

EU-CHINA

LEGAL EXCHANGES AND ATTAINMENTS

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中欧法律和司法合作项目学术论文精选

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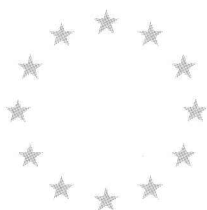
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Legal and Judicial Co-operation Programme
中国-欧盟法律和司法合作项目



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LEGAL EXCHANGES AND ATTAINMENTS

Selected Dissertations From EU-China Legal
and Judicial Co-operation Programme

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For their hard work that has made this book published in such a short period of time, I would like to acknowledge Ms. Yang Ke, director of the Legal Application Division, Law Press, China, and Ms. Rachel Song, editor of the Legal Application Division, Law Press China.

Last but not the least, we cannot fully express our gratitude to H. E. Mr. Wu Dawei, Vice Minister for Foreign Affairs, P. R. C. and H. E. Mr. Serge Abou, Head of the European Union Delegation to China and Mongolia, for taking the time to write the prefaces despite a busy schedule. Their words are encouraging and inspiring to the authors, and also highlight the attainments and significance of the legal exchange between China and the EU.

Guo Yang
19 May 2005

Preface

The year 2005 marks the 30th anniversary of the establishment of diplomatic relations between China and the EU. Thanks to the efforts on both sides during all those years, the EU has become the biggest trading partner of China and China the second biggest trading partner of the EU. In the meantime, friendly and cooperative relations between China and the EU moved forward rapidly in all fields. In 1998, China and the EU launched their annual summit mechanism. In 2001, the two sides established a full partnership. China and the EU have developed an ever closer consultation and fruitful cooperation in the political, economic, trade, scientific, cultural and educational fields. China-EU relations is better than ever.

As an important part of China-EU relations, the two sides launched the China-EU Legal and Judicial Cooperation Programme in 2000, which is the largest legal cooperation project in China. Under this Programme, many Chinese judges, public prosecutors and lawyers have been funded up to visit and study in several European legal institutions and law schools. All these activities are aimed at contributing to the development of the rule of law and providing a platform for Chinese and European legal professionals to exchange views, to share experiences and to learn from each other. Just as Chinese proverb says, “There are other hills whose stones may serve to polish the jade”. China is devoting itself to build a socialist country under the rule of law, a grand undertaking entails not only to root ourselves in Chinese national circumstances and to study and inherit Chinese cultural and tradition but also to pay attention to and draw on useful experience and approaches. Thus, the exchange activities under this Programme are particularly important to China for its ambitious reform and positive participation in the globe affairs.

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Meanwhile, the European side also benefits through the exchanges under this Programme, which has contributed to the dialogue between the two ancient civilizations and enhanced mutual understanding, trust and consensus between the two sides.

This collection of essays integrates thoughts and views of thirteen Chinese young lawyers who have spent nine months in Europe for visits and study under this Programme. It covers thoughts on the operation of companies under a market-oriented system, reflections on perfection of judicial system and probing into the protection of human rights during the administrative or criminal judicial proceedings. They are not only personal achievements of the authors but also represent the accomplishments of the legal exchange and cooperation between China and the EU. The conclusions or views in these essays may be far from perfection but the authors shall be, anyhow, recognized and praised for their patriotism in the desire to contribute to the building of legal system of their motherland and their persistence for truth.

I am delighted to write this preface on the occasion of the 30th anniversary of the establishment of diplomatic relations between China and EC(EU).

H. E. Mr. Wu Dawei
Vice Minister for Foreign Affairs, P. R. C.

Preface

Each year since 2000, the European Commission sponsors a group of highly capable young Chinese lawyers to spend nine months or more in Europe. They attend a tailor-made course, designed by the EU-China Legal and Judicial Co-operation Programme, to examine how our legal systems and laws work in practice.

Although they study at a series of select European universities, the course has a practical rather than purely academic focus. Participants visit our legal institutions, from the European Court of Justice to local prisons; they undertake an attachment at a European law firm; and they are provided with a forum to exchange ideas with their European counterparts.

