhood is taken seriously, this could have an impact on whether arbitrators are likely to accept the state parties' interpretations of their treaty, even when the investment treaty authorizes such joint interpretations (as does the NAFTA).[105] Finally, a finding of corporate personhood might also impose implicit limits on the scope or effect of the state-to-state dispute settlement provisions that are typically found in most investment treaties, alongside investor-state arbitration provisions. It could mean, for example, that despite these state-to-state dispute settlement provisions, interstate arbitral decisions could not lead to binding interpretations of the underlying treaty at odds with the rights of these treaties' third party (investor) beneficiaries.

As these questions suggest, if corporate investors are seen as the recipients of direct rights and obligations under international law at least some of favored routes for "recaliberating" BITs and FTAs that states are now exercising or contemplating may prove more difficult. Perhaps arbitrators would be less inclined to permit states, such as Bolivia, Ecuador or Venezuela, to terminate their BITs or curtail their acceptance of ICSID arbitration to the extent such exit threatens the existing rights of the corporate third party /subjects of these treaties.

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[104] Compare Vienna Convention on the Law of Treaties, article 39 (enabling parties to amend a treaty among themselves) to its article 35 (precluding treaties from obligating third parties unless those parties consent).

[105] NAFTA, article 1131(2)(permitting the NAFTA parties to issue binding interpretations of their agreement). But see Pope & Talbott v. Canada, Damages, May 31, 2002, 41 ILM 1347, at paras. 23-42 (discussing whether this provision could authorize the parties to issue what are in fact amendments and not merely interpretations of their agreement).

If corporate investors are really subjects of international law, the implications for other features of investor-state dispute settlement are unclear. Would states alone remain free to change the rules of the investment arbitration game to force greater transparency or to require acceptance of NGO amicus briefs, even when this is resisted in a particular case by this new subject of international law?[106] Braun, a proponent of personhood for investors under BITs and FTAs, suggests that states will nonetheless always remain in firm control of these treaties and investor-state dispute settlement,[107] but it is not clear whether arbitrators will agree with him – not if investors' rights are no longer seen as derived from and dependent upon state consent. It is impossible to predict with confidence what consequences will ensure if investors come to be seen as equal stakeholders alongside states in the international investment regime.

Personhood and the Residual Rules of International Law

And debates are already emerging among scholars and arbitral panels concerning another contested question: to what extent are the underlying rules of customary international law, which now often apply as valuable gap-fillers unless expressly ousted by the terms of a treaty, affected by investor personhood? To what extent do the underlying Articles of State Responsibility, containing guidance on everything from attribution to remedy to defenses, continue to apply? One can see two possible contrary arguments emerging from the proposition that corporate investors are international legal persons.

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[106] See Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," Jan. 15, 2001 (deciding to accept amicus in that case despite the opposition of Mexico).

[107] Braun, supra note (Globalization-fueled Innovation . . .), at .

On the one hand, to the extent corporations (or investors) are treated as distinct subjects of international law, some would contend that the Articles of *State* Responsibility are no longer relevant as these apply solely to the relationship of states *inter se*. Douglas argues, for example, that "it is manifest that a breach of a treaty obligation owed directly to an investor does not necessarily entail a liability on the *inter*-state plane governed by the secondary rules of state responsibility for international wrongs."[108] Hints of such an approach are appearing in decisions such as *BG v. Argentina*, where the arbitrators noted that perhaps Argentina could not resort to the defense of necessity (codified in Article 25 of the ILC's Articles) because that defense could not be asserted against a non-state party.[109] Although *BG* ultimately found it unnecessary to decide that question, that case suggests that subjecthood could prove to be a tremendous boon to investor rights. If the dicta in *BG* is taken seriously, investor rights would receive greater protection than those of states inter se, an absurd but totally logical outcome if one believes that customary law anticipates no other defenses as between obligations incurred between a state and non-state subject of international law.[110]

On the other hand, some might conclude that, to the extent corporations are persons, it is all the more justifiable to apply the rules that ordinarily apply to other international persons under international law, including the Articles of State Responsibility to the

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[108] Douglas, supra note , at 184 (italics in original). For these reasons, Douglas contends that investment treaties create an independent "sub-system of state responsibility." Id., at 185.

