



ORIGINAL PAPER

Transnational Corporations, as Subjects of International Law in the Globalization Context

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Abstract

When analyzing the contemporary society, globalization eloquently describes every domain of existence, regardless of the geographic area, whether we are talking about the elimination of borders, rapid access to information, or the freedom of capital and circulation, for example. Its economic dimension, however, has a predominant impact, as Wallerstein considered that the world capitalist economy determines all dimensions of social life. Transnational corporations become, in today's context, an emblematic portrayal, defining globalization, characterized by the transcendence of traditional models of capitalism (Behrman, 2003). Thus, the regulation of global economic relations and functioning in this global space requires a new reference framework and specific institutional regulations, with no consensus yet. Although the role of transnational corporations as major actors in the globalization process is widely recognized, intense debate has been generated by their status as subjects of international law. Therefore, in this paper we intend to highlight the main aspects regarding their legal status, discussing also the larger globalization context.

Keywords: *transnational corporations; globalization; legal status; international law.*

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The context

Technological jumps, industrial development and economic interactions, all fostered by scientific discoveries, have reshaped the way people work, learn, interact, entertain and even live, in a remarkable way, for the last two centuries, starting with the First Industrial Revolution and the steam-powered engine. Nowadays, every local happening can become global in a blink of an eye, due to communication facilities and rapid data transmission through internet. Goods, cultural operas, ideas, can be produced everywhere and accessed, seen, bought from almost anyway on Earth. Globalization is a catchphrase frequently used to describe the actual connected society we live in and it's economic dimension is often brought to attention, as it is considered of capital importance. Furthermore, in addition to the multiplication of contexts in which globalization, as a process, can be observed, "the effects of globalization are most easily perceived in the economic aspects of life, such as trade, commerce, or public access to certain goods and services, due to significant increase in foreign exchanges" (Porumbescu, 2018: 79). In other words, economy usually deals with production and consumption issues and the defining feature of the global context is that production and consumption are no longer only locally situated, limited to a territory, but the frontiers and boundaries between states become less compulsory. On this fertile soil, transnational corporations emerged, as subjects of law. Although, throughout time, they have known many changes in terms of size and fields of action, the fundamental characteristics that differentiate them from other types of economic agents remain constant.

The United Nations Organization on Trade and Development defines transnational corporations as "legal entities or entities without legal personality consisting of parent companies and their foreign affiliates. The parent company is defined as an enterprise that controls assets of other entities in countries other than the mother country, usually by owning a capital stake. Foreign affiliate is a legal entity or entity without legal personality in which an investor as a resident in other economy holds a share that allows a long-term interest in managing of this company" (UNCTAD, 2016). In this analytical framework, the concept of *transnationality* can be used to define a new distribution of productive activities on an international scale. Transnational corporations are extremely powerful institutions and possess resources that far outstrip those of the majority of the states that are members of the United Nations Organization system. Among their main assets, we can include an immense reserve of managerial talent, financial assets and technical resources, which are being instrumentalized in order to conduct gigantic operations, all with the aid of a concerted global strategy. Since this type of investment creates integrative types of economic relations, engaging the global society in the internal economic operations performed within national borders, it came to be a very controversial one.

In the scientific literature dedicated to the study of these companies a rather consistent attention is being paid to defining and differentiating them from other types of economic international actors. However, the focus of this article is on investigating the extent of their indisputable role in the globalization phenomenon, and, consequently, their legal status under the provisions of international law.

The main actors of globalization are the transnational companies, respectively large companies (mostly from western countries), which have expanded their activity economic and financial beyond the borders of the country of origin, becoming the main economic agents in the contemporary world economy. They exist and act in all sectors

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of activity: industry, agriculture, banks, insurance, advertising, tourism, etc., holding important positions of control in the respective sectors. Many transnational corporations have in a relatively short time come to concentrate an economic force greater than that of some states, having therefore a word that is hard to say in terms of direction, magnitude and degree of complexity regarding the development of international economic relations as a whole, as well as their impact on the development of national economies.

The international arena depicts a landscape in which transnational companies have become the initiators and organizers of the international production of goods and services, the generators of foreign direct investments, therefore gaining the ability to play an important role in complementing the development and progress efforts of the national companies located in different countries. Under these circumstances, and given the resource package transnational corporations can provide for their hosts - in terms of capital, technology, access to markets, advanced technical, professional and managerial skills and knowledge - the frontier between the economic interests and other type of interests a corporation is entitled to lobby for becomes rather unclear.