This collection of essays is a fruit of those visits. It is the third in a series of books written by participants of the programme. The authors aim to pass on the benefits of their time in Europe to other Chinese legal professionals, and in so doing, synthesise their experience and share their perceptions concerning the relevance of European experience to China's legal development process.

The authors are also contributing to a better mutual understanding, between Europe and China, of our respective legal systems and norms. A common comprehension of law facilitates other areas of our bilateral relationship, such as trade, political dialogue, and our mutual interest in ensuring adherence to international conventions and treaties.

The essays in this book concern a wide variety of legal concerns, from commercial

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trade to human rights. Reflecting the course they undertook in Europe, their concerns are with the practical application of the law. And underpinning their work is an appreciation of the benefits of a society based on the rule of law. I commend the authors and wish the book every success.

A handwritten signature in black ink, featuring a large, stylized loop at the top and a horizontal line extending to the right.

Head of the European Union Delegation to China and Mongolia

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The Way to Humanity: Arguments for Establishing International Legal Framework of Corporations' Human Rights Responsibilities

——Jiang Ligang*

Abstract

Other than economic power, which is obvious, the social power of TNCs too is enormous and global but is far less obvious. ... the social power of TNCs is still minimally regulated. ... companies themselves have shown a distinct preference for voluntary standards, ... But ... voluntary codes alone are ineffective ... all the voluntary initiatives have significant limitations ... taking the examples of OECD Guidelines, ILO Declaration and UN Global Compact ... what on earth are the advantages of mandatory rules? ... The approval of the UN Norms represent a landmark step in holding businesses accountable. ... there is no legal barrier for international law to bind corporations ... at domestic law level ... difficulties with doctrine of forum non conveniens ... difficulties with doctrine of separate legal entities ... and issue of extraterritorial jurisdiction ... give no help in holding TNCs accountable for human rights abuses in developing

* LLB, East China University of Politics and Law, PR China; LLM, Waikato University, New Zealand, Years 5 Lawyer's Competent, EU-China Legal and Judicial Cooperation Programme. The author wishes to thank the EU-China Legal and Judicial Co-operation Programme for which this essay was prepared. Thanks are also given to the editors for their hard works. All kinds of discussion on the topic of CSR or corporate citizenship is welcomed by the author. Communications can be made via email: jiangligang@hotmail.com.

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countries. . . . China ,as a main destination of foreign direct investment and a new economic and political power in the world , should . . . takes the opportunity of UN Norms . . .

Structure

- I . Introduction
- II . The Necessity to Impose Mandatory Legal Obligations on Corporations
- III . The Legal Issues in Holding Tncs Accountable
- IV . What Should be the Next Move of China
- V . Conclusion

I . Introduction

That the world's largest transnational corporations^①(TNCs) are more powerful and influential than many states had been a cliché since the 1960s. As a result of this, more and more TNCs are out of the control of any state and become stateless.^② Under the democratic theory of balanced power, where there is a power, there must be responsibilities, and the power must under scrutiny in order to prevent human rights abuses. Therefore, there has long been a voice to regulate corporations in respect of human rights, as professor Vagts pointed out in 1970: "If the [multinational enterprise] poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the people affected by it."^③

Other than economic power, which is obvious, the social power of TNCs too is enormous and global but is far less obvious. TNCs have the ability significantly to

① It is not the task of the article to explore the concept of transnational corporations. The term of transnational corporation was employed by the UN Economic and Social Council. A simple definition is that it is an enterprise which owns or controls production or service facilities outside the country in which it is based, while there is no generally accepted concept for such entities.

② Kamminga, M. T "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC", Philip Alston (ed) *The EU and Human Rights* (1999), p. 553.

