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Sovereignty and Transnational Corporations[1]

Introduction

The reality of transnational corporations (TNCs) in an economically globalized word is nothing surprising. However, from the point of view of national or legal regulation those entities are difficult to conceptualize and come to terms with. It is very difficult to portray an international legal regulation of economic and commercial ties of varying strength between the parent company and its subsidiaries, or among themselves, or those and their suppliers, in a situation of not always completely solid and transparent corporate structures. On the one hand, there is the globalized economic reality of which TNCs are results and, at the same time, the creators; on the other hand, there is "heavy" formalization of the classical concept of the state from the sixteenth and seventeenth centuries,[2] which is based on the legal union between the territorial sovereign (the state) and its subjects. This state-citizenship union, which is certainly easier to grasp in the situation of natural persons (although there, especially in the case of dual or multiple citizenship, we may encounter a problem), is completely ungraspable in the situation of the economic "spider" network of TNCs. In fact, the economic interdependence between the different components of the TNC does not correspond at all to the real exercise and enforcement of legal power (jurisdiction).

In this article, I therefore draw attention on the real contradiction between the economic reality of the globalized world and the reality resulting from legal regulation. I will try to present some of the circumstances that arise from this clash between the two realities.

We can understand the term sovereignty, especially in terms of international law, as a manifestation of both the internal state's own power over its population and ter-

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1 This article is the outcome of the project Human rights violated by Transnational Enterprises: Identification and protection: Current development in international law (IGA_PF_2021-007) implemented at the Palacký University, Faculty of Law.

2 Jean Bodin, Thomas Hobbes and others. For a detailed analyses of Bodin's concept of sovereignty presented in 1583 in his *Six livres de la République*, chapter II, see for example, M. Turchetti, *Jean Bodin: théoricien de la souveraineté, non de l'absolutisme* [in:] *Chiesa cattolica e mondo moderno. Scritti in onore Paolo Prodi*, a cura di A. Prosperi, P. Schiera, G. Zarri, Bologna 2007, pp. 437–455.

ritory, and external power in terms of the sovereign equality of states. Combacau defines sovereignty as "the supreme power of the State defined in national law by its positive content, as the highest possible degree of superiority of its possessor over those subject to it."[3] Crawford differentiates sovereignty and jurisdiction by claiming that "sovereignty is shorthand for legal personality of a certain kind, that of statehood; jurisdiction refers to particular aspects, especially rights (or claims), liberties, and powers."[4]

TNCs[5] can be defined[6] as a group of companies consisting of a parent company and its affiliates that are spread over (many) countries and characterized by a unified business management and strategy. The principle of subordination between the parent company and its subsidiaries, and similarly between subsidiaries and possible exclusive suppliers, is apparent but not fixed. The element of unified business management and strategy plays a role of constitutive element of the definition and is thus the true essence of a TNC. It is important to note that it is this element that undermines, devalues, and weakens the positive content of the sovereignty of state. When speaking about TNCs, the issue arises of a kind of paralysis of the state's sovereignty, or, more precisely, of its jurisdiction to include or to grasp the transnational corporation as a whole.

In this article, I will present three situations of the clash between globalized economic reality, on the one hand, and national (or state) sovereignty, limited territorially and personally, on the other: the self-limitation of sovereignty in the area of administrative jurisdiction vis-a-vis foreign investors, human rights abuses perpetrated by TNCs, and the concept of corporate citizenship and its challenges.

The self-limitation of administrative jurisdiction vis-a-vis foreign investors

The concept of self-limitation (or self-restraint) is well known in international legal theory; it is clearly formulated by Georg Jellinek. His concept of "Selbstbeschränkung" has been seen as a foundation of international legal obligations.[7] In order to create international obligations the state restrains its own will and obliges itself to manifest

[3] J. Combacau, S. Sur, *Droit international public*, 7e éd., Paris 2006, p. 235.

[4] J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford 2019, p. 191.

[5] Within this article, the concept of transnational corporations (TNCs) will include other similar or close concepts such as multinational corporations, transnational enterprises, or multinational enterprises.

