

Business and Human Rights: Economic and Institutional Contexts

HUMR 5133 – Business and Human Rights

Lecture 1

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Course content

Substantive issues

- Recent developments in linking business practices and human rights within the UN and in other international organisations, and *in context of globalisation*
- Analyse efforts in making human rights important normative, political and legal frameworks for the conduct of business in different societal and political contexts
- Arguments in favor of and against extending human rights to the corporate sector, and discusses legal developments, including normative and remedial mechanisms
- Strengths and weaknesses of the CSR movement and the scope for making human rights regulatory measures for corporate behavior
- Practical cases of companies, and case law

Skills

- Analyse and identify relevant human rights issues on B/HR
- Locate applicable source material (e.g. case law) and identify and interpret the relevant substantive rules and principles
- Understand the obstacles and challenges of B/HR
- Critically evaluate existing human rights treaties, and existing guiding principles in context of B/HR

An overall idea?

Can human right contribute to better business?

Can business respect human rights and enhance human rights?

How can human rights law represent a “regulatory framework”?

- Legal regulations
- Hard and soft law
- Opportunities – limitations: economic, social, cultural, institutional

Cross-references to SDGs:

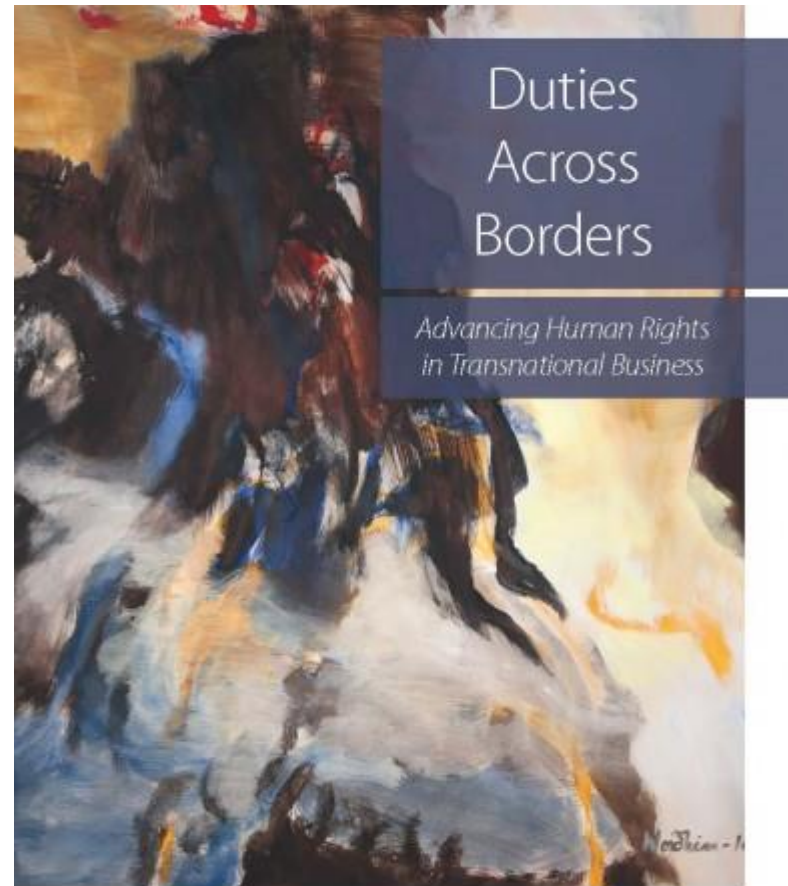
SDG 8

Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all

SDG 8.8

Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment

Other SDG?



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Main questions

Conceptual

- *Why* should companies (multinationals and other business enterprises) have human rights responsibilities/obligations?
- *Which* legal and practical problems arise in trying to regulate corporations?