③ Vagts, D. F "The Multinational Enterprise: A New Challenge for Transnational Law" (1970) 83 Harv. L Rev. p. 791.

affect the level of enjoyment of human rights. Although TNCs economic activities do have some positive effect, such as promoting the rights to work and adequating living standards and such derivative rights as health, education, housing, and even political freedoms,^④ on human rights protection and promotion, it is certain that human rights abuses by TNCs do occur, and do so frequently in the sphere of economic, social, and cultural rights.^⑤ The point is after professor Vagts made his statement quoted above thirty years ago, the social power of TNCs is still minimally regulated. The temptation to boost profits by conspiring human rights abuses with the host state may therefore prove irresistible.^⑥

In response for the debate of obligations of TNCs, governments and companies themselves have shown a distinct preference for voluntary standards and self-regulation. The Universal Declaration of Human Rights (UDHR)^⑦ is treated as a reference for inspiration and guidance rather than the source of legal obligations. And sadly the strategies of liberalization of the international institutions have exacerbated human rights abuses by TNCs.^⑧ Efforts have focused on encouraging companies to commit themselves to voluntary principles, and on finding means to ensure that these commitments are fulfilled.^⑨ These voluntary standards include the United Nations Global Compact,^⑩ Organization of Economic Cooperation and Development's (OECD) The OECD's 1976 Guidelines for Multinational Enterprises (as revised in 2000),^⑪ the International Labor Organization's (ILO)

④ Supra n2, p. 554.

⑤ See Business and Human Rights Resource Centre website at < <http://www.business-humanrights.org> > for updated allegations of violation of human rights by corporations.

⑥ Schachter, O "The Decline of the Nation-State and its Implications for International Law" (1997) 36 Colum. J Trans. L 8~12.

⑦ Universal Declaration of Human Rights, G. A. Res. 217A (III), U. N. GAOR, 3d Sess., U. N. Doc A/810 (1948).

⑧ Supra n2, p. 554.

⑨ The international council on human rights policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (2002) p. 12.

⑩ U. N. Global Compact (2000), available online [20 Sep. 2004] < <http://www.unglobalcompact.org> >.

⑪ OECD Guidelines for Multinational Enterprises 19 (2000), available online [20 Sep. 2004] < <http://www.oecd.org/dataoecd/56/36/1922428.pdf> >.

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Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy^⑫ and many internal codes of conduct adopted by TNCs themselves who as forced to do so by mounting activism of NGOs, workers and consumers in developed countries in the form of protests, product boycotts and selective purchasing.^⑬ But as a number of commentators have pointed out that voluntary codes alone are ineffective in protecting human rights from abuses by TNCs and that their proliferation is leading to contradictory or incoherent efforts.^⑭

The relevance of international law and of legal enforcement should be treated seriously. This article therefore is going to argue the necessity and possibility of adopting mandatory rules, both from domestic and international perspective, notwithstanding the legal difficulties in the way to do so. In part II, the inefficiencies of voluntarism and the advantage of mandatory regulation will be analyzed. Then the legal issues will be addressed and possible solution will be delivered in part III. Part IV deals with the proper response of China in respect of corporate social responsibility (CSR). This article argues that China, as a main destination of foreign direct investment, should actively adopt domestic legislation to regulate corporate behaviour in China, as well as urge the enacting of international law of CSR.

^⑫ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, P 8 (1977), available online [20 Sep. 2004] < <http://www.ilo.org/public/english/standards/norm/sources/rne.htm> >. In 2000, the Declaration incorporated the ILO Declaration on Fundamental Principles and Rights at Work.

^⑬ For example, consumer discontent that footballs were made by children led to a consumer boycott that forced the manufactures to stop using child labour. See Liubicic, R. J. "Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards Through Private Initiatives" (1998) 30 *Law & Pol'y Int'l. Bus* 111. another example concerns infant formula. Certain companies were led to increased infant mortality because the mothers lached clean water and were not properly instructed in the use of the product. Once consumers learned about the increased infant mortality, they began boycotting Nestle Products. Zelman, N. E. "The Nestle Infant Formula Controversy: Restricting the Marketing Practice of Multinational Corporations in the Third World" (1990) 3 *Transnat'l* L. 697.

^⑭ *Supra* n9, p. 14.

