

SUPPORTING HUMAN RIGHTS THROUGH TNC GOVERNANCE: The Necessity of a Global Response to a Global Challenge¹

Stepanka Zemanova
University of Economics, Prague

Abstract

This paper discusses the topical issue of making transnational corporations (TNCs) more aware of the human rights aspects of their entrepreneurial activity. The issue is understood primarily as a multi-level, multi-actor governance matter. The paper starts with a brief overview of major forms of human rights abuses committed by TNCs. The following sections deal with corporate, state and international levels of governance in order to evaluate the appropriateness and effectiveness of existing tools, to identify advantages and disadvantages of their current shape and usage and to suggest alternatives for their future improvement. As major drawbacks are seen in the lack of legally binding international rules, the obstacles that hinder the evolution of international norms in this area are also examined. In the end, an outline of possible alternatives of future developments is provided.

Introduction

Prior to the current financial and economic crisis, transnational corporations² had always constituted a more important part of the global economy. Their share of world-wide economic indicators was reported to increase dynamically year by year. In 2007, 78 thousand transnational companies with more than 780 thousand foreign affiliates were estimated to employ 73 million people.³ The sales of their affiliates reached 25 trillion USD⁴ whereas their assets amounted to 51 trillion USD (UNCTAD, 2008,

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² As is common within the field of international relation studies, there are different notions of transnational corporations. Sometimes the purely cross-border character of business activity is emphasized. As a result every company present in more than one country can be labelled as a TNC. However, more stringent approaches require headquarters in one country and wholly or partially owned subsidiaries in others (West's Encyclopedia of American Law, 1998) perhaps combined with some economic and legal criteria - control through foreign direct investment, multiple layers of ownership and control etc. (Dine, 2006). In that sense they are understood also in the following.

³ The number almost tripled since 1990.

⁴ The number quadrupled during the mentioned period.

30). They were the major players in foreign direct investment contributing more than 4% of the world's GDP (Gallagher and Zarsky, 2006). That corresponded with their position in the elite club of driving forces and the most important beneficiaries of economic globalization, as well as accelerators of the social dimension of globalization by changing and unifying consumption patterns and spreading mass popular culture.

However, despite their indisputable contributions to research, technology, innovation, technical skills, scientific knowledge and economic progress (Dicken 1998; Gupta and Govindarajan, 2000; Jensen 2003), they also epitomize negative aspects of globalization for a large part of world society (Monshipouri, Welch and Kennedy, 2003; Meintjes, 2000; de Schutter, 2005). In accordance with the neo-liberal economic theory, they concentrate particularly on profit maximization (Friedman, 1962; Palmer, 2001; Dine, 2006; Ingham, 2008) and often ignore broader societal aspects of their activity. As a result, they contribute to the persistence (or worsening) of worldwide imbalances reflecting past developments in the international economy such as unequal distribution of income between different groups of countries and social strata, poverty and underdevelopment (Baker, Epstein and Pollin, 1998). In addition, some of them interfere in the internal political affairs of their host countries (directly or indirectly) which can affect domestic problems, political and social conflicts and the extreme suffering of the population. The former Guatemala and Chile or contemporary Nigeria and Somalia may be used as typical examples of such negative influence (Sikkink, 2004; Frynas, 2003; Kline, 2005; Monshipouri et al., 2003).

None of these negative impacts of corporate operations can be considered entirely new. Actually, some could be traced back to the origins of capitalist transnational business on the eve of the colonial era (Ishay, 2004; Ingham 2008).⁵ Yet, they had been almost overlooked for a long time both by the general public, activists and scholars. With certain exceptions - including the abolitionist movement in the late 18th and the 19th centuries (Keck and Sikkink, 1998) or the proceedings against German top-managers accused of gross human rights violations before the trial of Nuremberg (Pegg, 2003) - little attention was paid to non-economic (political and social aspects) of TNC entrepreneurship until the 1970s.

⁵ The practices of the British East India Company are the appropriate early example.

In the 1970s, serious consideration was given to the engagement of TNCs in subversions of pro-labour rights governments in Latin America. Since then, investigation into negative externalities of TNC business activities has been intensifying rapidly. The struggle to force the TNCs to improve their behaviour has been intensifying. Nowadays they are monitored from various perspectives including economic, legal and political ones (Addo, 1999; Frynas and Pegg, 2003; Sullivan, 2003; Alston, 2005; Kline, 2005 etc.). They are also examined through the lens of the international relations discipline, although not as one of its mainstream topics. For instance, repeated warnings against an increase of their economic power (not only) at the expense of states have been made (Cerny 1995, Macleod and Lewis, 2004; Gurría 2009). International relations scholars involved in the study of TNCs have also suggested various ways towards more stringent monitoring and regulation of TNC entrepreneurship (Jackson, 1998, Dine 2006, de Schutter 2005).

In the context of the current crisis, that could be understood as a business ethics and TNC regulation failure at least partially, the necessity of further development of standards of TNC behaviour has become obvious. In the coming months and years, various levels of governance will seek solutions to the fatal deficiencies in management of some of the largest and influential TNCs and for ways to manage current turbulence and prevent future problems in the global economic system connected with them (Gurría, 2009). In this respect it is also important to continue dealing with the negatives remarkable outside the economic sphere, somewhat neglected in the debates on the excesses that have contributed to the current global economic paralysis.

