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Slaying The Dragon

Vertical Integration in the Food System and Human Rights implications

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Abstract

What started as an investigation on the right to food and the food system has quicky become a much deeper and richer study on the nature of the corporation, in particular the transnational corporation. This is the case because I have quicky realized that the only way in which effective and progressive Huma Rights are going to be out in place in the food system is through a better understanding of the corporate entity, which now monopolizes such field employing its economic and management strategy of choice, namely vertical integration: the fragmentation of ownership and control of operations along the supply chain. TNCs are de facto keepers of the right to food and the food system, the main actors to which overtime has been delegated the task of managing it. This fact has carried corporate philosophies and internal norms to the international sphere, starting a chain reaction of environmental and social costs which have been largely overlooked until the second half of the 20th century, with the beginning of the Human Rights and business movement. We will attempt at theorizing a new meaning of the right to food and food security passing through the historical development of the corporation, seen as the main proxy of private initiative as opposed to public state initiative. Such an endeavor also includes a mandatory discussion of how such economic and social changes from which the corporation originates have influenced the way in which the human community has conceived and regulated the corporation in law and practice. Lastly, a brief proposal on new philosophical principles of law and their possible implementation is offered, with the objective of replacing the current corporate-oriented framework which informs, from the bedrock, the current international legal system and the food system.

Introduction

It does not do to leave a live dragon out of your calculations, if you live near him. Dragons may not have much real use for all their wealth, but they know it to an ounce as a rule, especially after long possession.

J.R.R. Tolkien – The Hobbit

The spirit and objective of this thesis are best understood by taking the first step from a dissection of the title. First and foremost, I offer my apologies to those who may be put off balance by the novelesque breath I decided to put into it, but I found this metaphor particularly well suited to sum up in a compelling way the matter at hand. After all, nature-related symbolism has been ever present in the business world since its very inception and this thesis is all about business and how it brings to the forefront a conflict between two very different conceptions of society, law and the state, they themselves appearing in literature through their mythological semblances: leviathans and behemoths. Leviathans are the old Hobbesian constructs still informing our way of thinking today with their strict version of power relationships as characterized by centralization and linear causality nexus; Behemoths are a construct posited by Neumann in his seminal work employed by the prosecution during the Nuremberg Trials. It depicts, greatly ahead of its time, a reality in which interest groups are organized through complex nets of power relationships which are highly fragmented and have a tendency to dilute responsibility and accountability by distributing them asymmetrically between a vast number of subjects in the network. In stark contrast with the Leviathan, the Behemoth is a model of social organization which does not respond to a single “brain” and is not coherently structured, making it hard to inspect with traditional tools like, to make an example as a preview of what’s to come, attribution of guilt and partition of liability among multiple actors often in dubious hierarchical standing among each other. Needless to say at this point that the exact scope of this work is transnational business and its relationship with human rights and international law at large. Those are the dragons I seek to slay, together with the by now dusty mental structures and theoretical foundations in which they find purchase to take flight. As a final note on the title choice, the reader may find amusing the notion that the current top four firms in the global pork industry are Chinese firms and they willingly

chose the nickname of “Four Dragons”[1].

In Tolkien’s universe, dragons are powerful creatures, way beyond the ability of the common folk to keep them at bay. Such power manifests in both their physical prowess (for example their huge proportions) and intellect, this last quality being perhaps the most critical of the two. Dragons are described as master manipulators and cunning deceivers, the use of their tongue combined with their accumulation of knowledge during the centuries leading to results falling just short of magical influence or mental control. However, what defines them at the core is their connection, both symbolically and materially, with greed. Dragons are creatures of wealth, bewitched by gold and intimately dedicated to hoard as much of it as possible and never letting go. The obsession is so iconic and rooted in them that it gives the name to a mental state, even though in the books is presented more as a curse or a medical condition, affecting humans and all other creatures too: the dragon sickness. Of course, dragons did not create greed, they serve as the highest manifestation of what it can do to life when left unchecked, namely it generates monstrous constructs, uncaring for the costs needed to sustain the pursuit of riches: dragons monopolize key natural resources, burn villages and kill with no hesitation, even at the loss of a “single cup”[2]. Gold makes them stronger too, hardening like a chainmail on their bodies as they slumber on top of their treasure, keeping watch. We can now better understand why Tolkien in the quote above rightfully warns us of the danger of ignoring such a creature at our doorstep. Unfortunately, this is precisely what has transpired in the real world when we live the fantasy behind and look at the three main domains of this dissertation: business, Human Rights and the food system. To be more precise, we have created such dragons and fed them abundantly while actively erecting practical, conceptual and legal barriers that have now come back to haunt us in our efforts to achieve better regulation. Asserting that the main issue was simply a lack of consideration, and such was the consensus until not long ago, is far too light a sentence since we would be now presented with a blank canvas to fill at our discretion. Instead, international law and policy are main protagonists in the making of the problem and we are presented with the double impervious task of simultaneously dismantling the old and imagining the new.

Let us suppose that such creatures did truthfully exist and, as a bonus, were to

[1] Liberti, S. (2021). *I signori del cibo. Viaggio nell’industria alimentare che sta distruggendo il pianeta*. Minimum Fax.
[2] van der Waard, N. J. (2017, May 31). *“Dragon Sickness”: The Problem of Greed*. Academia.Edu. Retrieved March 6, 2022, from https://www.academia.edu/32985048/_Dragon_Sickness_The_Problem_of_Greed

be intangible, capable of being ubiquitous through multiple continents and could multiply themselves virtually ad infinitum, each new instance possessing various degree of autonomy from the main body depending on the situation. In case this list proved insufficient, we can even theorize a scenario in which such creatures would act in an organized fashion to lobby with coordinated efforts for their common interests. Wolves among sheep, they could even manage to influence the very bodies erected to keep them in line. At the end of this over exemplified mental representation lies a decently accurate representation of modern Transnational Corporations (TNC) and Multinational Corporations (MNC). We will dwell more in depth into definitions later, for now let us employ the same logic as the experts, both independent and at the UN level, and use the terms interchangeably. In any case, the question that comes to mind remains: how would we manage and make accountable creatures of such nature? Is it even possible realistically? Should we then use "hard" or "soft" governance to accomplish this result? What is the extent of their Human Rights Impact? Even louder are not the questions but their lack of, considering that rigorous assessment of the corporation as a phenomenon is relatively in its infancy when weighed against the overall timeline of economic, legal and social development. TNCs appear to be like a huge black hole, its effects strongly visible anywhere around us, its impact on its surroundings undeniable, and yet no shape or box seems to fit them. Such a conclusion endorsed by the literature and normative landscape we are going to tackle is, to use an euphemism, rather alarming. While the technicalities of this gap and, as stated in the title, its consequences will be addressed exhaustively, I want to stress in this introduction what in my opinion is the heart of the problem, the simplest cartesian *idées claires et distinctes* on which I build the Human Rights case against TNCs: like Tolkien's dragons, TNCs unique trait is greed. I find Monod's terminology[3] in his seminal work: "Le hasard et la nécessité. Essai sur la philosophie naturelle de la biologie modern" quite effective to better frame my previous statement: TNCs, the modern company, are a teleonomic apparatus surgically designed and shaped by one genetic finalistic principle only: profit maximization for investors. Every aspect, every feature, may it be technical, structural or cultural, revolves around serving this objective. The parallelism with biology is closer to reality than some may be willing to admit, but organizational psychology and research as old as 2003 speaks for itself on

[3] Monod, J. (2017). *Il caso e la necessità (italian edition)*. Mondadori.

this matter[4]. This definition of the purpose of a corporation takes the name of "Shareholder Primacy Doctrine" and completely excludes any formal social responsibility or purpose for the corporation beyond the parallel duty to limit legal and financial liability as much as possible. Sadly, despite some notable advancements, most states and commentators will argue it is still the accepted status quo and the pillar of modern capitalism and international trade. Together with the Separate Corporate Personality doctrine, the Shareholder Primacy model forms the sword and shield with which TNCs and their affiliates escape virtually all liability, the latter being often employed as a presumption of innocence since *mens rea* can never be established, eclipsed by the assumption that TNCs act guided by profit and not by intentions of doing harm. However, as we will argue, this presumption must be turned upside down, because SCP and Shareholder Primacy effectively create a system designed to promote shameless and reckless risk taking, almost requiring it by force. Similar conduct is logically highly correlated with the possibility or inclination of business activity being in violation of Human Rights.

Thus, I believe that, even before moving to accountability issues generated by the complex and magmatic territorial and organizational architecture of a TNC, such a teleology in itself and the normative framework it crystalized are completely incompatible with the Human Rights framework and its effective and realistic implementation. Any serious advancement in the field must dispose of these concepts the way they stand now. A system with financial gain at the center will always be at odds with a system which postulates human dignity at the center. This is because Human Rights-based dignity is a precondition: fundamental, inalienable rights come before the State, they belong to people just by virtue of being people. The logical implication of this fact is that all subsequent human action should develop with such rights as the base, having their respect, protection and fulfilment always in mind. The moment we accept the primacy of profit we are also forced to accept that Human Rights have a place at the negotiating table only when they themselves are harbingers of profit. This means completely throwing out the window the very concept of Human Rights as inalienable and as preexisting the permission of any entity to exercise and granting them. When accepted to its fullest. The Shareholder Primacy Model leads us to a path reverting to *droits octroyée*, a path even more than dangerous than the original since it presents rights as concessions granted not by the State but by an entity

[4] See, for example: Dr. Robert Hare (2004), in *The corporation*, produced by Achbar, M. & Abbott, J. The documentary itself is based on the book by Joel Bakan which bears the same name.

practically, philosophically and legally rescinded from any public purpose. The concept that Human Rights have a price cannot possibly be tolerated and this is perhaps the most striking weakness of soft solutions to this challenge, such as Corporate Social Responsibility (CSR). Modern Business and Human Rights conceptualization moves from faulty premises and for this reason cannot possibly give birth to adequate and wise culture and law.

The lens I use to study this landscape is that of International Law. I stand with Hart[5] in my belief that law is essentially a social construct arising from the growing body of interactions inside and among social groups. The members of the group come to know and decide what values they deem worthy of a certain degree of protection and they regulate their expectations of conduct on that premise. As the complexity of the interactions of a group grows, so does the complexity and the need for law to create and maintain such expectations. For such a mechanism to properly function it is of paramount importance, especially in a system where division of labor and its increasing demand for extreme technical specialization prevent automatic and fast comprehension of certain phenomenon by the uninitiated, that policy makers and the judiciary keep up with the times in their understanding. An example of this is offered by the recent efforts that gave rise to the GDPR in the UE or the Facebook trials, both cases where those in power proved to have little command of the new technological wave and, by force, how it should be handled. This trend is bound to worsen as technology has more and more influence in our daily lives and the level of expertise required to stay in the loop escalates. A similar thing has happened and is still happening in the Business and Human Rights sphere, where State-centric frameworks with Hobbesian foundations (the Leviathan) fog the vision of observers and rigorous integration of operational/managerial theories of the corporation/organization with more classical legal/political approaches still severely lacks. Similarly, further research is greatly required in fields such as Human Rights impacts of international trade and financial institutions (IFIs) and human rights compatibility of the current international private law of contracts (which is curious considering how big of a deal contract law is for TNCs). At least we seem to have reached a consensus on the failure of the voluntary commitments approach, even if the counter proposals of this new wave of enthusiasm (among which the banner holder is surely the draft of a binding treaty by the Open-ended Working Group) still lack real teeth.

[5] Shapiro, Scott J. (2009). *What is the Rule of Recognition (and Does it Exist)?*. The rule of Recognition and the USA Constitution, Matthew Adler, Kenneth Himma, eds., Oxford University Press, Yale Law School, Public Law Working Paper No. 184, Available at SSRN: https://ssrn.com/abstract=1304645

In summary, like in other fields (for example the law of secession and self-determination), our inability to think to politics and law beyond the State is severely limiting our progress, exposing us to potentially very wide gaps of governance and accountability when we face the harsh reality that Behemoth-like models of power relationships are already alive and kicking as we speak. To borrow insightful imagery from James Hillman, even if on the outside we are wearing nicer clothes, our brains are still cluttered with the same old furniture dating back to the 19th century and the guy pushing the buttons in the control room is still Moses[6]. Most importantly, a parallel maturing of the international constituency, at every level of governance, must take place. We as citizens and consumers must be the first to change our view of what is expected from private economic actors and TNCs and put our foot down when necessary. We must demand reforms cohesively and do not abuse of what Bauman called "moral sleeping pills", offered by the luxury of living on the side not affected by the imbalances of the system (temptation that CSR greatly promotes). Furthermore, this thesis will make a point of showing that this safe space is actually shrinking down and it was never that safe to begin with. It is in everybody's best interest to overhaul the business and human rights system and what stage best suited to test such statement than the food system and how TNCs, its biggest and most numerous actors, affect it. The point is that the stability and safety of the food system are the keystones for many other human rights, since the food system is the first driver of environmental harm. By reflection, TNCs being the biggest contributor to the food system, having the adequate policy and legal space to regulate them is the way forward to achieve these objectives. TNCs, the Global Value Chain (GVC) they form, food and the environment are global topics of global proportions and of global concern. In this sense, the dragon to be slaying mentioned in the title is not only a metaphorical one, representing the current conception of TNC and its underlying theoretical foundation, but also the practical, observable dragon of the vertically integrated economy of the food system, which basically operates like a cohesive unit with common interests and objectives and embraces the entire planet: agribusiness.

In this exercise, we will begin with an illustration of the history of the TNC in the international arena, especially the international legal arena. The fundamental philosophical, political and economical premises informing the contemporary vision and form of TNCs and their playing field will be addressed. Such developments, it is argued

[6] Hillman, J. (2018). *Il potere. Come usarlo con intelligenza* (Italian Edition). BUR Biblioteca Univerzale Rizzoli.

here, are best appreciated when their coming into being (or not coming into being) is viewed as the latest and loudest manifestation of a struggle which goes much further back in time: the struggle between the private and the public sphere of human activity. In this sense, Human Rights emergence has exacerbated this tension, since their latest developments, to be fully absorbed, require the acceptance that under certain circumstances even private action carries public weight and must as such carry correspondent responsibility. In the business and Human Rights debate, the core of this dissertation, this struggle is the struggle between Human Rights norms and the Shareholder Primacy model, a struggle which spreads to the entire system in which TNCs act, from the UN instruments to the World Bank regime. The second part will showcase through analysis and practical examples, especially jurisprudence, how the struggle previously depicted generated a schizophrenic system with numerous and challenging gaps with the potential to render Human Rights effectiveness substantially null. The main instruments available at international and national level, including most recent attempts at innovation, will be scrutinized, like the OECD guidelines, the international trade and investment regime, the French initiative, the ATS and most importantly the new drafts of binding treaty by the OEIWG. Lastly, the consequences of TNC conduct, including the trade and investment regime by virtue of being virtually a tailor-made creation for their consumption and the overarching vehicle of their operations, on the food system will be offered. It is the opinion of the author that to properly tackle this issue law alone is of course not sufficient and it requires a revisitation of the concept of food security and the right to food through the lens of food sovereignty, conceived not as an anachronistic call to autarchy but as a more reality-bound gaze upon what secure and sustainable food really means.

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The Dragon Sickness: the separate (a)morality and law of economic behavior

The private/public dichotomy: the reasons of business and Human Rights incompatibility

The history of the TNC is just as much the history of the (excessive) conservatism of international law and policy. It is well known that international law orthodoxy speaks of horizontal relationships among sovereign states, describing in fact a state-centric legal system with no place for any other entity. In other words, the only subjects of the international legal system are sovereign states and it should then come as no surprise that the very existence, at this point undeniable, of powerful non-state actors presents a conceptual challenge even before the practical side of it. This challenge extends to the attempts made and currently in the works to regulate TNCs internationally. In the same spirit, traditionally, the "year zero" of international law coincides with the creation of the Westphalian international community, happened around 1648, the same moment the modern state came into being. Such an account of the history of international law is well documented and way beyond the scope and purpose of this thesis, what is interesting, however, may be the fact that it overlooks an obvious temporal continuum and reduces it to some sort of "Big Bang" moment in the international arena. After more careful examination, we are confronted with the need to reconcile this new modern form of international law and politics with everything that came before as the former did not surely emerge ex nihilo. The results are quite instructive. Most significantly for our ends we discover that entities beyond the state have not only always existed, but they thrived and were tasked with considerable powers and functions that would later become the proper exercise of public and governmental authority. A powerful argumentation on this point has been offered by Fred Haliday:

> *(…) the residual, or supposedly recent "non-state" is in fact a continuation of something that prevailed until this modern state was formed. In pre-modern society much that is today controlled by the state was administered by other entities – the family, the tribe, the religious group, the local lord*[7].

Directly building upon this notion, Peter Muchlisnski interestingly stimulates our

[7] Halliday, F. (2001). *The Romance of Non-State Actors*, in *Non-State Actors in World Politics*, edited by D. Josselin and W. Wallace. Basingstoke: Palgrave

imagination in positing that the nation-state could be conceived as "a construct formed by non-state actors to further specific group interests"[8]. How did this deep disconnect happen then? The answer must be sought inside the deep transformation of society and, consequently, the role and place of human activity inside of it. Before the modern state, clear private/public divides did not exist and the two categories were in a state of flux. In Europe, for example, the public domain of the state was itself closer to a patrimonial possession by groups of elites and the closest thing to a theory of the individual as we possess today was the notion of the believer, who existed as a simple cog of a superior system administered by God and its emissaries and had no inherent value outside the lens of the Christian community. This was bound to change profoundly during the Enlightenment and, perhaps even more, thanks to the quake initiated by the Industrial Revolution. The new society was based on capital accumulation and its new driving force, the same force capable of standing up to foreign competitors and menaces, was the middle class. Both cause and consequence of this new trend is the contemporary conception of the divide between a public sphere of activity, which is supposed to be regulated, and a private sphere of activity, which instead deserves only protection and freedom from interference. Ironically enough, this public/private divide stemming from the 18th century and reaching up to the 20th is the mother of two sons that could not possibly be more at odds with one another but nonetheless share the same philosophical and social intuition as their reason of existence. The two creations I am referring to are the modern business enterprise and Human Rights, both standing on the shoulders of that revolutionary concept which is the free and equal individual, with a dignity and autonomy preexistent to those granted by any other authority. It can be argued that without such a conception of the human person the industrial revolution would not have achieved the same heights that it did, since the very concept of economic entrepreneurship requires individual action and an autonomous sphere of influence. The middle class required to be let loose to achieve its latent potential and, at soon enough, the public sphere became a residual concept concerned with protecting its private counterpart (traditionally associated with and originating from economic activity). As we will see, the same process translated over time to the international arena. To quote Claire Cutler:

[8] Muchlinski, P. (2010). *Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights*, in *Non-State Actor Dynamics in International Law: from law-takers to law-makers*, edited by Noortmann, M. & Ryngaert, C. Ashgate.

> *This separation allows for capital accumulation through the operation of an unregulated market, which is institutionalized and made effective through the rise of state regulation aimed at protecting the market or 'private' sphere from control by other competing interest groups (Claire Cutler 2003: 43–45). This can be carried over to the international arena by way of creating a deregulated field within which private commercial actors can function. Historically this may be said to have been the function of the medieval 'law merchant' which was subsequently internalized within the national legal order of states and which now has as its contemporary counterpart the law relating to trade and investment liberalization and investor protection*[9].

The aftermath is the laying down of the cornerstones of a system in which public authority will (and to some extent must) protect private interests when it is expedient to do so, may them be human Rights or business activity. Anthony Carty & Janne Nijman asserted that the Westphalian State and the modern corporation were in fact the results of the division of a more vague and centralized form of sovereignty typical of Feudalism, which was organized under the form of a triad, with the third element being precisely the Church:

> *In very broad strokes, the State increasingly gleaned authority from its ability to defend its public, that is, the public interest, from external and internal hostilities; the corporation gleaned its authority from its ability to enrich the State, that is, territorial extensions of sovereignty and police power amplified for the VOC and BEIC as tax revenues proved vast; and the Church gleaned its authority from God, who also gave the King unconditional authority to rule through Divine Right (in contrast to the conditional rule granted by China's Mandate of Heaven). 10 While by now the Church has drifted away from this holy trinity of public organization, the dance between the corporation and the State – and the ways in which law grafts form onto them – is ever vibrant*[10].