Legal

- *What* is the scope and nature of responsibilities of states, corporations and *related* actors (e.g. IFIs)?
- *How* can companies be held accountable for human rights violations?
- *What* is the nature of existing forms of regulation and remedy?
- *What* does human rights law say, how is it emerging?

Social Science/Regulation Theory/Public Policy

- *How* have corporations, states and others **integrated** new ‘business and human rights norms’ in their operations?
- *How* can companies be **made responsible** for HR violations/problems?
- *What* are the most **effective forms of regulations** and under what conditions? State, international, market
- **Conditions and limitations** of human rights regulation of business: Buzzword? Avoidance strategy?
- Can companies **change** their conduct and ‘behavior’?

Outline

1. The context: Globalisation
2. The rise of the global human rights discourse
3. Regulating Corporations – Regulatory Theory
4. Case illustration: The Bhopal Gas Explosion
5. HR/B discourse different from the CSR framework?
6. Social effects of business – an old topic
7. Arguments against and in favour of linking HR/B
8. Limitations and current debates
9. Theories: How explaining the growing interest in B/HR

Literature:

Deva, ch 1, 2 and 5

Ruggie, Introduction

Andreassen and Vinh, Introduction

Kinley

1. The Context: Globalisation

- Globalisation in the 1990s:
 - The growth in the global economy, and expanding interconnectedness in economic, political and cultural terms; reciprocal influences. Changed the social context of human rights
 - At the present, the world economy is “in a fragile state” (UNCTAD, 2016)
 - The growth of protectionism; undermining Bretton Wood institutions?
- The growth of so-called “emerging economies”: BRICS, and in the ‘Global SOUTH’
- The expansion of foreign investment and Trans-National Corporations (TNCs) since the second half of the 1980s

TNC – “enterprise comprising entities in more than one country which operate under a system of decision-making that permits coherent policies and a common strategy”

The entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the others and, in particular, to share knowledge, resources and responsibilities with the others (UNCTAD)

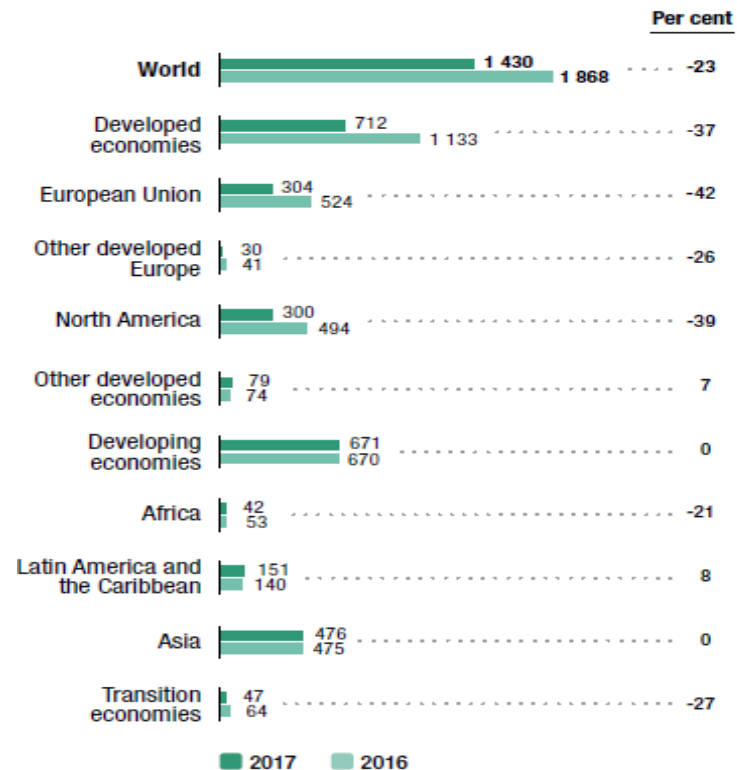
- 1990: 35.000 TNCs with 150.000 affiliates (UNCTAD)
- 2011: 80.000 TNCs, 800.000 subsidiaries (Ruggie).
- 2016: 100.000 TNCs, 860.000 affiliates (World Investment Report, 2017)
- About 1,500 State-owned TNCs (1.5 per cent of all TNCs) with more than 86,000 foreign affiliates

Is the “Global Firm” in retreat? (Unctad)

If so, WHY?