This paper aims to revitalise the debate on eliminating possible negative impacts of TNC business in the field of human rights and to combine it with the mainstream topics of the current discourse. Since the global reflection on possible solutions to disturbances links the perspective of a strong and healthy world economy to a more robust regulatory framework (Gurría, 2009) it tries to evaluate the appropriateness and effectiveness of existing tools and to identify the (up to now) unexploited possibilities at various levels of governing the TNC entrepreneurship. In addition, as academic scholars have focused more frequently on one of those levels (Kolk, Tulder and Welters, 1999; Wawryk 2003; Wells and Elias 2005; Lucke, 2005; Kline 2005) it also attempts to extend the limited range of contributions, combining them into a single framework (Monshipouri et al. 2003; Breining-Kaufmann 2005).

From the theoretical point of view, this paper is based on the assumption that TNCs operate in a structured multi-level (corporate, state, and international), multi-actor environment. Each level offers different opportunities to regulate the activities of TNCs in order to force them to behave more ethically in accordance with contemporary international human rights standards. At the same time each level is characterized by a different structure and different influence of particular actors and by specific obstacles that need to be overcome.

When inquiring into particular forms of influence by TNCs in the multi-level environment, it is necessary to distinguish between the regulation of TNCs and TNC governance. Regulation is an older form of pure management or government. Governance extends traditional regulatory framework and includes societal steering with the participation of various kinds of entities and with the use of various methods of decision making (Corkery, 1999). Furthermore, these terms are distinguished from the term corporate governance referring primarily to the internal affairs of a company, its structure, aims and tools for their achievement, controlling and the relations between various groups of people involved in its activity (Kolk et al., 1999; Schleifer and Vishny, 1997).

To fulfil its main goal, this paper proceeds in several steps. First of all, it briefly outlines major patterns of negative impacts of TNCs on human rights. Then it examines how the negative impacts were dealt with in the traditional forms of TNC regulation by companies themselves and by states where it is present and turns to the shift from government to governance at the state level. In the following sections the possibilities and limits of two major forms of global governance – the voluntary initiatives of international intergovernmental organizations (IGOs) and mandatory rules incorporated in legally binding international norms – are discussed. After an analysis of past developments and the current state of affairs at various levels, the paper concludes with an overview of the most up-to-date perspectives and future tendencies.

Negative impacts of TNC economic activities in the human rights sphere – traditional monitoring and regulation

Although the relation between TNC business and human rights need not be necessarily negative,⁶ a multitude of cases has been recorded so far

⁶ For a discussion on different modalities of this relation see e.g. Spar, 1998; Richards, Gelleny and Sacko, 2001; Meyer, 2003; de Schutter, 2005; Zarsky 1999.

where transnational companies play an active role in creating human rights violations or where they serve as their accelerators. They emerge either directly or indirectly. Direct impact is felt - for example, when a TNC supports repressive actions of the official government⁷ or if it profits from dreadful conditions in factories.⁸ Indirect impact appears when the TNC's commercial activity is accompanied by serious interferences into internal affairs that create room for human rights violations committed by governments or non-governmental military groups.⁹ With these obvious examples also come less clear cases of negative impact, e.g. downsizing¹⁰ or two-tiered employment systems¹¹ within the field of economic and social rights (Forsythe 2000, Richards et al. 2001).

The extent and effectiveness of direct impact monitoring depends on how much attention it attracts and how different obstacles are overcome e.g. the lack of TNC openness to external control, extreme situations in host (or home) countries or the impossibility to cover the costs of necessary investigation. According to Jungk (1999), monitoring is influenced by four determining factors. These factors include the degree of human rights violations (sporadic vs. systematic), the nature of human rights violations (resulting vs. not resulting from governmental policy), the type of violated rights (fundamental vs. not fundamental) and proximity, that reflects to what extent a company's business is linked to the human rights situation in a country. Proximity sometimes correlates with the TNC key domain. Those engaged in mining and extraction industries¹² have been frequently accused of so-called militarized commerce supported by local military forces as their operations are rather limited geographically. In contrast, the geographically less dependent textile businesses¹³ that respond to conditions in particular countries more flexibly tend to have more labour rights violations and the use of slave and child labour. Chemical

⁷ The support of the Royal Dutch Shell company to the military government in Nigeria in order to suppress local resistance or the contract of Unocal with the Burmese state military to secure protection for its pipeline are notorious examples of such behaviour.

⁸ Inhuman practices of textile companies are often discussed within this context.

⁹ United Fruit in Guatemala 1954, ITT in Chile 1973...

¹⁰ Downsizing means drastic cuts in personnel combined with replacing own manufacturing activity with outside contractors, usually from low wage and insufficient labour standard countries.

¹¹ Under two-tiered employment systems abysmal differences in wages are understood between employees in the headquarters of the TNC engaged in research, innovation and marketing.

¹² Royal Dutch Shell, Occidental Petroleum, Chevron...

¹³ Nike, Gap, Reebok.

businesses¹⁴ are accused of health violations more frequently by exposing their employees and local residents to toxic materials and processes (Spar, 1998; Wells and Elias, 2005).

Documenting the indirect impacts of TNC activity on human rights seems to be even more complicated, as it is almost impossible to adhere to the *ceteris paribus* principle, i.e. to isolate the activity of a TNC / TNCs as an explaining variable and to monitor the evolution of the human rights record while other factors remain fixed. There is also the danger of the *post hoc, ergo propter hoc* logical mistake that lies in the possible confusion of the time sequence between these phenomena and their causal connection. In addition, it is difficult to prove any kind of indirect general relationship between TNCs and human rights with reliable statistical models because the results of investigations usually strongly depend on the choice of inputs. This is obvious for example from the debate between Meyer and a triad of American scholars Smith - Bolyard - Ippolitio which came through in the late 1990s on the platform of Human Rights Quarterly journal.¹⁵

Yet, the necessity of preventing the negative impacts of TNCs activities within the human rights sphere does not derive from the number and nature of well-documented cases, nor it is a purely scholarly question. Instead, it is closely connected with widespread public demands and public opinion in favour of human rights, as well as the aforementioned struggle for better and more equitable layout of the world economy and a more balanced form of globalization.