[109] *BG Group v. Argentina*,Final Award, UNCITRAL, Dec. 24, 2007, at para. 408. See also Bundesverfassungsgericht [BverfG], Decision of May 8, 2007, summarized in Stephan W. Schill, German Constitutional Court rules on Necessity in Argentine Bondholder Case, ASIL Insight, July 31, 2007, available at http://www.asil.org/insights070731.cfm (German court ruling that necessity was not available as a defense to Argentina because no such defense was applicable as between a state and a private individual).

[110] Crawford's and Greenwood's respective expert opinions in *Talisman*, see supra at note , also appear to be based on the proposition that the residual rules of state responsibility do not apply with respect to non-state entities.

extent these prove amenable to application.[111] This is certainly suggested by some ATCA cases which have applied the Articles of State Responsibility rules concerning state attribution by analogy to infer when, for example, a corporation can be said to be "aiding or assisting" a state.[112]

Neither of these black/white outcomes dictated by a finding of person/subject-hood is desirable.

Deciding whether underlying rules of custom, including the matters dealt by the articles of state responsibility, ought to be applicable in the investor-state context should not be a question that turns on whether the investor is or is not an "international legal person" and therefore can be analogized to a state. Determinations of what is an international legal person are, for reasons noted, hardly intellectually rigorous. Those who rely on the circular reasoning involved in personhood determinations may find their conclusions challenged over time. Personhood may be a thin reed on which to rely for specific conclusions about what corporate responsibility actually entails under customary international law. In any case, such a top down approach to finding international corporate obligations is precisely the wrong way to figure out what obligations make sense or reflect what the principal makers of international law, namely states, actually

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[111] For a comparable contention with respect to international organizations, see the discussion infra of the ILC's proposed rules on IO responsibility. Some of the arbitral decisions rendered against Argentina, such as *CMS, Sempra, and Enron*, suggest a variant of this approach. In those cases, the tribunals suggested that investors were owed the same consideration that states owe inter-se at least for purposes of the necessity defense. Thus, in these three cases, the tribunals assumed that the defense of necessity, codified as article 25 of the ILC's articles of state responsibility, which requires consideration of the defenses' impact on other members of the international community, required consideration of the impact of this defense on the rights owed under the BIT to the investor. *LG&E v. Argentina*, however, resisted this re-interpretation of Article 25. For a discussion of these cases, see José E. Alvarez and Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime," in Sauvant, supra note (Yearbook of International Investment Law & Policy), at 379; available as a pdf at http://www.vcc.columbia.edu/pubs/.

[112] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 16 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

want. Most importantly, such a top down approach loses sight of the ways that corporations are distinct from states or natural persons. It makes it more difficult to *contextualize* corporate obligations in light of these realities.[113]

A decision as to whether a corporation is "aiding or assisting" a state under the ATCA ought not be resolved through a mechanical application of rules devised for resolving the entirely different question of whether one government is "aiding or assisting" another, at least not on the sole premise that both states and corporations are subjects of international law.. Guidance on such questions should be sought from the usual state practice/opinio juris exercise or perhaps from examining general principles of law. In the absence of clear international law on point, it would be far better to examine what national laws provide with respect to corporate responsibility in comparable instances.[114] Those sources are more likely to be attentive to the ways corporations are distinctive actors operating in distinctive ways. Those sources are also more legitimate bases to establish corporate obligations precisely because states – which remain after all the most legitimate kind of law-makers -- continue to be involved in determining their content. Drawing such conclusions from international "personhood," on the contrary, threatens to remove the element of state control from such important questions and may itself threaten the credibility of international law itself, especially if states resist the outcome.[115]

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[113] This is precisely the appeal of the "protect-respect-remedy" efforts of John Ruggie, as elaborated by Backer. See supra note ..

[114] As is attempted in the Brief of Amici Curiae filed by International Law Professors in Support of Plaintiffs-Apellees, in Balintulo, et al. v. Daimler AG, in the United States court of Appeals for the Second Circuit, 09-2778-CV (Dec. 17, 2009).

[115] Compare Carlos M. Vásquez, "Direct vs. Indirect Obligations of Corporations Under International Law," 43 Columbia J. Transnat'l L. 927, at 950-58 (2005)(noting the possibility of such adverse outcomes should obligations be directly imposed on corporations without the intervention of states). Interestingly, Vásquez contends that it is conceptually plausible to ground primary liability for violations of the primary

Personhood and the Rights at Stake

What does personhood mean for investor and "human" rights?