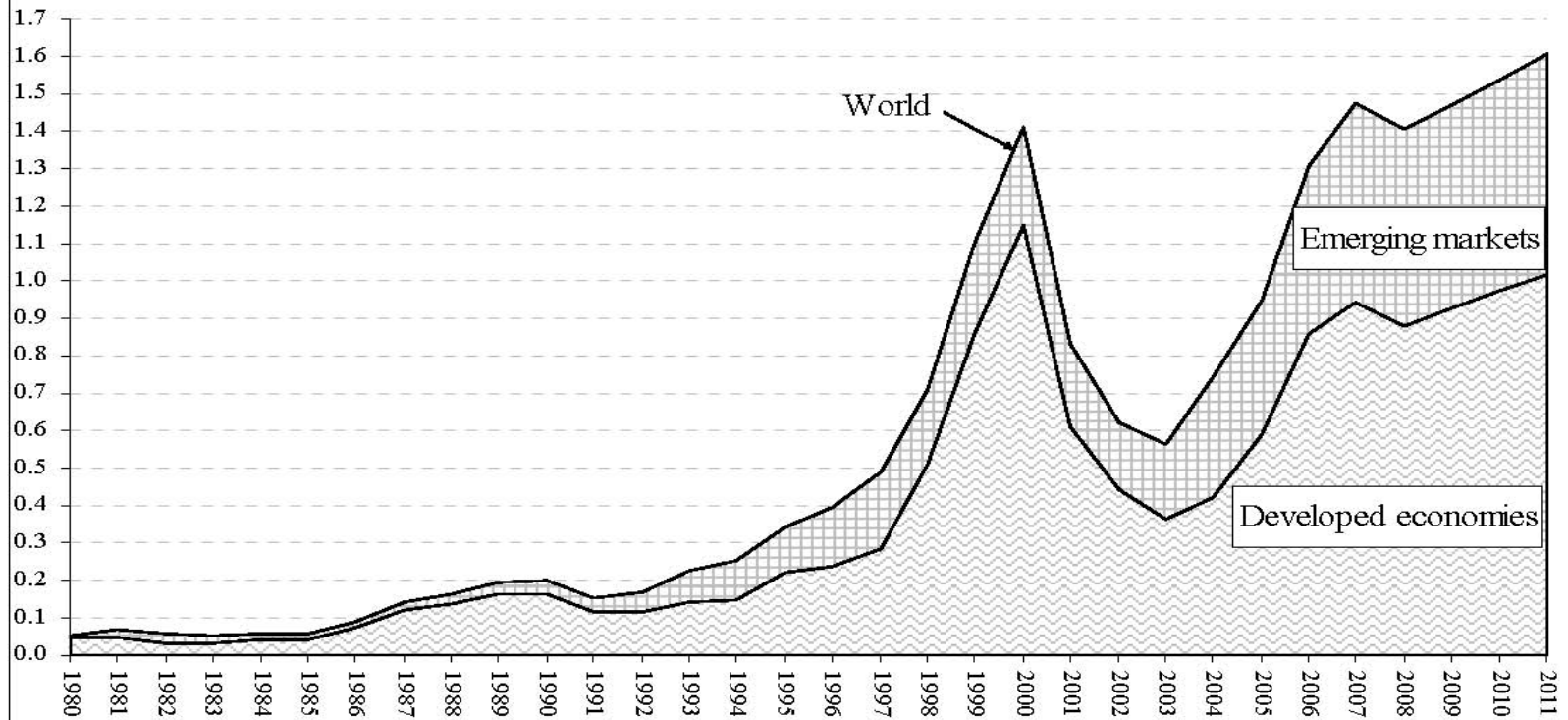


Figure I.2. FDI inflows, by region, 2016–2017
(Billions of dollars and per cent)