The Dutch East India Company (VOC) and the British East India Company (BEIC) are

[9] Claire Cutler, A. (2003). *Private Power and Global Authority*. Cambridge: Cambridge University Press.
[10] Carty, A. & Nijman, J. (2018). *Morality and the Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order.* Oxford University Press.

the scholarly accepted ancestors of the modern TNCs and in the above citation they combine perfectly with the Westphalian State in a quasi-symbiotic relationship, the latter providing the normative and security space for the former to continue seeking profits and expansions. Unfortunately, this also implies that, at least at the most intimate and basic level, Human Rights have no real theoretical special place in the family of the private domain, they are simply a way in which legal legitimacy and responsibility were distributed inside a polity to better pursue other (more important) material goals. At the very best it can be argued they are a primus inter pares by virtue of the values they protect in the community but by age (at least in their contemporary and almost properly developed form) they are the youngest of them all. By contrast, the special place economic activity in the making of the modern society and the modern man is explicitly present in instances dating much more back in time. Particularly interesting is the place early international law conferred to such an activity, a testimony that further calls into question whether states would really be willing even before being able to regulate private economic conduct. The principles expounded from the texts of these "founding fathers" of International Law will reveal themselves particularly useful in the rise not only of the capitalist middle class and the new capitalist system but also, and perhaps unsurprisingly to the well versed in economic theory (especially dependency and global-south branches), in the justification of colonialism and more recent economic imperialism in the globalized era. Another phenomenon they conveniently facilitated is an underlying theme of this study and stands true with particular force in the 21st century: the gradual transfer of legal authority from states to TNCs, an outcome which flows inevitably from the slow division of labor initiated by the members of the Westphalian triad in the fashion explained above. Coherently with this statement, policy makers and observers today are still concerned, when speaking about CSR and due diligence, that the instruments will be used as an excuse by states to shy away from the admittedly impervious task of regulating TNCs, informally leaving them with free reign to decide for themselves through vague and voluntary commitments to what (economically feasible) extent they wish to cooperate. In exchange, these weak efforts take pressure off their shoulders and give the impression that progress is being made by hiding quality under quantity. Let us now turn to these old principles of law and their proponents.

One of the most influential schools of international legal thought is without a doubt the Salamanca School, brought to prominence by jurists such as Francisco de Vitoria. As far back as the 16th century, de Vitoria created for the first time the

distinction between personal morality and commercial morality, presented in the following mental experiment:

> *You are a captain of a ship full of grain, and you are headed to a port in a country where there has been famine for a long time. You arrive at the port and you see the people coming with their money in their hands, and they want to buy the grain that is in your ship. You, as the captain, know that in the distance of two days of sailing, there are tens of other ships on their way to this same port, loaded with grain as well. Do you have the duty to disclose to your clients what you know?*[11]

The answer:

> *If you are ordinary men and women, then of course you have to tell these starving people that there are other ships with grain coming. This means that the price of your grain will go down, down, down, down. But that is your duty to the people closest to you. [But i]f you are a commerçant, a merchant, then, well, it is not that clear*[12]*.*

We can see here not yet the primacy but the beginning of the separation between a law governing natural persons and another reserved for economic and commercial transactions. Building up from this, in a way which always tickles my fancy for the ironical, Grotius erected his seminal theory of the law of the sea. What I find stimulating is the fact that Grotius was an active lobbyist for the VOC. In Grotius view, free trade at sea was a natural right granted by no less than God himself and violation of such a right justified the use of force. Taken to its extremes, this doctrine seems to anticipate by more than a century what would become the central pillar of American exceptionalism and their manifest destiny[13], namely that free trade and the benefits it provides are paramount for world peace. This basic understanding still ripples through modern views on the nexus between Human Rights, trade and development. Given the

[11] This is a paraphrasing of Vitoria, provided by Martti Koskenniemi in an interview with Demitri van den Meerssche for Opinio Juris, Interview: Martti Koskenniemi on International Law and the Rise of the Far-Right, (12 Oct. 2018), available at http://opiniojuris. org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-ofthe-far-right (accessed 5 May 2020). Quoted from Kevin Crow, 2021.
[12] Ibid.
[13] For an expansion on these concepts and their influence on American foreign policy see: Pero, D. M. (2017). *Libertà e impero. Gli Stati Uniti e il mondo 1776–2016*. Laterza.

mostly American (or at the very least western) connotation of the international system and the origins in US circles of the modern theory of the firm, we can estimate with good margin why things are the way they are for the most part. Another man directly linked to Grotius (by way of frequent citation) and in need of no presentation to explain his weight in international economics is Adam Smith. For the purpose of this chapter, however, an assessment of Vattel's theology is more critical.

Vattel's writings date back to the 18th century and are slightly anterior to Smith's, making him the real precursor of rational choice theory. In his view, humans are fundamentally self-interested creatures, with needs at the base of their behavior rather than law. Self-interest, however, has a double nature: internal and external, internal being one's own happiness (what today would be defined as "utility") and external being the happiness of the community. Vattel argued that a paradox does not exist between the two given that under certain circumstances external happiness is condition for personal happiness. Needless to say, marrying this vision in full completely shatters any notion that morality, emotion or value exists outside of what is contingently efficient. Here we have, in simple and crude terms, the essence of corporate and private behavior, on top of which modern polities have been built from the ground up: self-centered pursuit of utility maximization (the Shareholder Primacy doctrine of the future) is the center piece while everything else is, to continue employing economic vocabulary, an "externality", good or bad it may be. No higher law or principle exists outside of this rational approach. Framed like this, it is not a form of conceptual stretching to imply that Vattel's predated contemporary visions of business and Human Rights regulation, in which TNCs have the duty to preserve and perfect themselves and their activity following the Shareholder Primacy Model (the internal dimension), but no corresponding duty to protect and perfect the external dimension exists, this second side of the coin being reduced to a mere *interest* rather than a hard duty; and interest may be subjected to change. We can ow see that all the pieces were already on the chess board and in fact it did not take long for the old charter-based model of the company, based on investigation and disclosure of a publicly stated purpose of the activity, to give way to free incorporation to better serve economic objectives. The only thing missing was how to conceive the legal personality of these entities, issue that national courts and judge-made law, especially in the US, did not wait too long to tackle, we will explore this aspect better in the next subsection.

All these considerations find their highest expression in nowadays divide between, for example, private international law and public international law, or in the

fact that the United Nations Guiding Principles on Business and Human Rights (The “Ruggie Principles”) speak of primary responsibility of states and secondary responsibility of TNCs. Furthermore, the system is skewered in favor of TNCs almost unfairly, them possessing rights and powers effectively making them quasi-individual or quasi-state entities without the corresponding duties. Sometimes they even possess rights that no other natural or legal person has (like deferred prosecution in the anti-corruption framework). TNCs rights are hard but their duties still look soft, the way in which investment disputes are settled a perfect portrait of such an imbalance. Another more striking and direct proof of this duality can be seen in the omnipresent reluctance to attribute human rights responsibilities to private actors, the most frequent rebuttal being that human rights protection is a public matter and as such sole responsibility of the state, a position strongly endorsed by, among others, the US and encapsuled in the famous essay written by Milton Friedman, leader of the soon to be notorious Chicago School of Economics: "A Friedman Doctrine: The Social Responsibility of Business is to Increase Its Profits”, published by the New York Times in 1970. This endemic struggle is visible in its most modern form at the level of CSR (Corporate Social Responsibility) and due diligence initiatives. I don’t envisage a short and peaceful resolution of this tension, one of the parts in doomed to give way because the conflict is at the fundamental level of the theoretical and rational assumptions behind the norms and the beliefs, on one hand the pursue of capital accumulation and profit maximization and on the other Human Rights protection. Optimism tends to wane especially after considering that Human Rights, in the reconstruction presented here, appear to be a secondary child of a free space originally imagined for economic activity. In a sense, Human Rights (at least first-generation Human Rights, those safeguarding civil and political liberties) have been the needed normative and philosophical language through which the realization of the modern industrial and capitalistic society was possible. Perhaps no field of study showcases this better than international theory of development, which from the get-go postulated a fascinating but not at all irrefutable positive nexus between neoliberal capitalism, international trade and democratization, which in turn leads to better Human Rights implementation. Only for a very short moment, and maybe not even then, at the time of the New International Economic Order (NIEO) was some structural change put at the negotiating table, and not without substantial resistance. It should also be noted that the NIEO failed and nothing remains of it. In summary, capitalist economic expansion is always the real root and aim to pursue and we just must deem ourselves lucky that as a part of the package (maybe,

eventually) some measures of human Rights improvement seem to come along. Practice seems to confirm this, at the time of writing still no serious Human Rights procedure or terminology is employed in International Investment Law mechanisms (for example the arbitration tribunals under the auspices of the ICSID and the World Bank) and International Development and Financial Institutions themselves (IFIs) openly shy away from or outright refuse to accept entry points for Human Rights in their operations.

The human origins of Corporate Personality

By now we should be familiar with the notion that international law and private non-state actors are far from alien forces to one another and neglect, as many have argued recently, is certainly not the issue at stake. Rather, the lack of deep reflection and understanding of the actors involved seems to be more relevant, especially in the modern globalized world where the TNC, together with society and technology, have evolved so rapidly and have left such a mark as to leave the impression that the creation has overtaken the creator. We have also touched upon the key role non-state actors (interest groups, lobbyists, intellectuals, private subjects at large…) play in the creation of any legal system and in the organization of any polity and the same stands true today, perhaps more than yesterday given that such actors are at the peak of their powers. International law was always interested in and concerned with economic activity, assigning it almost a salvific role in the system, most notably in the case of Grotius. The need and will to serve, nurture and safeguard this realm of human activity logically, propelled by social changes and necessities that paired badly with feudal structures, led to the progressive theoretical separation between the private and public spheres of law, morals and behavior. The private sphere was to be naturally unregulated and kept free from interference, fact that brought to the modern theories of the individual and the foundation of universal, fundamental rights. This change however did not happen overnight. From the Westphalian state and its VOC and BEIC during the “Scramble for Africa” to the contemporary definition of TNC and devices such as SCP and Shareholder Primacy, roughly 2 centuries have passed. Without a doubt, the biggest change that can be witnessed happening in this time window is the definitive divorce of the TNC, as the representatives of private economic initiative and its separate legal and moral dimensions, from any public purpose. We should now investigate the practical ways in which such a philosophical, political and social

evolution has materialized not only in the general legal language and technology employed but also specifically in the structure and personality of the TNC overtime.

Initially, as it was previously mentioned, what we now call private and public spheres of human action were in flux. Corporate ventures were established and tolerated only when they served a public purpose and their investors (shareholders) were small groups of elites that needed to share a purpose, a technical expertise, a nationality or a class. This arrangement was officially sanctioned and contained inside a document named "charter", which gives the name to the charter phase of corporate personality[14]. The charter and, when introduced, limited liability are the fundamental elements of the modern corporation. They were designed to promote risk taking and allow the corporation to be most effective inside the limits of the chartered agreement. When a corporation exceeded such limits, the charter could be revoked. Instead, nowadays the only common purpose needed from investors is making money and their social and political base could not be more diverse and fragmented. Furthermore, the slow and steady disappearance of the revoking in practice combined with a judicial streak that operated a switch from the elite public charter to widespread private incorporation. The logic behind it was to prevent the benefits of limited liability to be the privilege of a handful of people[15], but it also gifted an exponential scale to the issues shared so far in this thesis. Now virtually everyone could incorporate a business with limited liability and the only check and balance left was the fading and vague "public purpose", prone to instrumentalization and misinterpretation. This evolution made the corporate phenomenon, especially TNCs, much harder to manage in the long run, for example remedies such as those employed to call to order the late BEIC would be unfeasible. Most notably, whereas investors were at the beginning owners of an interest, now the gold standard is that they own the corporation itself. This is a subtle and key difference because it means that in the past the logic was that corporate purpose and investor interest were two different things. In other words, investors had an interest in the success of the corporate venture, which was the accomplishment of a public service. In the modern sense, investors instead *are* the purpose, they *own* the company instead of being mere facilitators of an endeavor and this led to the pivotal theory launched by Adolph Berle and Merrick Dodd in the 1930s. Their competing views in the Harvard Law Review, where Berle argued that a corporation was property

[14] For a more detailed account of the colonial charter era see: Lustig, D. (2020). *Veiled Power: International Law and the Private Corporation 1886–1981* (Law and Global Governance). Oxford University Press.

[15] See: Winkler, A. (2018). *We the Corporations: How American Businesses Won their Civil Rights*. Liveright.

of the shareholders and as such it should serve their "best interest", while Dodd tried to reaffirm that they were a public construct and thus their concern was to be found in the interests of the public at large (a position similar to CSR initiatives of today, as the one sponsored by Blackrock arguing for a stakeholder rather than a shareholder primacy[16]) poetically symbolize the process of private/public divide this chapter is based upon. Of course, Berle won and by the 1970s shareholder primacy was the internationalized and accepted legal and doctrinal truth of the private enterprise. It appears that the double morality and standards for humans and merchants which troubled de Vitoria's reflections are now fully realized. The previous innovations may have started mainly in the US and the UK, but they quickly spread internationally and now they are uncontested in internationally. I think at this point it is very hard to refute that national and international legal sensibilities shared a common inclination to be very permissive and zealously supportive of the private economic initiative, the steady dismantlement of the few remnants of public interest in doctrine and practice standing relatively unopposed exception made for some perplexities here and there (assertion proved in an even stronger manner by US jurisprudence). As we speak, TNCs control more than half of global international trade, span multiple economies, territories and national legal systems and, incredibly similarly to what has been considered a state prerogative by orthodox doctrine, they are lawmakers as much as they are law-takers and they can and will escape or fight against national legislation that swims against their investors interests even when such laws serve the public. This independent morality, independent purpose, and multinational social base scattered around the globe (shareholders and investors) facilitated by the democratization of private incorporation effectively make the TNC an entity which answers to a different constituency than that of the State. In the words of Crow:

> *(they) have political power without commensurate attachment to a definable political community. The geographic, economic, ideological, and physiological dispersement of shareholders creates in the place of genuine political interest singular sets of interests that are predefined or assumed by corporate managers and directors*[17].

[16] Larry Fink, A Fundamental Reshaping of Finance (Letter to CEOs), available at www.blackrock.com/corporate/investor-relations/blackrock-client-letter (accessed 20 May 2020); Doug Sundheim & Kate Starr, Making Stakeholder Capitalism a Reality, Harv. Bus. Rev. (22 Jan 2020).
[17] Crow, K. (2021). *International Corporate Personhood: Business and the Bodyless in International Law* (1st ed.). Routledge.

This introduces transparently another dimension of the "schizophrenic tension" [18] between the Westphalian sovereign state and the TNC. Despite their innate historical and social connection, positivist international law and the private initiative are drifting apart, the former technically and mentally constrained by its theoretical limitations in truly understanding the latter. The result is, rather than non-state actors (and the TNC) being invisible to international law, them being naively or incorrectly managed by such law, leading to accountability and theoretical gaps which become almost the sole dominion of the TNC. Some groups were already aware of these possible developments in the 19th century, for example US sensibility to the subject was noteworthy, the Pennsylvania delegation to the Dartmouth College decision, quoting in 1838 that: "'Whatever power is given to the corporation, is just so much power taken away from the State, in derogation of the original power of the mass of the community"[19]. Such attitude did not last long though and TNCs and the system around them are considered by the majority a net positive presence, exception made for some incidents along the way due to a few "bad apples"[20].

After having seen how TNCs became autonomous and to what innovations they need much of their prowess; after having traced the origin and underpinnings of their lack of duties aside profit and their lack of accountability outside of investors (of course this is an oversimplification, the point is not that there are no rules managing TNCs but that their creation and imagination does not flow naturally and varies within an inherent challenge), a question rises spontaneously: what are they in terms of legal personality? Should they be legally conceived as an extension of their investors? Are they a separate entity? Should it be a full personality or a limited personality? Do they have rights despite having no duties and, if yes, to what extent and grounded in what? We already know the answer to some of these, for instance positivist Westphalian international law cannot consider any entity outside states, at least in principle, to have full legal personality, the accepted view today being in fact that legal personality of TNCs is hybrid. Legal personality is after all a fluid concept, as enshrined in the landmark Reparations for Injuries Case before the International Court of Justice (ICJ). The Court stated that:

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[18] Dowling, P. (2020). *Limited liability and separate corporate personality in multinational corporate groups: conceptual flaws, accountability gaps, and the case for profit-risk liability*, in *Accountability, International Business Operations, and the Law Providing Justice for Corporate Human Rights Violations in Global Value Chains*, edited by Liesbeth Enneking, Ivo Giesen, Anne-Jetske Schaap, Cedric Ryngaert, François Kristen, and Lucas Roorda. Routledge.

[19] Trustees of Dartmouth College v. Woodward, 17 US 481 (1819).

[20] Achbar, M. & Abbott, J (2004). *The corporation.*

> *The subjects of law in any legal system are not necessarily identical in the nature or in the extent of their rights, and their nature depends upon the needs of the Community*[21].

The pivotal test here is the *depends upon the needs of the community.* The historical account presented shows that international law and the Westphalian state were never blind to the private non-state actor, emerging from and in dialogue with it. The perceived blindness, especially by activists in recent times, is due not to the impossibility of international law to "see" the non-state actor or conceive it, but to what I call a *functional blindness.* In other words, the dialogue and relationship between international law and non-state actors, stemming from social reasons intimately linked to industrial and economic activity that ultimately generated the modern state, never thought (until recently) that any such *needs of the community* existed apart from self-interested preservation and expansion of sovereignty (for the state) and profit (for the TNC in our case). So it is only natural that the legal personality that resulted for TNCs is imbalanced and limited to what was perceived to be their place in the world, a place where in pursuit of these objectives they were bestowed with more rights and privileges than duties, as the latter were destined to the state. This was the original "sacred oath" between the public state and the private initiative, its most modern and powerful representative being the TNC.

Legal personality of corporate actors began to be fleshed out is this fashion in the bedrock of the firm and corporate law: the US. Again, we will see that it was an arbitrary judicial exercise without a compelling explanation, achieved in great part thanks to corporate lobbyist infiltration and pressure. The great win for corporations in this instance was that they were able to secure for themselves the basis for enjoying the same rights attributed to natural persons. This result was achieved via interpretative evolution of the reading of the 14th amendment. It reads:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal*

[21] ICJ (1949). Reparation for Injuries Suffered in the Service of the United Nations.

protection of the laws[22].

The entry point for corporate rights was the use of the term *persons* instead of a more precise people. The final living drafter of the clauses, Roscoe Conkling, who was deeply involved with the Southern Pacific Railroad Company, used some of his supposed old notes to argue before the Supreme Court that the term was chosen on purpose to imply that it applied to corporations as well. Historian Adam Winkler sums the whole affair up in the following terms:

> *Everyone knew when it was ratified in 1868 that the amendment's guarantees of equal protection and due process were designed to secure the rights of the newly freed slaves and protect them from discrimination by the states. Nearly a decade and a half later, however, in December of 1882, the esteemed Roscoe Conkling told the justices the Fourteenth Amendment was also written to protect the rights of corporations like his client, the Southern Pacific Railroad Company*[23].

In the end, the Supreme Court decided to go along with that and, aided by superficial lectures of the landmark Santa Clara County v. Southern Pacifc Railroad Company case, the word *persons* was officially to be read as if including corporate entities, even though the underlying theory of the firm or legal reasoning employed remained a mystery. The impact of such a decision will not be felt until much later, because the interwar period and extremely small scale of US TNCs generated little traction for company regulation or controversy. However, after WWII, when US private personhood and shareholder primacy will be exported in the rest of the world through their economical and legal negotiating position, it will prove game changing. This idea that TNCs had rights and the architectural impossibility of international law to follow through, combined with the uncontroversial nature of purely profit and shareholder-based duties, will fuse together to carve an expanding niche in international law where the TNC could thrive uncontested: the International Investment Law regime and the International Trade regime. Let us explore this development.