The elevation of the rights holders in the investment regime – from third party beneficiaries of treaty rights ultimately under the control of states to full scale "subjects" of international law – may have effects on the substance of the rights that are protected by this regime (and possibly by other regimes). Consider the debate over the meaning of "fair and equitable" treatment recently decided in the NAFTA *Glamis* case.[116] In that case, the question was whether the arbitrators would find, consistent with what was stated by the NAFTA parties in their binding interpretation of their treaty, that the FET guarantee was indistinguishable from the customary rules for the treatment of aliens. Prior NAFTA tribunals had suggested that the FET guarantee in the NAFTA was not limited to such customary rules or, if so limited, that those customary rules had evolved in accordance with evolving notions of due process.[117] In *Glamis*, the tribunal limited its inquiry to the older cases that had been explicitly based on an application of the international minimum standard as applied to aliens. It accordingly upheld a far more limited interpretation of what FET requires than that found in, for example, TECMED. *Glamis* found that FET was violated only by "egregious" or "shocking" state conduct.[118]

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rules of international law on corporate actors if these are violations of primary rules applicable to individuals precisely because corporations are "artificial "persons" comprising groups of natural persons." Id., at 944.

[116] See also discussion in Brower, supra note .

[117] See David A. Gantz, "Pope &, Inc. v. Canada," 97 AJIL 937 (2003)(describing the Pope & Talbot line of NAFTA decisions).

[118] *Glamis Gold, Ltd. v. United States*, Award, UNCITRAL, June 8, 2009, at para. 609 (distinguishing TECMID). In doing so, Glamis recognized a schism in the meaning of the FET guarantee among investment agreements. But see Jordan C. Kahn, "Striking NAFTA Gold: Glamis Advances Investor-State Arbitration," 33 Fordham Int'l L. J. 101 (2009)(contending that while *Glamis* purported to apply a customary international law standard, it actually used U.S. takings jurisprudence to inform its interpretation of the NAFTA's FET guarantee).

Whether the result in *Glamis* is right or wrong is not my concern. My point is that seeing investors or corporations as "subjects" or "persons" may play a subtle role in all-important determinations of the scope and meaning of investor protections, such as FET. Are investors merely "aliens," that is a special kind of invitee to a host state subject to a delimited realm of protection, or are they "persons" who, like natural persons, ought to be entitled to a wide panoply of protections under international human rights law?[119] If investors are seen as persons or subjects of international law, it may be easier to convince investor-state arbitrators that the old rules applicable only to "aliens" under espousal are anachronistic and irrelevant.[120] This may encourage interpretations of FET that are closer to the pro-investor standard in *TECMID* than to those in *Glamis*.[121]

Equating corporate and natural persons could also encourage the transjudicial communications between international dispute settlers and among these and national courts that many scholars and human rights advocates crave and praise.[122] For some, the prospect that investor-state arbitrators or WTO panelists will draw from the jurisprudence

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[119] Rob Howse argues, for example, that *Glamis* ignored modern conceptions of customary law which, in his view, encompass the contemporary jurisprudence of human rights tribunals. He contends that FET should accordingly be seen in light of the accountability of public authorities urged by those who analyze global administrative law. He suggests that this more generous view of what FET requires is justified precisely because that right no longer is about, as it was in the days of espousal, protecting the dignity of the state but is about protecting "individual rights." To Howse, the meaning of FET should be "inspired by not only the universe of BITs but also the universe of human rights law in the broadest sense . . . it would arguably also be responsive to the obligations of the sate with respect to the human rights of its own citizens. . .." Robert Howse, "Custom in International Investment Law: Glamis Gold and Other Developments," available at http://www.iilj.org/research/documents/IF2010-2.pdf (cited with permission from author).

[120] Perhaps predictably, the Dunoff, Ratner, and Wippman casebook suggests that the rules relating to state responsibility to aliens, along with the rules governing espousal, are anachronistic and have been displaced by modern human rights law. See generally, Dunoff, Ratner, and Wippman, supra note , at 441-443.

[121] Although a broad interpretation to FET under the NAFTA is now less likely given the NAFTA parties' explicit interpretation limiting the scope of FET (see Notes of Interpretation, July 31, 2001, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en), such an interpretation is far more plausible in the context of BITs or FTAs which simply include an FET guarantee that omits any reference to or limits itself to customary rules applicable to the protection of aliens.