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

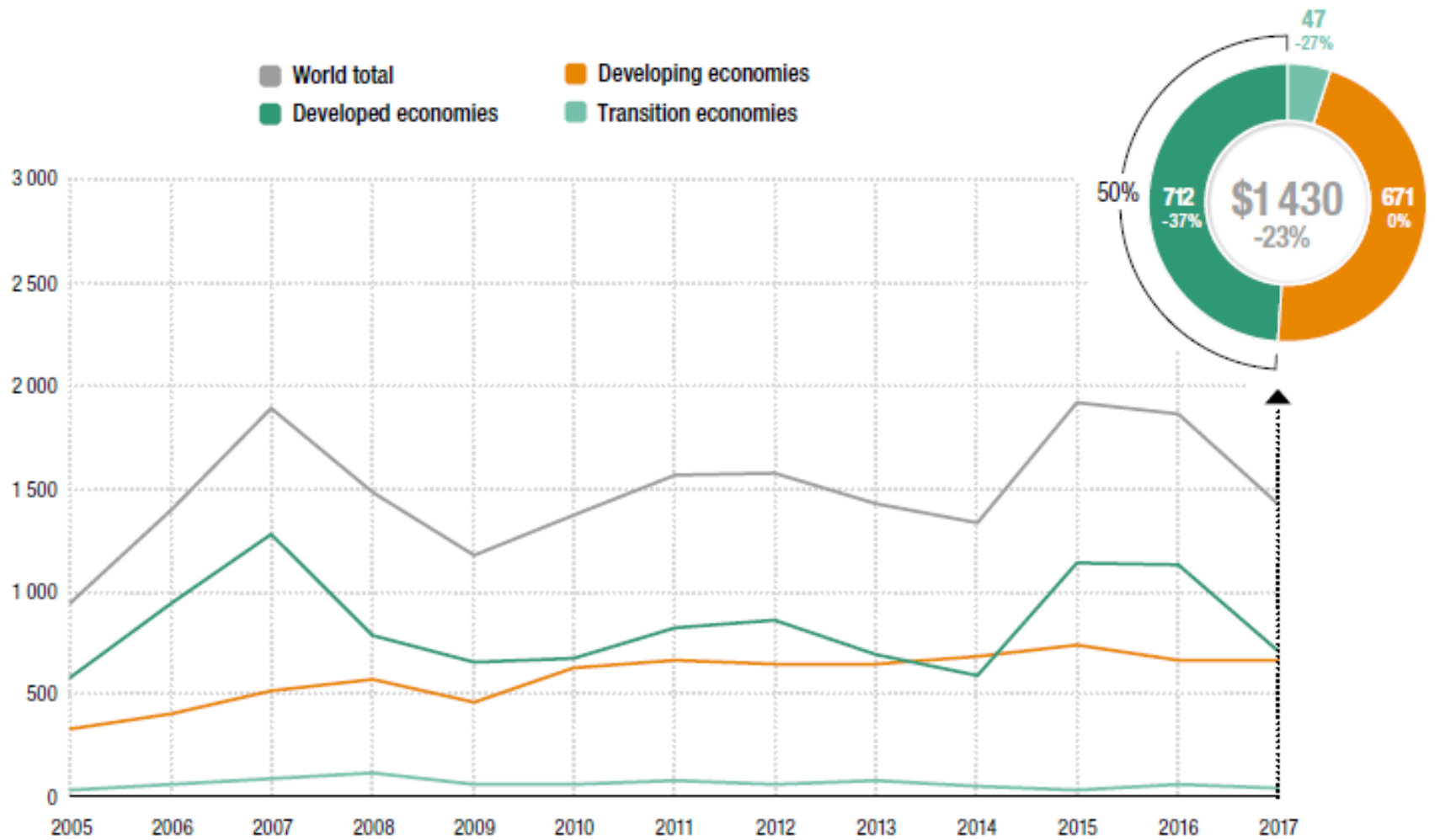
**Figure 1. FDI inflows, global and by group of economies, 1980-2011*
(Trillion US dollars)**



* FDI inflow projections for 2007-2011 are derived from data in World Investment Prospects, whose regional definitions vary slightly from World Investment Report data.

