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## Governing Global Capitalism: A Lawyer's Perspective

In April 1959, editor-in-chief of *Time* magazine, Henry Luce, spoke vehemently to the World Congress of the International Chamber of Commerce, encouraging business leaders “to unite [their] energies on something which is really fundamental—fundamental to civilization and economic progress. That something is the advancement of the rule of law.” Together with lawyers, business leaders had “the responsibility to see that the rule of law prevails in every corner of the business world.” Luce insisted that international trade needs “legal certainty” and business leaders would do better by focusing less on “certain rules and regulations” and more on “basic and universal rules under which all business could prosper.”<sup>39</sup> One of the proposals he asked the audience to endorse was German banker and politician Hermann Abs’s Magna Carta (a formative proposal to enact what is known today as investor-state dispute settlement, or ISDS).

In this speech Luce articulated central intuitions about the relationship between business, history, and law. First, he distinguished market competition from the world-making project of business leaders. Businesspeople have long been interested in shaping the law; regulations are a source of commercial advantage—or barriers to market entry for competitors. But business associations have also worked hard to shape the world order to increase profits and consolidate political influence. Luce’s 1959 appeal for business leaders to unite against development policy and support Abs’s Magna Carta was motivated by his concerns about New Deal Liberalism and its projection onto the world. The US government resisted Abs’s Magna Carta despite pressures from the US Council of the International Chamber of Commerce (ICC) and the American Bar Association.<sup>40</sup> As Luce noted in his speech, the tension herein was not about “certain rules or regulations;” it was about the underlying

<sup>39</sup> Henry Luce, “Peace through Law,” speech before the International Chamber of Commerce, 1959 Washington Congress, in “Society to Advance the Protection of Foreign Investments, Convention on Investments Abroad with Comments, Speeches and New Literature,” Publication No. 3 (Bergisch Gladbach, 1960): 36–40, 36, 39.

<sup>40</sup> See Kenneth J. Vandeveld, *The First Bilateral Investment Treaties U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford, 2017), 1–5.

principles, the grammar, or, as I prefer to call it, the legal imagination.<sup>41</sup> This imagination reflects a certain order of the world, and business leaders—particularly transnational capitalists—want to have a loud voice about order.<sup>42</sup>

Second, Luce saw lawyers as fundamental. They not only help to advance specific objectives in administrative or legal proceedings but also assist businesses in defining the underlying rules of the game. The centrality of lawyers lies in their skills to determine the vocabulary of world making, its meta-language, specifying notions such as property, contracts, states, sovereignty, investment, trade, rights, obligations, corporations, treaties, and how they relate to each other. There are various strategies in this regard. One that repeats itself in international law is the claim that the law should move toward the standards of civilization; that is the prevailing forms of governance and economic development in the Global North. These “universal rules” are represented as objective and desirable. Behind these arguments, however, there is always an individual or group project that asserts itself against competing visions. In fact, business leaders and lawyers normally engage in intense work and networking about the grammar of world order when events seem capable of steering the law away from its “universal” path. For instance, ISDS was imagined as a means to maintain control over natural resources in a world dominated by decolonization and the Cold War.<sup>43</sup>

History is central to understanding the multilevel strategies employed by business leaders and their lawyers. Past battles over specific standards and the grammar of world order produced current international law. “Over time, victories and defeats on the terrain of law add up, reproducing patterns of empowerment and disempowerment.”<sup>44</sup> As Orford explains, “law is already shot through with history, that history is already shot through with law, that the two are intimately related.”<sup>45</sup> Or, to put it differently, present law can only be understood as a historical artifact in which present, past, and future are intertwined in the analysis as much as the arguments to shape the future. Lawyers cannot talk meaningfully about the law without having this struggle in mind, consciously or unconsciously.

The way lawyers work with the law partly explains why historians often see lawyers as having a “presentist” tendency. From a lawyer’s

<sup>41</sup> Nicholas Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (Oxford, 2021), 51.

<sup>42</sup> See Leslie Sklair, *The Transnational Capitalist Class* (Oxford, 2000).

<sup>43</sup> Perrone, *Investment Treaties*, 51.

<sup>44</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, 2016), 61.

<sup>45</sup> Anne Orford, *International Law and the Politics of History* (Cambridge, 2021), 10.

perspective, however, this is not a methodological flaw.<sup>46</sup> Even legal academics, who may have never practiced law, cannot escape the fact that the meaning they produce in their articles or books is inevitably related to ongoing battles concerning “certain” or “universal” rules. Irrespective of whether historians can resist this presentism, a question I prefer to leave to historians, I suspect we are all inevitably caught in these battles if we choose to look at the law as lawyers do.