¹⁴ Cape plc, Thor Chemicals.

¹⁵ Meyer (1996) constructed a statistical model building on engines of development school and Hymen hypotheses. The engines of development school suggested that TNCs contributed to improvement of the so-called second generation of human rights with their economic activity whereas Hymen maintained their operations lead to lower levels of civic and political rights. The model compared the International Freedom House political rights and civil liberties rankings, illiteracy rates of adult population, infant mortality and life expectation to levels of GNP per capita, direct foreign investment based on the US Commerce Department data, US economic aid and foreign debt of more than 50 least developed countries in two different time periods - 1985 and 1990. He concluded that both political rights and socioeconomic rights were positively associated with foreign direct investment which meant that the TNCs help to promote both categories. His opponents (Smith, Bolyard and Ippolitio, 1999) using a slightly modified data set (World Bank date on investment instead of US ones) came to opposite findings and demonstrated a consistent negative correlation.

Dealing with human rights in traditional forms of TNC regulation

The TNCs are more regulated than governed traditionally. Regulatory steps are implemented at two different levels – directly within the corporation and in the states, where the corporation develops its activities. The internal level (paradoxically often designated with the aforementioned term corporate governance) primarily concerns the relationship between shareholders and management. The external one (which can be matched with legislative, executive and judicial powers of the home and host states) provides political and legal conditions for entrepreneurship and creates a general base for business.

Within the framework of corporate governance, it is necessary to achieve a balance between owners and directors of a company based on the widespread opinion that the company serves the interest of the shareholders which is, as stated above, profit maximization. Profitability based on the logic of economies of scale, whose results correlate with total costs (Chipman, 1970; Wilson, 1975) presses them to use the differences in human rights standards and human rights violations for their purpose; the need to preserve competitiveness in relation to local businesses functions similarly.

Directors serve the interests of the company with no direct duties to owners but are appointed and dismissed by the owners (Dine, 2006). This shape offers some room for ethical behaviour, provided the shareholders/management are inclined towards it. Incentives to consider ethical principles and norms in entrepreneurial activity are rather weak, often limited virtually to employee initiatives and the requirements of labour unions. These incentives are often pragmatic responses to local challenges such as deficiencies in health care (Hertz, 2002).

Thus, the demands for ethical behaviour result more likely from the legislation and policies of the home and the host states. In response to concrete cases of TNC contributions to human rights violations, new instruments have been under development for more than three decades. They include:

- non-binding extra-legal regulation,¹⁶
- legal regulation of TNC behaviour imposed by states,¹⁷

¹⁶ Model Business Principles released by the Clinton administration in the US.

¹⁷ The US Foreign Corrupt Practices Act of 1977.

- the institute of civil and criminal responsibility and the complicity of legal persons in national law in order to prevent, monitor, prosecute and sentence human rights violations by companies¹⁸ (Wells and Ellias, 2005; Wawryk, 2003).

However, the effectiveness of these instruments is also limited. Subjects to domestic law states mother firms, as well as their affiliates, are subordinated to the jurisdiction of different states. The requirements for an ethical dimension to their behaviour vary fundamentally, not only among individual host countries and home countries but also within groups of home states.¹⁹

Despite the high standard common for many developed states, which are the most frequent homes of TNCs,²⁰ it is difficult to force individual mother and daughter firms to adhere to them. The overlapping of legal orders and governments' authorities are limited by the doctrine of state sovereignty. States are able to protect the interests of companies against each other, for example with agreements on protection of property or investment. Yet they cannot protect each other against the unethical behaviour of TNCs (with minor exceptions - e.g. the cases filed under the Alien Tort Claim Act in the US - Breining-Kaufmann 2005; Wells and Elias 2005; Forsythe, 2000).

The pattern of traditional bi-level regulation is demonstrated in figure 1 with an example of a TNC with a home in state A and two of its host states B and C (where B is a developed democratic state and C represents a weak state with poor human rights record). The example shows that the TNC can be pressured from four different sides (A, B, C, internal regulation - bold crowfoots).

The states recorded in figure 1 could strengthen their human rights demands within the framework of interstate relations with relevant provisions in trade or investment agreements (dashed crowfoots). However, in practice the steps taken in favour of TNCs and their business occur without any connection to human rights protection. Thus, the direct power of states A and B is limited in figure 1 only to the part of the TNC situated in their territory. The methods to prevent the TNC from exploiting