The exodus of TNCs to greener legal pastures, aided by states, is an historical account of the North-South divide across the 20th century. It all started with a landmark

[22] U.S. Const., Amendment XIV, Section 1.
[23] Winkler, A. (2018). *We the Corporations: How American Businesses Won their Civil Rights*. Liveright

decision of the ICJ in 1970. Until that point, due to the nature of International Law, the entire protection of TNC internationally was contained in the diplomatic protection regime, through which states could protect their nationals and, by reflection, potentially their TNCs in which such nationals were investors. Needless to say, this was not ideal and could not absorb the increasing volume of international trade and the expanding unique traits of the TNC mentioned above, mainly their territorial and national dispersion. After the aforementioned decision in the Barcelona Traction case the situation worsened, since such protection in complex (but increasingly common) situations was barred by the ICJ in the following majority opinion:

> *Considering the important developments of the last half- century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane*[24].

It then proceeded to rule that: "the right of diplomatic protection in respect of an injury to a corporation belonged to the state under the laws of which the corporation was incorporated and in whose territory it had its registered office, and not to the national state(s) of the shareholders of the corporation"[25]. Probably this rationale was chosen also for simplicity's sake in such murky waters, as another paragraph of the opinion seems to indicate:

> *Opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater in as much as the shares of companies whose activity is international are widely scattered and frequently change hands*[26].

States and shareholders were then left with the bitter realization that current

[24] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgement, 1970 I.C.J. 3, 43.
[25] Ibid.
[26] Ibid.

international law and the ICJ were not ideal fora for the kind of tutelage of their interest they strived for. On this premise the rapid race towards the modern IIL regime was initiated, a process that powerfully showcases how non*state actors, in particular TNCs and their interest groups, took on the lawmaker role through lobbyist pressure. The first step isn't very original, consisting of a classical and simple turning back to bilateralism via bilateral investment treaties (BITs). Embarking on such an enterprise produced a collapse of the natural and legal categories inside the single category of "investor". Private sector representatives and brokers were actively involved in these negotiations, an eminent example being the first BIT between Germany and Pakistan in 1959[27]. If achieved, such a change would be substantial in eliminating obstacles for corporations to achieve full enjoyment of natural persons rights, which at the time were still limited to ones such as property and the extension to these entities of political rights was still absent. However, after having achieved personhood in Southern Pacific, this logical leap wasn't so hard to take. Connecting to a point I have made in the previous subsection regarding the intertwined story of individual liberties and economic activity/privatization of life, the fight of the Civil Rights movement provided in the US a strong momentum for this legal revolution and it materialized in the opposition by news corporations against laws limiting freedom of speech[28]. Ultimately, corporations acquired human rights but still the silence was heavy in the obligations department. Most strikingly, jurisprudence failed to provide a clear understanding of what kind of person the corporation was, some aspects leading to them being quasi-states, others to being closer to people. This blurred framework led to paradoxical results, like in Boy Scouts of America, where it was decided that a homosexual activist could be rightfully excluded from the non-profit organization because First Amendment rights of the organization prevailed over those of employees. Another example is Hobby Lobby, where corporation's right to practice its religion prevailed over the right to contraceptives of its members, a right granted by the Affordable care Act[29].

This innovative sprint rippled through the international sphere through the proxy of the powerful commercial states like the US and the UK and through interest groups like the International Chamber o Commerce (ICC) and European groups like the German Society to advance the Protection of Foreign Investment. The latter produced a draft agreement which, though never adopted, became the accepted model for all

[27] For a thorough history of Deutsche Bank that includes sections on the fascinating career of Abs, see: Plumpe, W. et al (2020), *Deutsche Bank: The Global Hausbank*, *1870–2020,* Bloomsbury Business
[28] For a full list of cases see Kevin Crow (2021) p.40
[29] Burwell v. Hobby Lobby, 573 US 682 (2014).

subsequent BITs, it was called the Draft Convention for the Protection of Foreign property and it managed to reach the OECD machinery, where it met its rejection. These efforts were also aimed at counterbalancing the movement kickstarted by developing States under the banner of NIEO. Developing states, being the other side of the coin, were more interested in policy space and reaffirmation of state supremacy over investment matters, mainly because they were always host states and outward foreign direct investment (FDI) from developing countries to developed countries was still virtually nonexistent. It is only natural then that where developed countries wanted to secure lasses-fair provisions for their companies and eliminate every barrier, developing countries instead pushed for stronger public finger on the pulse.

Doreen Lustig explains in simple terms the challenge of the NIEO, going to the heart of the dispute and its defining tensions:

> *The prominent objective of the NIEO coalition was to secure their governments' regulatory supremacy in their relations with corporate investors, and to undermine the existing hierarchies of the international legal order*[30]*.*

The NIEO coalition managed to gain support even among capital-exporting countries, riding the wave of concern emerged from the US ITT involvement in the Chilean affair and scandals like Watergate and Lockheed. The Barcelona Traction case also generated hope for the global south, similarly to another decision of the ICJ in the AIOC case. All this pressure led to a one-of-a-kind opportunity to negotiate an instrument under the auspices of the UN, what can be considered the ancestor of all modern regulation attempts towards international business and TNCs: the Code of Conduct for Multinational Corporations. Such an effort was doomed from the start, the competing visions too different and the stakes too high. It was already emphasized that all countries of the NIEO coalition were at the time of the negotiations mainly receivers of FDIs and so naturally at odds with FDI exporters; socialist countries themselves decided to seize the opportunity to promote their anti-capitalist sensibilities rather than engaging in constructive discussions; capital powers, on their part, suffocated enthusiasm for the initiative by approving a much lighter code with the same purpose inside the OECD, where they held the reins, in 1977. Eventually, In 1992, the project

[30] Lustig, D. (2020). *Veiled Power: International Law and the Private Corporation 1886–1981* (Law and Global Governance). Oxford University Press.

sunk and the rest is history, Wolfgang Friedman said it best:

> *It would be one hundred and fifty years before I would expect any formal agreement between developing countries and capital exporting countries on the principles of international law . . . The alternative to waiting one hundred and fifty years was to proceed with ad hoc investment and the ad hoc agreement*[31]*.*

In the present, IIL is stronger than ever and has crystallized its BITs system through the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States, passed by resolution by the World Bank. This new system, the ICSID, allows for arbitration clauses inside BITs which empower private investors to bring states before an ad hoc arbitration court for alleged violations of the terms. This is particularly biased against developing countries, the traditional host-states, because the system remains rooted in the assumption that host states laws and regulations cannot be trusted and the system exists to keep them in check with the permanent threat of litigation. Again, Lustig cuts through the bulk of the matter with the direct:

> *This regulatory architecture was designed to redress the mistreatment of foreign investors, not foreign investor wrongdoing. It conferred a set of rights and privileges on private corporations (and other kinds of investors) with no corresponding responsibilities. Together, these divide- and- rule measures, for bilateralism and arbitration, constituted the regulatory infrastructure for corporations operating transnationally after the 1970s*[32]*.*

Envisaged to manage nationalization claims typical of the Cold War and decolonization economic divide, nowadays the ICSID has bloomed into something completely different but operates with the same theoretical and mental foundations. We must leave further exploration of the ICSID to its dedicated part, but a fitting concluding remark may be that it has de facto created a vision of TNCs has having justiciable and enforceable rights under international law while at the same times enjoying unprecedented

[31] Proceedings, Regional Meeting American Society of International Law, New York, March 2, 1961, 'Economic Development and Foreign Investment— Role of Law'. Quoted by James N. Hyde, Remedy and Performance: Planning Future Development Agreements, 105 Collected Courses of the Hague Academy of International Law 356 (1962).

[32] Lustig, D. (2020). *Veiled Power: International Law and the Private Corporation 1886–1981* (Law and Global Governance). Oxford University Press.

procedural and substantial privileges.

Concluding Remarks

Powerful commercial states have succeeded in creating a safe space outside the UN and, at the time, outside of the claims of the defunct NIEO, utilizing for a better aligned with their intent and where they could escape the "tyranny of the Majority". We will see it better in our critique of the food system, but the same pattern presented itself in the environmental and development debates so strictly connected to agribusiness and the way the food system was established. I would like to offer some figures to solidify just how much support and follow up states were willing and ready to give to the ICSID system: by the end of the 1980s, 371 BITs had been negotiated, and by the end of the 1990s this figure had risen to 1,862[33]. In the end, it was the "Grenadas and Bangladeshes of the world that had to reform their laws and practices to be sure that they could satisfy the U.S. BITs' treatment standards"[34]. We are now able to answer the questions on the legal personality of the TNCS and the place they occupy in the international legal system. They are right bearers with limited subjectivity, which acquired rights and direct access to judicial bodies but still no clear and widely accepted obligation or duty. On the contrary, after having acquired personhood, they proceeded to acquire a long list of natural person political and civil rights and secured a negotiating position on par with that of states in their sphere of influence, mainly IIL and international trade. However, this new power and visibility of TNCs opened the door to new functionalist and organic approached to international law and the corporate phenomenon, approaches that go beyond and are more flexible than the classic Westphalian positivism. The watershed for this new era is usually identified in the 1990s and the rise to prominence of Human Rights as the new regulatory paradigm of international relations. So, as we will see, there is still a lot of unexplored space for improvement but for now we must continue our deep dive into the dark gaps of regulation by assessing how this legal and political anatomy of the TNC reflects into the specifics of the institutions, mechanisms and rules designed to check them.

[33] UNCTAD, World Investment Report 2015, at 106 (2015) (Figure III.4, trends in IIAs signed 1980–2014).
[34] Alvarez, J. (2010). *The Evolving BIT, 1 TDM*. Retrieved March 6, 2022 from https://www.transnational-dispute-management.com/article.asp?key=1542.

Symptoms: Westphalian law schizophrenia vis-à-vis Transnational Corporations

The use of this medical language to define the nature of the corporation and its relationship with law and society at large must be attributed to a paper written by Paul Dowling[35]. In my opinion it perfectly describes the numerous dichotomies we have identified so far in our analysis of the corporation: private and public, person and construct, rights without obligations, political power without constituency, double morality. They constitute schizophrenia rather than simple duality because all these pairs contain a stark contradiction between the two terms they are based on. In the present chapter, we are going to finally explore the most important and visible dichotomy, the one that in our times identifies the TNC more than any other and to which many of the legal struggles in the subject can be attributed: the TNC being both a transnational and a national phenomenon. To the international law enthusiast, even before dwelling in the specifics, such a quality is already enough to cause some head-scratching, just based on intuition. The subject of analysis from here on out is the contemporary TNC, as defined originally by David E. Lilienthal in 1960s. In his paper published by the Carnegie Institute of Technology titled: "The Multinational Corporation", he qualifies the multinational corporations as: "corporations . . . which have their home in one country but which operate and live under the laws and customs of other countries as well"[36]. TNC and MNE are in theory and practice almost identical and an overview of the literature will show that choice is often based on personal taste. I too, as mentioned in the introduction, steer away from this discussion and choose TNC as in my view the transnational trait does a better job at stressing the core issues and characteristics of such entities. Being multinational can also be used to identify firms which have a diverse shareholder and employee composition and it is not strictly linked to transborder transactions. We then combine Lilienthal's definition with the three main traits of TNC personality: lack of connection to any static political constituency, being at the same time a possession/extension of its shareholders and a separate "person" (fact that overtime gave it access to both active and passive rights without corresponding duties) and the capacity to enforce and reproduce within and without state boundaries its normative rules (solidified in the ICSID system, the other IFIs and

[35] Dowling, P. (2020). *Limited liability and separate corporate personality in multinational corporate groups: conceptual flaws, accountability gaps, and the case for profit-risk liability*, in *Accountability, International Business Operations, and the Law Providing Justice for Corporate Human Rights Violations in Global Value Chains*, edited by Liesbeth Enneking, Ivo Giesen, Anne-Jetske Schaap, Cedric Ryngaert, François Kristen, and Lucas Roorda. Routledge.

[36] Lilienthal, D. (1960*). The Multinational Corporation*. Development and Resources Corporation.

the WTO). This combination brings to light an international legal personality which transcends all limitations to which other entities and the law are instead subjected. For instance:

> *Courts have jurisdiction over particular treaties or issues within particular geographic spaces, texts are subject to interpretation within the boundaries of 'legitimate' discursive space, justification must proceed from some premise or Grundnorm: for example, human dignity, economic efficiency, original textual intention, and so on*[37].

Furthermore, TNCs transnational nature of operation generates a complex net of activity which spans multiple territorial spaces and legal jurisdictions without being necessarily strictly linked to any of them. This net of "home states" (where the investments come from and the TNC usually is incorporated) and "host states" (those who receive the investment) connected by business operations and transactions forms the Global Value Chain (GVC), a realm beyond the state and often beyond the law. We will now see how, from the 1990s, the international community has reacted to this scenario and tried to regulate it under the auspices of the new Human Rights impetus. Unfortunately, we start this study already knowing that the result has been voluntary commitments and soft law initiatives, as they have been perceived as more realistic and coherent with the purpose, nature and new role of de facto equal partner of states gained by TNC over the centuries. TNCs themselves have been actively involved in many of these negotiations and have managed to breath their essence inside their clay, leveraging the full power of their unorthodox lawmaker position.

Conceptual flaws of the SCP doctrine and Limited Liability

We have already touched upon this point in the previous chapter, but a deeper understanding of the actual implications is in order. SCP and Limited Liability (LL) mutually reinforce each other, since without SCP a concept such as LL would not even be conceivable. SCP mainly in the US from the moment corporations were allowed to have rights and constitutional guarantees on the same level as natural persons, effectively rendering them a separate entity. Notwithstanding this innovation,

[37] Crow, K. (2021). *International Corporate Personhood: Business and the Bodyless in International Law* (1st ed.). Routledge.

corporations still remained trapped in a limbo that saw them as both a possession of shareholders/investors and a separate legal entity with its own rights and privileges. From this conceptual skipping stone, to appease the rising demands of middle and upper classes for more ease of investment and to achieve the full potential of industrialization, legislators created an overly relaxed environment based on the *externalization of risk.* In other words, those individually and personally involved in the financial backing of the venture needed a shield to protect them from the risks associated with possible failure. In the words of Dowling and Paddy Ireland, a pro-investors legal environment was considered by:

> *Legislators to be a necessary catalyst for the capital-intensive project that ultimately drove forward the industrial revolution, and has since been termed an economic necessity, without which full economic development was impossible*[38]*.*

LL serves this very purpose and can be seen as the most logical consequence of SCP. After all, if we assume the corporation can be a separate entity from investors, with its own rights and duties, we can also assume that this legal person is potentially "capable of enjoying rights and of being subject to duties which are not the same as those enjoyed by its members"[39]. We have seen this materializing in a couple of cases mentioned in the previous chapter. The seminal proceeding in which this idea will be cemented in common law will be Salomon v. Salomon, where it was ruled that "a company is entirely separate from its members, even in situations where it is effectively a one-person operation financed and managed by a single individual[40]. Thus, while investors can enjoy the full range of benefits deriving from the business operation when it succeeds, their potential losses are capped by what they have put in it, all the rest being transferred to unwilling third parties (the so-called externalities) and creditors. "Risk shifting"[41] and "externality-producing machines"[42] are some of the most critical terms that have been proposed by part of the literature to label this behavior and the

[38] Ireland, P. (2010). *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility.* Cambridge Journal of Economics 837.
[39] Davies and Worthington (n 1) 35.
[40] Salomon v A Salomon & Co Ltd (1896) UKHL 1, (1897) AC 22.
[41] Millon, D. (2006). *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability.* Washington & Lee Public Legal Studies Research Paper Series, 12, 39.
[42] Robé,J. P. (2011*). The Legal Structure of the Firm.* 1(1*)* Accounting, Economics, and Law 57, 66 (noting that corporate governance scholarship often "assumes that all externalities are adequately internalized via contracts or regulations. This assumption, however, does not correspond to the reality of a globalized world": 47–48).

corporation pursuing it respectively. This freedom of action, coupled with its (absent) moral compass under the form of Shareholder Primacy, make the corporation an extremely unstable and unaccountable entity, especially when it blows to its full transnational dimension and becomes a TNC. Just to challenge the idea that profit has stopped to be the only socially assigned purpose of corporate action, Canadian law professor Joel Bakan recently concluded that "corporate social responsibility is thus illegal – at least when it is genuine"[43]. Despite the underlying and foundational premise that corporations are creatures of their shareholders and are thus only devoted to maximization of their profits, they also possess a SCP from which LL flows, and this is where the schizophrenia lies. Furthermore, unlike natural persons, corporations have been granted a series of rights inaccessible to people, like being able to own others of their same kind and perpetual existence through share and asset transfer.

Human Rights have been extended to corporations also in Europe under the auspices of the ECHR[44]. SCP and LL have ultimately gifted to the corporation a persona behind which they can hide not only from many of the legal and financial setbacks of their activity, but also from the social and cultural criticism they may receive. I am still at a loss for words when I think about the interviews caried out in "The Corporation" documentary, showing normal people around the street describing corporate entities with human-like adjectives and physical features when asked what came to their mind thinking about popular brands. The intertwined stories of SCP and marketing theory are beyond the scope of this thesis, but I believe much is to be said about it and how corporations benefitted from finely tuned social avatars that could be used to sway public opinion and pursue the construction of the good consumer. It also speaks volumes of the ability and interest corporations have in "preying upon our social nature"[45] to further their economic interests.

At the international level this schizophrenia, as we have seen, has not only been accepted but also promoted. TNCs rights and access to remedies propelled them in a position of equal litigants to states in their regime of interest, thereby making untenable negationist positions regarding the inability of TNCs to have separate legal personality in the international legal system, and yet obligations toward them meet resistance in the form of absence of subjectivity and ultimately end up targeting only states, as the

[43] Bakan, J. (2005). *The Corporation.* See also: Dearborn, M. (2009). *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups.* 97 California Law Review 195, 249.

[44] Emberland, M. (2006). *The Human Rights of Companies.* Oxford University Press. See Art.1 of Protocol 1, rights under Art.8 and Art. 10 of the ECHR.

[45] See*: Polanyi, K. (2001). The Great Transformation: The Political and Economic Origins of Our Time.* Beacon

only and supreme sovereign entities responsible for rights protection. This final remark suggests that for regulation purposes the international system doesn't seem as ready to recognize TNCs subjectivity as it is instead for their privileges, stubbornly insisting that TNCs are to be treated like objects belonging to nationals under the jurisdiction of a sovereign state. Another objection that has been moved to support this logic is that increasing TNCs hard duties would amount to recognizing their role alongside states in the international arena and would create issues of scape-goating between states and TNCs. To be fair, I believe this is happening anyways, but right now it is so without "hard duties" being in place so I would gladly choose the less of the two evils. Overseeing the presence and activities of foreign investors remained then absolute discretion of the host State, but international economic agreements to which the host state is part can limit such discretion. Furthermore, meeting the interests of foreign investors, or the absence of sufficient host State resources, may put the TNC in a more favorable position compared to its home country. Often, state and TNC interests do coincide and the fear of missing out or being undercut supersedes every other consideration. Historically and pragmatically, states are not the best depositaries of guardian duties towards corporations, especially in the present global economy. Of course, TNCs could not be more ready and happy to oblige this arrangement. Now, efforts have been made in recent times to depart from this absolute separation of responsibilities between states and TNCs, the most notable of which being the United Nations Guiding Principles on Business and Human Rights (UNGPs), but in their pragmatism they fail to address the most critical points we have identified and their self-regulatory, soft nature cannot possibly overshadow profit orientation and the other legal hurdles the system poses. Particularly, SCP and LL have even stronger effects at TNC level, because:

> *The company law doctrine of "separate corporate personality" is recognized in most, if not all, jurisdictions. Under this doctrine, each company, as a separately incorporated legal entity, is treated as having a separate existence from its owners and managers. Consequently, a company (a parent company) that owns shares in another company (a subsidiary) will not generally be held legally responsible for acts, omissions or liabilities of that subsidiary merely on the basis of the shareholding*[46].