Source: UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New York and Geneva: United Nations, 2007), p. 3, and Laza Kekic and Karl P. Sauvart,

Figure I.1. | FDI inflows, global and by group of economies, 2005–2017 (Billions of dollars and per cent)



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

Foreign direct investment incentives

Typical of emerging economies

- Low corporate (and income) tax rates
- Other types of tax concessions (tax holidays)
- Preferential tariffs
- Export Processing Zones
- Investment financial subsidies
- Free land or land subsidies
- Infrastructure subsidies
- Energy subsidies
- Derogation from regulations (usually for very large projects), labor rights, etc

Regulatory response

- political
- legal (treaty, GCs other)

Political-economic response - international

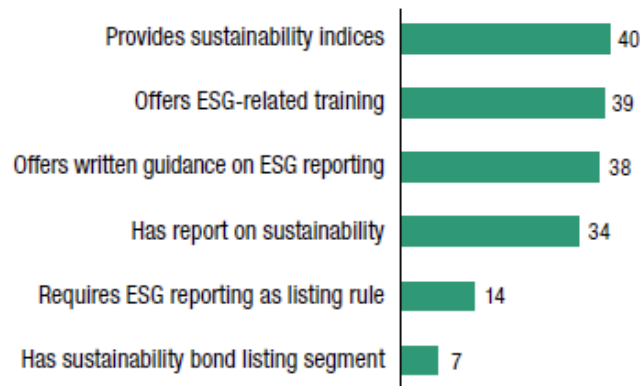
“Capital market policies and instruments designed to promote investment in sustainable business and support the achievement of the SDGs are an increasingly important feature in the investment landscape.

.....

Key actors in promoting new policies, tools and instruments are stock exchanges, institutional investorsand security market regulators. The sustainability practices of stock exchange markets can be a useful benchmark for monitoring innovation in sustainable finance, given stock exchange’s position at the intersection of portfolio investors, listed companies and capital market authorities”

UNCTAD World Investment Report 2018

Figure III.12. Overview of sustainability mechanisms used by stock exchanges (Number of exchanges)



Source: UNCTAD, SSE initiative database.

Political response – national/international

National industrial policies



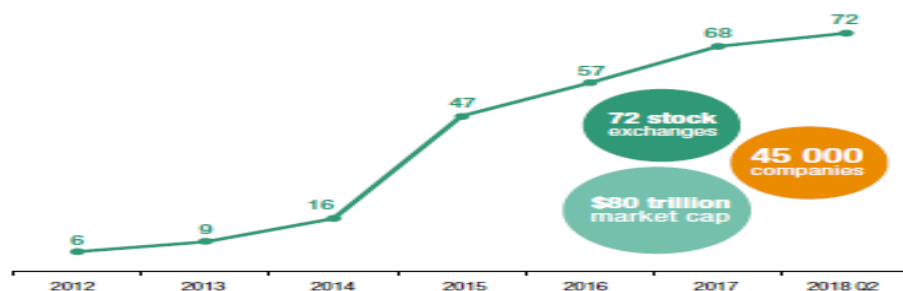
International political economic response

Sustainable Stock Exchange Initiative

“The United Nations Stock Exchange initiative (SSE) which has now grown to include most of the stock exchanges in the world.....provides an indicator of the growing attention that exchanges are giving to sustainability in their markets. Launched in 2009, the SSE is a UN Partnership Program administered by UNCTAD, IN Global Compact, UN Environment and Principles for Responsible Investment. Through the SSE’s multi-stakeholder platform, exchanges engage in consensus- and capacity-building activities with portfolio investors, listed companies, capital market regulators and policymakers”.

