Cambridge University Press
978-1-108-83037-9 — The Cambridge Companion to Business and Human Rights Law
Edited by Ilias Bantekas , Michael Ashley Stein
Excerpt
More Information

1 Business and Human Rights
Foundations and Linkages

Ilias Bantekas

1.1 Introduction

Where does one situate business and human rights? From the perspective of law alone, business falls within the general sphere of private law, further broken down into discrete sub-spheres, particularly corporate law and commercial law. The human rights component is situated in constitutional and international law. Prima facie, 'business' and 'human rights' fall into distinct spheres of regulation and differ in their primary sources. If law were simply approached from a compartmentalised perspective, business would be of no relevance to human rights and vice versa. This, however, is artificial and is antithetical to holistic approaches to problem solving, not to mention the inter-connectivity of law.[1] It is unfortunate that in simplifying the study of law through the creation of sub-disciplines, the emergence of sub-discipline expertise (for example, labour law) has magnified the differences between them. It is absurd to realise the impact of business (broadly understood) on human rights, yet approach the issue from the perspective of public or constitutional law. Neither of the two can respond to broader questions about whether business (law) can aid the pursuit of human rights; which part of business regulation is injurious to human rights; and why corporate rights could not have the same value as socio-economic rights, given that corporations are vehicles of

[1] I have addressed this issue in two other works. See I Bantekas, 'An Inter-Disciplinary Criminology of International Criminal Law' in I Bantekas, E Mylonaki (eds.), *Criminological Approaches to International Criminal Law* (Cambridge University Press 2014) 1, 3–5 and; I Bantekas, 'Sovereign Debt and Human Rights: An Introduction' in I Bantekas, C Lumina (eds.), *Sovereign Debt and Human Rights* (Oxford University Press 2018) 1.

growth and well-being.[2] In equal measure, corporate lawyers require some understanding about the impact of corporations' operations on their wider stakeholder community and how such impact is measured from the perspective of human rights benchmarks; and most importantly, what is the added value of human rights on corporate regulation. If there is no value from human rights and environmental protection to business, then there is something wrong with the international human rights architecture and it is imperative that all concerned find ways to remedy this. At present, this discussion is patchy and piecemeal at best, with the two (human rights/environmentalists and business communities) having stayed apart from each other; in other fields of regulation the convergence of opposite camps through common discussions has led to mutual understanding and exceptional outcomes.[3]

This chapter starts from the premise that business and human rights is much more complex than the impact of corporate practices on the fulfilment of human rights and environmental law. Rather, it is crucial that one identifies the underlying causes of this tension, namely: (a) the broader corporate perspective in its transnational context; (b) the interstate investment relations and; (c) the international financial architecture. Within all three of these, home and host states interact with each other, as well as with corporations. Powerful home states are lobbied by multinational corporations (MNCs) to create an international framework that better guarantees investment and trade. This is taken up as a policy imperative and reflected in international treaty making. States, both home and host, are clearly central to this process and their achievements, good or bad, will ultimately shape, or open up the space for subsequent corporate conduct. Hence, the starting point for our understanding of business and human rights should not be based on corporations themselves but rather extend to all the

[2] See ECA Watch, 'Financing Human Rights Abuse: The Role of Public and Private Financial Institutions', available at: www.business-humanrights.org/sites/default/files/media/documents/banktrack-eca-watch-ciel-statement-to-un-forum.pdf.

[3] Prior to the UN Convention on the Rights of Persons with Disabilities (CRPD), all regulation excluded the views of disabled persons. This changed with the negotiation of the CRPD, whereby disabled persons were present and active at every level, alongside diplomats and other state agents. The result was a convention that had absolutely nothing to do with the prior regime. See K Skarstad, MA Stein, 'Mainstreaming Disability in the United Nations Treaty Bodies' (2017) 17 *Journal of Human Rights* 1.

contextual and underlying grounds that shape their existence, regulation and performance.

