2024

Corporations as International Economic Law Actors

Barnali Choudhury

Corporations as International Economic Law Actors

Barnali Choudhury

Note: An edited and peer-reviewed version of this piece is forthcoming in the Encyclopedia of International Economic Law (Edward Elgar, 2024)

Abstract

Actors in international law are presumed to be states. Yet in the international economic law arena, the corporation is one of the most prominent non-state actors. Indeed, in some instances, the corporation may even be more influential than the state in some arenas of international economic law. This short piece examines three instances of this influence. First, it looks at the role of corporations in law-making; second, it examines corporations' role in monitoring and compliance; and, third, it explores corporations' legal personality in international economic law. Finding corporations' immense influence on law-making and monitoring and compliance, combined with a robust legal personality, this piece concludes that not only are corporations actors in international economic law, but they are also part of the framework of global governance in the area.

Corporations as International Economic Law Actors

Actors in international law are presumed to be states. Yet corporations can also be considered international law actors if they 'perform functions in the international arena that have real or potential effects on international law'.[1] Such functions can include law making, whether formally or informally; and monitoring and compliance. It may also involve the entity having rights or obligations, which may entail legal responsibility.

In the international economic law arena, the corporation is one of the most prominent non-state actors. Indeed, in some instances, the corporation may even be more influential than the state in some aspects of international economic law.

Law-Making

Treaties, such as international investment agreements or the WTO agreements, are an important source of international economic law. While these treaties appear, at first glance, to be exclusively a product of state action the role of corporations influencing the process of concluding these treaties should not be underestimated. For example, drafts of impending trade agreements, such as the Trans Pacific Partnership Agreement, have been made available to corporate lobbyists for them to comment on and make suggestions.[2] Companies have also been given private forums to discuss impending trade agreements with state trade officials.[3]

[1]ILA, *Final Report of the Committee on Non-State Actors of the International Law Association* (2016), para. 19 and 20.
[2] Taylor Wofford, 'What Is the Trans-Pacific Partnership and Why Are Critics Upset by It?', *Newsweek* (June 2015).
[3] Eric Crosbie and Stanton A. Glantz, 'Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid' (2012) 23:12 *Tobacco Control* 1.

In some instances, states are effectively adopting and parroting corporate arguments thereby enabling corporations to make international economic law through back channels. The World Trade Organization's (WTO) Technical Barriers to Trade (TBT) Committee meetings has been found to have been a fertile ground for states to openly or implicitly advance corporate arguments that are often contrary to those advocated by the World Health Organization.[4] Studies have also shown that some states have incorporated corporate lobbyists into their trade delegations enabling corporations, via their lobbyists, to directly negotiate against other states in a WTO forum open only to states.[5] While states consulting with corporations on trade and investment treaties helps to democratize international economic law,[6] it also risks obstructing states from promulgating trade treaties designed to promote public – and not private corporate – interests.

In some areas, the role of corporations in law-making is much more direct than simply influencing state actors. Standards in international agreements, for instance, are often expressed in terms of industry practice. This enables obligations in international agreements to be set, not by state, but by corporate standards.[7] Lex mercatoria similarly enables corporations to define the content of contractual provisions in international contracts. One commentator has even argued that corporations are able to create norms of international law through the use of modern internationalized contracts that are operationalized by international investment treaties. [8]

[4] Pepita Barlow, 'Industry influence over global alcohol policies via the World Trade Organization: a qualitative analysis of discussions on alcohol health warning labelling, 2010–19' (2012) 10:3 *The Lancet* E429.
[5] Stephen Tully, *Corporations and International Law Making* (Brill, 2007), 156; ActionAid, 'Under the Influence: Exposing Undue Corporate Influence Over Policy-Making at the World Trade Organization' (2006), 3.
[6] Melissa J. Durkee, 'International Lobbying Law' (2018) 127 Yale L.J. 1742.
[7] Vaughan Lowe, 'Corporations as International Actors and International Law Makers' (2004) 14(1) *The Italian Yearbook of International Law Online* 23, 25.
[8] Julian Arato, 'Corporations as Lawmakers' (2015) 56 Harv. Int'l L.J. 229, 231-3.