UNCTAD World Investment Report 2018

Figure III.13. | SSE initiative members, 2012–2018 Q2 (Number of stock exchanges)

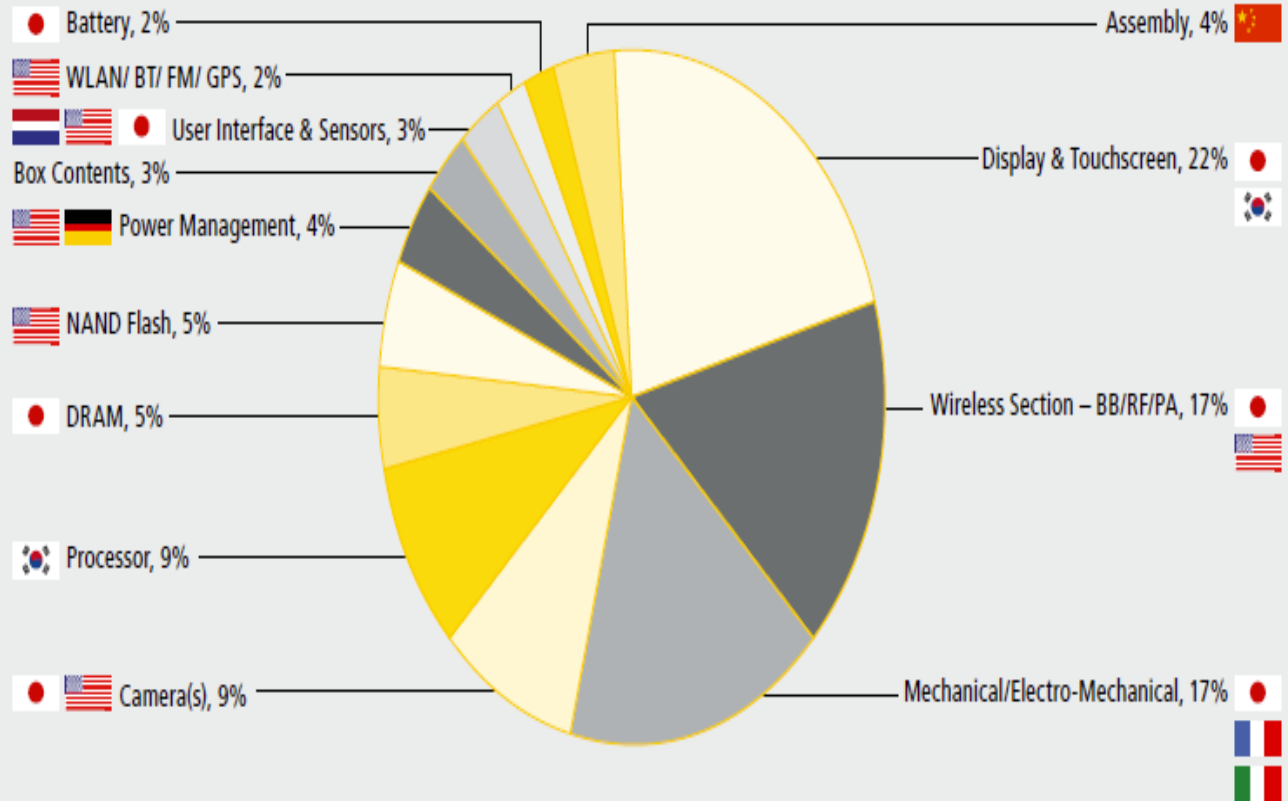


Source: UNCTAD, SSE initiative database.