1.2 Business and Human Rights from the Perspective of Corporate Law

Corporations are not necessarily the unitary entities with a single mind that most people think they are. There could well be significant tensions within a large corporation. Shareholders want to increase their profits, while the board of directors (BoD) juggles between satisfying shareholders, expanding operations and keeping within the boundaries of the law. At the same time, as corporations expand, their impact on other external entities increases. This is true in respect of consumers, contractors, subcontractors, the secondary economy, indigenous persons, as well as those affected by the ups and downs of regional and national economies. All these entities constitute the so-called stakeholders of corporations and it is now generally accepted that BoDs owe duties not only to shareholders but also to all affected stakeholders.[4] This further explains why states ultimately perceive it in their best interest to 'bail out' large corporations, including banks, when these are at the brink of collapse, because of the adverse impact on the economy and pertinent stakeholders. While these 'bailouts' are justified for the greater good, including the national economy, they suggest that irrespective of the irresponsible conduct of corporations, including banks, states will always try to keep them afloat, even if this is at the expense of pensions, healthcare, education and other social services.[5] The post-2008 financial crisis clearly demonstrated that industrialised states poured as much money as possible on bankrupt corporations that were responsible for the crisis and their own demise, while at the same time curbing all social expenditures. This evinces that the Global North perceives corporations, including banks and financial institutions, as the cornerstones of their internal and global legal order, over and above the *demos*, constitutions and social well-being.[6]

[4] FE Freeman, *Strategic Management: A Stakeholder Approach* (Pitman 1984).
[5] See I Bantekas, R Vivien, 'On the Odiousness of Greek Debt' (2016) 22 Eur LJ 539.
[6] Y Varoufakis, *The Global Minotaur: America, Europe and the Future of the Global Economy* (3rd ed., Zed Books 2015), who discusses these issues at length, particularly how the US federal government decided to save all those banks and financial institutions that brought about the post-2008 global financial crisis.

Within this context, it comes as no surprise that the governments of the industrialised North are eager to expand the markets and general playing field of their corporations. It is in this light that international trade law (elimination of all barriers to free trade, including tariffs and state aid) and foreign investment law (through investment guarantees) have become major policy areas for states, effectively overriding other spheres of regulation, including human rights and environmental law. The era of globalisation, especially since the early 1990s, has allowed MNCs to effectively evade any serious regulation and instead to 'embrace' self-regulation as the only viable alternative, at a time when corporate misconduct was the norm rather than the exception.

In a nutshell, the regulation of corporations is territorial.[7] Company X is subject to the laws of the country in which it is registered or incorporated.[8] If company X trades its products or services in a different state, the laws of that other state would apply, albeit these laws would be conditioned or subject to international trade law regimes, such as those under the World Trade Organization's (WTO) agreements. Were company X to expand and undertake operations in a state other than that of its incorporation, it must incorporate anew in that host state. It is not enough that it is incorporated in state X, because the new host state has an interest in regulating any company established on its territory. Hence, from the moment company X sets up an affiliate in a new host state (let us call this state Y), this is now a new company, X2, subject only to the laws of Y. This is not controversial and is consistent with the principle of sovereignty. The concerns between MNCs and human rights typically arise in connection with: (a) the limited international legal personality of MNCs; (b) the intra-shareholding implications of MNCs, including their tax conduct; (c) the weak regulation of developing host states, and; (d) the absence of extraterritorial regulation by home states. These will be explored in turn in the following short subsections.

1.2.1 The Limited International Legal Personality of MNCs

Legal personality means having rights and duties under a particular legal system and the capacity to enforce or have these enforced against or in

[7] See on MNC regulation, LC Backer, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 Geo J Int'l *L* 101.