Monitoring and Compliance

As with law making, states have an important role in monitoring and compliance of international economic law. Corporations, however, also have a role here which, in some cases, is arguably larger than the role of states, particularly in relation to the use of dispute settlement.

For the most part, states are the primary drivers of the monitoring and compliance of WTO Agreements. Nevertheless, corporations can prompt their home states into bringing monitoring or compliance procedures under the WTO. The *Japan - Measures Affecting Consumer Photographic Film and Paper* dispute was a dispute, in reality, between American corporation, Kodak, and Japanese corporation, Fuji.[9] In the US, corporate promptings of the government to ensure that other governments adhere to their WTO obligations has become so commonplace that commentators have labelled US corporations as proxy plaintiffs in WTO litigation.[10]

Under IIAs, it is even more common for a corporation, or foreign investor, to ensure enforcement of the agreement. This is because IIAs often enable foreign investors and corporations to directly initiate an investment arbitration against the state.[11] Because of this mechanism, corporations or foreign investors can directly maneuver a state to act in accordance with its international law obligations under the IIA. In so doing they can also advance interpretations of IIAs that are at odds with the intentions or the expectations of either the state or the treaty itself.[12]

[9] *Japan - Measures Affecting Consumer Photographic Film and Paper*, Panel Report, WTO DSB, WT/DS44/5 (23 April 1998).
[10] Jeheung Ryu and Randall W. Stone, 'Plaintiffs by proxy: A firm-level approach to WTO dispute resolution' (2018) 13 *The Review of International Organizations* 273.
[11] Lowe, supra n 7, at 23-24; Jose Alvarez, 'Are Corporations Subjects of International Law?' (2011) 9 Santa Clara J. Int'l L. 1, 5.
[12] Ladan Mehranvar and Lise Johnson, 'Missing Masters: Causes, Consequences and Corrections for States' Disengagement from the Investment Treaty System' (2022) 13:2 J. of Int'l. Dispute Settlement 264.

Indeed, foreign investors or corporations are more likely than a state to monitor and ensure a state's compliance with their IIA obligations.

Corporations and foreign investors, however, do not need to actually initiate an action against a state to ensure the state complies with its IIA obligations. Rather, the threat of an investment arbitration against a state can often also work to ensure a state complies with its IIA obligations, even if in doing so it negates other obligations under international law.[13] It can also use investment arbitration strategically 'to delay or discourage regulation either in the defendant state or in a third state' or 'to prompt undisclosed settlements from the state'.[14]

Legal Personality

International law actors further possess substantive rights and duties which, in some instances, can result in legal responsibility. This tracks closely with the idea of legal personality; that is, that an actor is a legal person under the law.

In applying these factors to corporations in international economic law, it is easy to see that in terms of rights, corporations enjoy a bounty of these. Many of these rights are found in IIAs and can include such rights as the right to national treatment, the right to most-favoured nation treatment, the right to fair and equitable treatment, the right to enjoy property free from expropriation, and the right to directly initiate investment arbitration in cases of state interference with their property, among others. Corporations do not enjoy similar rights under WTO law

[13] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) *Transnational Environmental Law* 229.
[14] Barnali Choudhury, 'Investor Obligations for Human Rights' (2020), 35 (1-2) ICSID Rev.- Foreign Investment L. J. 82.

although they may enjoy the benefits of any reductions to trade barriers that their home state is able to obtain either through negotiations, dispute settlement, or other WTO mechanisms.

Conversely, duties for corporations under international economic law are more difficult to find. Again, under WTO law, corporations do not bear direct duties as these agreements are directed at states not companies. IIAs are also not directed at companies but given the bounty of rights these agreements offer to corporations, it is somewhat surprising that the agreements do not prescribe corresponding duties.