[46] OHCHR, *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse.* (A/HRC/32/19, 2016)

We see here the first and main benefit of SCP internationally. It is not only natural persons (investors) who are behind a veil in respect to the business they own, but also TNCs (because of SCP) in respect to the other companies they own (subsidiaries). In the eyes of the law, an individual can start a business and a parent company can create a subsidiary. Both creations are from the moment of their inception separate entities from their creators, even if they own the entirety of the shares. The unique ability of the TNC to potentially multiply *ad infinitum* these veils by relentlessly dividing into longer and longer chains of ownership poses an imposing obstacle to overcome for liability and protection purposes and brings us to the next topic: Extraterritorial obligations and the issue of TNC responsibility for the conduct of subsidiaries.

ETOs and corporate groups: economic integration as a liability shield

In principle, investors (from here on out used as a term including both natural investors and parent companies) are not liable for the actions of their creations' operations. This means that potential victims need first to challenge the subsidiary, both in normal and extreme circumstances. In normal circumstances, the subsidiary's assets will be exhausted and in extreme circumstances where this is insufficient (even where the subsidiary cannot remedy and goes bankrupt or ceases to exist), the investor still is untouchable. As we have seen, a seemingly unfair mechanism is justified by the overall benefits which are believed to arise for society at large when larger amounts of capital and access to entrepreneurship are encouraged. We will not discuss here, as it would bring us too off topic, the exception to this rule: the "piercing the corporate veil doctrine" (it is in any case inconsequential for business and Human Rights purposes, since criminal liability of natural persons for grave violations already exists in the International Criminal Court regime, despite legal persons as possible targets of prosecution being ruled out from the Rome Statute). It is then possible to affirm that a presumption of separateness exists and it is the first obstacle to overcome during legal proceedings.

The first issue with this legal framework is that it endorses (and rationally encourages) risk shifting to victims and accepts an outcome where they get no remedy. Tort and environmental victims are the most common of this reckless risk-taking machinery, especially in weak rule of law countries (weakness that is often actively promoted or maintained by investors for securing better entry conditions to the host country) where successfully suing the subsidiary could be near impossible. Secondly, the current test for attribution of responsibility in these instances is that of ownership

and control, which can prove an herculean task. It helps only in part that: "the very nature of vertically organized group companies dictates that a parent company will always have ultimate control over its subsidiaries"[47], since the doctrine operates a test of *control vs effectively exercised control.* Illustrating in a convincing way how and to what extent such control is exercised requires meticulous work and access to resources and information which often are not accessible at the jurisdictional stage of proceedings, the risk of inadmissibility in the home country of the parent company always looming. This strategy was employed, for example, in the Vedanta case, where the TNC strategy was clearly to deflect the claims to the courts of the extremely poor Zambia, with the mathematical certainty that no justice would have been obtained by the claimants there[48]. The only way to win is to somehow demonstrate that a real "relationship of proximity" exists and thus effective control has been exercised, an accusation which puts the burden of proof on claimants facing a defendant with unlimited financial and legal resources, able if needed to manipulate the fluid corporate and management practices and manuals to depict an ad hoc scenario in which distance is greater than what it really is. We are then confronted with the realization that trying parent companies is extremely hard, trying subsidiaries can often bring no results and at the same time, because of SCP and LL, the corporate group is invisible as a distinct entity. The only path left seems to be innovation and many attempts have been made at this which we can be said to all derive inspiration from the common law principle of the *duty of care.* It is this duty of care which inhabits the UNGPs and all the CSR initiatives based on due diligence.

A duty of care approach grounded in tort law seems better suited for transnational investor litigation compared to piercing the veil doctrines and others. First and foremost, SCP shielding presents an exception when the investor: "become personally liable by reason of his own acts or conduct"[49], which means that victims of subsidiaries can turn on parent companies when they believe their direct contribution to the harm is present. This is what the "actually exercised control" test is based on. However, the key here is that under veil piercing control must be so that the subsidiary almost vanishes into instrumentality, while in tort law and negligence law the standard is looser. The landmark case is Chandler v. Cape[50], which established an interesting doctrine based on assumption of responsibility, while managing to not directly

[47] Petrin, M. (2013). *Assumption of Responsibility in Corporate Groups: Chandler v Cape plc* 76(3) Modern Law Review 603–19.
[48] Dominic Liswaniso Lungowe & Ors v Vedanta Resources Plc & Anor (2017) EWCA Civ 1528, 96–7.
[49] Model Business Corporation Act (n 33).
[50] Chandler v Cape (2012) EWCA (Civ) 525.

challenge the corporate veil. I would like to quote in full:

> *The court closely analyzed the subsidiary's health and safety (H&S) systems, looking for the parent's involvement therein. It found these systems lacking and thus that the parent's conduct was causing the damage through a mix of action and inaction. It appeared to the court that the subsidiary counted on the guidance and oversight of its parent for its H&S systems and in effect ceded control over H&S to the parent. The court combined the matters that the parent had a 'superior knowledge' of asbestos risks and that the subsidiary 'relied' on that knowledge to establish a duty of care owed by the parent to the subsidiary's employees.72 The court declared 'assumption of responsibility' by the parent company. Notably, a large part of the parent's wrongful conduct was by omission*[51]*.*

Notably, many cases like the aforementioned Vedanta have been built on this decision as the reason to believe in their success. This path does not come without its shortcomings, however, as thresholds are still considerably high and there is an important barrier to take down every time, represented by the *filter of no responsibility for third party misconduct* under normal circumstances. The duty of care itself requires very precise analyses to be established and leaves much to be desired in terms of certainty of the outcome.

The UNGPs explicitly recognize the depth of the problem posed by SCP and LL:

> *The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability*[52]*.*

Ruggie himself, the man behind the UNGPs, acknowledged it:

> *At the very foundation of modern corporate law lies the principle of legal separation between the company's owners (the shareholders) and the*

[51] Mares, R. (2020). *Liability within corporate groups: parent companies' accountability for subsidiary human rights abuses,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.

[52] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (A/HRC/17/31 21 March 2011).

> *company itself, coupled with its correlative principle of limited liability... This raises a fundamental question for business and human rights: how do we get a multinational corporation to assume the responsibility to respect human rights for the entire business group, not atomize it down to its various constituent units?*[53]

Despite this knowledge, Ruggie opted for a more practical approach based on soft-law and non-legal incentives. His due diligence mechanism closely resembles a risk-management manual, probably with the intention of offering a framework with which the business world was already familiar and emphasize the non-binding and corporate oriented nature of the exercise. That is not entirely the case. Cleverly disguised between the lines, it is possible to see the potential of what could have been a magnificent tool, since after a closer look what Ruggie asks business to do is nothing short of risk-assessment and mitigation not for its own social risks but for third party right-holders, even without a business case being present for its implementation. The UNGPs also tried to bypass the SCP and LL conundrum entirely by establishing the now famous "respect, protect and remedy" framework, the first two pillars reflecting hard law directed to states and their negative and positive obligations towards Human Rights, while the third pillar talks to the general "business enterprise". Such a term is not clarified in the UNGPs nor in the Commentary, however Ruggie did specify that in the case of TNCs it speaks of the "entire corporate group, however it is structured"[54]. This clearly comes from ambitious aspirations of corporate group liability diluted by realism into soft forms and tries to stay clear from issues of precise entity definition and personality attribution. It also gives the impression that a change of direction towards functional approaches to the legal corporate phenomenon are indeed possible and close to the surface. We shall explore them later in our reform proposals section.

As of now, however, the UNGPs keep the faulty architectural imbalances of TNCs intact despite being theoretically opposed to them, first and foremost by being completely silent over what should happen in case their due diligence standards are not met. After all, due diligence, especially in soft form, is nothing more than a secondary standard of conduct that should be used to meet other primary obligations. They are also too vague to be directly enforceable and even when converted into law they give no guarantees for effective remedy and protection, which was the prime

[53] Ruggie, J. (2013). *Just Business: Multinational Corporations and Human Rights*. Norton.
[54] Ibid.

objective Ruggie and his team had set out to accomplish. For instance: “for regulation to have effect or potency, there must be sanction; for rights to have meaning, there must be remedy for their breach”[55]. For example, how should a claimant establish the connection, which the UNGPs do not dispute as they do not want to substitute national legislation on corporations but only provide a global standard of expectations, between a supposed defective (or absent) application of due diligence and the damage he or she suffered? Probably only a clear definition of the elements that make up a perfect due diligence plan could be used as a test, but the field is still too murky and underdeveloped to offer such a tool. The previous defects are also present in the most recent and eminent attempt to translate the UNGPs into hard law: the French due diligence law of 2017. Perhaps the worst shortcoming of the text is the fact that it abandons the main brave statement provided by the UNGPs, namely its addressing the “business enterprise” as a whole. The French law goes back to traditional approaches and targets only French parent companies (considerations of competitive disadvantage probably influenced this decision), thus resurrecting the same old issues of direct control and influence for determining the connection between parent behavior and subsidiary conduct. Burden of proof is again heavy on victims and the law fails to capture the economic and social reality of a TNCs operation, refusing to speak of a responsibility that flows throughout the entire corporate group. In his brilliant analysis on the subject, Björn Fasterling[56] also suggests that such an approach could become a new form of “window dressing”. The existence and the visual impact of fancy due diligence plans and programs could become more important and legally relevant than their effective integration throughout the organization, which is in stark contrast with UNGPs 15 and 19. At the end of this effort, what risks remaining is a theoretical exercise that ironically goes against the very thing the law wanted to avoid: putting French investors in a tough spot. Creating the apparatus the law requires is going to be in fact equally costly but without the benefit of effectiveness. Furthermore, should the creation in itself be interpreted as sufficient discharge of due diligence duties? It

[55] Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, J Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc A/ HRC/ 8/ 5, 2008; Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, J Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011. See also Article 8, Universal Declaration of Human Rights and Article 2(3) International Covenant on Civil and Political Rights.

[56] Fasterling, B. (2020). *Whose responsibilities? The responsibility of the “business enterprise” to respect human rights*, in *Accountability, International Business Operations, and the Law Providing Justice for Corporate Human Rights Violations in Global Value Chains*, edited by Liesbeth Enneking, Ivo Giesen, Anne-Jetske Schaap, Cedric Ryngaert, François Kristen, and Lucas Roorda. Routledge.

sounds contradictory, to use an euphemism, since the UNGPs and due diligence reason of existence is all about practical use on the ground and managerial feasibility.

Yet again, we are left unsatisfied. Quoting the non-state actor committee of the international Law Association, investors have a: “moral responsibility and societal expectation, rather than a legal duty, to respect human rights in their operations”[57]. On the other hand, attempts to swim against the current suffer from lack of courage or imagination. The UNGPs and the national legislation they inform are a great missed opportunity to challenge at the roots what makes this system dysfunctional, but instead shareholder primacy, SCP and LL where never formally put into question. The author hopes to have at least showed that, if not a complete overhaul, these principles need to be updated to better answer the new reality and needs of the community, as they are the real obstacles to Human Rights and business coexisting. Excessive faith has also been put on the ability and willingness of states to legislate properly and on the good faith of investors in their implementations of the UNGPs, as the United nation Working Group on Business ad Human Rights (the UN Special Procedure keeper of the UNGPs text) has found that state legislation is “patchy” and that “the majority of companies … do not demonstrate practices that meet the requirements set by the Guiding Principles”[58]. We can conclude with a grave citation of Mark B. Taylor. Which sounds like an epitaph more than a quote:

> *The UNGPs are international norms, the binding nature of which will be determined by national legislation, regulation and adjudication, for it is under national laws that companies are regulated: it is at the national level where courts and regulators enforce corporate compliance and it is States that are the principal duty bearers with respect to human rights protections agreed internationally*[59]*.*

The way in which stated fulfill such role is by providing for remedy space and the corresponding legislation, but at this point in the dissertation it should be clear that anthropocentrism and state centric frameworks are obsolete in administering investor liability and responsibility for the acts and omissions of the GVC they form. By relying on state political and legal technology, the law cannot see the GVC and the reality of

[57] International Law Association, Committee on Non- State Actors, Washington Conference Report, 2014.
[58] UN Doc. A/76/163 July 2018 para. 25.
[59] Taylor, M. B. (2020). *Human rights due diligence in theory and practice,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.

the global transnational business group and the best we can aspire to is parent or, worse, subsidiary regulation, with all that this implies. This stands particularly true when we start to enter the dense realm of Human Rights ETO of states, a realm possessing a constellation of limitations and old heritages. The resistance of state centrism to adapt to ETOs and its impact on business and Human Rights was made for the world to see in recent years through the rise and fall of the US Alien Tort Statute (ATS), for a long time the most promising and employed tool for investor transnational human rights litigation.

Too big to be responsible: The Alien Tort Statute and corporate defendants

The Alien Tort Statute was enacted in 1789 and is an integral part of the federal court system. It has stayed the same since its inception and it reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". At the time there was little to no debate over the fact that the "law of nations", now known as international law, was part of the law of the US, or of any other state for that matter. The same was true for unwritten natural law[60]. The objective of the provision was, according to scholars, to be sure that lawsuits brought for violations of international obligations and treaties would become an affair of the federal state rather than the one for state courts. With that said, the ATS would never receive much use at all until the second half of the 20th century, when it became Human Rights activists weapon of choice for fighting TNCs over the damage they caused outside the US.

The revival of the ATS started with the landmark case of Filartiga v. Peña-Irala, decided in 1980. Joel Filartiga, a Paraguayan teenager, was tortured to death in Paraguay by a local police officer, Peña, who then escaped to the US with the hope of escaping accountability. Joel's family filed a suit in a US federal court and it was ruled that a jurisdiction claim based on the use of the ATS could stand. The decision was based on the fact the case amounted to an alien suing for torture, which was and still is a (rather serious) violation (tort in the language of the ATS) of the "law of nations". However, after a closer look at the decision we can already foresee the limitations to which such legal exercise will be exposed in the future. First, before reaching said decision, the court asked for the opinion of the executive branch, which fortunately at

[60] For a detailed analysis of this history, see: Jay, S. (1989). *The Status of the Law of Nations in Early American Law.* 42 Vanderbilt L Rev 819, 824–8.

the time was the Carter administration (very committed to Human Rights expansion). Carter's government supported the finding of jurisdiction standing on the shoulders of the wide international consensus around prohibition of torture. Second, would remedies have been available in Paraguay the entire case could have been dismissed under the *forum non conveniens* principle. Lastly, in this particular instance Paraguay did not try to argue for Peña's entitlement to immunity[61]. In summary, what the court effectively asserted was that:

> *When a person responsible for an egregious, internationally recognized human rights abuse flees to the United States, those injured can sue under the ATS if suit is not possible in the place where the abuses took place, the home country does not assert immunity and the US government does not object[62].*

Particularly, the general spirit and framework of the decision was stated in the following terms:

> *In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior ... Among the rights universally proclaimed by all nations ... is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence*[63].

Such inspiring and bold claims were destined to encounter resistance, especially in the 1990s when defendants started to steer towards higher and more delicate profiles, including corporate defendants. Also, executive support started to disappear after

[61] Filártiga (n 9) 879, 881–82, 884, 890, 885.
[62] Stephens, B. (2020). *The rise and fall of the Alien Tort Statute,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.
[63] Filártiga (n 9) 890.

presidents like Raegan took over the reins.

The first case to lay down a legal theory for corporate accountability in this context was Kadic v Karadžić in 1996. The Kadic decision held that

> *A non-state actor could be held liable under the ATS either for claims that did not require state action, such as genocide, slavery or crimes against humanity, or when acting in concert with a state actor. Both theories could be applied to corporate defendants*[64]*.*

These elements were complemented in 2002 by the Unocal decision, where horizons of litigations were expanded even further by the new ATS jurisdiction test, which required just that the corporation provided "knowing practical assistance or encouragement' that had "a substantial effect on the perpetration" of Human Rights abuses[65]. This helped greatly in potentially holding corporations accountable for the main way in which they were likely to violate Human Rights and international law: by aiding and abetting states, thus by acts or omissions connected with complicity and accomplice liability.

It is relatively easy to imagine the potential impact of such provisions and the number of targets they could be applied to. Perhaps even easier is imagining how powerful interest groups reacted to these seemingly overexpansion of the role of the judiciary. Despite this debate being beyond interesting and contemporary, especially in Human Rights matters, it is far too complex and overarching to analyze it in full here. In any event, it may suffice to stress the inconsistency, if not the hypocrisy, of commentators and judges on this topic. As we have seen, jurists and governors had no issue recognizing a completely fictitious personhood for corporations even if it was based objectively on nothing. In the same vein, prosecutors and judges at Nuremberg weren't exactly conservative in their (just) effort to convict the German establishment[66]. I personally don't see why similar developments could not be envisaged in the business and Huma Rights debate too, considering they serve an equally important public interest and target an equally big normative and enforcing gap. To be fair, judges

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[64] Stephens, B. (2020). *The rise and fall of the Alien Tort Statute,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.

[65] Unocal (n 4) 947.

[66] For a detailed analysis of how outdated understandings of the corporation, anti-trust sensibilities and Westphalian international law limited the Industrialists Trials in Nuremberg, see: Lustig, D. (2020). *Veiled Power: International Law and the Private Corporation 1886–1981* (Law and Global Governance). Oxford University Press.

did a remarkable job initially in resisting the pushbacks, like in the Sosa case during the Bush administration[67], but opposition to the ATS came quickly and determined to restrict its usage, fact already present in the cautious language employed in the Sosa decision itself.

Corporate outburst has been particularly strong, perhaps to the verge of being hyperbolic at times. For example, in the Exxon Mobil case concerning corporate responsibility for the actions of the Indonesian security operators, it was argued that FDI in Indonesia could be rendered beyond repair and destroy the stability of the entire region[68]. I would like to quote in full a statement made by Judge Posner in another case:

> *One of the amicus curiae briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned[69].*

Eventually, many of the same issues underlined in our discussion on ETOs and the French law arose. Courts started a restrictive approach in the interpretation of pleading procedures which led to an insurmountable burden of proof on the shoulders of plaintiff, weight made even heavier by the fact that corporate defendants enjoy almost complete control over external perception of company theory, structure and of course over material evidence. Furthermore, in a sort of twisted double-edge effect of the Barcelona Traction opinion, it is now accepted that a corporation can only be sued where it is incorporated or has its principal place of business. The latest decisions which cemented this restrictive approach are from 2013 and 2018 respectively and are a remarkable example of why schizophrenia might be the most accurate term to describe national and international law vis-à-vis TNCs and the corporate entity in general.

As we have seen, until now corporations in the US were treated under the ATS the same way natural persons are treated, like entities capable of torts and violations. This could be a pleasant surprise after what we have been through in the previous

[67] United States v Alvarez-Machaín 504 US 655, 657–70 (1992) and Sosa (n 7).
[68] Letter from William H Taft, Legal Advisor, Dep't of State at 1, 3–4 (29 July 2002), Doe v Exxon Mobil 393 F Supp 2d 20 (DDC 2005) (No 01-1357).
[69] Flomo v Firestone Natural Rubber Co, LLC 643 F 3d 1013, 1021 (7th Cir 2011).

pages of this dissertation, where we exposed the limited subjectivity of corporations and defined them as bearers of rights with no duties under international law. Early stage ATS litigation can be seen as an attempt at bringing this opportunistic quasi-person theory of the firm full circle, by embracing the obligation side of the coin which comes with being a person. This attempt was shattered by Kiobel v Royal Dutch Petroleum Co. in 2010, where the court held that the ATS cannot regulate corporations because they have no recognized liability in international law[70]. I find particularly ironic that the ATS clearly uses the term *person* in its text cited above, the same term from which the very existence of corporate personhood was derived by making the 14th amendment a legal fiction, and yet somehow corporations cannot have obligations under the ATS. We can only conclude from this that the term *person* in the 14th amendment can include corporations because international law at the time assigned such rights and personality to them, otherwise the reasoning of the court has no legal sense and falls into double-standard fallacies. This is however far from the truth and if international law recognizes rights for corporations at the time of writing (see for example the considerations we made about the ECHR) it certainly was not the case at the time of the 14th amendment drafters.