[8] Exceptionally, there is some limited deference to home regulation. M Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 326–30.

favour of the entity in question. There are as many legal systems as there are states, albeit only a single supranational sphere of regulation, namely international law. Corporations possess legal personality in domestic legal systems, but this is not the case under international law. This is an important observation, because as we shall see in a subsequent subsection the level of corporate regulation is very weak in the developing South and hence given the lack of extraterritorial regulation by home states, a counterweight through the medium of international law would have alleviated the regulatory imbalance. While states and international organisations enjoy almost unlimited international legal personality, the same is not true of natural and legal persons. Natural persons enjoy rights, among others, in human rights treaties, enforceable chiefly before domestic courts and occasionally also before international courts and tribunals, as well as international criminal liability in respect of crimes under international law.[9]

Legal entities, chiefly corporations, are mentioned in few international treaties, such as bilateral investment treaties (BITs), as investors, but with no discernible obligations bestowed upon them.[10] MNCs are third parties to BITs, yet these directly confer upon them rights (that is investment guarantees and the customary right against unlawful expropriation). MNCs and legal persons in general are at best rights-holders in human rights treaties (specifically as regards the right to property) but are not imposed with positive or negative human rights obligations. The imposition of treaty-based obligations for MNCs has been debated for several decades and it seems that a business and human rights treaty might be close to fruition.[11] Given that MNCs own a big bulk of the globe's assets,[12] along with powerful industrial states, and hence already possess far higher political and economic power than most (if not all developing) states, it is wholly artificial that such power is not reflected in their share of international

[9] See e.g. art. 25 ICC Statute.

[10] One may posit that BITs oblige investors to comply with national law, but only so far as this is compatible with the BIT, customary law on foreign investment and any agreement entered into between the host state and the investor. See K Nowrot, 'Obligations of Investors' in M Bungenberg et al. (eds.), *International Investment Law* (Hart 2015) 1155.

[11] See draft business and human rights treaty, available at: www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

[12] UNCTAD has set up a Transnationality Index (TNI), which measures among others the ratio of MNC foreign assets and sales in comparison to local assets and sales, which may be used to compare global MNC profits.

obligations. The proliferation of soft law instruments and corporate codes of conduct are mere guises to avoid hard regulation and upset the current tripartite corporate architecture, namely: strong but not extraterritorial home state regulation; no international law obligations; weak, chiefly exclusive, host state regulation.

This *transnational* corporate architecture, therefore, allows MNCs to shop around for jurisdictions that allow them to maximise profit with as few regulatory hurdles as possible. In the absence of extraterritorial regulation and no obligations under international law this is an attractive regime for MNCs. As we shall see[13] this state of affairs has so far only been penetrated through social pressure from consumer groups and civil society, as well as private international law, namely the filing of civil suits alleging violation of a transnational tort.[14]

1.2.2 Intra-shareholding Implications of MNCs

Given that corporations can only be incorporated in the territorial state, the only way that affiliates established abroad may be owned and controlled by the parent company is through intra-shareholding. The following is an appropriate case study. Parent company A, incorporated in country X, owns all or the majority of shares in affiliate A1, incorporated in country Y, as well as affiliate A2, incorporated in country A. This pattern can be applied in as many affiliates around the world as possible. It is not only the parent company, A, that owns shares in the other affiliates, but all affiliates among the group, to a lesser or larger degree. Hence, A2 may own 10 per cent in A5, 3 per cent in A10, 12 per cent in A25 and equally A25 will own similar shares in other affiliates. This intra-shareholding allows affiliates in the group to control not only the overall profits within the group, but also the directorship of each affiliate. If affiliates were open to unlimited publicly available purchase of shares (so-called initial public offering), then the parent company, as well as other affiliates, would lose all control over the other affiliates. This is nothing short of catastrophic for major MNCs, because each affiliate trades in, or produces, patented products and sought-after brands. If each affiliate were able to profit from such

[13] But chiefly explored in Chps. 8 and 25 of this volume.
[14] On remedies, see E Baginska (ed.), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2015).

patents or brands without profits going to the parent company, and without the latter (or the group) controlling the use of trade secrets, then the creation of MNCs in this manner would be detrimental to the parent company and the group.

While intra-shareholding allows for development-oriented investments, as well as growth, across the globe, the weak transnational corporate architecture, as described above, gives rise to serious human rights and environmental concerns. The first and most obvious is that one of the usages of the MNC model may take the form of forum shopping for the weakest regulatory regime.[15] Such a choice may be predicated, among others, on cost considerations (for example, low or no pension contributions; light environmental compliance; light health and safety requirements), tax avoidance or avoidance of public scrutiny by civil society organisations. No doubt, MNCs typically set up affiliates chiefly in order to create new consumer bases and expand the range of their operations, with the other aforementioned grounds playing a minor or major role.

