On Multinationals and Sustainability: 
A Legal Perspective

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Abstract: Multinational enterprises, as key actors in today’s globalized economy and politics, considerably affect numerous aspects of sustainable development, especially in time of economic recession. The submitted contribution deals with international legal framework with respect to sustainability as one of the most thoroughly discussed goals and objectives that is not only to be declared by the multinationals but, first and foremost, to be effectively implemented and put into force. The contribution covers the theme of sustainability in multinationals from the standpoint of international economic law both structurally and materially. In terms of organizational background, the contribution focuses on the role of the United Nations and the OECD as the main sources of soft law regulating such areas as corporate social responsibility or industrial ecology in multinationals. As to the subject matter of the concept of sustainability, numerous aspects have been mentioned in the contribution including, but not limited to responsible supply chain management, human rights due diligence processes or combating the illicit trade in minerals.


1 Introduction

Multinational enterprises play a pivotal role in today’s economic, political as well as legal relations worldwide. As key players in modern globalized economy, they are definitely among the most influential de facto subjects of international economic law as well. Some authors claim that the main function of multinationals is to promote sustainable development. Others believe that their actual influence should be regulated in order to maintain sustainable development, otherwise they would use and abuse natural as well as human resources uncontrollably until there is nothing left, especially if operating in the least developed or developing countries. On the other hand, most multinational corporations officially express their concern for ethical and ecological approach to business conduct, using such concepts as corporate social responsibility or industrial ecology in their corporate strategy. On the structural level, both United Nations and the Organization for Economic Cooperation and Development strongly support responsible business conduct of multinationals by creating a legal platform aimed at regulation of their complex business operations and emphasizing their considerable contribution to sustainable development through soft law.

Pursuant to the OECD Guidelines for Multinational Enterprises, these „comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.” This definition is focused on the control aspect within the “body” of a multinational corporation. On the other hand, the UN differentiate between the term “transnational corporations” which are basically

viewed as “enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be cooperatives or state-owned entities”4 and the term “multinational corporations” that stands for “enterprises owned and controlled by entities or persons from more than one country.”5 Hence it is clear, that multinational enterprises (MNEs) according to the OECD are more or less synonyms to transnational corporations (TNCs) according to the UN. For the purpose of this contribution the term “multinational enterprises” will be used for both MNEs and TNCs.

The concept of sustainable development has been defined by the Brundtland Commission (1987 World Commission on Environment and Development) as follows: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”6 The definition may seem vague at first sight, however due to its multidimensional character, such approach is more of an advantage than not. Generally, the concept of sustainable development bears strong environmental connotations. In legal terms, these have been transposed to the system of international law through such instruments as the OECD Guidelines for Multinational Enterprises or the Draft UN Code of Conduct on Transnational Corporations.7 The concept of sustainable development has traditionally its strongest presence in chapters of the documents dealing with environment, however new areas are gaining its importance, for example sustainable development with respect to technology transfer or human rights.

The relationship between multinationals and sustainable development is more than evident – multinationals through the flow of foreign direct investments on one hand and their economic power in host countries on the other are the ones setting rules in all respects, including sustainable development in the host country or the lack thereof. In terms of international economic law, or in broader sense international law, the legal personality of multinationals is being discussed as they are vivacious candidates for becoming subjects of international law alongside traditional legal subjects such as states or international organizations8.

2 Material Aspects of Sustainable Development: Corporate Social Responsibility v. Industrial Ecology

The concept of industrial ecology with respect to operations of multinationals across boundaries intertwines with the concept of corporate social responsibility in several ways. Within industrial ecology the activities of multinationals on a global level are compared to functioning of ecosystems in nature. According to Miller: “The necessity of viewing the relevant ecosystem as an intertwined and constructed mixture of spatial levels and organized actors must be given more attention if industrial ecology is to provide a useful perspective for understanding and improving ecosystems worldwide.”9 From legal perspective, two relevant areas are becoming more visible: labor relations especially with respect to issues associated with protection of rights of workers and human rights in general and environmental issues including protection of ecosystems and improving environmental standards within operations of multinationals.