[6] The definition offered here is for the purposes of this article. Different documents (on an international or national level) may refer to different definitions of TNCs, as for example the OECD Guidelines for Multinational Enterprises. The third draft of the UN Legally Binding document on Business and Human Rights provides a definition of business activity of a transnational character.

[7] R. Mitchell, *International Law as Coercive Order: Hans Kelsen and the Transformation of Sanctions*, "Indiana International and Comparative Law Review" 2019, vol. 29, p. 257.

some conduct in the area of international relations. Jellinek's formula of self-limitation has become influential as a means of reconciling the insistence on the ultimate autonomy of sovereign states with a binding character for international legal norms; its imprint is apparent in later discussions by Triepel and others.[8] If Jellinek's concept of self-limitation as the basis for the existence of the binding character of international law was later revised, the practical impact of self-limitation of sovereign rights is still relevant. This is the situation where the state limits, defines, and delineates its sovereignty and, more precisely, its jurisdiction, especially in the field of administrative law, through bilateral or multilateral treaties on the protection and promotion of foreign investment (BITs). Thus, there is self-limitation in the treatment of foreigners – foreign investors – and their investments, and the extent of self-limitation varies from treaty to treaty. In this sense, the state limits its jurisdiction with respect to a specific kind of treatment included in the BIT (most favored nation treatment, national treatment, the treatment of full protection and security, fair and equitable treatment, treatment based on umbrella clauses,[9] etc.).

Among the major examples of self-limitation, we can mention three clauses that regularly appear in bilateral agreements on the promotion and protection of foreign investment and that constitute an indefinite interference with the sovereignty of the host state[10]: the indirect expropriation clause, the fair and equitable treatment clause, and the so-called umbrella clause.

First, the indirect expropriation clause restricts the state, to a large extent, in its legislative activities, not only in the general economic field but more specifically in the tax field, or also in the environmental or labour field. Such pieces of legislation may have a direct impact on the property rights of the foreign investor. Different arbitration tribunals have interpreted national legislation as indirect expropriation. "Some tribunals have focused on the expected benefit of the use and enjoyment of the investment property as the test for indirect expropriation. Others have focused in a similar way on the disputed measure's effect as the sole criterion (sole effect doctrine). Yet another group of decisions have attempted a balancing approach that takes into account the larger context surrounding a measure allegedly constituting indirect expropriation."[11]

Second, the fair and equitable treatment clause is also uncertain in framing limits to the state's sovereignty. Such a provision was originally of a customary character, and its content was mainly based on the principle of a minimum standard of treatment and the concept of denial of justice. However, different interpretations have been adopted by international investment tribunals. To explain the content of what is fair and

[8] *Ibid.*, p. 258.

[9] The concept of umbrella clauses will be explained later in this section.

[10] R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, "New York University Journal of International Law and Politics" 2005, vol. 37, pp. 953–972. Dolzer is refers to three types of clauses typically contained in investment treaties that have the most severe impact on domestic legal systems.

[11] *Ibid.*, p. 959.

equitable,[12] arbitration tribunals refer to the notion of predictability, certainty of the legal order, lack of ambiguity, due process,[13] and consistency and transparency of the administrative conduct of the state. Thus, in this regard, it is the transparency or consistency of the state's conduct which is at stake rather than legislation that backs such conduct. Such fluidity in the interpretation of the concept of fair and equitable treatment by international arbitration tribunals has had an impact on limits to the state's sovereignty in the treatment of foreign direct investors.