To argue that in the 21st century corporations have no duties in the eyes of international law stands true only if we limit ourselves to the hard facts and we dispose quickly of the increasing body of national and regional initiatives which have been blooming in the last decades, despite their imperfection. Furthermore, if we adopt a customary international law perspective, the degree of precision and the quantity of regulation efforts have been dramatically increasing over the years and, combined with an increasingly standardized and diffused technical language for texts and practices, they make the argument of hardening of soft law at least worth of consideration[71]. Abbott and Snidal's have much to say on this particular conception of custom[72]. We can find an interesting practical perspective on this last consideration in the work of the UNWG, the UN Special procedure keeper of the UNGPs text. In interpreting the Guidelines and managing communications to states and businesses, the UNWG draws from sources other than the UNGPs, with great emphasis placed on the role of the Universal Declaration on Huma Rights (UDHR) and even its preambular clause, which

[70] 621 F 3d 111 (2d Cir 2010), aff'd on other grounds 133 S Ct 1659 (2013).
[71] Compelling arguments on this topic have been advanced in: Clapham, A. (2006). *Human Rights Obligations of Non-State Actors* (Collected Courses of the Academy of European Law) (1st ed.). Oxford University Press.
[72] KW Abbott & D Snidal (2000), *Hard and Soft Law in International Governance.* 54 International Organization 421.

states that: “every organ of society shall strive to promote respect for human rights and fundamental freedoms and to secure their universal and effective recognition and observance”[73]. Lou Henkin also stresses an often-overlooked fact about the UDHR and its addressees:

> *At this juncture the Universal Declaration may also address multinational companies. This is true even though the companies never heard of the Universal Declaration at the time it was drafted. The Universal Declaration is not addressed only to governments. It is a ‘common standard for all peoples and all nations.’ It means that ‘every individual and every organ of society shall strive—by progressive measures . . . to secure their universal and effective recognition and observance among the people of the member states.’ Every individual 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*[74].

The UDHR is now largely considered part of customary international law binding on all states and this suggests that, if we consider the opinions of the UNWG as an authoritative statement in the light of art 38 of the ICJ statute, we must accept that, at least to some degree and despite opposition, a standard of conduct and the expectation of its respect are indeed emerging in this field. In the words of the Special Tribunal for Lebanon, the UNGPs and their endorsement by the Human Rights Council:

> *Represent a concrete movement on an international level backed by the United Nations for, inter alia, corporate accountability. Although we are wary that such instruments are non- binding, in light of the fact that corporations have been considered subjects of international law [citing the Barcelona Traction case] the possibility of proceeding against a corporation*

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[73] Numerous scholars have debated whether this preambular provision of the udhr reflects customary international law and whether therefore, corporations, as organs of society, incur human rights obligations. Contrast L Henkin, ‘The Universal Declaration at 50 and the Challenge of Global Markets’ (1999) 25 Brooklyn Journal of International Law 17, 25 and M Karavias, Corporate Obligations under International Law (oup 2013) 88– 89.

[74] Henkin, L. (1999). *The Universal Declaration at 50 and the Challenge of Global Markets*. 25 Brooklyn JIL. 24–25. See also K. De Feyter, “Corporate Governance and Human Rights”, in Institut international des droits de l’homme, Commerce mondial et protection des droits de l’homme: les droits de l’homme à l’épreuve de la globalisation des échanges economiques (Brussels: Bruylant, 2001) 71–110, at 77. Amnesty International, ‘The UN Human Rights Norms for Business: Towards Legal Accountability’, IOR 42/001/2004 (2004) at 5 and 7.

through criminal prosecution cannot be discarded but rather criminal regimes are regarded as an available remedy. The Appeals Panel considers these factors to be evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights[75].

Putting interesting alternatives aside, after the veil of the company settled the issue of liability, the second major blow to the ATS came in the form of the veil of the state. The Supreme Court, again in Kiobel, examined a problem that was never raised before and was instead taken for granted: the extraterritorial applicability of the ATS. The outcome has been that there now is a presumption against extraterritoriality which now needs to be disproven. The test the Court devised to overcome the presumption pretty much buries the ATS forever as a viable instrument of litigation: the "touch and concern test"[76]. It is important to note that under this new standard "mere corporate presence"[77] in the US is not enough to overcome the presumption, while some judges tried to go even further by making jurisdiction of the ATS limited to violations committed on US soil[78]. At the end of this restrictive streak lies the Jesner v. Arab Bank case, decided in 2018. Justice Kennedy's statements in this case are enlightening and display yet again the readiness with which corporation schizophrenic identity leads to contradictory results under the law. Kennedy completely disconnected violations of Human Rights from the corporations that commit them, reducing them to the acts of the people working for them. This recurrent return to pure "thinghood" visions of the corporation has been a theme throughout this analysis and it is now apparent it only happens when TNCs are asked to bear duties in exchange for their privileges. Justice Kennedy himself argued for full corporate personhood instead in the 2010 Citizens United decision, where he stated that corporate speech "'does not lose First Amendment protection "simply because its source is a corporation"[79]. ATS claims are thus now only admissible when they address domestic corporations and the issues at hand touch and concern the US with sufficient force, even though the clear threshold for such concern

[75] Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, stl- 14- 05/ PT/ AP/ ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Special Tribunal for Lebanon, October 2, 2014, para 46. See also Clapham, A. (2017). *Human Rights Obligations for Non- State- Actors: Where Are We Now?,* in *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, edited by Lafontaine, F. & Larocque, F. Intersentia.
[76] Kiobel (n 8).
[77] Ibid.
[78] Ibid.
[79] Citizens United v Fed. Election Comm'n 558 US 310 (2010).

has yet to be agreed upon. The downfall of this instrument represents a great loss for corporate defendant litigation, since a proper international forum is still missing and they can only be challenged under domestic legal systems and courts.

CSR and due diligence: asking amoral entities to show moral behavior

In 1984, the world got acquainted with the harsh reality of globalized TNC expansion and the governance gaps that came with it. This was the year in which the Bhopal gas disaster happened and, if we don't consider the ITT Chilean affair and civil disobedience campaigns during the Apartheid in the 1970s, it traditionally marks the beginning of the international Business and Human Rights movement. It is still to this day, the largest industrial disaster in history, hundreds of thousands of people either died or were left with life-long severe health implications. Amazingly, perpetrators still have to be punished and victims have not found satisfactory remedies[80]. From that day forward, business started to mean something for Human Rights beyond employment and labor relationships and in the late 1990s and early 2000s regulation efforts poured from civil society and international institutions alike. During this wave, a remarkable example is the UN Global Compact launched under Kofi Annan secretariat in the year 2000, still considered the most successful initiative if one were to judge by the number of signatory companies only. However, these efforts transformed into barriers rather than bridges towards harder and biding accountability mechanisms for business behavior. Without going too much into detail, symbolic of the real impetus behind the business and Human Rights movement is the failure represented by the defunct UN Draft Norms, which were opposite to the Global Compact and wanted to build the foundation for a legally binding regime. Similarly to what happened to the ILO Tripartite Declaration and the OECD guidelines, instruments failed when they set out to go beyond voluntary commitments and substitute texts with lighter language were adopted in their stead. The UNGPs themselves, as we have noted, very carefully avoided to mention binding norms and transparently advertised the contrary. It is not an aesthetic trinket the fact that the appointment of Ruggie as the UN Special Representative to the Secretary General in 2005 has been called "Normicide" [81]. Thus, this failure

[80] See: Baxi, U. (2016) *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?* 1/1 BHRJ 21.
[81] Wettstein, F. (2020). *The history of 'business and human rights' and its relationship with corporate social responsibility,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.

foreshadowed the struggle between soft law frameworks (under the name of CSR) and the original Business and Human Rights initiative. This detrimental effect of CSR on the evolution pf the field is visible in the heritage Ruggie left to his successor, the UNWG, specifically created to function as the sole arbiter of the UNGPs. Traditionally, Special Procedures stick out from other mechanisms because they are not treaty-based bodies and have thus the ability to draw from every source of law to discharge their mandates. Another defining feature is their ability to receive communications and initiate a dialogue with the parties involved, bypassing classic barriers and procedures such as the exhaustion of national remedies, normally necessary to receive standing in human rights courts. However, by being anchored to the UNGPs and the nature of their legitimacy (the promise of not being too demanding and intrusive), the UNWG has refused for many years to discharge these functions. Regarding the choice of sources, the UNWG is technically bound by mandate to employ the UNGPs only, even if we have seen that recently it departed from such a limited approach. At present, the UNWG has started to receive complaints but the point still stands.

"Corporate responsibility refers to any attempt to get corporations to behave responsibly on a voluntary basis, out of either ethical or bottom-line considerations"[82] Instead, accountability: "refers to requiring corporations to behave according to social norms or face consequences"[83]. At this second turning point in our study, where we approach the conclusion of the analysis of the effects SCP and LL had on international and (trans)national regulation attempt directed at TNCs, we can positively affirm the status quo is the better represented by the first quote. States are also actively supporting this view of the corporation, individually and in collective fora. For example, regarding Henkin theory of the UDHR and the UNWG use of general international law to better anchor liability for corporations, by 2004:

> *EU Governments conceded that "such a provision could allocate responsibility to corporations", however, they go on to draw a distinction between "responsibilities" and "legal obligations". For EU Governments, the legal obligations rest with states: "The Covenants, Conventions and Declarations that lay the basis of human rights responsibilities have been negotiated, signed and ratified by States, which also bear prime*

[82] Karliner, J. & Bruno, K. (2002). *Responsibility vs. accountability*. International Herald Tribune.
[83] Ibid.

responsibility for their implementation"[84].

This seems to admit a secondary responsibility (without legal obligation) for corporations and thus States continue to be the main liable entities for corporate misbehavior, a nexus between them and corporate action always required. This was crystalized in the UNGPs and its tripartite framework, which reserves binding obligations to States to provide for remedy, make sure effective sanctions are in place and to protect human rights from third-party abuses. TNCs are then free to circumvent state obligations by directly influencing them or moving and relocating where conditions are more favorable. With the restriction of ATS litigation and general transnational litigation, combined with the lack of an accepted international jurisdiction and mechanism, the real perpetrators enjoy excessive exemption from the law, by hiding behind subsidiaries that take the full brunt of the risks and are sometimes specifically designed to that aim. According to Dwight Justice: "governments were using CSR as a substitute for their own failure to address the social consequences of globalization"[85].

Answering to these legal and normative complexities by simply turning a blind eye to them will not benefit us in the long run. The very premise of CSR is faulty, since it relies on the moral side of an entity that by design has none (fact that main representatives of society and public interest still endorse or at least seem to condone) and reduces long term social and Human Rights welfare to something inferior to the quarterly contingencies of a business model. CSR was created because states were deemed ineffective as the sole medium for enforcing compliance, as they were themselves often partners in crime with TNCs, and hard law approaches were failing for this reason. This did not change substantially and in turn:

> *CSR moved from a concept to become an industry as consultants and enterprises emerged, offering CSR services to business. Among these services were social auditing and reporting as well as "risk assessment" services. The trade union concern with this industry is that it is assisting business in redefining the expectations of society instead of responding to them*[86].

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[84] Para. 6. of the Austrian reply to the request by OHCHR for input from states regarding the report concerning "Responsibilities of transnational corporation and related business enterprises with regard to human rights", see Decision of the Commission 2004/116, at 3.
[85] Justice, D. W. (2002). *The international trade union movement and the new codes of conduct*, in Jenkins, Pearson, and Seyfang.
[86] Ibid.

Now Human Rights due diligence responds to the same logic corporations respond to and it's carried out by other private subjects for profit. Human Rights and law compliance, for example in contexts like France post 2017, have become a business, with all the cover-ups and strategies that doing business implies. A recent survey of Europe's largest 100 companies concluded that almost 90 per cent now include "some form of ethical statement within their annual reports"; the survey nevertheless concluded that: "While the quality of communication on environmental issues is generally convincing, when it comes to human rights, it is less effective. Studies and data gathering carried out by the Ruggie team before and after the UNGPs are even more disheartening and strongly point toward an almost irrefutable reality where greenwashing and window-dressing are overly common[87]. Similar results have been reached by Economist Intelligence Unit in 2017, when they measured 4 out of 5 respondents of their 800 CEOs pool considered their supply chain "responsible", and yet not even a quarter of them address key issues such as child labor or climate change in their supply chains and 30 per cent had decreased their focus on supply chain responsibility over the preceding five years[88]. Such findings fuel the criticism that CSR mostly serves as a marketing and reputational tool for corporations, while changing little to nothing about the way they do business. In technical language, this practice is called "decoupling" and it fits perfectly in our terminological constellation dealing with dualities and schizophrenic consequences of corporate personality. From the start, the main interpretative filter guiding political, social and most importantly legal reform should have been the warning heeded by John Coffee in his quoting of a lord Chancellor of England alive in the 18th century: "did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?"[89]

Better efforts should have been made in fleshing coherently such body and soul of the corporation, instead we are left with shareholder primacy as the soul and an immortal body which can replicate and divide itself to infinity to the point of disappearing vis-à-vis most of the law. Moreover, this law seems more interested in making corporations show that they superficially change something rather than

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[87] For a detailed assessment of Ruggie's work for the UNGPs see*:* Ariel Aaronson, S. & Higham, I. (2015). *Putting the Blame on Governments: Why Firms and Governments Have Failed to Advance the Guiding Principles on Business and Human Rights,* in *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors,* edited by Kurt Mills & David Jason Karp. Palgrave Mcmillan.

[88] The Economist Intelligence Unit. (2017). *No More Excuses: Responsible Supply Chains in a Globalized World.* The Economist.

[89] *No Soul to Damn: No Body to Kick*: *an unscandalized inquiry into the problem of corporate Punishment.* 79 Mich LR (1981) 386–459.

regulating and promoting the real effects of these changes, or lack thereof. The French law is a perfect example of this fallacy, as it never provides for tests of measurements that can allow for substantiated critiques of the due diligence schemes built by corporate defendants. It appears as if those schemes being there is enough on its own to discharge the obligation. Let us see an example on the ground of the possible shortcomings of this approach:

> *The non-profit Room to Read, founded by former Microsoft executive John Wood, is widely lauded for its results-oriented approach to improving education in developing countries … Room to Read regularly reports on its impact by citing the number of books it has distributed, libraries built, and participants in its programs. But the organization eventually realized that many recipients lacked the minimum language skills required to use the books … Consequently, the organization came to recognize that counting numbers of participants or books distributed – a common strategy to measure outcomes for non-profit organizations – says little about whether lives are transformed or students become more literate*[90].

Even state duties towards corporations, especially TNCs, are not so clear because of the nature of their operations. They are activities inherently transnational in nature which logically carry extraterritorial risks and violations which require from the State an extraterritorial application of the law. For instance, the UNGPs endorsed by the Human Rights Council in 2011, encourage states to regulate business actors and activities with extraterritorial effect. Yet, they did not clearly recognize corresponding state obligations to prevent and redress business-related human rights violations outside their territory:

> *At present states are not generally required under international human rights law to regulate the extraterritorial activities of business domiciled within their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters, some human rights treaty bodies recommend that home state take steps to prevent abuse by business enterprises within their*

[90] Bromley, P. & Powell, W. W. (2012). *From Smoke and Mirrors to Walking the Talk: Decoupling in the Contemporary World*. 6/1 The Academy of Management Annals 483.

jurisdiction[91].

Almost all Human Rights treaties also include limitations based on this ancient interaction between territory and jurisdiction, adding a level of complexity to the many intricacies already present in the field. After our examination of Kiobel and Jesner in the ATS domain, we will surely find a similarity between their reasoning and what the ECtHR stated in Al Skeini the landmark case on the extraterritorial application of the ECHR:

> *jurisdiction is presumed to be exercised normally throughout the state's territory. Conversely, acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 ECHR only in exceptional circumstances*[92].

Such "exceptional circumstances" where identified by the Supreme Court in the US with the vague but strict "touch and concern" test, but the logic is the same: states are normally concerned only with what happens inside their borders, since everything else could amount to interference with other states sovereignty over their own borders. This state-sovereigntist approach not only belittles the gaps created by, and the transnational Human Rights impacts of, the GCV[93] but it also fails to respond to a core concern in the business and human rights domain, namely Human Rights obligations of the home state of the parent – or controlling – company of TNCs to prevent and redress human rights violations committed in the host state of corporate investment. We have seen how apparently the US could not care less of what its TNCs do abroad, as far as they cannot be sued, and still in many countries the very idea that corporations can have criminal responsibilities or be held accountable for civil liabilities is an alien one. Furthermore, alternatives based on negligence and similar approaches are not present in every country and even common law in general, as we have seen, possesses a general presumption over being guilty of failing to prevent third-party misconduct. As we will see in the next chapter, recently some bold innovations have been put forward, but their reception is far from being conclusive. Jurisdiction and ETOs issues are also at the core of the OEIGWG and the binding treaty discussions currently ongoing; they have a dedicated section at the end of the dissertation. In the

[91] UNGPs (n 5) Principle 2, Commentary.
[92] ECtHR, 2011, para 131
[93] HRC, 2008

meantime, and until more concrete changes occur, I must agree with the assessment of Ioana Cismas and Sarah Macrory when they describe the business and Human Rights regime as one of "remedy without law"[94]. CSR has unfortunately morphed into the main trojan horse through which neo-liberal and Westphalian categories and logic have polluted the business and Human Rights debate, impoverishing its chances to attack the root philosophical and normative causes of current gaps and instead building the entire system around them. CSR, as long as it will condone the public-private divide that sees states as the only relevant actors and corporations as mere specialized economic entities, will bare little to no fruit in advancing the cause. What we need is not a privatization of Human Rights, but a politicization of corporate behavior.

[94] Further exploration of this definition: Cismas, I. & Macrory, S. (2016). *The Business and Human Rights Regime under International Law: Remedy without Law? in Non- State Actors and International Obligations Creation, Evolution and Enforcement*, Edited by James Summers and Alex Gough. Brill Nijhoff.

Patients: TNCs and the food system

At the moment, the only mechanism with a semblance of coherence that has been widely endorsed in TNCs regulation in the ICSID arbitration system. In this chapter we will see how its origins date back to excessively pro-capitalist and western views of trade and development, crystalized in global institutions like the World Bank (WB) and the World Trade Organization, under the auspices of which the system was conceived. These institutions have perpetuated a normative and political environment skewered in favor of unregulated investment designed to favor capital-exporting countries at the expense of the global south. While this conflict is not the topic of the thesis per se, its understanding is paramount as it represents how the current idea of corporation and its role in society have prevailed over alternatives, including why the rules of the game are the way they are. The implications of this reconstruction reverberate particularly in the right to food and the food system domains because, by virtue of their importance in every aspect of national and international life, they have been one of the oldest arenas in which public and private interest have confronted themselves. Furthermore, it is from right to food and development debates that our current understanding of Human Rights has matured, particularly from second generation Human Rights, that represent the specific field in which this analysis must be framed. The fundamental equation we try to establish here is that corporations, through the proxy of the state, have secured for themselves a monopolistic control over their relevant policy space and institutionalized said control inside the relevant global actors, which coincidentally are also the main managers of the world food system. Thus, a change must take place at the root of the issue and can hardly be resolved with the structures available.

IFIs, Trade and the creation of the food system

The origins, evolution and corporate role in the food system have been meticulously reported by Raj Patel[95], former associate of both the WB and the WTO and now a food sovereignty activist, and the Italian journalist Stefano Liberti[96], whose thorough investigations bring much substance and concreteness to the matter at hand. Let us start with some definitions.