The complexity of products

Figure 3.10

iPhone 5 Component Costs by Supplier Headquarters Location and China Assembly Cost



While the iPhone 5 is assembled in China, it consists, almost entirely, of components produced by firms headquartered in Korea, the United States, and Japan. Assembly accounts for only 4% of the iPhone's total manufacturing cost. Source: Based on data reported in Andrew Rassweiler, "Many iPhone 5 Components Change, But Most Suppliers Remain the Same, Teardown Reveals," IHS ISuppli Press Release, September 25, 2012.

The complexity of production



Smartphones, coltan,
and human rights?



2. The rise of a global human rights discourse

Simmons (2009:3):

*We find today
“an increasingly dense set of international rules, institutions and expectations regarding the protection of individual rights”
that is more significant than at any point in human history”*

- The growth of the human rights agenda, adoption of human rights instruments
 - took effect in the late 1970s and 1980/90s.
International Human Rights - “globalised”? Part of globalization?
- The whole gamut of human rights:
 - most prevalent: labor, health, free speech, physical security, forced evictions, access to law, indigenous rights, land rights, right to organise, right to information
- Theoretical: *Legal innovation* for social change?

Regulating Corporations

- In the 19th and 20th Century, the state sought to primarily regulate at the domestic level. International regulation: subsidiary and complementary; either *ad hoc* or weak
- Globalisation and the rise of *multinational* corporations has challenged this traditional means of regulation
- AND: international law has largely **facilitated the activities of corporations** rather than seeking to regulate behaviour
- The early 21st Century has seen a step by step shift (e.g. UN Convention against Corruption) and the rise of reflexive regulation (regulation theory)
- Significant debate over its effectiveness

4. BHOPAL GAS DISASTER



EXPLOSION AND IMPACT

The 1984 Bhopal gas disaster

The human cost (estimates)

- ▶ Up to 10,000 deaths in first three days
- ▶ Additional 25,000 people died of related injuries by 1994



- December 2-3, 1984:
 - Union Carbide India Ltd pesticide plant in Bhopal, India leaked over forty tons of the poisonous gas *methyl isocyanate* into the community surrounding the plant
- Officials estimates:
 - 558,125 injuries (2006 figure)
 - Immediate death toll – 2,259, and a total of 3,787 deaths related to the gas release
 - Alternative estimates: 8,000 people died within two weeks, and 8,000 subsequently from exposure
 - 3,900 people permanently disabled

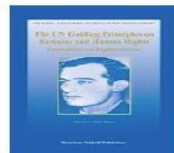
Legal battles

- Facts: Union Carbide India was owned by Union Carbide Corporation (US) with 50,9 % ownership and the Indian Government-controlled banks and other local shareholder owned 49,1% (and exception form the Foreign Exchange act at the time)
- The Government of India took responsibility for litigation against the parent company in the United States in 1986; but jurisdiction was denied (in the US) with reference to the principle of *forum of non conveniens*
- The US Court ruling claimed that the Company should submit itself to the jurisdiction of an Indian court
- In February 1989, the Supreme Court of India approved, controversially, a settlement whereby UCC would pay the victims \$US 470 million in full and final settlement of all civil and criminal claims, in the present and in the future (an out of court settlement)
- The Indian Supreme Court heard appeals against this settlement, but upheld the settlement and dismissed any further petitions
- The Court ordered the Indian government "to purchase a group medical insurance policy to cover 100,000 persons who may later develop symptoms"
- It requested UCC and its subsidiary UCIL "voluntarily" fund a hospital in Bhopal, at an estimated \$17 million

CRIMINAL NEGLIGENCE

- In 1991, the Supreme Court reopened the criminal cases against the UCC, against its Indian counterpart and directors and employees.
- In June 2010 a court in India handed down a verdict in the case. It found Union Carbide India Ltd. and *seven executives of the company guilty of criminal negligence*
- **The company was required to pay a fine of 500,000 rupees (\$10,870) and the individuals were each sentenced to two years in prison and fined 100,000 rupees (\$2175) a piece**
- All released on bail shortly after the verdict

5. HRB DIFFERENT FROM CSR?



5. HRB DIFFERENT FROM CSR?

- *Corporate social responsibility* (CSR) emerged in the 1970s
 - The predominant discourse concerning the non-economic behaviour and effects of corporations
 - Based on principles of charity and benevolence
 - Do additional goods in the community/society
- The *business and human rights* (BHR) discourse has gained prominence only in the last 5-10 years
- What are the differences?