The work of business historians can be crucial for a legal way of thinking about economic global governance. For decades, international lawyers have mainly focused on the history of law’s struggle from the perspective of professors, intellectuals, and diplomats, paying limited or no attention to business leaders and their lawyers. The history that has attracted the attention of most law academics are stories of people who were closely related to ideas in one way or another. Of course, ideas matter. However, we should not overlook the project of business leaders such as Luce or Abs.<sup>47</sup> These individuals and their lawyers borrow ideas from intellectuals, but their work is more about practice and outcomes. Lawyers and law firms gain a reputation and earn higher fees when they show results. On this side of history, law firms, general counsels, and legal advisers appear more prominently than law professors and intellectuals. The ISDS story illustrates this well.<sup>48</sup> Many of the business leaders and lawyers that promoted this project in the 1950s and 1960s worked for or were involved with oil firms. In this capacity, they hired prominent international law professors as consultants; for instance, Hartley Shawcross and John Blair, Royal Dutch Shell’s employees, hired famous English professors Elihu Lauterpacht and Robert Jennings to advise on questions of arbitration and state contracts in international law.

Focusing on these projects from the perspective of business can be productive in numerous ways. No doubt, states remain the masters of international law; they sign treaties and are protagonists of most international disputes. Scholars of international law rightfully tend to concentrate on the actions of diplomats and international bureaucrats because they speak for states. At the same time, this way of looking at international law partly distorts our understanding of international law making and runs the risk of overstating the influence of the state, including the impact of interstate tensions (for instance, North and South tensions). Historians have shown that states have often acted in

<sup>46</sup> Orford, *International Law and the Politics of History*, 285, 287, 314–317.

<sup>47</sup> Following the actors and their networks offers a relatively unexplored line of research. Philip Scranton and Patrick Fridenson, *Reimagining Business History* (Baltimore, 2013), 177, 201.

<sup>48</sup> See Perrone, *Investment Treaties*, Chapter 2.

international law representing the interests of their business and commercial interests. Beckert notes that “cotton industrialization was thus not only a project of capitalists, as we know, but equally a project of governments.”<sup>49</sup>

The point is not only that business projects can help us to explain law and policymaking but also that business leaders and their lawyers may promote their interests through means other than influencing states or international organizations. When discussing his vision for international investment after the nationalizations in Egypt and Indonesia, Abs insisted that foreign investors must not overlook local business elites but work with them. David Rockefeller similarly concentrated on the multiple business opportunities that foreign investment could create for local businesses in Latin America.<sup>50</sup> According to business scholars, it is the job of corporate advisers and lawyers to locate actors with similar interests, including and especially in the South.<sup>51</sup> Distribution is always a question for commercial partners, but ultimately leaders like Luce and Abs wanted to do business with people who shared their world-making project.<sup>52</sup>

When trying to understand why some conceptions of rights or duties prevail in the struggle for law, I suspect these transnational alliances have been of utmost importance, bringing together actors from the South and the North in still unexplored ways. The operation of ISDS suggests how this may work in practice. Analyzing the impact of ISDS on regulatory action, Broad and Cavanaugh have found that states tend to minimize or disregard the risk of ISDS litigation when local elites have no or limited interests in the extractive sector.<sup>53</sup> This attitude favors regulation that benefits the environment or communities. On the other hand, when local elites care about extraction, the risk of ISDS may be taken more seriously and chill regulation. Extrapolating these dynamics reveals that the same local elites that supported extractivism may have seen in ISDS a policy favorable to their own goals as well as an obstacle for competing nationalist elites or Indigenous peoples.

The long relationship between business, law, and history provides insights into how we govern capital today, the history of “victories and

<sup>49</sup> Sven Beckert, *Empire of Cotton: A Global History* (New York, 2015), 164.

<sup>50</sup> David Rockefeller, “What Private Enterprise Means to Latin America,” *Foreign Affairs* 44, no. 3 (1966): 403–416.

<sup>51</sup> Martin Heidenreich, “The Social Embeddedness of Multinational Companies: A Literature Review,” *Socio-Economic Review* 10, no. 3 (2012): 549–579.

<sup>52</sup> Quinn Slobodian highlights the importance of this project for business associations and neoliberal intellectuals. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA, 2016).

<sup>53</sup> Robin Broad and John Cavanaugh, “Poorer Countries and the Environment: Friends or Foes?” *World Development* 72, issue C (2015): 419–431.

defeats,” and the future of global regulation. Take the case of business and human rights. Since World War II, business associations, multinational corporations (MNCs), and their lawyers have defended a relatively consistent view of international rights and obligations that reflects a vision of world order. This consists of strong rights, which firms can enforce internationally or transnationally through arbitration or strategic jurisdictions, and the impossibility of having international corporate obligations. For business associations, the last backstop was and continues to be that MNCs cannot be sites of international or global regulation. While investment treaties and ISDS have received some attention from lawyers and historians alike, examining closely the position of business during the post-War World II formative years shows that most business actors were concerned about international state rights (and correlative corporate obligations), like those established in the charter of the International Trade Organization (ITO). Oil and other natural resource MNCs were interested in ISDS, but the ICC closed ranks against international state rights (and corporate obligations).<sup>54</sup> As Philip Cortney put it, the ITO Charter “would actually block future ICC efforts.”<sup>55</sup>

These efforts were related to making a world where MNCs could take advantage of the “governance gaps” between national regulations. After the demise of the ITO Charter, business leaders and their lawyers continued to strongly resist international corporate obligations. In the late 1960s and early 1970s, the voices representing MNCs as sites of regulation—as actors that should be regulated through interstate coordination—gained significant momentum in the North and the South, including from influential academics and trade unions.<sup>56</sup> Business associations, notably the ICC, took the issue seriously and deliberated on how to change this perception and counterbalance the demands of the Global South and trade unions in Europe and the United States.