The World Food Summit in 1996 defined food security in the following terms:

[95] Patel, R., & Carlotti, G. (2015). *I padroni del cibo (Italian Edition*). Feltrinelli.
[96] Liberti, S. (2021). *I signori del cibo. Viaggio nell'industria alimentare che sta distruggendo il pianeta*. Minimum Fax.

> *Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life*[97]

Unfortunately, after careful and pragmatic historical reconstruction, this was hardly the true objective policy makers and relevant actors were pursuing at the time the machinery was set in motion. In the 1950s, John Rhodes, one of the leaders of the mining and extractive industries, noted that the poor (in particular the new working class stemmed from the Industrial Revolution) were increasing rapidly and there was not enough food available to satisfy them all (I use the term available with a clear purpose that will become clearer later). If that was to continue, they would have surely rioted, so the only solution was to turn to other countries to secure food supplies. From the beginning, the nexus between food and security wasn't welfare, but a more realist matter of foreign policy and national security: civil war was to be kept in check. We can see that similar logics have a distinct Malthusian afflatus that, despite being misleading and mostly an oversimplification of reality, still survives in today's arguments surrounding development and food. However, history seemed to support Rhodes predictions, as the 19t century has been the climax of revolutionary movements around the continents and saw the birth of Marx and Engels "Communist Manifesto" in 1848. Patel correctly underlines how similar revolutions in the global south, for example in Haiti, and their brutal repression are easier to comprehend if read in the light of the fear of revolutionary contagion. After all, it was the misery and exploitation of colonized regions that kept the prices and the pitchforks at bay in the north. We can already see that "Liberté, Égalité, Fraternité" was not a cry shouted for all to hear. The same logic, with the opportune changes, has characterized the entire design of the global food system until very recently.

During the Cold War, in the post WWII period, food literally became a weapon and the centerpiece for international peace. In 1949, Henry Truman held a speech on January 20th where he stated:

> *We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. Their economic life is primitive and*

[97] FAO, Policy Brief, June 2006, Issue 2, retrieved on March 6, 2022 at https://www.fao.org/fileadmin/templates/faoitaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf

stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas[98].

The third sentence is the most revealing while the first declared the intent of giving this reform a global scope. Truman's statement is considered to be the beginning of international development policy[99]. Security issues connection with development are particularly apparent in the various doctrines the US adopted in their warfare against the USSR, which can be summed up in the belief that communism thrived where poverty and abuse were rampant, consideration which required economic and social warfare rather than a strictly military approach. The role of the Marshall Plan and other economic factors in the downfall of the soviet giant is well documented in a vast array of history books. Furthermore, when Europe got back on its feet and started to reject the poisonous (for the local economy) aids of the US, the next recipient of choice will quickly become the lobal south, starting the phenomenon nowadays known as "dumping", the practice of flooding developing countries markets with the food surplus of the north. What emerged was a proper relationship of dependency, 79 percent of US exports going towards the "Third World"[100]. Emblematic of this was the artificially low price of grain, obtained with cunning foreign policy instruments such as Eisenhower Public Law 480 (PL 480), which offered strategic access to the US food reserves for any state willing to oppose labor movements and pro-socialism regimes (clearly targeting countries at the border with the USSR).

Following the Oil Crash of the 1970s, the food world order changed. Buying and transporting grain became significantly more expansive and oil shot up the priority lists of strategic objectives. Ironically, the US were ready in exchanging grain for oil with a starved USSR, despite the Cold War climate. In turn, the global south started with the aid of Europe the First Green Revolution, in an attempt to free itself from the (now absent) support of the US. The outcome was simply the dependency from a new drug: instead of alimentary aid, developing countries were now dependent from the technologies, skillsets and the financial and capital assets required to sustain the Green Revolution (machines, fertilizers, chemical agents…). This process had extremely high human costs, like in India, where to fight the famine in the short term the government imposed forced sterilization to the masses (which, if we allow

[98] Inaugural Address of Henry S. Truman, https://avalon.law.yale.edu/20th_century/truman.asp, accessed on 27 February 2022.
[99] See for example Esteva 1992, Rist 2002, Cowen & Shenton 1996.
[100] Friedman, 1982, 265.

ourselves some devious thinking, proves particularly useful to fight hunger and rebellions at the same time). Poor countries had relied on credit from OPEC countries, at the time swimming in profits and providing low interest rates thanks to the era of the "Petrodollar", to sustain the Green Revolution and their economy. Unfortunately, with the Oil Crash and peaking of interest rates, the time came to repay the debt but many found it impossible to do it in times of recession. This is where the WB and the other IFIs stepped in and became the de facto owners of these countries development policies. The contract between the south and these institutions was simple: cashflow would come at the cost of high interest rates to check inflation and most importantly high liberalization of the market: no entry barriers and no public intervention, for example the "marketing boards" that guaranteed minimum prices for agriculture workers. Creditors had bought the social policy of the global south. Also, the debt needed to be paid in dollars, so this new arrangement cemented, with the right balance of threats and incentives, the position of these countries in the global economy as the open-sky farms of the north, to which they would sell employing the advantage of their ideal environment and resources. Needless to say that the de facto leader of this coalition, the US (as the provider of policy space) and the private sector (as the main provider of trade and investment) would play a significant role in shaping the future of the system, in particular through the WTO. The WTO began its operations in 1995, built over the General Agreement for Tariffs and Trades (GATT) and keeping it intact but with a great difference. The US were adamant in gifting to the WTO what they felt the GATT strikingly missed: a dispute-settlement mechanism. That mechanism will prove instrumental in safeguarding an unfair system in which countries of the north were granted permission to keep their entry barriers in place, together with public subsidies to agriculture, while the south, following the introduction of agriculture in the WTO, was banned from doing the same, giving free reign to western TNCs to operate without opposition from its governments[101].

Patel himself stated in his book that one cannot comprehend the food system without talking about TNCs, which play the music to which the GVC dances. Some of the oldest and most disturbing tracks of their orchestra are precisely connected to the food industry. Chiquita Brands, previously known as United Fruit Company, recently paid a 25 million dollars fine after pleading guilty of financing paramilitary forces in

[101] For example, the "Blair House Agreement" negotiated in the GATT Uruguay round in 1992.

Colombia[102]. The Service Employees International Union (SEIU) defined the issue as a need for a "fundamental shift in a 'profit at any costs' business model"[103]. Again, shareholder primacy is at the forefront and identified as a root cause of the controversy. But how do these TNCs control the food system ad the GVC? To answer this question, we can finally turn to another key term of this thesis title: vertical integration. In the food system, but in almost any market, TNCs form complex webs of business relationships that, when summed, form the GVC. There are various ways in which they operate this integration, the most common being vertical integration. Contrary to horizontal integration, which is a consolidation of many firms that handle the same part of the production process, vertical integration is typified by one firm engaged in different parts of production (e.g., growing raw materials, manufacturing, transporting, marketing, and/or retailing). Vertical integration is the degree to which a firm owns its upstream suppliers and its downstream buyers. There are three varieties of vertical integration: backward (upstream) vertical integration, forward (downstream) vertical integration, and balanced (both upstream and downstream) vertical integration. A company exhibits backward vertical integration when it controls subsidiaries that produce some of the inputs used in the production of its products. For example, an automobile company may own a tire company, a glass company, and a metal company. Control of these three subsidiaries is intended to create a stable supply of inputs and ensure a consistent quality in their final product. It was the main business approach of Ford and other car companies in the 1920s, who sought to minimize costs by integrating the production of cars and car parts, as exemplified in the Ford River Rouge Complex. A company tends toward forward vertical integration when it controls distribution centers and retailers where its products are sold. An example is a brewing company that owns and controls a number of bars or pubs[104]. In the food system, such tendency has always been present, proof of this fact is the extremely low number of subjects with total control of a single market. For example, for centuries only 4 companies controlled the entire grains trade: Cargill, Continental, Bunge and Louis Dreyfus[105]. This trend persists today and, in fact, it grows stronger, leading to extraordinary levels of market concentration in the hands of a handful of actors, with the paradox that instead of having lower prices and more competition, as a result of

[102] BHRRC, https://www.business-humanrights.org/en/latest-news/chiquita-fined-25-mln-for-colombia-terror-cash-2/ accessed 27 February 2022.
[103] Ibid.
[104] Lazonick, W. & Teece, D. J. (2012). *Management Innovation: Essays in the Spirit of Alfred D. Chandler,* Jr. OUP Oxford. p. 150.
[105] Murphy, 2006.

liberalization and private control of the economy, we are left with almost no competition, the entire supply chain operating in quasi-monopoly. We can now give a face to abstract terms such as GVC and TNC employed in the previous chapters on an intuitive level. Lilienthal definition still stands, but we start to see how it manifests concretely. Currently, vertical integration through production and marketing contracts have also become the dominant model for livestock production, with 90% of poultry, 69% of hogs, and 29% of cattle being contractually produced through vertical integration[106]. Such practice is supported because it has increased food productivity in a way that will be explored later in the chapter. However, "... contractors receive a large share of farm receipts, formerly assumed to go to the operator's family"[107]. Under production contracts, growers raise animals owned by integrators. Farm contracts contain detailed conditions for growers, who are paid based on how efficiently they use feed, provided by the integrator, to raise the animals. The contract dictates how to construct the facilities, how to feed, house, and medicate the animals, and how to handle manure and dispose of carcasses. Generally, the contract also shields the integrator from liability[108].

The main way in which vertical integration is achieved is through FDI, in particular merges and acquisitions. Such arrangements manage to bypass even antitrust bodies and consumer organizations through lobbying and clever Darwinian rhetoric, leveraging supposed general benefits for the entire community derived from major efficiency and economies of scale. Most of the time such arguments are largely based on faith and reduced the complex social reality of such intervention to a “can’t stop the future” argument, where who fails to adapt must step back and be absorbed or disappear. The short end of the stick almost always goes to small business and local farmers, especially in frameworks such as the North Atlantic Free Trade Agreement, and the general liberal economy described above, where poorer countries are forced to compete with heavily subsidized industries of richer states without the old safety nets of fixed minimum prices, just to name one. For example, Monsanto has acquired Seminis in 2005, effectively rendering it the leader of seeds globally. Its justification was that technological and research capabilities and objectives of the two firms were complementary and an acquisition would have led to more research and better results. However, concentration in the seed industry and privatization of research have in

[106] Stokstad, P. (2008). *Enforcing Environmental Law in an Unequal Market: The Case of Concentrated Animal Feeding Operations*, 15 Mo. Envtl. L. & Pol’y Rev. 229, 234-36. Spring.
[107] "USDA ERS - Farmers' Use of Marketing and Production Contracts".
[108] Stokstad, P. (2008). *Enforcing Environmental Law in an Unequal Market: The Case of Concentrated Animal Feeding Operations*, 15 Mo. Envtl. L. & Pol’y Rev. 229, 234-36. Spring.

reality resulted in less research and investment in the field[109]. More realistic as a motive seems Monsanto declaration that natural seeds were a booming market and thus the acquisition would have allowed Monsanto to surpass its rival DuPont. Another big conglomerate, Altria, offers an example of the privileged access and influence these entities enjoy in the political sphere. Between 1998 and 2004, Altria spent over 100 million dollars in lobbying activities directed at federal agriculture agencies[110]. Consolidation through integration is key in gaining access to the right to exempt oneself from the law, a power that makes TNCs very similar, in practice, to sovereign entities like states. Markets and rules were created under the auspices of BITs constructed in the framework of the WB and the WTO, through the lobbyist pressure of TNCs at both the policy level of international institutions and at the normative level of adjudication and remedy, institutionalized in the ICSID mechanism. For instance, when in 1993, the US and Canadian government declared that their citizens needed to consume less animal fats they did not base their decision on evaluations of scientists (pushing for the same thing since decades) but on the contingent demands of the vegetal oil industry[111]. In light of these considerations, the current attempts at a revolution in food and agriculture are directly piloted by the private sector and are not pursued with genuine good intent but profit maximization or manipulation of the public opinion, as evidently showed by paternalistic and superficial campaigns such as that of the “golden rice” or the genetically modified cotton in Andhra Pradesh. Advocating for marketing devices such as the Golden Rice in the effort of eradicating hunger is misleading and distracts from the endemic problems in the food system, namely that people don’t starve because food is insufficient, but because it is unequally distributed, together with the wealth necessary for its acquisition.

On the topic of inequality and how the system currently creates and perpetuates them globally, it is now paramount assessing at least briefly the impact that such a system has on the plane itself. Food debates, as it was showed by this analysis, have never been only about food, there was always much more at stake. In the 21th century, food security assumed an entire different meaning because of its intimate connection with environment and climate change. Food is not connected to these phenomenon’s per se, exception made for obvious links derived from the dependency food has towards the weather, but how food is produced and how it is consumed share a much deeper bond with the environment. On their part, food production and consumption are

[109] See for example Fernandez Cornejo & Schimmelpfenning, 2004
[110] Patel, R., & Carlotti, G. (2015). *I padroni del cibo (Italian Edition*). Feltrinelli.
[111] Levenstein 1996.

to be traced back to development models and markets created by the private sector under a short-term capitalist extractive mentality, the sustainability of which is entirely fictional if not disproven matter-of-factly. The agribusiness machinery, in particular livestock, is the main source of nitrous oxide, which is 296 more polluting than carbon dioxide. It was projected that by 2050 levels of nitrous oxide will increase by 80%, compared to the 20% growth by 2040 projected for carbon dioxide. These figures are the result of the expected growth in the demand of meat and dairy products, which is escalating to the point of becoming a phenomenon worthy of its own name, under the banner of "meatification"[112]. In short, growing middle classes in developing countries are asking for better standards of living which are reflected in their diets. China, for instance, has become the main (if not the only) source of demand for the pork and soy markets, absorbing alone most of the production of Brazil and the US. The implications of this phenomenon, as well as its scale, are way beyond what appears at a glance. The World Bank using world standards for measuring greenhouse gasses determined that animal agriculture is responsible for 51% of man-caused climate change[113]. This is an often-overlooked connection, we tend to struggle to see the whole picture of supply chains, especially when they reach a point of complexity as they have in our times. Animals do not survive on thin air; they require a substantial number of resources which of course must be taken from the earth. It is estimated that raising animals for food consumption constitutes 30% of the global water consumption and takes away from other purposes 45% of available land. An economist stated that to satisfy the demand of China alone, if the trends stay as they are, would require one third of all the farmable space on the planet[114]. Another famous externality of animal agriculture is deforestation, allegedly 91% of the Amazon Rainforest was cut down to make space for crops. Last but not least, the agribusiness machinery and animal agriculture, like all activities, produce waste, a cost currently bared by the ocean and its "dead zones"[115]. There are many other ways in which we can picture the issue, by for example reasoning in terms of biomass. Humans started as the mere 1% of the total biomass, while now they form its 98% together with the animals they own and raise. For those interested, I recommend watch the independent study of Kip Andersen and Keegan Kuhn, on which the documentary "Cowspiracy" is based.

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[112] Liberti, S. (2021). *I signori del cibo. Viaggio nell'industria alimentare che sta distruggendo il pianeta*. Minimum Fax.
[113] Andersen, K. & Kuhn, K. (2014). *Cowspiracy: The Sustainability Secret.* Appian Way Productions.
[114] Liberti, S. (2021). *I signori del cibo. Viaggio nell'industria alimentare che sta distruggendo il pianeta*. Minimum Fax.
[115] Andersen, K. & Kuhn, K. (2014). *Cowspiracy: The Sustainability Secret.* Appian Way Productions.

Such a loss of biodiversity and such an intensive exploitation of nature are clearly non-sustainable and blindly impose extractive and non-regenerative rhythms and goals of production in a sector that should be preserved and oriented around careful management. Land is exploited through monoculture productions that impoverish the soil beyond repair and are at risk of making many species of plants and animals disappear. The topic of standardization, from both an external perspective (products and effects of production) and internal (managerial and business theories) is extremely interesting and represents another field of study that informs the way in which industrialism has transformed the natural and mental landscapes of the world and its population. For instance, standardization (or McDonaldization[116] and all the names which have been used by sociologies to describe this phenomenon in different phases of contemporary history) is a key genetic feature of the industrial corporation, which survives on efficiency and thus strives to preserve and reproduce the mechanisms which are the most efficient. The global corporation, the TNC, then exports these systems all over its domain of operations, often the entire world. The result is that diversity is sacrificed in favor of predictability and scientific reproducibility. In order to make an example, in the meat and dairy market soy has become the gold standard of animal feeding because of its inherent qualities. A genetically modified family of seeds has been used to overcome natural limitations (for instance the very delicate soy seed could never thrive in Brazil because of its temperature, but Brazil is the main soy exporter nonetheless). The result is that now almost the entire surface of Brazil is under production-intensive business models operated by agribusiness firms, utilizing just one breed of seeds. A similar process has happened for pork, the main meat fed by soy together with beef. After trial-and-error adjustments, a singular species of pork was deemed worthy of intensive production (the one raised in Iowa). The result is that all the meat in the world tastes the same, is fed the same and arguably is the same, raising serious questions about what real choice the consumer has apart from brand and the label on the box. TNCs are the principal promoter and exporter of this uniform lifestyle, in the same vein as they were and still are the main promoters and exporters of the idea of “good consumer”. Very interesting, but too long to analyze here, is the relationship between business and human behavior, hinted at in a previous chapter, an early successful account of it being “The Hidden Persuaders”, the bestseller written by Vance Packard in 1957. Similarly, disciplines such as “environmentalism” born inside the retail industry encapsule the role that TNC had figured out for us since the

[116] See George Ritzer, 1993.

beginning of their history.

Many solutions have been advanced by activists, some based more on sentimentalism than realism, like biological production and the so called “locavore”. Biological alternatives are not a solution neither, their popularity is based entirely on marketing and propaganda, as they are effective in helping the rich man to feel responsible and at peace with its conscience (many of them at the moment of writing have also been acquired by agribusiness conglomerates). Industrially raised animals, for example, require 8 months less to reach consumption readiness compared to grass-fed ones. These 8 months subtracted to pollution and water consumption, for example, have a lot of weight when we assume the grass-fed ad local models to be the ones employed globally (assumption which is far from a certainty, since satisfying global meat and dairy production through non-industrial means appear a utopia or at best a good intention). Unfortunately, this nexus between agribusiness and the environment gained traction and recognition only in recent years, obstructed by the fact that it is a truth far more “inconvenient”[117] than climate change itself. Admitting that the current way of sustaining our very basic need for food is wrong at the roots and self-destructive would challenge so many aspects of our daily lives and require reforms so substantial that few have the intellectual honesty to practice what they preach to its full extent. The main narrative, even by most NGOs, is that the carbon dioxide and fossil fuels are the main evil and policy efforts are directed towards the energy sector, even if a simple analysis like the one offered in the present chapter clearly shows that the real damage is being caused elsewhere. Al Gore himself stated that it is hard enough to talk about carbon dioxide and there is no need to confuse the people[118]. In conclusion, at the moment we are living off of resources that we do not have, the entire industry is a big speculative bubble destined to burst and the problem is too big and solutions probably still understudied. On the latter, I endorse however the simple realization that if all the land and food (like soy and cereals) we are investing into animal agriculture would go to the starving of the world we could probably afford healthy diets for all. I hope to have compellingly defended the position that a reform is needed and that must pass to new regulation and policies for businesses. If not the direct bearers of such duties, states at least should be willing and able to bare them, but unfortunately the corporate form and the way it operates institutionally have severely limited public capacity to intervene. Let us see better how corporate values and demands translated

[117] Expression taken from the groundbreaking documentary starring Al Gore, released in 2006.
[118] Andersen, K. & Kuhn, K. (2014). *Cowspiracy: The Sustainability Secret.* Appian Way Productions.

into the international development agenda, the WTO and the WB.

The WTO, IMF and the ICSID system: economic amorality institutionalized

Let us imagine that a state decides to take matters into its own hands and, in the name of the public good it is tasked to represent, emanates appropriate legislature to limit in some way corporate space. In a perfect exercise of its severing capacity, said state regulates sectors such as healthcare, agriculture or labor policy. Unfortunately for this dummy-state, its actions will inevitably collide with the acquired rights of some TNC, which will then proceed to fight the state behavior in an appropriate forum under the auspices of the ICSID.