In fact, IIAs are notoriously silent in prescribing duties for corporations or foreign investors. That being said, IIA tribunals have found that corporations or foreign investors are required to comply with host state laws, establish investments in good faith and not illegally, refrain from engaging in fraud, and to engage in due diligence before establishing the investment. Some IIAs also prescribe specific duties on corporations or foreign investors such as refraining from engaging in corruption, respecting human rights, or engaging in environmental impact assessments, among others.[15]

IIAs also confirm that corporations have international legal personality, in limited circumstances, since they can enforce their rights under IIAs by initiating investment arbitrations. Yet IIAs are less likely to prescribe legal responsibility for corporations if they fail to meet their (limited) duties under IIAs. While some IIA tribunals have refused to allow corporations to continue an investment arbitration because of a failure to meet an IIA duty and others have reduced the award a corporation or foreign investor might otherwise be entitled to because of a breach of a duty, in general, IIAs do not make provision for establishing legal responsibility for corporations

[15] Ibid.

or foreign investors. As a result, most companies and foreign investors do not face legal responsibility even if they breach an IIA duty, save for the few cases in which a state has brought a successful counterclaim against the company.[16]

Understanding the Role of Corporations in International Economic Law

From this very brief discussion, it appears that at least in some circumstances corporations are actors under international economic law. In light of this recognition, the debate as to whether corporations should be considered subjects or objects under international law is not entirely helpful.[17] Rather the focus of the discussion should centre on what the repercussions on international economic law are when corporations possess legal personality.

For instance, when corporations act as law-makers, the result may be to pervert the public nature of international economic law into an area of law that privileges private interests. Negotiating a trade treaty which either parrots corporate rhetoric or incorporates corporate players on the negotiating team risks introducing a bias in favour of corporate interests into trade rules which are designed to be fair and neutral. More worryingly, including corporations as part of the process in drafting an international economic law treaty risks the possibility of state or public interest issues being negated, watered-down or ignored entirely. In addition, if corporations are given the impetus to create norms of international law, the norms they create – for instance through the use of internationalized contracts – can be used against a state, even when that involves the public interest.[18] Consequently, as a law-maker, corporations can be working – directly or

[16] Ibid.
[17] Lowe, supra n 7, at 26; Alvarez, supra n 11.
[18] Arato, supra n 8.

indirectly – to diminish the public interest. This can have large scale repercussions on important areas such as human rights and climate change, among others, but it also creates a venue for corporations to transform the governance of the state, without being part of the democratic process.

Similarly, when they become a powerful driver of WTO litigation or are entrusted with their own enforcement of IIAs, corporations can use monitoring or compliance not to ensure that the goals of global governance are achieved, but rather for private aims. Corporations can thus use litigation strategically, not to enhance the mutual respect of trade or investment obligations between states (as states would if they were the drivers of monitoring or compliance) but to enhance their own financial pockets. As with corporations engaging in law-making, corporations usurping the power of monitoring and compliance away from states can also contribute to the diminishment of the public interest. One of the best examples of this is the Philip Morris investment arbitrations against Uruguay and Australia, in which the corporation used investment arbitration strategically (by even transforming its nationality to take advantage of a more favourable investment treaty) for the sole purpose of challenging tobacco packaging-related health regulations that even the World Health Organization supported.[19]

Given their law-making and monitoring and compliance abilities, corporations appear to not only be an actor in international economic law, but also part of the framework of global governance in the area. International economic law, and its processes, have entrusted corporations with considerable power in some areas and have also legitimatized this power. Endowed with this source of legitimized power which stands in opposition to the public interests of states, corporations should be required, at the very least, not to diminish issues of a public interest. This

[19] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

could be done by prescribing duties for corporations in international economic law that are designed to protect the public interest or by removing the overreach of corporations into public interest issues. To some extent, efforts are being made in this area in the ongoing treaty negotiations of the Business and Human Rights treaty at the global level or through the EU's proposed Due Diligence Directive at the regional level. Both instruments are designed to constrain the reach of corporations as they participate in transnational activities facilitated by international economic law. For it is only by protecting the public interest from the reach of corporations, that international economic law has any hope of countering the increasing power of corporations as international economic law actors.