[122] See, e.g., Anne-Marie Slaughter, "Judicial Globalization," 40 VJIL 1103 (2000); Anne-Marie Slaughter, "A Global Community of Courts," 44 Harv. Int'l L. J. 191 (2003).

of regional human rights courts suggests the welcome dawning of "humanity's law," that is, progressive jurisprudence that respects the dignity of the individual across the trade/investment/human rights/international criminal divides.[123] This may be overly sanguine. Increased resort to human rights standards by investor-state arbitrators (or by WTO adjudicators for that matter)[124] may not be desirable from a human rights perspective. The importation of human rights law into investor-state arbitration is, after all, most likely to enhance the rights of the investor – not *humans'* rights as traditionally construed. This is likely to be the case at least insofar as the jurisdiction of investor-state tribunals remain restricted to reviewing the rights of the investor (and not the respondent state's counterclaims or those of natural persons injured by the investor).

Once a corporation is accepted as a person, it is more likely that the due process (and possibly other guarantees) that are applied to other persons, as in human rights regimes, would be seen as relevant and applicable within the investment regime. Depending on the context, this could enhance the rights of investors vis-à-vis the host state. This is most evident concerning the FET standard noted above but the same might be said of other BIT/FTA guarantees, such as the rights to full protection and security, non-arbitrary treatment, non-discrimination, respect for all "commitments" made by a state (as under the typical "umbrella" clause), or national treatment. While we know that what natural persons should be entitled to expect in terms of "full protection" from a state, and what businesses should be entitled to expect differ in reality (and perhaps morally), such

[123] Ruti Teitel and Robert Howse, "Cross-Judging: Tribunalization In a Fragmented But Interconnected Global Order," 41 NYU J. Int'l L. & Pol. 959 (2009).
[124] See, e.g., José E. Alvarez, "How *Not* to Link: Institutional Conundrums of an Expanded Trade Regime," VII Widener Law Symposium Journal 1 (2001).

distinctions may vanish (as they did in *Citizens United*) as corporate and other persons are assimilated.

It is questionable whether the types of arbitrators now sitting in investor-state disputes will, given their largely commercial expertise, draw the human rights-friendly conclusions that advocates of "transjudicial communications" or "humanity's law" anticipate. Human rights advocates may not like what happens to their human rights as these get translated to the commercial setting of investor-state disputes. Do such advocates really want investor-state arbitrators to conclude, from the famous Inter-American Court of Human Rights opinion in *Velasquez-Rodriguez*, that capital importing states need "to respect" and "to ensure" the rights of foreign companies in their midst and protect them from, for example, disrupting protestors or union organizers?[125]

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[125] Compare U.S. Restatement, Foreign Relations, supra note , at § 702, Reporter's Note 2 (noting that a state violates customary norms of human rights when it "encourages" or "condones" certain conduct as state policy) to *Velásquez Rodriguez*, Inter-American Court of Human Rights, Judgment of July 29, 1988, 28 ILM 291 (1989)(affirming that governments are under a direct obligation to act to prevent private action in violation of the enumerated rights in the American Convention of Human Rights). Given the fact that human rights tribunals are increasingly turning to compensation as a remedy for human rights violations, see Dinah Shelton, Remedies in International Human Rights Law (2d ed. 2005), it is possible that corporate investors might turn to such precedents in order to demand compensation when their operations are disrupted or their property is damaged by private parties. While BITs and FTAs lack the "to ensure" clause that appears in the American Convention on Human Rights (or in the International Covenant of Civil and Political Rights), arbitrators who are convinced that corporations ought to be treated like natural persons may find that investment treaties as well as human rights instruments expect states "to respect" and "to ensure" all the rights accorded in these instruments. A view that states are obligated to *ensure* corporate investors from rights violations committed by private parties could have significant expansive potential for a number of BIT/FTA rights, including full protection and security, FET, and their umbrella clauses. The scope of all of these guarantees remain subject to interpretation. While few would deny that a private individual who faces a violent mob is entitled to reasonable police protection under full protection and security, for example, the scope of that guarantee when it comes to a corporation and its economic interests is more ambiguous, especially given other relevant laws (such as labor legislation). The right to full protection and security might be amenable to considerable expansion if the corporation's right is analogized to that of a private individual. Another area of lively debate exists among arbitral tribunals and scholars about the scope of umbrella clauses in investment treaties, including whether such clauses enable an investor to seek investor-state arbitration for the state's repudiation of a debt or commercial breach of a contract. See Dolzer and Schreuer, supra note . Elevating corporate investments to full scale subjects of international law could help encourage expansive interpretations of umbrella clauses or other comparable guarantees, especially where it helps convince arbitrators that all contractual commitments or specific assurances made to investors through law or regulation are entitled to enforcement under the principle of *pacta sunt servanda*.