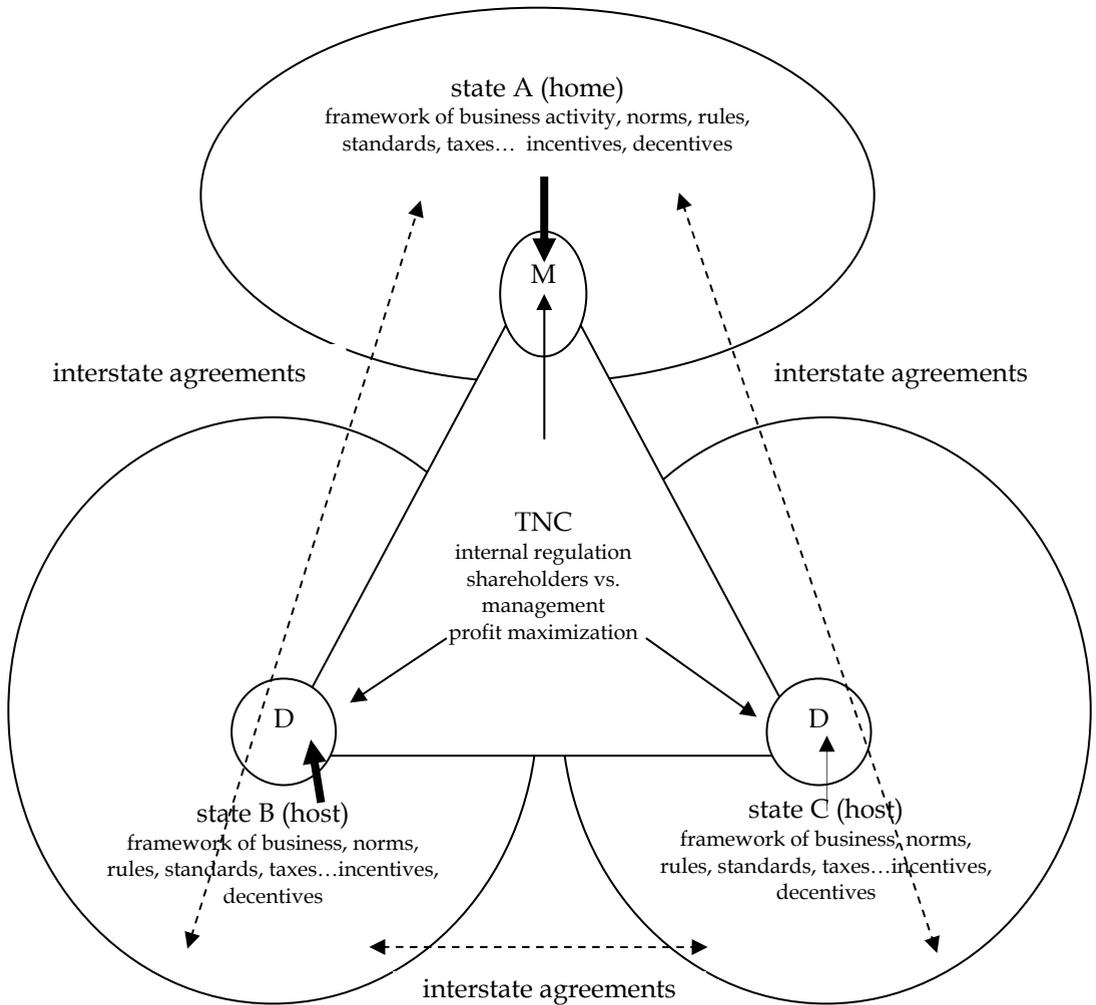
¹⁸ Australian Criminal Code Act of 1995, Amendment to French Penal Code of 1991 etc.

¹⁹ Compare for example the member states of the European Union, The US and Japan.

²⁰ Dynamic developing Asian economics form the second significant group of the home states.

lowered human rights standards are limited to the (little probable) action of state C itself.

Figure 1: : Regulation of TNCs - traditional pattern



M- mother company, D - daughter company

————> direct / - - - -> indirect effect on TNC activity within the field of human rights (different strength demonstrates different intensity of pressure)

On the whole, the bi-level regulation seems to be quite transparent and simple, but the seeming simplicity is complicated by the inability to deal with negative human rights externalities systematically and their necessary persistence. Positive shifts depend on the willingness of the corporations, especially in host states with low human rights records. This is always in

conflict with a corporation's business plans. To improve the situation either internal incentives in favour of pro-human-rights behaviour must intensify or the external tools must be used much more effectively. Yet this cannot be done without strengthening their extraterritorial nature in order to overcome limits given by state frontiers.

From traditional regulation to governance

A solution to some of the mentioned problems may be seen in the transformation of regulation to governance that has been under way since the 1970s. It is closely connected with the rapid spread of information and communication technologies typical of the on-going process of globalisation that enables the rise of even stronger local, regional and global public actors, such as scholars and academic institutions, non-governmental activist movements and organizations (NGOs) and intensifies public and media scrutiny. In addition, the post-materialist part of consumers whose decisions transcend pure rational calculation of price and utility and who take into account the ethical aspects of consumption come to the stage (Fagan, 2006; Tallontire, Rentsendorj and Blowfield 2001).

Next to the regulation tools used by traditional centres of regulation, additional ones emerge thanks to the new governance actors themselves. As they are exposed predominantly by non-state actors, they reach to the voluntary (extralegal) sphere.

They count:

- campaigning, praising and shaming, consumers boycotts,
- nongovernmental organisation codes of conduct,²¹
- industry associations codes of conduct,²²
- cross-sector and cross-actor social accountability auditing and certification,²³
- fair trade initiatives,²⁴
- ethical investment indices and consulting.²⁵ (Steinhardt, 2005)

Simultaneously, many states improve existing tools with tightened controls. As a consequence, much broader demands are considered by the

²¹ Amnesty International's Human Rights Guidelines for Companies, The Code of Labour Practices for the Apparel Industry Including Sportswear, the Clean Clothes Campaign.

²² Responsible Care® in the international chemical industry.

²³ Social Accountability 8000, AccountAbility 1000.

²⁴ Better Banana Project.

²⁵ Down Jones STOXX Sustainability Index, EthicalQuote of the Swiss firm Covalence.

TNCs in their entrepreneurship. This may lead to changes in the whole business philosophy.

Facing criticism by HR activists and consumer organizations (and taking into account possible negative effects of bad publicity and image) weakens the original notion that the sole purpose of a TNC is to make as much money as possible at any cost (Kolk et al. 1999). The TNCs also calculate on the new comparative advantage consisting in the opportunity of distinguishing a brand from others through its ethical dimension which alternates the traditional cost/benefit analysis, leading to preference towards lower labour standards or worse working conditions. In comparison with the past, if there are more incentives, then shareholders/management will to behave ethically and to contribute to human rights protection at the level of TNCs. The bipolar structure of differing interests in the company with shareholders on the one side and management on the other transforms into a multi-polar one with a large group of stakeholders - all persons, groups and organisations which may be positively or negatively affected by a TNC's activity (Lebeda, 2006).