Third, the umbrella clause is the most striking in terms of interference with sovereignty. The umbrella clause is a provision included in a BIT providing that the host state will observe any commitment (obligation or undertakings) which it has entered into with regard to investment. Thus, breaches of a bilateral international treaty may include breaches that take place on a purely contractual level between the foreign investor and the state in which the investment is established. Such a phenomenon is described as a transformation of contract claims into treaty claims. The original idea is to protect the foreign investor from a possible arbitrary change in the investment contract or in the national legislative framework governing it.[14] However, the practical impact of the umbrella clause varies. The arbitration tribunal in SGS v. Pakistan found in favour of a *sensu stricto* interpretation of the umbrella clause, meaning not every breach of a contractual obligation can be considered as a breach of an interstate treaty.[15] This would amount to an extreme interference with state sovereignty. On the other hand, the award of the arbitration tribunal in SGS v. The Philippines[16] is based on a textual interpretation of the clause. For the arbitrators, the umbrella clauses "means what it says,"[17] and they diverged from the restrictive interpretation adopted in the award in the SGS v. Pakistan case six months before. However, the arbitration tribunal in SGS v. The Philippines then specified clearly that the real impact of umbrella clauses referred to the scope but not to the performance of such obligations.[18] Such a divergence in the interpretation of the umbrella clause thus has an impact on uncertainty in the limitations of state sovereignty.

Substantial clauses included in the BITs that provide for self-limitation of host state administrative organs are accompanied by limits in the area of the jurisdiction of judi-

[12] International tribunals when referring to the ordinary dictionary meaning equate the word "fair" with "equitable" and vice versa.

[13] As a modern version of the notion of denial of justice.

[14] However, umbrella clauses should be differentiated from clauses of stabilization where the purpose is to freeze the legislative framework for the state-investor relationship to the date of the conclusion of the state contract.

[15] SGS Société Générale de Surveillance S.A. v. Pakistan, Dec. on Objections to Jurisdiction, 18 ICSID Review 307 (ICSID (W. Bank) 2003). The tribunal held that the effect of umbrella clauses could not be to "elevate" breaches of contract to breaches of the bilateral investment treaty.

[16] SGS Société Générale de Surveillance S.A. v. The Philippines, Dec. on Objections to Jurisdiction, Case No. ARB/02/6 (ICSID (W. Bank) 2004).

[17] *Ibid.*, para.

[18] "Article X(2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained."

cial organs (the clause of arbitrability). This is an important example of sovereignty self-restraint, which offers the foreign investor the possibility of bringing an action against a host state before an international arbitration tribunal.[19] A similar mechanism exists, too, in human rights adjudication. The difference between international human rights adjudication and international investment arbitration is fundamental. It lies within the conception of the judicial mechanism and the subject matter of the dispute. While in the human rights field, adjudication is by a judicial[20] or quasi-judicial[21] body, the international investment procedural mechanism is arbitration. Judicial or quasi-judicial bodies, as permanent organs, create their proper case-law and thus maintain a certain consistency within it. This is not the case with ad hoc arbitration tribunals. Ad hoc arbitration tribunals are not bound by previous decisions in other cases decided by other ad hoc tribunals, which may cause some cracks in the predictability of voluntary state self-limitation. Thus, the lack of case-law consistency within international investment arbitration creates some legal uncertainty as to how an international tribunal will assess the state's conduct framed by self-limiting jurisdiction.[22]

Similarly, in the context of compensation for breaches of treatment rules, financial intervention is particularly sensitive for the state, and in this sense financial interdependence with sovereignty cannot be denied.

In all the situations presented above, there is a voluntary self-limitation by the host state. However, the formulation of substantive protection clauses, as well as a certain interpretative unpredictability on the part of arbitration tribunals, may cause fissures in the exercise of state sovereignty. The situation is somewhat different in the area human rights.

Human rights abuses committed by TNCs

In the previous section, we saw how sovereignty is self-limited by a host state in the context of providing an international legal standard of protection to foreign investors. Conversely, the issue of human rights abuses raises a problem of the state-centric conception of human rights protection, the enforcement of which is exclusively territorial.

There are numerous examples where TNCs, sometimes with the tacit approval of the host state, violate human rights norms, labor safety standards, environmental policy obligations, waste management, etc. The behavior of such profit-oriented companies may then threaten the lives and health of members of a local ethnic commu-

[19] Sometimes/often the foreign investors may bypass totally the national judicial mechanism and initiate arbitration before an ad hoc international tribunal.

[20] Especially regional human rights systems of protection specify judicial mechanisms, e.g., the European Court for Human Rights.