Each MNC operating in a weak regulatory environment possesses two choices: (a) simply comply with the bare minimum requirements of the host state's law, or; (b) apply those higher standards it would be expected to fulfil in the home state of the parent company. In most cases, the higher degree of compliance is unproblematic. Exceptionally, some home states may render this difficult or problematic. Autocratic host states may be hostile to the idea that certain corporations allow trade unions, quality pensions, health and safety, freedom of expression in the workplace or enhanced environmental quality control, because such measures are either sanctioned under law (for example, trade unions and freedom of expression in many countries), or would otherwise expose the state's poor governance. As a result, MNCs may face a real dilemma when truly predisposed towards enhancing the state of human rights and environmental protection in such countries. Such issues will be analysed in more detail elsewhere in this book,[16] but it suffices to state here that such matters need not necessarily surface or become obstacles years after the affiliate has been incorporated in the host state, but well before that. The application of

[15] See UNCTAD, 'Increasingly Complex Ownership Structures of Multinational Enterprises Poses new Challenges of Investment Policy-Makers' (2015), available at: https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=303.

[16] See Chp. 11 of this volume.

higher standards may well be articulated in BITs and other multilateral investment treaties (MITs), be stipulated in a contract with the host state, imposed by a (future) multilateral treaty concerning MNCs or set out in extraterritorial laws of powerful home states, aid incentives and others.

When an MNC is allowed to operate in weak regulatory environments, it is clear that little or no meaningful development can ever take place (in the sense of the human development index)[17] and that human rights, civil and political, as well as socio-economic generally deteriorate. Under such circumstances, inward investment becomes injurious to the host state, because it culminates in the depletion of natural resources, assists corrupt regimes to consolidate their power, while exacerbating poverty and under-development. This is absurd, because investment is meant to augment growth, development and emulate solid democratic governance practices.[18] Poor regulation further breeds poor corporate conduct, driven by the desire of directors to please shareholders and of elite service providers to find loopholes in the system.

Transfer pricing (TP) is emblematic of such synergies. It is discussed elsewhere in this book,[19] but it suffices to state here the following. Typically, corporations are audited for their end-of-audit year losses/expenses and profits in the country of incorporation. The tax authorities then subtract all applicable losses/expenses from their profits and apply taxes to that latter amount. Very crudely, let us assume that company X makes annual profits of 100 USD, while incurring losses of 15 USD and allowable expenses at the tune of 15 USD. If corporate tax in the country of incorporation is 20 per cent of net income, then X will be taxed as follows:

[17] The three indicators of HDI are: longevity, knowledge and decent living standards. See UNDP, *Human Development Report* (Oxford University Press 1990) 11. A Sen, ‘Capability and Well-Being’ in M Nussbaum and A Sen (eds.) *The Quality of Life* (Oxford University Press 1993) 30–53, who distinguishes between capabilities and wellbeing. Sen’s capabilities approach demonstrates that wellbeing differs from welfare in that the latter concerns prosperity in terms of material needs. He measures the developmental progress of states by reference to the capabilities of their citizens (capabilities approach) and distinguishes between positive and negative freedoms. Sen, whose influence was significant in the formulation of the HDI, has argued that only bottom-up development is sustainable, whereas development driven exclusively by governments is unsustainable because of the violation of rights and the lack of empowerment involved in the process.

[18] See Z Huaqun, ‘Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice’ (2014) 17 *JIEL* 299, 323, who argues that the concepts of ‘balance’ and ‘sustainable development’ be inserted in BITs.

[19] See Chp. 10 of this volume.