As a part of the changed approach, the TNCs develop new tools. These are based on the triple bottom line²⁶ or the corporate social responsibility²⁷ concepts that combine the economic pillar of TNC activities with social and environmental ones.

The set of the new tools used by companies includes in particular:

- corporate ethics offices,
- voluntary internal ethical codes of conducts,²⁸
- socially responsible investment initiatives,
- fair trade initiatives²⁹ (Prusa, 2007; Snell, 2002).

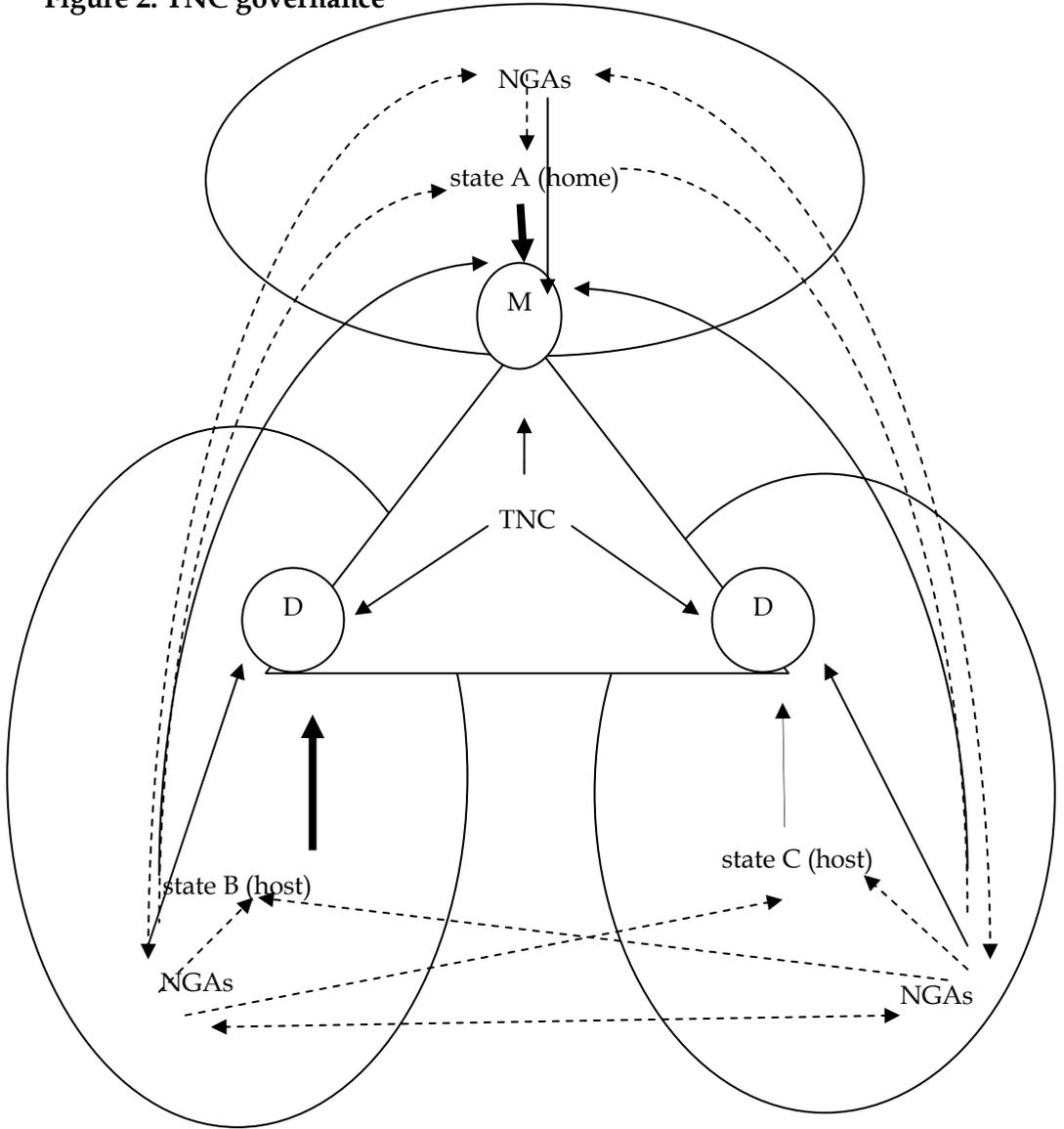
²⁶ The triple bottom line concept may be understood as a response of the business community to the demand for sustainable growth. It stresses assessing companies not only according to their financial results but also according to social and environmental ones with the main motto: People - Planet - Profit.

²⁷ Under the term corporate social responsibility a set of corporate actions positively affecting an identifiable social stakeholder's interests and not violating the legitimate claims of another identifiable social stakeholder (in the long run) is understood (Snell, 2002).

²⁸ Levi Strauss' Global Sourcing and Operating Guidelines, Reebok Human Rights Production Standards...

²⁹ Starbucks fair trade coffee.