We should also consider the possible impact on the "human" right that is "imported." As is also suggested by *Citizens United*, what is recognized as a civil right may subtly change once it is applied to a corporation. The meaning of "political speech" in the United States after *Citizens United* is likely to change over time thanks to that decision.[126] There is the potential for considerable two-way traffic between the substantive rights applied in the human rights and investment regimes once all are seen as ostensibly dealing with "persons." No one can confidently predict that any and all transformations of the rights being trafficked will accrue to the benefit of natural persons.

Consider the most often cited right in investor-state dispute settlement: fair and equitable treatment. If FET comes to be seen as the applicable due process standard for all persons under international law, at least in non-criminal settings, what implications does that have for the rights of natural persons? Consider, for instance, *TECMID*'s insistence on protecting legitimate expectations and the right to transparent government action as applied in non-investment settings, from agencies denying a tax rebate to those issuing drivers' licenses. Although this might be seen as a boon to human rights, not all of those in the global south may agree since *TECMID*'s standard appears to assume technical and other resources that exceed those available to many governments. Expanding the reach of *TECMID*'s (Western?) concept of "good governance" may not ultimately redound to the legitimacy of the human rights movement.[127] On the other hand, what would human rights advocates think if *Glamis*'s far narrower view of FET,

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[126] Quite apart from whether *Citizens United* results in a greater role for corporations in the U.S. political process or an actual increase in corporate contributions to political causes, the Court's decision is likely to change citizens' *perceptions* of the role of corporate wealth and power in political decisions. At least in this respect, the Court's decision has changed what "political speech" will now mean in the United States.

[127] Indeed, it would appear to be a prime example of the "dark" side of human rights as portrayed by critical scholars. See, e.g., Makau Mutua, "savages, Victims, and Saviors: The Metaphor of Human Rights," 42 Harv. Int'l L. J. 201 (2001).

which provides a remedy only for "egregious" or "shocking" government action, begins to gain traction in human rights settings?

And what would two way traffic between the investment and human rights regimes do to the right of property under international law? Human rights law has been notoriously reticent about accepting property rights as human rights. That right does not appear in the two human rights Covenants and, within the European Convention on Human Rights, the right to property is balanced against the state's ample regulatory interests.[128] For its part, the Universal Declaration of Human Rights recognizes protection against arbitrary dispossession but not a right to compensation.[129] None of these human rights instruments accord property holders the absolute right to prompt, adequate, and effective compensation that is guaranteed by most investment treaties – a right that some investment treaties recognize even with respect to regulatory takings.[130] It is not likely that human rights advocates will take kindly to any attempt to export the investment regime's far more generous views of property rights elsewhere.

For these reasons, transjudicial communications between human rights and investor-state tribunals may not produce the anticipated progressive 'virtuous circles' some expect.

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[128] See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, as amended, article 1. Of course, the existence of a property right under international law is a distinct question from whether, assuming such a right exists, it applies to juridical entities such as corporations or is recognized with respect to shareholders. Note that the U.S. Restatement anticipates that aliens are entitled to all human rights that states are obligated to respect for all persons subject to its authority and would include the right to property or another economic interest that under international law "a state is obligated to respect for persons, natural or juridical, of foreign nationality." U.S. Restatement, Foreign Relations, supra note , at § 711.

[129] Universal Declaration of Human Rights, article 17.

[130] See generally, August Reinisch, "Expropriation," in Peter Muchlinski, et, al, ed., Oxford Handbook of International Investment Law, at 407 (2008).