100 – 30 USD = 70 USD. Transfer pricing allows *all* the affiliates of an MNC to declare the *same* losses and expenses incurred in one jurisdiction in their own annual tax returns, as long as they possess shares in that other affiliate. Hence, the same losses and expenses are declared in several national tax declarations around the world, even though they have only been incurred once and in only one jurisdiction. This mechanism allows all affiliates to decrease their tax burden and in doing so decrease the amount of tax owed to the country of incorporation, which in turn impacts social services and the enjoyment of fundamental rights.[20] Fortunately, the Organisation for Economic Co-operation and Development (OECD) is in the process of taking measures against TP through its Base Erosion and Profit Shifting (BEPS) mechanism,[21] but such measures will not have global application absent a multilateral treaty.[22]

1.2.3 Weak Laws in Developing Countries

It is now universally acknowledged that developed states attract the bulk of global foreign investment.[23] This is true despite high taxation, competitive salaries, rigid regulation and higher cost. This suggests that corporate investors generally prefer safe and stable politico-legal environments for doing business, as opposed to fragile, autocratic states, even if their operating costs are significantly low. Yet, developing states continue their 'race to the bottom' as if this data was irrelevant or flawed. Of course, the key reason for such intransigence lies in the plain fact that no state can magically transform itself into a haven of legal certainty, impose the rule of law, modernise its state apparatus and provide a pool of well-educated personnel to prospective investors. In the absence of long-term plans and policies, developing states naturally turn to short-term options, all of

20 This has led to a scholarly literature arguing in favour of a unitary taxation of multinational corporations. See A Ezenagu, 'Unitary Taxation of Multinationals: Implications for Sustainable Development' available at: www.cigionline.org/sites/default/files/documents/SDG%20PB%20no.4_0.pdf.

21 See www.oecd.org/tax/beps/.

22 See generally RS Collier, JL Andrus, *Transfer Pricing and the Arm's Length Principle after BEPS* (Oxford University Press, 2017).

23 See M Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a BIT and they could Bite', World Bank Policy Research Working Paper No. 3121 (2016).

which are predicated on the idea that weak regulatory governance is the only competitive advantage they can offer to foreign investors.[24]

A lax regulatory framework is detrimental to the developmental health of all states, but its effects are particularly accentuated as regards poorer states. Poor states can only overcome their predicament by offering high quality education to their people, with a view to creating meaningful jobs that will raise the country's overall standard of living. Skilled personnel are entrepreneurial, attract high-end investors, develop marketable patents and pay taxes. Race to the bottom-type of laws typically attract investors that require unskilled, low-paid, labour. Lax regulation, furthermore, breeds short-term investments that have little, or no, regard to the natural environment or the depletion of the host state's natural resources.

Weak host state regulation further makes foreign corporations complicit in the corrupt or injurious conduct of the host state. Most MNCs would rather not forcibly evict indigenous groups or impoverished populations, or employ forced and slave labour. There is little incentive and no business sense in doing so. Yet, as the *Ogoniland* case aptly demonstrates, the absence of a robust human rights policy when dealing with an autocratic host state can make a corporation fully complicit and tarnish its reputation.[25] It is exactly this delicate situation that prompted initiatives for self-regulation, although this needs to be qualified. Self-regulation typically occurs in contexts where the state has not yet, or is in the process, of regulating a particular sphere. In anticipation of such impending regulation the pertinent stakeholders pre-empt the state through the adoption of industry-wide rules, which, while unofficial in nature, are viewed and applied as though they are binding on said stakeholders. The expectation is that the state will defer to self-regulation and will either desist in adopting laws of its own, or adopt laws that complement those adopted by the industry concerned.[26]

[24] I Bantekas, 'The Human Rights and Development Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws' (2019) 31 Fla J Int'l L 130.

[25] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESCR)* v. *Nigeria* (*Ogoniland* case), ACmHPR Communication no 155/96 (2001). See also K Tangen, K Rudsar, HO Bergesen, 'Confronting the Ghost: Shell's Human Rights Strategy', in A Eide, HO Bergesen, PR Goyer (eds.), *Human Rights and the Oil Industry* (Hart 2000), 185.

[26] See A Flohr, *Self-Regulation and Legalization: Making Global Rules for Banks and Corporations* (Palgrave 2014).