Figure 2: TNC governance



M- mother company, D - daughter company, NGAs - non-governmental actors
— direct influence on TNC activity within the field of human rights
- - - indirect influence on TNC activity within the field of human rights

Hence, two traditional levels of regulation (or now more precisely *governance*, a corporate one and the state one) persist but they reflect direct and indirect influence of much more subjects, with activity related to human rights protection. The change is demonstrated in figure 2 on the

previously-used example of a TNC, a home state A and two host states B & C. It is obvious that the originally simple schema has transformed into a complicated network with numerous actors present fully in states A, B and probably partially in state C (NGOs, scholars, media, citizens etc. next to the states and the TNC itself) as well as many new direct and indirect channels of influence. The newly emerging actors complete the intensified internal and external pressure on the TNC. In addition, they are able to extend the influence abroad although predominantly in an indirect form.

Moreover, figure 2 illustrates the possibility of using the spontaneously emerging governance pattern in order to negatively challenge the TNC operation in a weak state unable to regulate it directly. The importance of the non-governmental element is indisputable in such a situation. Therefore, they add an important missing element as compared to the situation recorded in figure 1 above.

But still, despite multiple combinations of voluntary initiatives and of national legal obligations in some TNCs, progress is only of a formal nature and does not reach further than to public statements and manipulated reports. Some companies try to hide their past offences through the swing to an ethical code (the so-called bluewash phenomenon).³⁰ Others³¹ show that ethical goals may be fulfilled only within a part of a TNC's activity or that a company may behave ethically and non-ethically at the same time. This might be intentional, as profit could decrease substantially if the company changed its attitude toward human rights radically. Last but not least, small improvements are sometimes related to management's inability to control their affiliates and subsidiaries effectively (Strike, Gao and Bansal, 2006; Lebeda, 2006).

In many situations, simultaneous responsibility/irresponsibility reflects directly the persistent shortcomings of control at the levels of governance just discussed. As obvious from figure 2, they insist in part in the lack of external pressure that would force the TNCs to implement higher standards in areas with poor human rights records (the hypothetical C state in the example used). On the other hand, what has been neither mentioned nor demonstrated in the figures above are the significant insufficiencies in control of the real performance and the improvements achieved. The feasibility of external audit by specialized official and non-official agencies,

³⁰ F.e. the Rio Tino or Nestlé companies were criticised for such behaviour in the past.

³¹ Nike, Philip Morris...

and NGOs or international organizations comprises only a selected number of cases. The room offered by judicial and legal mechanisms imposed by states has seemed to be restricted through reserved attitudes of the liability of legal persons common to a great number of home countries, the repeatedly mentioned differences in human rights standards across individual countries, extraterritorial character of TNC activity and the changing balance in economic and (sometimes) political power of TNC and states in favour of the former ones (Jungk, 1999; Wells and Elias 2005).

Extended governance pattern: a regional and global challenge

In order to add the still missing parts of the puzzle it is of course necessary to use the existing tools of governance much better. The need to deal with the causes and consequences of the current global economic crisis, including negative contribution of several TNCs to its emergence might turn into an important external incentive both for states and non-state actors to work on these issues more intensively than before. Nevertheless, it is also desirable to complete the existing governance mechanisms with direct external (extraterritorial) stimuli that are included neither in the traditional regulation pattern (figure 1) nor in its extended governance form (figure 2). This could be done within the framework of bilateral interstate relations (investment and trade agreements in figure 1, special agreements regarding human rights etc.). However, with respect to the perplexity of such a settlement, multilateral solutions seem to be more appropriate.

Despite the fact that the earliest initiatives in this direction were recorded again during the 1970s and have been further elaborated up to the present, both by worldwide and regional intergovernmental organizations (IGOs) such as the UN, ILO, WTO, OECD..., numerous insufficiencies persist here.³² Unlike the national level where the combination of voluntary extra-legal and legal instruments for TNC regulation emerged, voluntary tools prevail on the international stage. Although they can be regarded as soft international law, their implementation and enforcement remain a matter of political and public pressure.

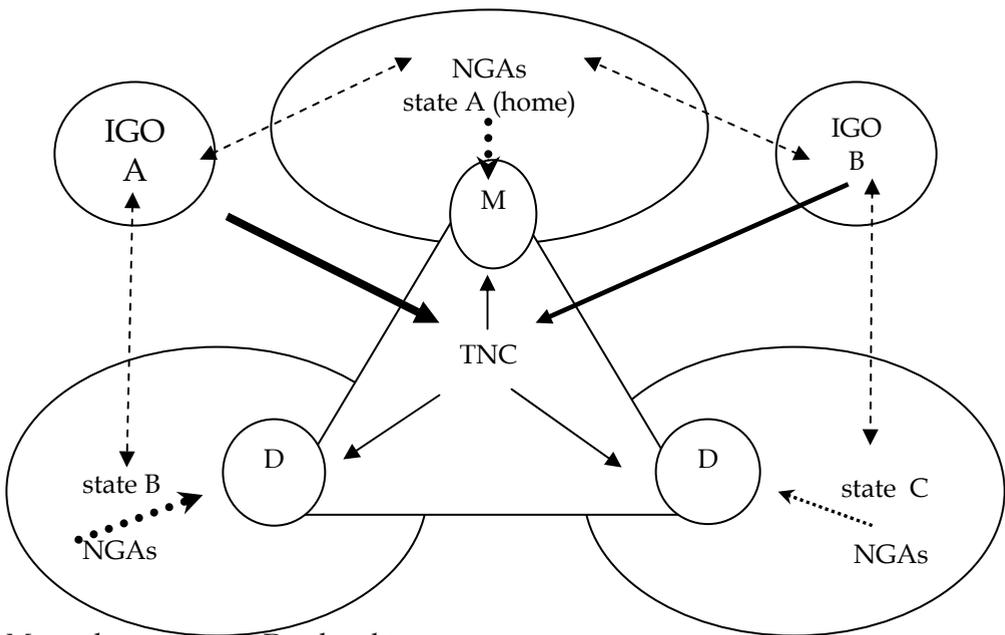
The fact that enforcement might be ensured by IGOs themselves, states and non-state actors brings all the available levels of governance together.