From the international politics perspective, corroborated with the extensive expansion of the role of the transnational corporations in the multi dimensioned global links concluded nowadays, we argue that it is of critical importance to draw a difference between the legal status of the transnational corporations under the provisions of public international law and their role as actors in the development of relations on the international arena. While the last is indisputable, being given the contemporary international context, as previously described and further analysed in this paper, as being dominated by processes such as globalization, significant multiplication of international contacts, the increasing role of non-state actors etc., the first frame of analysis creates room for significant debate in the international relations theory.

Historical development

Although the issue of the role of multinational companies in establishing the international agenda and their interference with state politics, as well as numerous examples of such practices have been around for a long time, the events that led to the introduction of the matter in the political and administrative theory are more recent. Setting the topic of international economic agents as subjects in the global evolution of the international system was fuelled by the rapid intensification of their activity and the expansion of the territorial frame of their initiatives, partly due to the innovations in the production and transportation processes.

The spread of powerful private entities, which influence state processes, was also facilitated by the technological and financial advancement of the United States following World War II (Hinsey, 2017), combined with a doctrine and propaganda of consumerist type that transformed the social ideals and lead to a rapid transformation in the global landscape. The change of the global social paradigm is often regarded as one of the most important aspects of the globalization process, describing it as "the phenomenon that causes significant structural changes in societies, involving a number of new processes like massive technological development, demographic ageing or facilitating access to education, all these producing permanent changes of values, so that it became imminent the question: What cultural values dominate today and which of these will prevail in the future?" (Niță, Ilie Goga, 2017: 11). These kinds of questions arise in relation to the significant interference of the set of values promoted by

transnational companies and the traditional, locally constructed ones. Furthermore, it is often argued that “historically, the relationship between the economic power and the political power of transnational corporations has been very controversial” (Sklair, 2002: 145).

Considering this, it is important to highlight the fact that evidence of the interference of these transnational economic actors in other sectors of activity, such as political, administrative, or even legislation is not recent, but dates back to incipient forms of enterprises that conducted production and financial affairs in the colonies of the former great empires.

One of the oldest examples of transnational companies is the East India Companies (English East India Company, East India Trading Company, or English East India Company) (Encyclopaedia Britannica, 2019), which was a set of commercial companies that have shared, with vast rivalries often solved by bloodshed, the area of the current Indian state, and belonged to the British, French, Danish and Dutch. The most widespread and efficient of these was the East India Company, known as the Honourable East India Company or the British East India Company and informally the John Company. It was one of the first English stock companies, initially set up to trade in the East Indies, but ended up trading even with the Qing Dynasty of China and gained control of large parts of the Indian Continent. The company received the Royal Charter and the title of “Governor and Company of Merchants of London Trading in the East Indies”, signed by Queen Elizabeth I on December 31, 1600 (Molesworth, Foster, 1893: 3), becoming responsible for about half of the global trade at that time. At the peak of its domination in India, the company had a private army of nearly 260,000 people (double from that of the country from which it came) exercising military control, almost entirely, in the region and assuming administrative functions, either directly or by completely obedient leaders.

At the moment when such companies carried out their activities they acted, in legal terms, as representatives of the states that commissioned them, thus making it more difficult to establish whether they should be regarded as subject of private law or public law. However, over time, the influence of the sovereign states in the transnational companies has diminished, making room for private initiatives, and the initial state-company directed link was reversed, along with the increase of the interests of the non-state actors in the development of internal politics and international relations.

Transnational Corporations and globalization

As argued above, transnational corporations certainly are an emblematic symbol of the actual global world. Therefore, according to our scope, some necessary specifications regarding globalization need to be made in the following lines. Firstly, theories regarding globalization are generally grouped into two main categories: the ones that link globalization with modernism and the ones that see this phenomenon in relation with postmodernism. Moving further with our analysis, one can easily acknowledge that globalization certainly is reflected at every level of the social life, even if we speak about communication, economy, politics or ideology and symbolic dimension.

Although when trying to define globalization over-simplification is unavoidable, the attempt of Anthony Giddens is often mentioned and briefly describes in an understandable way this phenomenon. According to his view, globalization can be regarded as an “intensification of worldwide social relations, which link distant localities in such a way that local happenings are shaped by events occurring many miles away

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and vice versa” (Giddens, 1990: 64). His perspective also captures the dialectic nature of globalization, in the sense that local consequences of the facts that determined them, situated at a great distance, may be different from their precursors.