[21] Human rights mechanisms on international level usually specify an organ which is considered a quasi-judicial body, e.g. the UN Human Rights Committee.

[22] In two cases based on the same factual background, two different arbitration tribunals evaluated the conduct of Czech authorities differently (cf. Lauder v. Czech Republic, and CME v. Czech Republic).

nity, contaminate drinking water sources, or undermine social justice. In such cases, procedural mechanisms of protection and, in particular, the procedural possibility of seeking reparation fail. With regard to TNCs, the fundamental question is whether and to what extent a corporation as such is bound by human rights norms arising directly from international law, or through obligations received within domestic law. In simple terms, is the corporation bound by international human rights norms?[23]

As explained above in the section on the definition of the TNCs, the jurisdictional link or ties of allegiance are very complex. In fact, from a formal point of view, it is even impossible in the situation of a transnational corporation created by a parent company, its subsidiaries and their suppliers to speak about a unique (or even coherent) link of nationality and, thus, a link of jurisdiction.[24] Thus, in the situation of a group created by a parent company and its subsidiaries, the question of whether the TNC is solely bound by the law of the parent company arises. Is the whole TNC under the jurisdiction and sovereignty of the parent company's state? That is, the state in whose territory strategic business decisions are adopted? Or is it the state of the subsidiary, e.g., the foreign investor, that executes strategic business decisions adopted by a parent company that is the *primary* state of tie of allegiance? Or even the state of the material supplier (cotton for Benetton International) that employs the local population in almost inhuman conditions? Or is it even possible to invoke international human rights law with respect to TNCs? And if so, can we identify what documents or obligations are binding for them?

The issue of the substantive rules that are applicable to a TNC is flanked, of course, by procedural issues. The problem arising from the clash between economic reality and different legal orders is the problem of the forum, which is, logically linked to the question of the passive legitimation of the subject. Simply, this is a matter of the question as to who the defendant party is/should be. The combination of substantive challenges with procedural ones leads in general to deadlock. First, we do not know precisely if and to what extent human rights norms are directly biding on TNCs. Especially in the situation described above, the set of biding human rights norms may vary according to what state has jurisdiction (the parent company's state, the subsidiary's state, or even the supplier's state). Second, in the case of human right abuses, victims legitimately bringing a suit will face the problem of who should be the defendant party. Such deadlock caused by formal applications of *hard law* has led the international community to seek to regulate such challenges in a different way. However, there has not been, and still is not, much willingness on the part of states to adopt a binding *hard law* instrument. The path of soft law instruments has been followed. Soft law instruments seek to prevent human rights abuses by TNCs. Thus, different preventive

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[23] The issue of applicable substantive rules is also secondarily connected with the issue of responsibility for human rights violations. Such human rights abuses could amount to crimes. However, the criminal responsibility of legal persons is not regulated in all domestic legal orders.

[24] Formally, it is even impossible to ask a TNC to possess a unique jurisdictional/nationality link. Business and corporation practice shows that the possibility of creating subsidiaries having different ties of allegiance lies at the very center of the existence of a TNC.

measures at the level of governments have been adopted on an international level: OECD Guidelines on Multinational Enterprises or Guiding Principles on Business and Human Rights (UN OHCHR).

The 1975 OECD Guidelines offer a set of non-binding principles and standards for responsible business conduct. This declaration, most recently revised in 2011, also introduced the practice of National Contact Points (NCP). The NCPs serve as a mediator[25] in a dispute over alleged violation of principles of business-related responsible conduct by a TNC. The procedure is usually initiated by a non-governmental organization (sometimes representing victims of such behavior). Both Czech and Polish NCPs have already examined several notifications dealing with observance of OECD Guidelines principles.