We need to consider the dissent's insight in *Citizens United* that the rights and obligations of corporations and natural persons ought not be treated as equivalent. Such equivalence is not necessary for corporate responsibility and accountability. Close readers of the work of leading advocates of such responsibility, namely Clapham and Ratner, will discover that neither relies on such equivalence. What they assert, correctly, is that given the very real differences between corporations and other participants in the international legal system, the only viable approach is to delineate corporate rights and obligations inductively from the bottom up: that is, to define the rights and obligations of corporations by what those entities are and what they are not. This is, in effect, what Justice Stevens urged in his dissent, where he argued for case by case determinations of how best to regulate political speech by corporations. This careful delineation of corporate rights and obligations is made more difficult to the extent that corporations are assumed to be "international legal persons" (and/or "subjects") and particular corporate responsibilities are simply derived from that assumption.

Conclusion

As David Millon has demonstrated, there is a long historical tradition, at least within U.S. law, of using characterizations of the corporate person as a vehicle to justify regulatory agendas with respect it.[131] Ostensibly objective or academic descriptions of the corporation as either a distinct entity artificially created by the state or a "natural" aggregation of natural persons have been respectively advanced at various times and by various authorities in order to justify particular normative claims concerning, for example, whether shareholder wealth maximization or other social goals ought to be the

[131] Millon, supra note .

appropriate objective of corporate law.[132] It would appear that at some of the litigants in ATCA cases are engaged in comparable efforts. Like Millon, I believe that efforts to derive "ought" from what advocates contend "is" objective reality (namely that corporations are or are not like natural persons or other international legal persons like states) stand in the way of addressing the truly urgent questions raised by international corporate activity.[133] International lawyers should spend their time addressing which international rules apply to corporations rather than whether corporations are or are not "subjects" of international law.

Skepticism about the "personhood" of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly they now have both.[134] There are a number of ways that human rights litigants in ATCA cases could conclude that certain international obligations apply to corporations. They could base such conclusions on analogies drawn from direct obligations imposed under specific treaty regimes (as in recent treaties that

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[132] Id., at 2-3. Millon contends that such characterizations have been used to distinguish corporations from or analogize them to partnerships (id., at 3-4), to encourage re-thinking of the state's traditional regulatory authority generally (id., at 7-8), to distinguish or compare corporations to the rights of shareholders or other natural persons (id, at 9-10), to conceptualize the corporation as a "citizen" and not only a vehicle for shareholder wealth (id., at 13-15), to use corporations as a vehicle to protect property rights (id., at 15-17), or as a basis for establishing corporate social responsibilities (id., at 17-21). Millon contends that contemporary (and as yet inconclusive) debates between "contractarians" who focus on shareholder primacy and "communtarian" corporate scholars who focus on corporate duties owed to the community, "are really normative arguments masquerading as positive assertions." Id. at 25.

[133] Cf. Millon, at 29 ("At least in the area of corporate law, efforts to derive "ought" from "is" have not succeeded. Indeed, such intellectual exercises may have stood in the way of careful examination of the truly urgent questions raised by corporate activity.").

[134] One need not agree with Crawford's and Greenwood's expert opinions (see supra at note) that the absence of explicit international law examples making corporations criminally liable establishes that no ATCA liability is possible. Even assuming that under the ATCA, this aspect of a viable claim is to be determined by international and not U.S. law, the question that might be posed is whether international law *precludes* finding corporate liability not whether it explicitly authorizes it. Compare *The S.S. Lotus (France/Turkey)*, PCIL, Ser. A, No. 10 (1927) (requiring evidence to demonstrate that international law precludes the exercise of national jurisdiction).

specifically extend their obligations to corporations with respect to counter-terrorism).[135] They might find such obligations in general principles of law (as through a showing that national laws impose civil or criminal penalties on corporations in comparable circumstances).[136] They might even find implicit duties on corporate entities (as well as other non-state actors) from the principle of universal jurisdiction as applied to *jus cogens* prohibitions. Alternatively, they might infer corporate liability from the application of rules for secondary liability (such as the application of international rules governing aiding and abetting in distinct international legal regimes, including under international criminal law).