Historically, the WB, the International Monetary Fund (IMF) and the WTO have been called "secretive, unaccountable and ineffective"[119]. Being the great temples of the crystallization of the international liberal vision of the world, they also represent the private/public divide typical of that vision. As such, these institutions have always proved impervious to Human Rights considerations and they are not included in any way, shape or form into their Articles of Agreement. To introduce such considerations would then amount to interference in the political space of sovereign states that willingly decided not to bind themselves on that regard in those instruments. Already, we can see the missed opportunity of not leveraging the considerable negotiating power these institutions brandish in order to foster Human Rights implementation around the world, for example including them in the conditions necessary to receive funds. Such a statement must however be handled with care, as Human Rights are universal only in principle but not in implementation and considerable differences and disagreements still exists over them such that excessive pressure, even more if exerted in connection with financial aid, could amount to neo-imperialism or just very simply lead to unfair or undesirable outcomes. With that said, it is certainly an avenue worth exploring, far from deserving to be ignored alltogether. In any case, currently the underlying philosophy to the functioning of these institutions is the same one animating the shareholder primacy model in the corporate group. Ibrahim Shihata, a Senior Vice-President and General Counsel of the World Bank, stated that:

[119] Woods, N. (2001). *Making the IMF and World Bank more accountable*. 77 International Affairs (2001) 83–100, at 83.

It should be noted that in extreme cases, where the violations of political human rights in a country are pervasive, there will inevitably be economic repercussions to these political events which the Bank may have no choice but to take into account as relevant economic considerations in its decisions. Also, the Bank is bound to pay due regard to the binding decisions of the Security Council taken under Articles 41 and 42 of the UN Charter (to maintain peace and security)[120].

In other words, Human Rights receive attention by these institutions only when they generate "economic repercussions" they "may have no choice but to take into account". Again, Human Rights are not special and require a business case to be acted upon. The only other instance mentioned as a valid cause of intervention is the same security reason we are now familiar with, so deeply rooted into the genetics of development as we have seen in the historical analysis. Identical positions have been defended by the IMF:

. . . the Fund does not have a mandate to promote human rights. It is not bound by the various declarations and conventions. Human rights are not mentioned in the Articles of Agreement; nor were human rights issues raised in the process of amending the articles four times. Moreover, the autonomy of the Fund in the UN system was established in its agreement with the UN signed in 1947. The emphasis by the Fund on poverty reduction, higher spending on education and health, the preparation of PRSPs [Poverty Reduction Strategy Papers] in a broad participatory process with active involvement of civil society, the enhancement of governance through all possible channels (improvements in information availability to facilitate accountability and dialogue, the strengthening of the rule of law, the promotion of transparency in government policies), and the push for a reduced role of the state in economic activity are all critical areas for the empowerment of the civil society and preconditions for the attainment of human rights in their broad sense[121].

[120] Shihata, I. F. I. (1997). *The World Bank and Human Rights, Österreichische Außenpolitische Dokumentation, Special Issue The universal protection of human rights: Translating international commitments into national action*, 40th International Seminar for Diplomats, Helbrunn Castle, Salzburg, Austria, 191–205, at 198.
[121] Taplin, G. B. (2001*). Speaking Points: Globalization and its Impact on the Full Enjoyment of Human Rights*, Speech to Sub-Commission on the Promotion and Protection of Human Rights.

Strict in principle, these stances, as is often the case in international law and policy, can be changed if the situation calls for it. For example, the Executive Directors from the G7 countries bluntly informed Barber Conable, the President of the World Bank, that there would be no lending to China (in the aftermath of the events in Tiananmen Square in 1989) and that if staff presented any new loans for consideration by the Board, the G7 EDs would vote against them[122].

Despite their noble intentions, initiatives of this kind feed the suspicion that conditionality in trade and investment matters could be used as a mean to pursue political agendas through other means. A more robust and coherent approach is needed in order to achieve both objectives: more human Rights orientation of these institutions and less unpredictability caused by *una tantum* political convenience. A similar arrangement would preserve the institutions desirable impartiality. With this structure in mind, we are ready to tackle the ICSID.

The ICSID mechanism is based at the WB in Washington. The *ad hoc* Arbitral Tribunals, investor-state dispute settlement tribunals (ISDS), established to solve the cases that arise under the system are empowered to emanate awards enforceable to all the parties of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Those tribunals, in line with the mandates of the institution under the auspices of which are created, rarely (if at all) engage in Human Rights discussion in their sphere of activity. Their treatment of Human Rights has been described as "superficial acknowledgments of human rights law unlikely to produce harmonized obligations"[123]. In the landmark case Compania del Desarrollo de Santa Elena SA v Republic of Costa Rica, the similarity between IFIs and the tribunals adjudicating inside IIL is most apparent, together with the space Human Rights really occupy in this system. The award reads:

> *International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the parties. While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the*

[122] *Gillies, D. (1993). Human Rights, Governance, and Democracy: The World Bank's Problem Frontiers.* 11 NQHR (1993) 3–24.
[123] Coleman, Cordes and Johnson 2020, p. 294.

compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference[124].

Perhaps a more correct approach would be one of weighing of concurring interests, similar to that employed in more pure Human Rights conflict cases. The issue that states could use Human Rights as an emergency escape mechanism from investment obligations cannot possibly outweigh completely the need for said rights to be respected. Clapham suggests that:

It seems fairly clear that in an extreme case of an expropriation resulting in crimes against humanity, the expropriation would be unlawful. Surely then, confiscation in response to crimes against humanity by non-state actors could actually be lawful[125].

It is less compelling and realistic, however, if a similar argument would be accepted regarding less grave violations, such as environmental and second-generation rights violations, which are arguably the core of TNCs sphere of activity, especially in the food sector. ISDS tribunals are encouraged in their quick dismissal of Human Rights assessments by the very bulk of investment treaties they are asked to draw from. The most recent comprehensive study on the matter has found mention of Human Rights only in the 0.5% of the 2107 investment treaties it considered[126]. To add insult to injury, the majority of these mentions were placed in the preambles of the instruments. In 2018, more than 850 treaty-based cases[127] were ongoing and the IIL regime amounted to more than 3300 treaties, with 2600 of them already in force[128]. The sheer size of this phenomenon combines with its case-by-case *modus operandi* and creates what has

[124] Compañía Del Desarrollo de Santa Elena, SA v Republic of Costa Rica, Judgment of 17 February 2000, 39 ILM (2000) 1317.
[125] See A. H. Qureshi. (1999). *International Economic Law*. Sweet & Maxwell.
[126] Gordon, k., Pohl, J., Bouchard, M. (2014). *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*. OECD Working Papers on International Investment, 2014/01.
[127] UNCTAD, Investment Dispute Settlement Navigator.
[128] Ibid.

been named a "chilling effect"[129] on the policy space of states. We must not be surprised then by the absence of *stare decisis*, but we should be concerned about the second defining trait of the regime, which is the absence of appeal and rigorous scrutiny. What is at stake is more real and tangible than simple conflict of laws considerations between Human Rights and IIL, as what is a stake is the concrete capacity or willingness of states to try and change things for their communities. After all, when you face the possibility of being charged with awards or *interim* measures amounting to hundreds of millions of dollars or the threat of being undercut by investors and other states, Human Rights surely lose much of their appeal. The consequences of arbitration awards on human Rights have not been thoroughly explored even though they stand out immediately after you look at the figures. Argentina, for example, reached a total evaluation of claims from investors amounting to around US $80 billion, which constitute not only a deterrent for future defendants but also an indirect damage to Human Rights implementation, because they are money subtracted from public finances and thus from the pursuit of the public good. Therefore, state conduct under the ICSID is extremely conservative and aimed at appeasing investors and trade partners, the trade-off simply does not pay off. An example of this conduct is offered by New Zealand, which reportedly delayed introduction of tobacco plain packaging rules until after the outcome of the Philip Morris v Australia case[130]. Allow me to share, to better focus on the possible outcomes allowed to happen under this mechanism, a list of the most challenged behaviors in ICSID arbitration:

1. Measures adopted in the context of local opposition to the activities of foreign investors
2. Legislation enacted to increase the minimum wage,53 an import restriction adopted due to health concerns
3. Environmental measures
4. Plain packaging requirements designed to reduce tobacco use
5. Measures adopted to set tariffs for essential services
6. Judicial invalidations of pharmaceutical patents[131]

Arbitration awards themselves can go as far as directly overturn favorable decisions taken by other judicial bodies. In Chevron Corporation and Texaco Petroleum

[129] Cotula, L. & Schröder, M. (2017). *Community Perspectives in Investor-State Arbitration* International Institute for Environment and Development.
[130] Coleman, J; Cordes, K. Y.; Johnson, L. (2020). *Human rights law and the investment treaty regime,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.
[131] Ibid.

Company (II) v Ecuador, investor–state proceedings were used by the investor to escape from domestic judicial proceedings brought by local communities damaged by its operations. Despite having obtained a judgment upheld by the highest court in the country, these communities ultimately faced defeat when the investment tribunal ordered Ecuador to suspend enforcement and recognition of the judgment "both within and without Ecuador"[132]. A final remark should be made on the arbitrators themselves, as they rarely possess a curriculum with relevant Human Rights Law experience or knowledge, element that surely influences their competence and willingness in dealing with these issues[133]. In conclusion, the ICSID system "prioritizes institutions of justice for foreign investors over the improvement of local institutions that could provide justice for members across society, including, but not limited to, foreign investors"[134]. It fully deserves its critiques and the label of "jurisprudence incohérente"[135] assigned to its IIL body of cases.

Last but not least, the WTO has not been immune to criticism. Slogans such as "OMCide" and "WTO kills" were mainstream in the anti-globalization narrative, particularly among right to food and food sovereignty activists who quickly identified the WTO as the main target to be terminated in order to advance their agendas. body. Peter Leuprecht, former Deputy Secretary- General of the Council of Europe, briefly summarizes all the concerns this thesis has explored in a multitude of different points of view:

> *In today's world, pan-economic ideology and its practical application are among the most serious threats to the cause of human rights. As far as the WTO is concerned, the question is whether it will be positively affected by the "mainstreaming" of human rights or whether it will be one of the playgrounds of pan-economic ideology and thus contribute to the undermining of human rights, particularly their social and cultural*

[132] Chevron v Ecuador II (n 66) Order for Interim Measures (9 February 2011) 3–4; Chevron v Ecuador II (n 66) First Interim Award on Interim Measures (25 January 2012); Chevron v Ecuador II (n 66) Second Interim Award on Interim Measures (16 February 2012); Chevron v Ecuador II (n 66) Fourth Interim Award on Interim Measures (7 February 2013) [79].

[133] Alvarez (n 42) notes "it is not clear that those who are selected to serve as ISDS arbitrators are experts in human rights law and it is possible that they may get it wrong – and not only if their expertise rests on commercial law".

[134] Yilmaz Vastardis (2018, p. 280; also, 2020).

[135] Bonnitcha, J. (2011). *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections*, in *Evolution in Investment Treaty Law and Arbitration*, edited by Brown, C. and Miles, K. Cambridge University Press.

dimension[136]*.*

We can start to formulate an answer to this conundrum by considering a case more concerned with healthcare, since it is easier to associate with what would be considered a public vs private interest situation. Governments such as that of South Africa have long struggled with the achievement of a decent standard of access to medicine. With that aim in mind, legislation was enacted that was promptly threatened by US and Europe (lobbied by their TNCs) with a panel procedure inside the WTO as, they argued, such legislation was contrary to the state's obligations in trade (specifically intellectual property as established in the TRIPS). It was only thanks to civil society backlash and the deep sensibility on the theme of healthcare and pharma companies that TNCs abandoned their IP claims. This high volatility has contributed to a climate of fear and promoted the simple realization that embarking in ambitious public interest defenses against the status quo is not worthy, especially where WTO sanctions or ICSID expansive awards are on the line. States too, in this last example, should seriously consider more seriously the ETOs of their actions, threats and sanctions in the territories affected and must be put in a position to be able to bear the full weight of obligations arising from such actions. The same goes for TNCs when they actively lobby and prevent the state from fulfilling its obligations and its role as the representative of the collective good. Under this system as it is now, Human Rights effectively have a price, which I believe could even be calculated if we crunch some numbers like, for example, the average cost of an award for the losing part and how likely, under current jurisprudence, it is for the state to lose. To this potential cost we need to add the sure loss of resources the state will inevitably sustain just to enter proceedings and defend itself, regardless of the final verdict. Surely such a result cannot be accepted.

[136] P. Leuprecht. (1999). *The World Trade Organisation—Another Playground of Pan-Economic Ideology?*, in *Human Rights and Economic Globalisation: Directions for the WTO*, edited by Malini Mehra.

Therapies: new frontiers in Business and Human Rights

We have seen how shareholder primacy, SCP and LL limit Human Rights protection and, in fact, encourage their limitation, first and foremost by devising the corporation as a reckless risk-taking machine able to profit from cost-externalization. On the international level, the ICSID system, administered by institutions inspired by the same political and economic philosophies of the private/public divide and endorsed by capital-exporting governments to preserve their position, encroaches on the policy space of states impairs and their effective ability and willingness to meet their Human Rights obligations, sometimes directly opposing Human Rights organs. On the level of the individual, SCP and LL created a paradoxical entity which escapes traditional regulatory attempts via sate-centric paradigms like territory, ownership and control. This corporate entity shields itself behind multiple personas to transcend physical and spatial limitations and at the same time rise to personhood status, a status which includes Human Rights. However, such personhood does not include the full range of duties traditionally attributed to natural persons and thus the corporation retained the benefits of both thinghood and personhood. Through economic integration, especially vertical integration, the corporation self-replicates through multiple jurisdictions and at the same time diffuses responsibility and liability through multiple veils of separate personalities, while concentrating resources, capital and knowhow. The result is that, while responsibility and liability are fragmented to the point of disappearing, profits and power are instead accumulated and centralized. We will now explore possible solutions to these issues, starting from the international level and then moving to liability and theory of the firm.

Food sovereignty, Human Rights and innovations of the CESCR

It should be expected at this point that economic, social and cultural rights are as limited as the policy space and the different morality of economic behavior they answer to, and we would be right in supporting this assertion. It is no coincidence that, compared to first generation rights, ESCR employ vague and soft language with very uncertain legal implications, to the point of feeding fears of indefinite postponement of their realization. However, it is precisely because of these limits and the lack of a solid jurisprudence in the field that the Committee on Economic, social and Cultural Rights (CESCR) had to be the most creative of the treaty bodies in its review and

interpretation of the Convention. Together with right to food and environmental activists, they have advanced the understanding of Human Rights as a whole, not just limiting themselves to their instrument. One of the main challenges they faced, on which I have also debated in another paper, has been the subpar status ESCR enjoy inside the Human Rights family, in particular the common belief they can never be justiciable. Such lack of justiciability derives from the fact that ESCR are naturally uncertain and non-specific in their content and require actions and provisions that produce results only after long periods of time and without guarantees. In other words:

> *the realization of economic, social, and cultural rights were by nature 'progressive.' The reporting procedure was in aid of that fact: The idea is to help governments fulfill their obligations rather than penalize them for violations*[137]*.*

To address this issue, in General Comment 3 (1990) the CESCR introduced the concept of "minimum core obligations", arguing that despite indeterminate substantive implications, ESCR have a core that can be identified, implying that it was possible to derive liability at least for violations of this common denominator. This device appears to possess an appealing sway at first glance, but it still lacks clear contours and brings to the fore the (unsolved) issue of what features of rights would be used to derive the minimum core obligations and if, in accordance with article 2 of the Covenant, they would be state-specific or universal, similar to nonderogable obligations[138]. Perhaps more success was reached with the now famous and widely accepted tripartite framework of Human Rights, a framework almost entirely inherited also by the UNGPs: the "respect, protect and fulfill" Human Rights classification. This doctrine is connected to justiciability as it argues that Human Rights, at a minimum:

> *it allows us to say that all human rights give rise to obligations to refrain from depriving the right-holders of what they have secured for themselves (in terms of health care, educational provision, food supplies, etc.). Such*

[137] Whelan, D. J. (2015). *Indivisible Human Rights and the End(s) of the State,* in *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors,* edited by Kurt Mills & David Jason Karp. Palgrave Mcmillan.
[138] Bódig, M. (2015). *Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights,* in *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors,* edited by Kurt Mills & David Jason Karp. Palgrave Mcmillan.

negative obligations are not exposed to the relativizing force of resource constraints, and they seem readily justiciable[139].

The creation of this doctrine was a direct response to the need to go beyond the traditional positive/negative duality of rights, insufficient to properly describe ESCR. These rights cannot be fully realized simply by not interfering or protecting from the interference of others. They require active involvement, planning and the consistency to strive for their realization in all our endeavors. With this aim, the tripartite framework offers not a duality but a "spectrum of obligations"[140], with respect obligations at the negative pole and fulfill obligations at the other end of the spectrum, at the positive pole. The idea itself was taken from the groundbreaking work of Henry Shue, presented in his book: "Basic Rights". His tripartition included duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived. Asbjørn Eide's, one of the Special Rapporteurs on the Right to Food, was the one responsible for bringing the theory to doctrinal status in his Final Report. This connection between ESCR, Human Rights broad innovations and the narrower right to food should not come as a surprise. We have seen already how the origins of the broader development framework, inside which ESCR operate and from which they draw their content, is linked to food system dynamics. Due to the big influence, since the beginning, of the private sector at all levels of this system it should also come as no surprise that another Special Rapporteur on the Right to Food, Olivier de Schutter, is the one responsible for the creation of a code of conduct for multinational enterprises[141]. The tripartite framework is now: "widely accepted as capturing a conceptual feature of all human rights and some see it as the cornerstone of a common doctrinal framework for all human rights bodies"[142]. The Maastricht Guidelines of 1997 also accepted its role as one of the defining theoretical compasses in the discipline and ,after better operativization, they could prove very useful in guiding efforts of Human Rights penetration into IIL treaties and trade agreements, especially to regulate potential conflicts arising from agribusiness TNCs and host states. TNCs operating in the field and host states. They

[139] Ibid.
[140] Ibid.
[141] United Nations, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (Addendum to the Report of the Special Rapporteur on the Right to Food, Olivier De Schutter) UN Doc A/HRC/19/59/Add.5 (19 December 2011).
[142] Bódig, M. (2015). *Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights,* in *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors,* edited by Kurt Mills & David Jason Karp. Palgrave Mcmillan.

could provide for a "minimum core obligation", close to the respect pole of the spectrum, from which states cannot subtract themselves and over which, as suggested by the UNGPs:

> *maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts*[143].

Human Rights Impact Assessments (HRIA) could be structured around these principles and provide for operative guidelines, translatable into directly justiciable legal standards, used to identify conflicts between IIL and Human Rights both *ex ante* and *ex post*[144]. Most importantly, due diligence legislation at the national level would reach a much needed level of legal certainty by adopting these clear minimum standards, allowing plaintiffs to prove effectively the relationship of causality between ineffective implementation of vigilance plans and the damage they suffered. At the moment, as we pointed out, such policy space is not guaranteed at all and the previous doctrines could help in defining it transforming it into something enforceable. However, this path would require overcoming another issue, which is the need for transparent and clear declarations of the primacy of Human Rights over other sources of law, such as IIL and BITs inside the ICSID. I firmly believe it has come the time, compelled by time constraints and desperate need for immediate change, to fully embrace the process of constitutionalization of international law, with Human Rights at its apex. Allowing plundering and non-sustainable business practices on a global scale to trump Human Rights, under any circumstance, is illogical and supports a normative approach in which Human Rights can apparently be derogated from at will through contracts, which is also untenable. I support other academics and experts who assert systemic integration should be employed to solve conflict of laws issues between Human Rights law and other international law. Systemic integration argues that:

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[143] United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), Principle 9. The commentary to Principle 9 notes that investment treaties "may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so". UN Guiding Principles, 11.