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7 See more e.g. on: http://unctd.unctad.org/data/oecd/43/29/48004323.pdf
The concept of industrial ecology is based on two basic pillars: balance of industrial ecosystems that enables them to be “self-perpetuating”\textsuperscript{10} and “flows among their constituent parts.”\textsuperscript{11} In practice, the concept of industrial ecology may be effective and efficient only if the same dimensions as the ones defining the corporate social responsibility have been activated, that is not only economic, but social and environmental aspects are to be given the same importance in the long run. Thus, instead of profit maximization or even maximization of shareholder value, the paradigm is shifting towards sustainable development that is possible only if balance is maintained.

International economic law as the main body of law regulating activities (even though only indirectly) of multinationals covers such areas as foreign direct investments or international trade – areas that are substantial for the actual existence of multinationals. However, the environmental, social or ethical concerns arising out of these activities are primarily dealt with on national level. As multinationals are operating worldwide, national legislation especially in highly underdeveloped countries may not represent sufficient standards of protection of environment or human rights on a regular basis. Thus corporate social responsibility within the context of industrial ecology is only a concept that may not be effectively implemented or enforced on an international level. In terms of corporate social responsibility, sustainable development should be achieved by respecting sound environmental management, responsible supply chain management, protection and promotion of human rights through continuous due diligence process as well as by ethical conduct of multinationals regardless of “worse” – in short term and in absolute numbers – financial results.

Currently, international law with respect to regulation of conduct of multinationals towards sustainable development represents a complex mechanism of guidelines that are to be implemented and enforced by states in relation to multinationals operating on their respective territories. The enforcement of this mechanism remains to be questionable. However, due to complexity of the world community both structurally (institutionally) and materially (in terms of subject matter of international law), it is doubtful if any other mechanism may be effectively put in force. Thus, regulation of multinationals with respect to sustainable development is almost exclusively ruled by soft law, which is fortunately complemented by other “external” factors that considerably impact the conduct of multinationals towards sustainable development by other than legal measures.

3 Institutional Framework

Originally, the institutional background for multinationals was created by the United Nations. The program on transnational corporations has been launched by the UN in 1974.\textsuperscript{12} For almost two decades, the United Nations Centre on Transnational Corporations (UNCTC) was the most important network for any regulatory tendencies in this particular field. The three main objectives of the UNCTC, though not explicitly citing the principle of sustainable development, indirectly confirmed its relevance anyway. These three objectives were:

- to further the understanding of the political, economic, social and legal effects on TNC activity, especially in developing countries;
- to secure international arrangements that promote positive contributions of TNCs national development goals and world economic growth while controlling and eliminating their negative effects; and
- to strengthen the negotiating capacity of host countries, in particular developing countries, in their dealings with TNCs.”\textsuperscript{13}

\textsuperscript{12} See more: http://unctc.unctad.org/aspx/UNCTCOrigins.aspx
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In terms of actual results of its activities, the Draft Code of Conduct on Transnational Corporations was elaborated, even though it has never been adopted.

In 1993, the agenda of the UNCTC was transferred to the United Nations Conference on Trade and Development (UNCTAD), which promotes “the development friendly integration of developing countries into the world economy... with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.” One of its numerous activities is aimed at promotion of sustainable development in the field of intellectual property rights which is being carried out in cooperation with the International Centre for Trade and Sustainable Development (ICTSD).

Alongside the above-mentioned institutions, several others focus on particular questions in connection with multinationals and sustainable development. The main objectives of the UN Division for Sustainable Development operating within the UN Department for Economic and Social Affairs include:

- “Integration of the social, economic and environmental dimensions of sustainable development in policy-making at international, regional and national levels;
- Wide-spread adoption of an integrated, cross-sectoral and broadly participatory approach to sustainable development;
- Measurable progress in the implementation of the goals and targets of the Johannesburg Plan of Implementation.”

At the moment, the UN Division for Sustainable Development is involved in preparations of the RIO+20 – the UN Conference on Sustainable Development.

In order to illustrate the multidimensional character of the concept of sustainable development, the range of issues that are being continuously dealt with by the UN Division for Sustainable Development is listed below including:

- social and economic aspects – with regard to multinationals e.g. in terms of industry or sustainable production;
- environmental aspects - natural resources management in general;
- stakeholders (including multinationals);
- means of implementation;
- regional dimensions, especially with regard to least developed countries (in particular Africa).