While Giddens sees globalization as an outcome of modernization, Wallerstein mainly describes economic globalization, Meyer considers the economic dimension and Luhman regards this phenomenon as a structural modernization of western societies (Rusu, 2008). From a postmodern perspective, globalization can also be understood in the light of the post-industrial, informational society, characterized by technological developments, digitalization, automatization, also called knowledge-based society, or even smart society. From this perspective, globalization is a result of technological revolutions. In economic terms, corporations, migration of capitals, the global division of labour, all are facets of financial globalization.

Trying to understand the position of transnational corporations, we should emphasize their important role in society, with echoes at every level: educational, cultural, political and certainly economic. In order to argue our position regarding the economic key position of transnational corporations, we will introduce a short paragraph which describes in an eloquent manner their impact: “The main centres of power in the world economy are capitalist states – states in which capitalist economic enterprise is the chief form of production. The domestic and international economic policies of these states involve many forms of regulation of economic activity, but (...) their institutional organisation maintains an “insulation” of the economic from the political. This allows wide scope for the global activities of business corporations, which always have a home base within a particular state but may develop many other regional involvements elsewhere” (Giddens, 1990: 70). Multinational companies are described as centres of economic power in the capitalist world, monopolizing all forms of production. Furthermore, economic activities and institutions benefit from a considerable amount of regulations concerning the international interactions between states, beside the domestic ones.

Giddens also catches the financial power of such transnational companies, but also the limits they reach, regarding for example territoriality: “The biggest transnational companies today have budgets larger than those of all but a few nations. But there are some key respects in which their power cannot rival that of states – especially important here are the factors of territoriality and control of the means of violence” (Giddens, 1990: 70). This remark is of main importance for our work, as it draws attention on both impact of transnational corporations and sensible issues regarding their sphere of influence, arguing thus for the importance of analysing multinational companies in the context of international law.

Besides the economic dimension, the one regarding industrial and technological development also links globalization and transnational corporations. In the actual context, fostered by communication possibilities, travel alternatives, division of labour also becomes global. Internalization and specialization in different domains in certain areas or regions also describes multinational companies and regards differences in resources, human or natural, skills, production of raw materials or type of industry. The global labour division is defined by the fact that some countries, areas or regions are raw materials suppliers, others products suppliers, while others become know-how suppliers, which becomes increasingly valuable in the knowledge-based society.

This diffusion of technology reshapes not only production activities and relations, but impacts all aspects of humans’ day-by-day life. Transnational corporations

can also be seen as a messenger of such transformations, especially in poorer regions, where they represent the only jobs provider for several communities.

A useful key in addressing transnational corporations' impact is Wallerstein's theory of Modern World System (Wallerstein, 1974). According to his perspective, the world can be seen as divided between centre, semi-periphery and periphery, the West having the central role. Worth mentioning here is that globalization is seen by Wallerstein mainly as an economic one, because the global capitalist economy influences all dimensions of social life, as politics, culture or education. The spread of global capital connections and the interdependency created as a result, depicts an economic and political landscape in which "capitalism means, first of all, profit and technical civilization. This social system is defined, in economic terms, through the predominance of private property and its mass extension, through free initiative and unlimited profit, perfecting of work means and serial production, dynamism of activities and wealth" (Ilie, 2014: 235). Furthermore, globalization determines the spread of central – western models to periphery and semi-periphery, contributing to uniformization.

Linking Wallerstein's thesis to transnational corporations, we must say that their economic impact is unquestionable. At the same time, the economic status is consolidated through the entire construction of such companies and the local context of each new established subsidiary may repaint in different nuances the model brought. Aspects as economic development of the region, other concurrent opportunities for the workforce, the educational status of the inhabitants, their values systems, may influence the way a certain branch of a multinational company looks like.

Furthermore, national and international legal regulations are a key factor in this equation, as they can allow or not certain activities, practices, policies. At the same time, we must acknowledge that while for certain areas work regulations are very strict, especially when looking at safety and security, protection of pregnancy, motherhood or minors, working hours and rest time, still are regions where labour activities are dangerous and under-regulated, compared to the "Centre". Moreover, pollution, dangerous or toxic substances, waste storage, considered hot topics in western countries, are differently seen across the Globe. Industrialization is frequently incriminated regarding such issues and industry has a lot to deal with them. Therefore, new markets, also for sale, but for workforce, or resources are sought for, and law regulations, together with political or legislative predictability and military stability are a key factor taken into consideration by transnational corporations when drawing their strategy regarding such new markets.

Transnational Corporations under the rule of International Law

The nucleus of international law is represented by the relations concluded among states, as primary subjects of this type of law. These global links ruled by the international law can be based on cooperation, but also on confrontation, sometimes peaceful, but also, at times, violent. However, in the contemporary development of international relations, the traditional actors of international relations, namely the states, can be often replaced by non-conventional actors, thus resulting in the emergence of new types of relations, such as those between states and transnational companies, or those between transnational companies, international organizations and/or non-governmental organizations.