[144] UN Guiding Principles HRIAs (n 24).

> *Although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say "other" international law*[145].

This would also mean a step in the right direction of reforming the old and defective understanding of shareholder primacy, by requiring that TNCs impact on the world, directly or through the proxy of the state, is filtered by a minimum threshold of coherence with general principles of law and Human Rights law. High hopes in this regard were generated by decision of the Inter-American Court of Human Rights in One exception is the Inter-American Court of Human Rights' decision in Sawhoyamaxa Indigenous Community v Paraguay, wherein the Court specifically sought to harmonize human rights and investment treaty obligations. the Court underscored the difference between the nature of state obligations under the investment treaty and under the American Convention on Human Rights, asserting that enforcement of the former should always be compatible with the latter, "which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States" [146]. Greater openness to evolution also manifested, even if in more ambitious and explicit tones, in the ICSID system:

> *Argentina advanced arguments based on human rights law as it sought to defend itself against a series of claims arising from measures undertaken by the government to safeguard sufficient water supply for the public following an economic crisis. Argentina also sought to rely on human rights law to advance a counterclaim arguing that the investor had violated its obligations regarding the human right to water. Although the counterclaim was ultimately rejected, the case marked the first instance where jurisdiction over a counterclaim grounded in human rights law was accepted, and prompted a noteworthy discussion regarding the nature of*

[145] UN General Assembly, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi) (13 April 2006). The technique is arguably codified in art 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). See also Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' ICLQ 60 (July 2011) 573, 585 (referencing a study concluding that international human rights law fulfils the three requirements needed for consideration under article 31(3)(c) of the VCLT).
[146] Sawhoyamaxa v Paraguay (n 28).

investor obligations under international investment and human rights law[147].

This approach could and should be combined with the increasing recognition of the nexus between Human Rights and environmental law, theoretically separate regimes. This is of paramount importance for effective intervention in the food system and agribusiness sectors. Where the state is unable or unwilling to intervene, like in agribusiness, individuals could challenge states based on their established obligation to protect and fulfill Human Rights, even from third parties and non-state actors, giving rise to negligence or complicity-based liability. The state could then act and, with the previous suggestions in place, avoid being stopped by arbitration tribunals, effectively regulating TNCs behavior. Some issues remain though, like the fundamental high costs of proceedings, even after a favorable pronouncement. Addressing this problem will require further study, together with quantitative research on the ways in which HRIA could be designed and how should they measure Human Rights Impact on the ground, since domino effects are likely to happen. For example, the HRIA of opening a new plant in a developing state could be deemed negative because of child labor, so closing the current structures down or abandoning the FDI altogether may be considered. However, assessments need to also take into consideration the costs of this decision. The children may reasonably and foreseeably end up working for a competitor, maybe in worse conditions, or they could end up unemployed in a social context were child labor, for how depressing it may sound, is pivotal in order to allow families to survive. From my limited experience and understanding, I believe that we still know too little on these dynamics to confidently emanate guidelines and comments from which legislation could arise, but at least we should aim at achieving a universally accepted operative definition of a gold-standard due diligence plan.

What has been said so far must also be declined under a ETOs paradigm. Host state ability and willingness to challenge (an defend themselves from) TNCs in their own country is important, but equally important is expanding and accepting the ETOs of home states regarding the conduct of their TNCs. A framework which could help in this regard is the International Assistance and Cooperation (IAC) obligation present in the ESCR field:

[147] Coleman, J; Cordes, K. Y.; Johnson, L. (2020). *Human rights law and the investment treaty regime,* in *Research handbook on Human Rights and Business,* edited by Surya Deva & David Birchall. Edward Elgar.

> *In the context of IAC, the respect obligation requires states to refrain from any direct or indirect action that would interfere with the full realization of rights in another territory*[148].

This includes keeping state-owned and all enterprises in check. States should also:

> *Be cognizant of how their trade and investment agreements impact human rights extraterritorially and ensure those agreements do not negatively impact economic, social, and cultural rights*[149]

And:

> *The duty to protect requires, inter alia, responding to the extraterritorial impacts of third-party actors. Primarily, states are to adopt legislation and other measures aimed at preventing and redressing infringements of Covenant rights that occur outside their territory due to the activities of business entities over which they can exercise control*[150].

How does this overcome traditional jurisdiction barriers? IAC is not tied to territory but to the simple *capacity of the state to provide assistance*. Home states are often in a greater position to regulate a business's extraterritorial impacts than the host state. That capacity is the metric by which to measure the state obligation, and that capacity suggests that in many cases there is an IAC obligation to regulate business nationals' extraterritorial impacts[151]. If taken literally, as suggested by Yilmaz Vastardis, this normative interpretation of IAC could lead to the conclusion that the entire ICSID system exists in violation of Human Rights and there is a IAC obligation to dismantle it in favor of a positive environment for the fulfillment of ESCR and local host states systems of justice[152]. This is, admittedly, not so far away from what I have hinted at throughout this dissertation and I believe, even without being so radical, that these are

[148] CESCR 2017, para. 29.
[149] Ibid.
[150] Van Ho, T. (2022). *Obligations of international assistance and cooperation in the context of investment law,* in *The Routledge Handbook on Extraterritorial Human Rights Obligations,* edited by Mark Gibney, Gamze Erdem Turkelli, Markus Krajewski & Wouter Vandenhole. Routledge. See also CESCR 2000a, para. 39; 2017, para. 30; 2020, para. 84; 2020, para. 84; 2016, para. 70.
[151] Ibid
[152] Yilmaz Vastardis, A. (2018). *Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements*. London Review of International Law 6(2), 279–297.

the only conditions in which a genuine and effective structural reform of the food system can be achieved. Traditional paradigms of business conduct and state/investor dynamics need to be reimagined from the ground up.

Behemoths, not Leviathans: holistic approaches to liability and corporate personality

Dominant understandings of TNCs as para-individual or para-State have created and sustained international liability structures that do not reflect the legal reality of the situation. For example, when we are talking about agribusiness and food systems, the most vertically integrated markets in the world, we are talking about big buyer firms, those with the highest negotiation power and moving the highest amount of transactions globally. Dan Danielson calls this "supply chain capitalism"[153], where big buyer firms don't compete with anyone but in turn the make smaller supplier firms compete with each other. As we have seen, historically the role assigned to the global south has been that of the producer of low-price goods and food for the rich. This also means that supplier firms and weaker rule of law and legal systems are overwhelmingly present inside developing countries, voiding almost all arguments which associate simple unregulated liberalization of markets and privatization of the law with automatic development. Furthermore:

> *Both States and smaller firms need the buyer firm, and as a result, buyer firm directives have a significant impact on the business practices of the firms within the GVC as well as the law that governs the contexts in which they operate[154].*

Ruggie provides the example of the Total group, formed by approximately 900 hundred subsidiaries, each of them comprising multiple properties and enterprises[155]. Such an entity is not identifiable through conventional means, Total is not just "Total". Regarding food, we are not only talking about farmers and big titans of livestock production or the empires of soy and avocados, there is the vast sea of retailers, wholesalers, marketing brands, manufacturers and so on and so forth. Starbucks:

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[153] Dan Danielson, Trade, Distribution and Development Under Supply Chain Capitalism, in David Trubeck, Alvaro Santos & Chantal Thomas (Eds.), Globalization Reimagined: A Progressive Agenda for World Trade and Investment (Anthem 2019).
[154] Crow, K. (2021). *International Corporate Personhood: Business and the Bodyless in International Law* (1st ed.). Routledge.
[155] Ibid.

Directly employs 150,000 people; sources coffee from thousands of traders, agents and contract farmers across the developing world; manufactures coffee in over 30 countries, mostly in alliance with partner firms, usually close to final market; distributes coffee to retail outlets through over 50 major central and regional warehouses and distribution centres; and operates some 17,000 retail stores in over 50 countries across the globe[156].

How do you regulate and distribute liability via traditional means in similar architectures? The consequences, as we have explored, are dire:

The producers of the components for the iPhone are responsible for the vast majority of the contract relationships along the GVC that enables Apple's final product. The legal effect of these contract networks is that the vast majority of the production chain is external to Apple and an ICP or MNE. In many cases – and in Apple's case especially prior to the company's internal efforts to increase transparency within these networks – it is not feasible to monitor the origins and labor conditions across all the firms involved in producer-led GVC[157].

UNCTAD reports that 80% of global trade flows through TNCs, and that was in 2013[158], which gives a good idea of the scope of the issue and the challenges it poses in terms of potential injustice. Article 9 of the Council of Europe Convention on the Protection of the Environment Through Criminal Law (1998) Explanatory Report notes that:

Article 9 deals with the liability of legal persons. It is a fact that a major part of environmental crimes is committed within the framework of legal persons, while practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organization, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal law sense) for the offence.

[156] United Nations Conference on Trade and Development (2013), p. 142.
[157] Crow, K. (2021). *International Corporate Personhood: Business and the Bodyless in International Law* (1st ed.). Routledge.
[158] UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, p. 135 (2013).

Furthermore, if an agent of management is sentenced, the sanction can easily be compensated by the legal person.

Corporations themselves are often immune from criminal liability because they are assumed to act only in pursuit of profit, making *mens rea* theoretically impossible to find. Ruggie again stresses that:

The fact that public law (national and international) does not generally encompass the economic unity of the multinational firm is the single most important contextual factor shaping its power, authority, and relative autonomy. Twenty-first century corporate globalization is built on foundational principles of corporate law that date back to the 19th century when they were intended to facilitate capital formation among natural persons: attributing legal personhood to corporations, investors' limited liability, and permitting one corporation to own another while still construing them to be separate legal entities[159].

With this in mind, underlying assumptions about jurisdiction, liability and law in a broader sense must be retheorized to better represent the social and economic reality of this actors.

First and foremost, new approaches revolving around effectivity and integration principles look best suited to address these challenges. Inspiration can be drawn, and applied to TNCs instead of states, from jurisprudence in the field of the international law of jurisdiction. In his concurring opinion to Al Skeini, Judge Bonello envisaged a "functional" approach to extraterritorial jurisdiction that should transcend state-based territoriality:

Jurisdiction means no less and no more than 'authority over' and 'control of'. In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional … The duties assumed through ratifying the Convention go hand in hand with a duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capacity to fulfil them (or not to fulfil

[159] John G. Ruggie, Multinationals as Global Institution: Power, Authority and Relative Autonomy, 12 Regulation & Governance 317 (2018).

them)[160].

We could adopt a similarly bold perspective in dealing with TNC liability, by exporting it to enterprise liability proposals. In this context, liability of a parent company for the conduct of its subsidiaries would extend to all links of the GVC in which it has assumed a risk (together with the potential gain). This would be particularly useful for regulating regimes with high vertical integration, such as the food system and agribusiness, where equity-based relationships are still the norm. Furthermore, it has the potential of going even further, bypassing limiting factors like the capacity of the TNC to liquidly change form and presence at will. Strict divisions and terminologies like subsidiary, contractor, partner and all the spectrum of different degrees of involvement and knowledge would give way to a test based on the capacity to enact change centered on the managerial and business reality of the group, similarly to IAC obligations for states. Under a different perspective, it is an approach inspired by doctrines such as the "risk theory" developed in France in the 19th century. The main concept here is, for liability purposes, the focus not on fault but rather on the deliberate (sometimes even reckless) carrying of a risky activity. The result is an automatic presumption of fault without subjective element, which reflects much better the nature and modus operandi of a corporation, especially a highly fragmented TNC. One of the advantages of this model is that it bypasses complications derived from the near impossibilities of establishing concrete causal relationships along the GVC, abandoning control-based mechanisms. It stands on the Roman law principle of *ubi emolumentum ibi onus,* which states that those who enjoy the benefit of a dangerous activity must also bear the potential harm that comes with it. While control still survives to a degree, it becomes a power of control rather than a *de facto* control. According to Dowling:

> *By applying a profit-risk/created risk approach to the overseas activities of MNEs, parent companies that create environmental and human rights risk through their overseas investment could be strictly liable for harm that arises directly from that risk. The determination of whether liability should attach to a particular shareholder would be a fact-sensitive question that could be decided by reference to the extent to which the shareholder "created" the risk. The purpose of such an approach would be to identify*

[160] ECtHR 2011, Concurring Opinion of Judge Bonello, paras 12, 13.

and hold responsible those who are genuinely "behind" a risky activity[161]*.*

This solution seems particularly apt at turning the tables on the very nature of corporations and TNCs as entities gaining profits through externalities. The reckless risk-taking promoted by SCP and shareholder primacy become the very premises on which liability is based, rather than pursuing the chimera of finding traditional control-based faults among the many personhoods of the TNC. Risk through investment is also a test on which corporations are more than trained to respond and ignorance could not reasonably be feigned, allowing ought to know considerations to always be effective. For example, borrowing an example from Björn Fasterling:

> *A retailer decides to outsource production entirely to supplier factories that are highly integrated into the retailer's value chain through long-term contracts, creating de facto economic dependencies and allowing the retailer to closely manage product quality. One could discuss at length whether the supplier is in fact part of the same business enterprise as the retailer. One way to delimit the business enterprise would be to apply notions of "ownership", which would separate the supplier from the enterprise as it does not stand in any share ownership relationship with the retailer. A related criteria for a business enterprise's boundaries could be "control", or "managerial command", if we define control as meaning that a manager of the controlling company can effectively intervene in the strategy or even in the operations of the controlled company. However, focusing on control structures does not provide much insight for solving the question, as the example shows: while the retailer may still have managerial command over product quality through contractual clauses and enforcement processes, it may have let go of control over work processes and labor conditions at the supplier's sites. We could put forward that the retailer, through its decision to outsource, has relinquished partial control over production processes and labor conditions. However, from a risk perspective, the retailer now faces higher uncertainties with regard to possible human rights violations occurring in the course of the*

[161] Dowling, P. (2020). *Limited liability and separate corporate personality in multinational corporate groups: conceptual flaws, accountability gaps, and the case for profit-risk liability*, in *Accountability, International Business Operations, and the Law Providing Justice for Corporate Human Rights Violations in Global Value Chains*, edited by Liesbeth Enneking, Ivo Giesen, Anne-Jetske Schaap, Cedric Ryngaert, François Kristen, and Lucas Roorda. Routledge.

manufacturing process of shoes bearing the retailer's brand. In other words, the retailer, by outsourcing production, has practically increased human rights risks that are linked to its business activities.

This proposal is also reminiscent of integration approaches envisaged not only in international law but also at the level of the UNGPs, which require enterprise-wise procedures and speak to the "entire corporate group, however it is structured"[162]. UNGP 19 also asks for "integration of findings". This means that people on the ground who become privy to human rights risks must communicate their observations to the person in the organization who can most appropriately address the situation and deal with the risk. On these premises, big buyer TNCs in the agribusiness GVC that, for example, engage in monoculture highly destructive environmental practices, affect local communities or cause well known peaks in suicide rates among rural workers with their contract conditions or willingly turning a blind eye to violent practices (if not directly supporting them) like the "grileiros" in South America[163] would be directly liable regardless of state willingness to challenge their operations. It is opinion of the author that the combined benefits of integration and enterprise liability reforms proposed here together with the structural and theoretical restructuring of IIL offered in the previous section would substantially contribute to counterbalancing corporate impunity and power in global governance.

[162] John Ruggie, Just Business: Multinational Corporations and Human Rights (W.W. Notron & Co. 2013) 97.
[163] Liberti, S. (2021). *I signori del cibo. Viaggio nell'industria alimentare che sta distruggendo il pianeta*. Minimum Fax.

Conclusion

Ray Anderson, former CEO of Interface (the largest commercial carpet manufacturer in the world) admonished in "The Corporation" documentary that:

> *I am drawing the metaphor of the early attempts to fly. The man going off of a very high cliff in his airplane with the wings flapping and the guy is flapping the wings and the wind is in his face and this poor fool thinks he is flying, but in fact he is in free fall and he just doesn't know it because the ground is so far away*[164].

Despite almost 2 decades passing since then, this image still represents the condition we are in. Our society, as Anderson said, is not flying and is still in free fall because we refuse to build it accordingly to the "laws of aerodynamics for civilizations that would fly"[165]. A sustainable, Human Rights based civilization could not be more far away from our current way of perceiving private initiative and business. The former's most valuable lesson is that freedom, despite it appearing so, is not unlimited and cannot be unlimited, as it must stop where the freedom of others begins. Man is free *and* equal, approach which naturally necessitates a dialogical mind open to balancing considerations. The latter, advocates for unregulated freedom, the entrepreneurial freedom of the romantic self-made man rushing towards the sun unbothered by the consequences. However, believing in a sphere of activity or dimension of human life that should be entirely untouchable and foreign from public scrutiny isn't less based on faith than believing in unlimited resources is. Despite many efforts and discussions over these and many other connected issues in the 21st century, basic innovations which should have been at the top of the priority list for their magnitude and relevance, like food supply and production, are belittled or intentionally disregarded in favor of more trivial objectives. The struggle between business, the environment and food teaches us an important lesson: the freedom and the value of man from which it stems from are perhaps the most valuable conquests of the modern man, but the contemporary man must now move to the next step, which is how to properly use them.

It is often moved as an objection, especially in the ESCR field, that rights cannot be seen and used as an attempt to prosecute and punish all which is unpleasant. After

[164] The corporation.
[165] Ibid.

all, we act with limited resources and compromises are inevitable. However, if we follow this point, which is a fair point, we must also have the courage to look at the other side of the coin: in the same way that a duty to eliminate all unpleasant aspects of the human condition cannot be inferred, a right to unregulated pleasure cannot be inferred either. Thus, the right to food cannot be intended as a blanket right to enjoy any food in any part of the world at any given moment of the year, not anymore. Similar realizations must be brought to more substantial form also in the corporate field. The law must come to reflect the new economic and social reality of the 21st century and abandon a system that, while effective and justifiable in the 19th century (even though it was really contested since then), does not serve a purpose anymore but providing for the foundation of an entirely inhuman system.

TNCs multiply their immunities by spreading SCPs via economic integration, spanning multiple continents, dissolving control and knowledge into legal and managerial atoms while profit reaping and accumulation of power and wealth remain ultimately centralized. The law has manifested a clear incapability to think and imagine the abstract and the collective in the corporate field, antagonized by a technical and legal gap that makes the inner workings and rules of TNCs opaque to the untrained eye. This has led to an entity mandated to be disconnected from society while paradoxically enjoying the rights of its participants, allowing only for remedy without law and rights without duties. Things are changing but they are just shy from truly making a difference. I have argued that this is because they surrendered to playing around the main triad from which corporate schizophrenia stems, instead of reforming it directly. We need new ideas of corporate personality, more connected to social purpose; new ideas of liability, away from dusty linear processes like ownership and control, so rare to be found in the globalized economy, where everything is fluid, even awareness; we need to dismantle shareholder primacy and move towards systemic integration of Human Rights at all levels, including trade and contract law. Human Rights as a concept and tool can only properly function when we accept their superiority in the system and, perhaps, here lies the biggest challenge of all, especially for progressive and hardly justiciable rights like ESCR. These are rights we badly need at the moment and which bare the heaviest weight in terms of where our society (and planet) are heading. The consequences of this struggle could be irreversible and yet the legal and political framework which contains such struggle is the most underdeveloped. As I have showcased, Human Rights emerged like the “son of a lesser god” rather than a fully separate and dignified phenomenon. Their true benefactor were economic changes

and aspirations and it is not a surprise that other authors in other fields have also been very critical about the potential of Human Rights and their genuine intent in changing the world order[166]. It is not only TNCs legal specificities that need reinventing, but Human Rights as a whole also require us, their social base, to come together and take a decisive step forward in taking them a bit more seriously. They are a relatively young device and cases like the TNCs case are the stress tests that powerfully remind us of that. Only when they will entirely shed their skin as enablers of more important matters (or an impediment to such matters) will Human Rights witness true change, and with them the TNCs and the environment they shape.

[166] See for example: Moyn, S. (2012). *The Last Utopia: Human Rights in History* (Reprint ed.). Belknap Press: An Imprint of Harvard University Press.

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