For example, in August 2018, the Polish NCP[26] received a notification by an NGO called the Development Yes – Open Pit Mines No! Foundation. The submission concerned an alleged non-observance of the OECD Guidelines by the Group PZU S.A., with respect to the obligation to reveal information on environmental impact and climate-related matters. In another case, the notification submitted by trade unions to the US NCP was transferred to the Polish NCP, as the multinational enterprises operated in Poland. Thus, "in May 2006 the US NCP received a request for a review from a trade union alleging a multinational enterprise had breached the employment and industrial relations provisions of the Guidelines due to claims of sexual harassment. The US NCP transferred the specific instance to the Polish NCP as the claims occurred in Poland. The Polish NCP met with the parties, however parallel legal proceedings were already underway. The court reached the verdict that the managers were not guilty of sexual harassment, but they had breached the regulations of the employment and industrial relations chapter of the Guidelines. After this verdict the specific instance was concluded."[27] Similarly, the Czech NCP examined a notification submitted by a Czech NGO against a Czech multinational enterprise operating in Myanmar for alleged violations of labour rights stating "that the company did not conduct due diligence to prevent the adverse impacts caused by its sourcing from the Myanmar based factory."[28]

In these examples, state sovereignty is not applicable due to territorial jurisdiction with respect to human rights obligations and the horizontal effect of those. However, different non-judicial (and thus non-binding) proceedings might be initiated against TNCs by submitting a notification on specific breaches of responsible business conduct. Thus, the state's sovereignty and territorial jurisdiction does not serve for the articulation of specific international norms within the domestic legal order. But rather, it serves as a vehicle to improve standards and principles of responsible business conduct, and to adjust in a very subtle way breaches with respect to environmental, human rights, or labour law issues. This pro-human rights and pro-environmental

[25] The procedural role of the NCP may vary between *good offices* and *mediation*. Occasionally, an NCP plays a mixed role of "good offices – joint talks with active support of the OECD NCP."

[26] http://mneguidelines.oecd.org/database/instances/0006.htm [accessed: 2022.11.09].

[27] http://mneguidelines.oecd.org/database/instances/pl0001.htm [accessed: 2022.11.09].

[28] http://mneguidelines.oecd.org/database/instances/cz0006.htm [accessed: 2022.11.09].

approach of states towards TNCs is mirrored in the case of TNCs themselves, which, through the concept of corporate social responsibility, create so-called business or corporate citizenship.

Undermining national sovereignty and creating "corporate citizenship"

"Corporate citizenship" can be defined as activities that ensure compliance with laws and ethical behaviour, contribute to social and economic well-being, and generate profits that provide a fair return to investors. In this sense, "citizenship" not only imposes responsibilities and obligations on corporations, but also confers the right to influence policy decisions.[29] TNCs have long been aware of the pressure from civil society (especially NGOs) on them, particularly in relation to violations of human rights or environmental law norms. Similarly, different pressure is also exerted by other stakeholders within the international community. This was presented above via the example of OECD Guidelines. In this regard, we can see a similar initiative on the European level. In February 2022, the European Commission adopted a proposal with regard to the EU Directive on corporate sustainability due diligence. Such a document should put pressure on TNCs to take human rights and environmental issues into consideration.[30]

Both from members of the international community and as well from non-state actors – NGOs – it is always and only soft power that is directed toward TNCs' conduct, soft power acting on the reputation of the TNC. TNCs themselves, through the concepts of corporate responsibility, or responsible business conduct, take strategic business (we could say, marketing) decisions, especially in order to show how they contribute to the creation of social good in addition to profit. This is the case of different projects such as: providing funds for charitable purposes (e.g. for the fight against HIV in Africa, building schools, etc.); self-regulation in the field of human rights and environmental protection (e.g. a willingness to submit to the good offices of an NCP, adopting codes of conduct – corporate social responsibility); and influencing international public policy (e.g. by participating in WTO negotiations, trying to influence negotiations on global warming).

If these non-profit (pro society) activities can be assessed very positively in general terms, they also have a direct impact on the concept of national sovereignty. That is, the concept by which the state meets the basic needs of society. Indeed, the fundamental criticism of these TNC activities lies in the limited globalized business perspective. Critics argue,[31] for example, that empowering corporate citizenship allows TNCs to shift responsibility and risk by focusing on voluntary codes of conduct, plea

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29 D.A. Rondinelli, *Transnational Corporations: International Citizens or New Sovereigns?*, "Business Strategy Review" 2003, vol. 14, issue 4, p. 14.