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Therefore, although both the legal doctrine and the studies in international relations theory consider the state either as the primary subject of international law, or the main actor of international relations, they also agree with the existence of other types of subjects/actors that need to be taken into account. Given these circumstances, it is impossible to disregard the fact that in the most recent period, after the Second World War in particular, a number of other factors, including public opinion, peace and anti-war movements, international non-governmental organizations, or international corporations act and exert a certain influence in international life. These entities act both legally and in the sphere of international relations, more indirectly, influencing - without determining - their content.

There are some characteristics of the international law that differentiate it from all the national systems of law: first of all, there is no institution invested with legislative authority. The international law is created based on the will of states that form, at a given moment, the international society, and the agreements they reach. In other words, the rules of international law are created by states, but, in some situations, other subjects of internal law contribute to creating legislation. Secondly, there is no higher authority entitled to observe and ensure the proper application of the norms. Thus, the consensus, the will of the national sovereign states is the only guarantee that the legal provisions of the international law are to be observed. And last, but of most importance, applying internal law depends solely of the will of the state, which is presumed from the moment it agreed to enforce a certain regulation. However, this system depicted above, created based on the sovereign will of the states, does not apply only to states, but also to all the other subjects of international law, which are represented, as most of the literature agrees, by international intergovernmental organizations, the peoples fighting for national liberation, and, in certain situations, individuals (Bogdan, 2007: 59-61). Therefore, transnational corporations are not listed as subjects of international public law, and the reason for this exclusion resides in the fact that they are not legitimized by the same kind of authority as the national states or the international intergovernmental organizations, which are founded based on the will of states, thus deriving their legitimacy from them. In other words, what transnational corporations lack, despite their significant influence in the development of countries all over the globe, is sovereignty. But, beyond these legal constrains it is undeniable the influence they have in the international affairs, being able to persuade political decisions and interfere with global politics. In this regard, it is important to highlight the fact that "while TNCs have always been political actors, the demands of economic globalization require them to be political at the global level in a more systematic sense than previously. The political action of TNCs at the global level, like most political action, is a mixture of the haphazard and opportunistic on one hand and well-organized and systemic behavior on the other" (Sklair, 2002: 145).

In the matters related to private international law, there is recognition of the transnational companies as subjects of law, numerous branches of legislation being specifically dedicated to economic and financial activities. However, the rapid acquisition of capital, due to the exponential increase of financial transactions, which was subsequently used to "colonize" the forms of administration, allowed transnational companies to rapidly expand their sphere of influence and to sway the legislative processes and the political decisions, both at national and supra-national level.

There are also authors who argue that, despite the fact that from the legal point of view, the concept of personality in the international law has been extended a lot

during the last years, the global system, in its current form, does "not take fully into account the international importance of transnational corporations and other non-state entities possessing such economic power" (Charney, 1983: 787). But even taking into account these remarks, being recognized as subjects of public international law would imply that the transnational corporations are holders of sovereignty, which is not true. This a prerogative only held by the nation states, and granted to them considering their exclusive authority over a certain territory and population, exerted through the means of an institutional complex. The state cannot invest sovereignty in the transnational corporations, since they submit to the legal authority of the state on the territory of which they were founded or develop their activities. The international intergovernmental organizations are subjects of international law due to the fact that their very existence derives from the decision of sovereign states to create them, thus investing them with legal autonomy. Once created, they exist autonomously from the founding nations.

On the other hand, as Charney (1983) argues, so far the international legal community has "failed to give these entities a legal role partly because of the power struggles among nation-states and the perceived threats to the nation-state system that they represent". In this context, one may presume that any continuation of these differences would bear consequences that are also likely to affect the global system, as a whole. Furthermore, the results acquired in the law making and law imposing processes in matters of international relations "depends largely upon the legitimacy of its rules. Because the law development process is the vehicle by which these rules are legitimized, a process that excludes powerful international actors will become less legitimate in the eyes of the excluded actors and will breed disrespect for the international system as a whole" (Charney, 1983). In addition to this, regarding the issue of sovereignty, it can be argued that even this concept, which embodies a certain level of equality between states, which are inherently different, can be dismantled or easily moulded into a prerogative fit for any other international actor. However, despite the fact that transnational corporations, aside for their economic activities, also interfere with the various kinds of political activity, a problem related to the legitimacy comes up, as the leaders and representatives of these companies do not accede to power as a result of democratic elections, nor can their activity be controlled by the means of a similar process. (Orts, 1995; Scherer, Palazzo, Baumann, 2006: 519).