³²Guidelines for Multinational Enterprises (OECD, 1976) and Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO, 1977) are examples of such initiatives.

However, the up to now identified limitations at the internal and national levels are not restricted in that way, as the differences of approaches among states and the misbalance between territorial states and extraterritorial TNCs remain unsolved (International Council on Human Rights Policy, 2002).

The new elements in the governance pattern extended with the involvement of two IGOs (A, B) are recorded in figure 3. The core of the schema (network of relations between different subjects in the home state A and the host states B & C) has been simplified (single chain-dotted crowfoot instead of the mixture of bold and dashed ones). In fact, it could be identical with that in figure 2.

Figure 3: The TNC governance pattern with the IGO voluntary regulation



M- mother company, D - daughter company

————> direct influence on TNC activity within the field of human rights (different strength demonstrates different intensity of pressure)

- - - - -> indirect influence on TNC activity within the field of human rights

.....> combined direct and indirect influence on the TNC activity exercised by state bodies and non-state actors

Thus, to improve the functioning of the system, it is essential to move beyond voluntarism and to exploit available international legal instruments or to introduce even more stringent international legal obligations on states

and companies. This might be done either by the reform of approaches and tools developed by international organizations in the past or by creating entirely new ones.

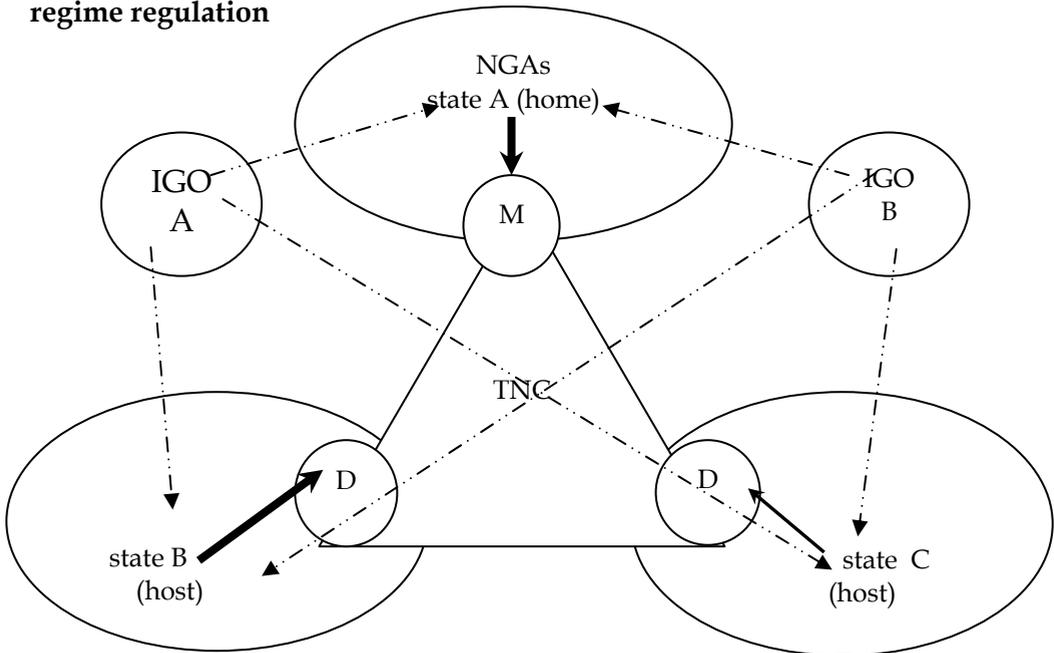
Nevertheless, the introduction of new legally binding norms - as well as improvement of the former ones - runs into two major obstacles. The first-human rights law and international economic law are two separate branches of the contemporary international legal order. This situation reflects developments in the international system after World War II. While creating a new post-war system, several attempts were made to prevent disturbances in international relations which contributed to the onset of the worldwide conflict, or (more precisely) to constrain possible foreign policy abuses to the detriment of general citizens' interest and to force states to aspire to their citizens' happiness and welfare. Yet for many reasons, the interconnectedness of human rights, economic issues and trade was ignored by the victorious powers after WWII. As a result, their real international administrations were clearly divided according to their nature.

During the post-war years, both the economic and political set of norms evolved in their own distinct ways, although there have always been certain linkages between the economic performance of a state, human rights and standard of living of its citizens. It functioned for example when the countries of the Third World formulated their economic requests as the right to development or when the UN Security Council imposed economic sanctions with the aim to end apartheid, but there was little attempt to establish a regular connection (Cottier, Pauwelyn and Bürgi, 2005).

The second major obstacle bears upon the current conception of international law where obligations are imposed primarily on states. This is common both to human rights and to economic rules. Compliance with requirements derived from concrete legal instruments for subjects such as TNCs may be safeguarded either by states themselves (which leads to the situation similar to that in figure 1) or by extralegal mechanisms such as pressure and shaming by IGOs and NGOs (figures 2, 3). The shift from the governance pattern discussed in the previous sections of the paper is therefore limited -even if the new tools are introduced. The difference consists merely in the source of legislation but not in the method of enforcement (as illustrated in figure 4).

The example of a TNC, a home state, two host states and two IGOs is extended with two international agreements each administered by one of those IGOs³³ – one of general human rights protection (A) and one of trade protection (B) that is not supposed to have any direct impact on the TNC human rights record but may affect it indirectly both in a positive and negative way. The core of the schema is simplified again.