II . The Necessity to Impose Mandatory Legal Obligations on Corporations

1. The Inefficiencies of Voluntarism

The traditional corporate response has been that human rights are concerns of states and international bodies such as the UN, not private actors such as corporations. Their ultimate responsibility, it is argued, is owed to their shareholders, whose overwhelming (if not only) concern is with profit maximization.^⑮ Moreover, Some argue that significant progress has been achieved in getting companies to respect human rights without recourse to legal regulation. They also argue that codes of conduct and other voluntary initiatives are ultimately a more effective tool for changing company behavior than legal regulation because companies will be more likely to respect rules they themselves design (or are involved in designing) than those external regulations, believing market forces will ensure that companies adopt best practices, with regard to human rights or other issues.^⑯

It is argued in this article that these codes cannot be solely or even largely relied upon as a tool to enforce human rights against TNCs. The first reason is obvious that nowadays one would be hard-pressed to find any major TNCs today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations. But in fact human rights abuses attributable to corporations have not been diminished these years with the proliferation of voluntary initiatives.^⑰ Furthermore, all the voluntary initiatives have significant limitations in holding TNCs responsible for human rights violations, taking the examples of OECD Guidelines, ILO Declaration and UN Global Compact which are widely ratified by TNCs.

^⑮ Friedman, M "The Social Responsibility of Business is to Increase its Profits" (13, Sep. 1970) N. Y. Times (Magazine) 32. Also see Henderson, D *Misguided Virtue: False Notions of Corporate Social Responsibility* (2002).

^⑯ Supra n9, p. 7.

^⑰ See Business and Human Rights Resource Centre website at < <http://www.business-humanrights.org> > for updated allegations of violation of human rights by corporations.

Firstly, these guidelines are not directed at corporations themselves, they are directed at states whose task is to apply them to the corporations within their jurisdiction, but they are not in any case binding on signatory states.^⑩ Secondly, it is notably that although the OECD and ILO instruments are non-binding, the monitoring bodies do not function as judicial or quasi-judicial bodies; they are the only such guidelines that contain implementation mechanisms specifically enabling corporate behavior to be scrutinized.^⑪ Whereas, as the regulations of preventing human rights abuses by TNCs, the implementation mechanisms of the OECD Guidelines and the ILO Declaration can hardly be considered functional. National Contact Points (NCPs) and the Committee on International Investment and Multinational Enterprises (CIIME) have been established under the OECD Guidelines for undertaking promotional activities and handling inquiries, but only three labour cases were brought in 1999.^⑫ In ILO Declaration, the Committee on Multinational Enterprises (CME) is responsible for monitoring implementation of the Declaration.^⑬ Their roles are limited to clarification of the interpretation of the instruments other than make specific findings of breaches by individual companies and the TNCs identities are kept confidential, thereby sheltering them from public scrutiny.^⑭ Thirdly, both the OECD Guidelines and the ILO Declaration encourage TNCs to respect internationally recognized human rights norms. The Guidelines recommend that enterprises “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”^⑮ They specifically recommend that enterprises contribute to policies of non-discrimination with respect to employment, to the effective abolition of child labor, and to the elimination of all forms of forced or compulsory labor. The ILO Declaration is addressed to governments of member states, employers’ and workers’ organizations, and corporations operating in their territories. The Declaration urges parties to respect the UDHR and the corresponding international covenants, as well

⑩ Supra n9, p. 99.

⑪ Kinley, D and Tadaki, J “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” (2004) 44 Va. J. Int’l L. p. 931, 949.

⑫ For the discussion of the function of the NCPs and CIIME, see Supra n9, p. 99~102.

⑬ For the discussion of the function of the CME, see Muchlinski, P *Multinational Enterprises and the Law* (1999) p. 458.

⑭ Supra n9, p. 101~103.

⑮ Part II (2) of the OECD Guidelines.

as a number of core labor-related rights.^{②④} But they simultaneously uphold the primacy of national law. Thus, they can do nothing to prevent host states from adopting lax labor and environmental standards, and TNCs cannot be condemned for taking advantage of such standards.^{②⑤}