6. Social effects of business – an old topic

- A. Smith: His idea of justice was not just to protect property rights but also a protection of violation of a person's human dignity
- K. Marx: Analyses and politicizes capitalism as an oppressive class system / lack of social justice for the working class
- Social democracy: a social welfare state with extensive regulation

Different conceptions - normative

- David Kinley: *Civilising* Globalisation
- Surya Deva: *Humanizing* business
- John Ruggie: Establishing a *common global platform* of action on which ***cumulative progress*** can be built step by step. *Ethical capitalism* is possible *through regulatory frameworks and incentives*

Danger: CSR represents lip-service strategies to improve TNCs reputation

Arguments against

Corporate-centric arguments:

- Stockholder theory: CEOs are just accountable to shareholders (Milton Friedman) – otherwise perverse effects
- CSR/BHR undermines the free market/capitalism
- Corporations are not meant for, nor suited for assuming social responsibilities

Regulation-centric arguments

- Human rights are formulated in a state-centric system and not suited to private enterprises
- Multinationals do not ratify HR treaties
- Practical/operational challenges: problems of attribution of responsibilities in a production and business chain

The Human Rights Case

Arguments in favor

- Corporation are social organs in society, and human rights obligations are for states and “any other organ” of society (UDHR Preamble)
- TNCs have the power to violate human rights
- Pragmatic argument about impact of TNCs on human rights
- Economic argument about externalities (in causal analysis of human rights violations)

The Business-Case

Arguments in favor

- Builds reputation of business or motivation of employers
- Long-term sustainability ('sustainable company')
- However, note that this discussion concerns the responsibilities to be assumed directly by businesses
- There are a a different set of arguments as to whether states should seek to regulate corporations, territorially and extra-territorially
- These would include economic arguments (e.g. externalities, sustainability) an principled arguments (respect and fulfilment of human rights)

Redefine the notion of a company – sustainable companies?

Arguments in favor

The business case for human rights impact analysis

- Maintaining good company and product reputation
- Effective risk identification and management
- Improvement of stakeholders relations
- Creating a legal and social licence to operate
- Increase motivation and productivity among workers
- Understanding the society in which the company works
- Contribute to a more attractive investment climate
- Contribute to sustainable development

Limitations and current debates

- Legalisation and a new treaty? HR Council Resolution 26/9, 26 June 2014
 - to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises
- The issue of extra territorial rights and protection
- Self-regulation and self-monitoring
- The importance of sector-based initiatives
- Implementation of the UNGP principles – commitments and compliance?
- The role of stakeholders (multi-stakeholder initiatives)

EXPLAINING THE RISING INTEREST IN B/HR

Globalisation from the 1980s as contextual factor:

- Growth in number and impact of TNCs
- The rise of human rights regime – growth in IHRL and norm diffusion

Political-normative explanations:

- The power of norms, and the “norm cascade” of human rights in the 1980s/1990s
- ‘Behavioral’ (market) adaptation
- Secure legitimacy – avoid reputational damage
- The role of ILO, OECD, UN in setting agenda and norm producers: communicative action?

Institutional explanations:

- Institutions – the UN – are areas of competition between norms, interest and ideas. The role of the Sub-commission and the Gen Sec in agenda-setting. ‘Failure’ of Weissbrodt/relative ‘success’ of Ruggie
- human rights norm diffusion in international fora and agendas