Conclusions

Multinational corporations should be understood both as results and also agents of globalization. Their transnational dimension is possible due to globalization, but in the meantime, they also contribute to the spread of models, values, principles or behaviours. Therefore, it can be assumed that transnational corporations resemble to a socializing agent, or a messenger of western cultures, according to the view of Wallerstein regarding the Modern World System. From this perspective, multinational companies bring from the country of origin to the new established subsidiaries not only technologies and know-how, but also principles, working and relating systems and procedures, some of them written, others unwritten – in one world, they pass on their organizational culture. Multinational corporations have internal rules that may differ to a lesser or to a greater extent from the typical, sometimes informal, work regulations of the country where they arrive. Through the models they propose, transnational corporations can influence, in a soft manner, not only the work behaviour of their employers and collaborators, but also their private lives, the way they relate and interact.

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Such an influence is also facilitated through training programs, internships or other specialization courses, that target both hard skills, as professional abilities, and soft skills, as communication, team-working, interacting, problem solving or creative thinking.

Regarding the importance of state versus non-state legitimacy in defining the international system, a contemporary perspective that takes into consideration several layers of power distribution needs to acknowledge the importance of unconventional actors in the global connections, due to the fact that “the actions and relations of multinational corporations, associations, organizations and networks, based in various countries or no country in particular and which are apart and independent from national governments, are added to the actions and relations of the two fundamental systems of politics, i.e. the states and the international system” (Attina, 2009: 54).

The position of transnational corporations as key players at global level is built on one hand on their economic impact, as producers, suppliers of goods and jobs and also consumers, and on the other hand on their smoother social impact, consolidated by models, values or principles. But, based on these functions provided by the transnational corporations for the “global village”, their reach in the political, administrative and legal decision-making process increases in direct ratio with their economic growth. Nevertheless, law regulations have the power to limit, direct, or moderate the impact of transnational companies.

The financial capital resources, which the transnational corporations obtain from the globalization of the principle of liberal democracy, namely free trade and non-interventionism in the economy, are transposed into significant contribution both directly (added value taxes, income taxes, state contributions, concession contracts, loans etc.) and indirectly (taxes, respectively the purchasing power of employees, public-private partnerships, development related, attracting investors, influencing migration, public diplomacy, etc.), on the GDP of the mother country (the state in which their headquarters are located), but also of those in whose territory they operate. Given these significant contributions to the national economy, elected political leaders may feel compelled to “bow an ear” to the wishes expressed by transnational private entities (Eijaz, Eijaz, 2011).

Despite the existence of certain situations when privately owned companies have acted by interfering with local forms of government, or have even fully incorporated them into their area of domination, the issue regarding the degree of interference of privately-owned corporations in state affairs became of scholar interest only in the end of the XXth century, being initially used by anti-globalization groups, as a formula meant to emphasize the diminishing role of the nation-state on the international arena. By radically changing the lenses and becoming even a topic in the political spectrum on its own, a basic description of the situation would be that of a political and economic system controlled to a certain degree by corporations and their specific interests. There are however voices claiming that “the actual scope of “globalization” is modest and that these various transactions still take place in environments that are shaped and regulated by states. Nonetheless, the belief that economic forces are superseding traditional great power politics enjoys widespread acceptance among scholars, pundits, and policy makers, and the role of the state is likely to be an important topic for future academic inquiry” (Walt, 1998: 32).

To sum up, the focus on this article was on the bi-dimensional status of transnational corporations in the international relations, namely from the legal

perspective, and from the one of the international relations, starting from the assumption that they represent a key social actor in a global world. While their role in the latter one is unquestionable, emphasized by the globalization context, the first one is still under scrutiny, and numerous transformations are likely to occur. Charney's proposed model that would involve a deeper cooperation in terms of law making between public and private international actors might become suitable for representing the interests of all parties involved in the development of global affairs: "a hybrid system, keeping law enforcement as a nation-state responsibility and opening law development to TNC participation, might permit the nation-state to keep its influence and power while providing the flexibility that would prevent international law from losing touch with reality. Such a system also has the potential to make the interests of TNCs and nation-states more alike, thereby making possible future TNC participation in all aspects of the international legal system" (Charney, 1983: 787). We may conclude that, despite the fact that according to the classic international law classifications, transnational corporations are not recognized as subjects of international public law, expanding their prerogatives in this field and recognizing their legal status and involvement may be considered a suitable evolution in this area.

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