Similarly, specific questions are covered with respect to labor relations, in particular concerning human rights, on the platform of the International Labor Organization. The fundamental document covering social or more precisely labor relations (as one aspect of sustainable development) is the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. As most legal instruments aimed at regulation of conduct of multinationals, the MNE Declaration may be considered part of the so called soft law that is not binding due to the lack of its enforceability.

As opposed to the institutional framework on multinationals and sustainability created and maintained by the United Nations, the Organization for Economic Cooperation and Development brings a viable set of guidelines that serve as “recommendations addressed by governments to

14 See more: http://www.unctad.org/en/Pages/AboutUs.aspx
15 See more about the joint project e.g.: http://www.unctad.org/en/Pages/DIAE/Intellectual%20Property/IPRs-and-Sustainable-Development.aspx
17 See more: http://www.unescd2012.org/rio20/index.html
multinational enterprises operating in or from adhering countries.” The principle of sustainable development as seen by the OECD is primarily focused on environmental issues, including but not limited to:

- Environment and Sustainable Development (Economic Issues)
- Biodiversity, Water and Natural Resource Management
- Climate Change
- Consumption, Innovation and the Environment
- Environment and Development
- Environment in Emerging and Transition Economies
- Environmental Indicators, Modelling and Outlooks
- Environmental Policy, Tools and Evaluation
- Fisheries
- Green innovation
- Sustainable Agriculture
- Trade, Investment and Environment
- Transport and Environment

In comparison to the broader understanding of the principle of sustainable development within the UN framework, the OECD does not cover social themes as these are specifically covered in other working areas. Thus the principle of sustainable development as used in the OECD Guidelines for Multinational Enterprises should be interpreted in terms of its environmental dimension with slight economic interception, excluding its social side.

4 Sustainable Development within the OECD Guidelines for MNEs

According to the OECD Guidelines for Multinational Enterprises: „Enterprises should contribute to economic, environmental and social progress with a view to achieving sustainable development.“ The principle of sustainable development has been eminent in the text of the document as a whole and used repeatedly in order to emphasize its importance. The general understanding of the principle of sustainable development has been primarily focused on its environmental aspects – the concept is mostly used in the sixth chapter of the first part of the updated version dedicated to environment. Pursuant to the guidelines: “Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.”

In order to achieve this objective, multinationals should develop and implement efficient and effective environmental management policies. Pursuant to the interpretation rules included in the guidelines “sound environmental management should be interpreted in its broadest sense, embodying activities aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long-term, and involving both pollution control and resource management elements.”

It is inevitable to implement a complex information system including information on environmental issues and/or challenges the enterprise is facing in order for the enterprise to build and maintain its

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20 See more: http://www.oecd.org/topic/0,3699,en_2649_34889_1_1_1_1_37439,00.html
21 See more: http://www.oecd.org/topic/0,3699,en_2649_34589_1_1_1_1_37425,00.html
credibility. The basic rule that is to be followed by multinationals with respect to environment is the so-called “precautionary approach.”

The precautionary approach is explained as a proactive approach to potential environmental threats that multinationals should take as soon as they find out about possible risks. In practice, this approach should be put in force through effective information systems and environmental management systems, including proper training of employees. As a result, the multinationals should “implement best practice policies for sustainable development that seek to ensure coherence between economic, environmental and social objectives.”

5 Conclusion

Multinational enterprises considerably contribute to sustainable development or vice versa to the lack thereof due to their direct economic and indirect political influence they are exercising globally. Often, their economic power is much greater than economic power of the state they are operating in. Thus, multinationals have the actual “force” to make a difference by carrying out their activities in accordance with the principle of sustainable development. From the point of view of international law, more specifically international economic law, the conduct of multinationals is regulated almost exclusively by soft law. On one hand, due to the complexity of the subject matter, it is highly probable that more strict international regulation is an impossible goal to reach. On the other hand, lack of actual legal force and enforceability of the rules as well as their “vagueness” (as to the content) seemingly weakens their importance. Thus the “real” regulation of the conduct of multinationals towards sustainable development is de facto self-regulation carried out by the multinationals themselves through effective and efficient implementation of their own corporate social responsibility strategy, ideally in line with the concept of environmental ecology and respecting environmental, social as opposed to merely economic dimensions of their activities worldwide.

Literature


25 This principle is included in the RIO Declaration on Environment and Development.


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