The discussion found the ICC divided into two camps: those who thought nothing should be done—that MNCs should be treated as any other corporation—and those who proposed an alternative grammar for business obligations to respond to the regulatory efforts. This was

<sup>54</sup> The ICC would have been satisfied had the Havana Conference adopted no further provisions in addition to those quoted above. It was Article 12 that gave rise to the ICC’s major apprehensions and criticisms. ICC, “Fair Treatment for Foreign Investments: International Code,” Brochure 129, August 1949, 18.

<sup>55</sup> Cited in George L. Ridgeway, *Merchants of Peace: The History of the International Chamber of Commerce* (Boston, 1959), 194.

<sup>56</sup> Paul M. Goldberg and Charles P. Kindleberger, “Toward a GATT for Investment: A Proposal for Supervision of the International Corporation,” *Law and Policy in International Business* 2 (1970): 295; Francesco Petrini, “Capital Hits the Road: Regulating Multinational Corporations during the Long 1970s,” in *Contesting Deregulation: Debates, Practices and Developments in the West Since the 1970s*, ed. Knud Andresen and Stefan Müller (New York, 2017), 185–198.

the language of guidelines and voluntary standards. In the late 1960s, this solution was proposed by intellectuals like the Atlantic Council's Director Sidney Rolfe, and by business leaders such as Shinzo Ohya and Pieter Kuin, and was executed by Shell's John Blair, who led the ICC working group that drafted its 1972 Guidelines for International Investment.<sup>57</sup> Business leaders used these guidelines to resist regulatory attempts at the United Nations and as a means to occupy the agenda at the Organisation for Economic Co-operation and Development (OECD). The 1976 OECD Guidelines on MNCs represents a significant victory for the ICC and the Business and Industry Advisory Committee to the OECD.

Despite the resistance of trade unions and the Global South, this vision of international corporate "obligations" occupied the space of global capital governance in the 1980s and 1990s. This grammar has remained dominant, reproduced and consolidated by the 2000 UN Global Compact, the 2006 demise of the UN Norms, the 2011 UN Guiding Principles on Business and Human Rights, and the ongoing resistance to a legally binding instrument to regulate the activities of MNCs. The ICC and some important MNCs, such as Royal Dutch Shell, participated in each of these battles to define the rules of economic globalization, promoting corporate social responsibility (CSR) as a response to the 1999 Battle of Seattle, the discontent with globalization, or as a more economically efficient alternative to international binding obligations.

For lawyers, this history of victories and defeats is highly relevant to the present struggle for law. Scholars often talk about business and human rights in terms of "governance gaps" resulting from globalization complexities,<sup>58</sup> yet the history of these legal struggles suggests that these "gaps" were carefully crafted by business leaders and lawyers. They played with legal concepts and language to produce nonbinding obligations and self-regulation. There were numerous calls to create international mechanisms to focus on MNCs as sites of global regulation. What prevailed instead is a grammar of investor rights, ISDS, investment facilitation, CSR, and business and human rights—a grammar, it is worth noting, that has created multiple business opportunities for local elites dedicated to what Surya Deva calls the "business" of business and human rights.<sup>59</sup>

Working hand in hand, lawyers and business historians can shed more light on the struggles over the grammar of global governance, the tactical

<sup>57</sup> Nicolás M. Perrone, "Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment," *Business and Human Rights Journal* 7 (2022): 375–396.

<sup>58</sup> See, e.g., John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York, 2013), 78.

<sup>59</sup> Surya Deva, "From Business or Human Rights to Business and Human Rights: What's Next?" in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Cheltenham, UK, 2020), 1, 5–6.

moves, strategies, networks, and multiple tools through which business associations, MNCs, and law firms created the international legal frameworks in which today's companies operate. The goal, I believe, is not only to identify proposals, competing alternatives, contingencies, and critical junctures but also consider how business leaders and associations, such as Luce, Abs, and the ICC, helped create the conditions in which the dominant legal imagination could thrive and remain at the core of most present policy discussions concerning the global economy.<sup>60</sup> The past and the present appear inherently intertwined here, at least to those progressive lawyers who continue believing that a more sustainable and inclusive future is possible.

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## Neil Rollings

# Business and Global Capitalism: Continuities and Change

**I**t is common for historians to focus their attention on turning points in the past. The risk with this is that it overstates how dramatic change

<sup>60</sup> "Instrumental and structural power undoubtedly play a role; however, [d]iscursive power, and the legitimacy to which it potentially gives rise, is the political 'prize' global corporations seek because it facilitates the creation of a world in the image of their interests." John Mikler, *The Political Power of Global Corporations* (Cambridge, MA, 2018), 49.