Figure 4: The TNC governance pattern with segmented international regime regulation



————▶ legal regulation, direct impact on the TNC activity within the field of human rights

- - - -▶ legal regulation, no direct impact combined with indirect extralegal impact on the TNC activity within the field of human rights

A perspective of a new comprehensive governance approach?

In the post-cold-war era, many political constraints to full enjoyment of human rights have been removed. The notion of the relationship between international norms concerning human rights and economic issues has

³³ For more clarity the reader can consider e.g. the UN and the International Covenant on Civic and Political Rights instead of IGO A and agreement A and WTO and GATT instead of B ones.

moved slightly as well. Today, greater awareness of the interactive character of particular areas and the ongoing struggle for its utilization in practice is obvious in international and national discourses as well as in practice.

The shift started with changes in rhetoric by international institutions such as the World Bank or the United Nations Development Programme in the early 1990s. Subsequently, it focused on the area of international economic and development relief. Positives and negatives occurred in the practice of states and international institutions (i.e. the conditioning of aid and development cooperation with certain progress in the field of human rights or in case of need restriction or interruption of development aid in response to human rights breaking). Furthermore, during the second half or the 1990s the elements of the so-called positive support for human rights were introduced (Uvin, 2004).

However, the progress achieved seems to ignore the relationship between human rights and trade and the consequent regulation of the TNC activity. There had been several attempts to improve the current situation in this respect, but they broke down for several reasons. For example, during the Uruguay round of GATT negotiations that led to the creation of the World Trade Organization, a group of (predominantly developed) states proposed establishing a direct link between human rights and international trade by including a social clause referring to labour and environmental standards. Paradoxically but not surprisingly, the proposal was opposed by numerous developing countries (countries C) dependent on the comparative advantage of cheap labour which (together with negative attitudes of business circles in developed countries) prevented it from passing (International Council on Human Rights Policy, 2002).

The follow-up meetings within the WTO framework such as the Millennium Round and the past phases of the still-unfinished Doha Round reflected not only the ongoing divide between different states' attitudes but also the divergent activity of pressure groups including the TNCs and pro-human rights NGOs. Whereas the pro-human rights NGOs and activist networks acted in favour of bridging over the gap between human rights and trade, TNCs insisted on support of a pro-liberalization movement. The same became obvious in the negotiations on the Roma Status of the International Criminal Court where the possibility of making TNCs liable for human rights violations at the international level was omitted.

Nowadays there are two lines of argument against regulating human rights aspects of TNC activities by legally binding norms at the international level. The first one points out the already mentioned persistent interstate character of international law affecting national law only indirectly. The other argument warns against the emergence of new forms of protectionism that could be based on human rights standards.

Insufficiencies in national regulations must be remembered though, and stricter international – regional and universal – regulation of TNC global entrepreneurship is required. TNCs directly profit from international legal norms concerning liberalization and movements of foreign direct investment are of special importance. As a compensation for these benefits, they should bear adequate duties.

Conclusions

Since 1970s, when the intensive observance of the close connections between TNCs and human rights began, the methods of governing this connection in favour of human rights undoubtedly moved forward. Today it is managed at several stages: from the company itself and its internal affairs, to the state environment and up to the broad regional and international level to help create a comprehensive governance network. Yet, despite the multitude of possibilities of how to govern, the impact of TNC activities within the field of human rights the real influence is still quite narrow. This can be explained by the following features of existing tools: the legal nature (voluntary, legally binding), the character of working (direct, indirect), and the territorial scope (limited to one state, cross-border).

In fact, contemporary governance of TNCs –human rights relationships– are based predominantly on voluntary direct and indirect instruments with limited radius. The shifts from traditional regulation, comprising corporate governance and state administration, to a multi-level multi-actor pro-human rights governance (recorded in the sequence of figures 1-4), have brought only particular changes. As it unfortunately does not combine the increased responsibility of the TNC with corresponding accountability, it relates merely to a part of the TNCs or a part of individual TNC activities most vulnerable to the external pressure.

The persistence of negative externalities of TNC entrepreneurship within the field of human rights can be accredited to the remaining gaps in the new governance pattern. The most important drawback identified in the

paper is the lack of international norms aimed at the creation of binding legal obligations enforceable either on the national stage (or even better - on the international one). This leads to the call for a global response to a global challenge. Such a response could be composed of a combination of existing human rights and trade norms, an incorporation of TNC obligations into the human rights norms, an incorporation of provisions regarding human rights into economic and trade norms, a creation of new comprehensive rules serving to govern TNCs, or the creation of several particular rules connecting human rights with regulation of trade in selected commodities for example.

Despite their desirability, future evolution of international legal obligations of TNCs within the field of human rights regulation is, for the time being, rather uncertain. As the obligation must be based on international treaties (either belonging to human rights or to the trade regime) their adoption is a long-term matter. The success of efforts towards a positive impact of TNC activities on human rights (or creation of new ones) will depend on the character of action and interaction of the main actors involved in and influenced by the struggle - TNCs themselves, IGOs, states, NGOs, citizens etc. Their results highly depend on the future developments in international evaluation as well as the course and impact of globalisation processes.

The current global crisis revealed substantial drawbacks in TNC governance, not only regarding negative externalities of their business but also in the economic field, could become a kind of accelerator towards positive changes. Therefore it must be (as it already is in several cases) understood as a challenge both by states, IGOs, NGOs and the academic community.

Political science and the international relations discipline are of special importance here - for they are able to provide other actors with relevant arguments relating to the fact that the search for an effective global solution to current negative developments in the international economy and for prevention of their repetition should be contextualized with their political aspects, including the need for stronger human rights protection. However, their role in future development is not limited to that task. As has been showed above, there is also much room for further research regarding the most suitable path to sufficient governance patterns.

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