30 https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en [accessed: 2022.11.09].

31 D.A. Rondinelli, *Transnational Corporations*…, p. 18.

agreements, and civil and administrative actions instead of criminal charges, thereby weakening criminal law and thus national sovereignty. The strong influence of TNCs on social programs and public sector policies can lead to selective or limited interventions that may not address the root causes of problems. Further, one can also argue that increasing corporate involvement in foreign aid, social policy, and human rights self-regulation in general undermines social policy, the sovereign functions of national governments, or at least displaces the accountability of legitimate government regulation. Other critics[32] argue that the concept of state sovereignty cannot be replaced by a new "corporate sovereignty" that is unfettered and unaccountable. They note that a voluntary approach such as "soft law" standards cannot realistically be legally enforced and cannot realistically impose human rights obligations on TNCs.

Conclusion

Different approaches and elements influence the relationship between the legal concept of sovereignty and its practical manifestations, on the one hand, and the social and economic reality created by TNCs, on the other. Limitations related to the territorial manifestation of sovereignty and, mainly, the issues of jurisdiction cannot come to terms with the globalized phenomenon of TNCs. In some area, states limit their (administrative) jurisdiction voluntarily (the self-limitation concept). Nevertheless, even such voluntary self-limitation may result in the risk of non-voluntary limitations on the state's sovereignty. In another area, sovereignty and jurisdictional manifestation of it has led to procedural incapacity in cases of human rights abuses committed by TNCs. Soft law instruments adopted to challenge such situations affect state sovereignty in an invisible way. Finally, the concept of corporate citizenship which is, in fact, also a product of soft law regulation to combat human rights abuses perpetrated by TNCs might affect the real implementation of a state's sovereignty.

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Summary

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Sovereignty and Transnational Corporations

The position and role of transnational corporations (TNCs) vis-a-vis the concept of sovereignty is specific. TNCs operate as an organism (an economic and social reality of a net created by a mother society, subsidiaries, and their suppliers anchored in different jurisdictions). The article presents three areas where the interaction of a state's sovereignty and TNCs is the most visible. First, it discusses the issue of self-limitation with respect to administrative jurisdiction in cases related to foreign direct investment and the risk to the host state in situations where such autolimitation is not clearly framed. Second, the author presents the issue of human rights abuses committed by TNCs, the procedural challenges for redress, and the way-out created by soft law instruments adopted at an international level. Third, the concept of corporate citizenship is presented, which might undermine national sovereignty.

Key words: transnational corporations; sovereignty; self-limitation; foreign investment; human rights abuses.

Streszczenie

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Suwerenność a korporacje transnarodowe

Pozycja i rola korporacji transnarodowych (KTN) wobec koncepcji suwerenności ma specyficzny charakter. KTN działają jako organizm żywy (ekonomiczna i społeczna rzeczywistość sieci tworzonej przez korporację macierzystą, jej filie i ich dostawców, którzy zakotwiczeni są w różnych jurysdykcjach). Artykuł przedstawia trzy obszary, w których koncepcja suwerenności państwa i KTN jest najbardziej widoczna. Po pierwsze, autor rozwija problematykę samoograniczenia w odniesieniu do jurysdykcji administracyjnej w przypadkach związanych z bezpośrednimi inwestycjami zagranicznymi oraz kwestię ponoszenia przez państwo przyjmujące ryzyka w sytuacjach, w których takie samoograniczenie nie jest jasno określone. Po drugie, autor przedstawia zagadnienie naruszeń praw człowieka przez KTN, wyzwania proceduralne w zakresie dochodzenia roszczeń oraz rozwiązania, jakie stwarzają instrumenty prawa miękkiego przyjęte na poziomie międzynarodowym. Po trzecie, w artykule została omówiona koncepcja obywatelstwa korporacyjnego, która może podważać suwerenność państwową.

Słowa kluczowe: korporacje transnarodowe; suwerenność; samoograniczenie; inwestycje zagraniczne; łamanie praw człowieka.