Larry Backer's description of John Ruggie's innovative "protect-respect-remedy" governance project, suggests yet another, even more promising and far more nuanced approach to finding corporate responsibility.[137] Ruggie's approach is appealing precisely because it departs from the hierarchical rigidity embedded in demarcating "subjects" and "objects" of international law. Ruggie's delineation of corporate responsibility is bottom-up, not top-down. As elucidated by Backer, it is based not on *a priori* assertions of personhood but on facts on the ground, including the reality that corporations operate under a social and not only a legal license; have unique systems of monitoring, information gathering, assessment and disclosure; may be made accountable through their own conceptions of "due diligence" to shareholders and the wider public; and may owe differing human rights obligations depending on their sphere of business, their

[135] See, e.g., Ratner, supra note .
[136] See, e.g., Amicus Curiae, supra note (International Law Professors in Support of Plaintiffs-Appellees, in Balintulo v. Daimler AG).
[137] Backer, supra note .

corporate structure, or their relationships with partners and suppliers.[138] Backer's and Ruggie's conception of corporate responsibility/accountability is evidence-based and pragmatic. It is the very antithesis of *deducing* obligations from formal subject- or personhood.

My warnings here concern only those arguments for corporate responsibility that, unlike Ruggie's rich conception, try to establish such responsibility on the premise that corporations are subjects of international law or are international legal persons.[139] Despite Ruggie's efforts, it is not clear that ATCA litigants will follow his lead instead of becoming mired in positivism formalism over subjecthood and its ostensible consequences.

Some might object that my concerns are misdirected. While it is true that the possible adverse consequences enumerated here for purposes of investor-state arbitrations may emerge in any case, without any reliance on the ostensible personhood of corporate investors, to date investor-state arbitrators have been notoriously reticent about many of the questions canvassed in this essay. There is as yet no consistent caselaw on questions such as whether states retain control to waive investor state disputes or whether residual inter-state rules of custom should invariably apply to resolve investor-state disputes. That these questions remain open should give us pause about closing them prematurely (and possibly wrongly) through the easy gambit of corporate personhood.

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[138] Id., at . Perhaps the fact that Ruggie is not a lawyer gave him an advantage in this respect. As is clear from the *Reparation Case*, international lawyers (and international judges) find it nearly inconceivable to posit an obligation without a prior finding of personhood. This is presumably why the ICJ insisted, in that instance, on answering a question that was not posed to it by the General Assembly, namely whether the UN was a legal person. At bottom, what I am suggesting here is that at least with respect to corporations, we resist being drawn into Higgins' "intellectual prison of our making", see supra at note , when addressing the real issue of what responsibilities corporations actually have.

[139] Despite his reliance on finding that corporations are "limited" international legal persons, Clapham appears to endorse this view as well. See Clapham, supra note , at 83 (suggesting that "we concentrate on the rights and obligations of entities rather than their personality").

Nor is it a complete answer to suggest that my concerns are overstated. Some might contend that speculating about the consequences of seeing corporations as "full scale" subjects or persons of international law is a straw argument. It is true that those who suggest that corporations are subjects of international law never suggest that they are the *equivalent* of states. This has been true since 1949 when the ICJ in the *Reparation Case* carefully noted that while the UN was an international legal person, it was not suggesting that its capacities were the same as those of a state.[140]

But while formal positivist theory accepts the premise that not all of our international law subjects or persons are functionally equivalent, there is a strong tendency in the literature – and in life – to assimilate all such "persons" in practice. *Citizens United* is not the only instance where personhood has been taken to absurd lengths. Despite the ICJ's warning in the *Reparation Case* that the UN was certainly not a state, there has been a strong tendency to assimilate the personhood of international organizations to those of states. A leading exemplar of this tendency is the International Law Commission's (ILC) decade-long effort to draft articles of IO responsibility. That effort has yielded an enumeration of draft rules that are almost entirely based on the ILC's earlier Articles of State Responsibility.[141] Some, including this author, have been critical of this effort precisely because IOs should not be treated in law (or in fact) as states for this purpose.[142] There is, for example, no concept of IO equality comparable to sovereign equality and the practice of states has yet to yield uniformly applicable primary or secondary rules of liability that are applicable for entities as distinct as the UN Security

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[140] See supra note .
[141] For discussion of these, see José E. Alvarez, "International Organizations: Accountability or Responsibility?," Luncheon Address, Canadian Council of International Law, Proceedings of the Annual Meeting, 2007 (available at http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf).
[142] Id.