The UN Global Compact is another soft law instrument which has been participated by over 2000 companies.^{②⑥} Its object is to encourage businesses to “embrace and enact” nine core principles relating to respect for human rights, labor rights, and protection of the environment, both through their individual corporate practices and by supporting complementary public policy initiatives.^{②⑦} However, again, the lack of independent monitoring and enforcement mechanism limit its scope and impact in providing protection against corporate abuse of human rights. Notwithstanding the UN expressly acknowledges that it has neither the mandate nor the capacity to monitor and verify corporate practices,^{②⑧} there is some concern as to the credibility of the Global Compact given that it is quite possible for TNCs to continue to violate human rights while enjoying the status of signatory to the Global Compact.^{②⑨} It has also been noted that the UN’s partnership with corporations creates a risk that they will gain excessive influence over the UN, threatening its mission and integrity.^{③①} It has indeed raised awareness of the issues involved, both within the corporate world and the UN itself, which is an important first step, but it is no more than that.^{③②}

②④ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, P 8 (1977), available online [20 Sep. 2004] <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>>. In 2000, the Declaration incorporated the ILO Declaration on Fundamental Principles and Rights at Work.

②⑤ Muchlinski, P *Multinational Enterprises and the Law* (1999) p. 460.

②⑥ All participated companies are available on the website of the Global Compact [1 Apr. 2005] <<http://www.unglobalcompact.org/Portal/Default.asp>>.

②⑦ Supra n10.

②⑧ Karliner, J and Bruno, K (Ed.) “The United Nations Sits in Suspicious Company” (2000) Int’l Herald Trib.

②⑨ For general criticisms of the Global Compact, see Kennedy, D “Rio Tinto: Global Compact Violator, Project Underground” (2001) available online [20 Sep. 2004] <<http://www.globalpolicy.org/reform/2001/0713rio.htm>>.

③① Clarke, V “Globalization and the Role of the United Nations” (2000) World Federalist Movement News, available online <<http://www.globalpolicy.org/reform/2000/1218vic.htm>>.

③② Hocking, B and Kelly, D “Doing the Business? The International Chamber of Commerce, the United Nations and the Global Compact” in Cooper A. F (ed.) *Enhancing Global Governance: Towards a New Diplomacy?* (2002) p. 203.

Nonetheless, to review these voluntary instruments, they do have some positive aspects which are worth to mention here. First, it is believed that TNCs will eventually benefit from a smoother and more profitable business environment by respecting human rights, therefore contributing to a stable, rule-based society in host states. Moreover, by adopting codes of conduct and conduct with respect to human rights may help a TNC to gain business reputation which is crucial to a corporate.^② Secondly, they have at least demonstrated an increased willingness to formulate some human rights standards against TNCs. And as some commentators pointed out that such soft-law initiatives may be elevated to hard-law through the formation of customary international law.^③ Thirdly, they may be transformed into a hard-law instrument in the future. In other words, they may have an important normative impact on the development of domestic and international laws, and this potential is the most significance of voluntarism on CSR.^④

2. The Advantages of Mandatory Rules

The next question is what on earth are the advantages of mandatory rules? Other than those advantages, namely legally binding and enforceable, that supplementing the shortcomings of voluntary codes, several other advantages are worth to be noted. In the first place, international human rights legal framework can provide a common and universal standard. It is the reality that all the exist voluntary codes of conduct are very much different from each other due to different ethical and legal standards, different countries and legal systems, even from different genuineness to the commitment to human rights. It is the task of international law to distil the basic rights that all individuals have in common across different cultures, therefore provides a universal minimum dimension against which the behaviour of companies

② For discussions on the interest of TNCs toward voluntarism, see McCorquodale R "Human Rights and Global Business" in Bottomley, S and Kinley, D (ed.) *Commercial Law and Human Rights* (2002) p. 89, 112. Also see UN High Commissioner for Human Rights "Business and Human Rights: A Progress Report" (2000) available online [20 Sep. 2004] <<http://www.unhchr.ch/business.htm>>. Also see the CSR Europe Q&A Session "United Nations Norms on the responsibilities of transnational corporations" available online [23 Sep. 2004] <http://www.csreurope.org/whatwedo/unnorms_page5097.aspx>.

③ Baade, W. H "The Legal Effects of Codes of Conduct for Multinational Enterprises", in Horn, N (ed.) *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980) 3, 13; also see Blanpain, R *Multinational enterprises and the social challenges of the XXIst century. The ILO declaration on fundamental principles at work. Public and private corporate codes of conduct* (2000).

④ *Supra* n19, p. 936.