Council, the World Bank, or the World Health Organization. The single set of rules of IO responsibility that the ILC is contemplating ignore the very real differences that distinguish these entities as well as the differing expectations the international community has with respect to their accountability and responsibility for wrongful acts. There are huge difficulties in assuming that the single set of secondary rules that the ILC appears to contemplate can encompass the responsibilities of such disparate organizations or that even if a single set of rules can be envisioned that these should replicate those that apply to states. It is not clear that there is any relevant state or IO practice supporting the proposition that, for example, despite the fact the WTO itself is not a party to the International Covenant on Economic, Social, and Cultural Rights, a WTO Appellate Body ruling might still be said to "violate" that treaty or if that even if that were the case, whether this means that the organization (and not merely its member states) is liable. Nor is clear that states or other constituencies want all of their IOs to be held accountable; indeed there is evidence to suggest that states established some IOs and gave them unique responsibilities (such as the Security Council's power to sanction the world if needed to maintain international peace and security) precisely to avoid the responsibilities that bind each state individually (such as the rules governing the use of force in cases of humanitarian interventions).

What the ILC's misguided effort demonstrates is the sheer power of language. Once international lawyers decided to call IOs "persons" in line with the *Reparation Case*, we imagined them to be so. Now we (or at least the luminaries on the ILC) are apparently imagining as well that they have the same obligations as states -- even though no IO can be a party to the human rights covenants or the Geneva Conventions, for example, and

even though there is a serious work of translation still to be done before we can extrapolate many human rights duties owed by states to the world of our Geneva or New York based organizations. Absent considerable serious work to elaborate applicable primary rules of obligation (some of which may vary depending on the organization), the ILC's proposed secondary rules for IO responsibility are likely to encounter some bumps in the road – as the positivist imaginings of some scholars meet the real desires and needs of states.

The take away point of this essay is simple: if collectivities of states ought not be confused with the states themselves, this is all the more true with respect to corporations. Whether or not one agrees with their conclusion, the dissent in *Citizens United* was right to point out that corporations are not merely groups of natural persons. They can no more be reduced to natural persons that they can to states. Personhood talk misleads.[143] International lawyers should heed the cautionary tale suggested by the ILC's draft rules on IO responsibility. We should not replicate the ILC's mistake. Neither IOs nor corporations are the equivalent of states or natural persons and we should beware simple minded efforts to draw out comparable obligations based on that flawed premise.

We should not lose sight of first principles. States, whatever their flaws, remain the single greatest repository for the legitimate enforcement of both national and international law.[144] They remain as well the most legitimate and effective international law-maker. Even today most of us rely on states for our protection and even

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[143] Indeed, Backer describes at great length the many ways corporations are different from either natural persons or states. Backer, supra note , at . Unlike the circularity of personhood determinations, Backer's effort is an impressively thorough explication of why the delineation of corporate human rights responsibilities needs to take into account those differences if it is to succeed.

[144] See, e.g., Charles R. Beitz, The Idea of Human Rights (2009)[check]. Having a state as one's protector is after all, as Hannah Arendt suggested, the "right to have rights." Hannah Arendt, The Origins of Totalitarianism at 290 (1968)[check]. See also James D. Ingram, "What is a 'Right to Have Rights?,' Three Images of the Politics of Human Rights," 102 Am. Political Science Rev. 401 (2008)[check].

undemocratic states are usually seen as more legitimate representatives of their citizens' collective interests than any NGO, international civil servant, or corporate official. As Benedict Kingsbury has suggested, while the age of globalization has greatly weakened the power of governments, they remain the central defense of their respective peoples.[145] States can protect us from globalization's excesses, including the potential harms produced by or in the name of free capital flows.[146] States are expected to address all the concerns of their polities, from the economic to the social. They are specifically charged with respecting the rights of their citizens under international law.

Corporations have none of these traits. As Jägers points out, corporations are not the intended beneficiaries of human rights and have "no inherent ability to suffer the harmful consequences associated with human rights deprivation."[147] Under mainstream U.S. corporate law, their principal mandate is to pursue profit for their shareholders.[148] Indeed, under most of the national laws under which they operate, if they deviate from that goal they may be punished, including by their shareholders. We should never confuse the economic rights of corporations (or of investors) for the rights of natural persons to live in dignity. Human rights lawyers, who have been so good at demonizing corporations under the ATCA, should be the last ones to humanize them by turning them into international law "persons."

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[145] Benedict Kingsbury, "Sovereignty and Inequality," 9 EJIL 599 (1998).
[146] Id.
[147] Jägers, supra note , at 29.
[148] But see Millon, supra note , at (describing competing "communitarian" views of the corporation).