HARD AND SOFT LAW INSTRUMENTS FOR REGULATING MULTINATIONAL ENTERPRISES: AN UPHILL STRUGGLE TOWARDS GLOBAL RESPONSIBILITY?[1]

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SUMMARY: 1. The Global Market Chessboard; 2. Multinational Enterprises and their Impact on Legal Systems; 3. Tradition and Innovation in the Role of States; 3.1. On the Duty of Control and Supervision of the Multinationals: any sign of change? 3.2. Hybrid Mechanisms for the Promotion of Due Diligence; 4.The Contribution of Soft Law; 5. Concluding remarks; 6. References

1. The Global Market Chessboard

This study takes some contextual considerations as its starting point to develop a reflection on whether, and on what terms, hard and soft tools can lead to positive forms of interaction in the field of labour protection and fundamental social rights.

The baseline scenario considers the transformation of business models and work organization, and the consequences for regulatory systems that are no longer confined within national boundaries but are strongly affected by the hybridization of sources and the multiplicity of regulatory agents (Ales, Senatori, 2013).

As a result, the researcher addressing the global scenario has to investigate a space in which boundaries fade and disappear, in a context that is far from reassuring with a plurality of regulatory instruments that cannot be neatly placed in traditional categories of law.[2]

Multinationals continue to consolidate their power which is greater than that of the states in which they operate (De Schutter, Ramasastry, Taylor, Thompson, 2012). They thus act as forces shaping regulatory processes at global level by imposing themselves as "the drivers of international trade and economic activity, upon which the livelihoods

[1] The article is published in "Employment Relations and Transformation of the Enterprise in the Global Economy", Proceedings of the Thirteenth International Conference in Commemoration of Marco Biagi, Edited by Edoardo Ales, Francesco Basenghi, William Bromwich, Iacopo Senatori, Giappichelli, 2016.

[2] FERRARESE 2013, 431. See for a comprehensive overview on the global network and its challenges MÜCKENBERGER 2013.

of many millions of people depend".[3] In contrast, from an institutional point of view, a unified government and enforcement body is lacking, while shared and standard rules are having difficulty in becoming established. This creates an environment that is unfavourable and even hostile to fundamental rights, in particular with the dispersal of responsibility accompanied by a loss of valid and effective control mechanisms and enforcement bodies.

In this connection, we investigate, as the primary field of observation, the phenomenon of multinational enterprises (MNEs) and the impact of global production networks (GPNs) in terms of employee and social rights protection.[4]

As already mentioned, "the asymmetry standing between a limited demand and a basically unlimited offer puts the work in the hands of multinational companies and breaks down the boundaries within which labour law, social legislation, welfare state, trade unions power and collective bargaining were born and had established themselves" (Lettieri, 2008). The strategies adopted by multinational companies, often in collusion with business and governments in the host countries, are mostly focused on reducing costs and maximising profits. Whereas investment in emerging countries promotes their economic and employment development (though in many cases in the form of undeclared or informal work), on the other hand, in terms of social progress, the results are extremely limited and unsatisfactory. From this starting point, we seek to identify the measures addressing the tendency to "disperse" responsibility, typical of production networks on a global scale, and the consequent undermining of rights.[5]

Economic researchers addressing this issue tend to offer an imbalanced reading that favours business, identifying work as a mere factor of production and neglecting the social rights and conditions of workers. In more recent developments, however, certain researchers, albeit a minority, have underlined the need to "improve the position of both firms and workers in global value chains and production networks driven by lead firms"

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[3] MCBETH 2010, 243. *See* United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013*. See also The World's Top 100 Non-Financial TNCs, Ranked by Foreign Assets, 2012, available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx.11.

[4] That is a crucial point in the global debate. Consider that the International Labour Conference in 2016 is to discuss decent work in the global supply chain. See KOLBEN 2011, who deals with the problem of labor regulation in global supply chains and developing countries? See also SABEL 2006. For an account of the trajectory of the topic see DOOREY 2013.

[5] SCOTT 2001, 565, speaks of a "seemingly infinite variety of possible corporate activities which could negatively affect human rights and which are at least candidates for being juridically sanctioned as actual violations of human rights".

(Barrientos, Gereffi, Rossi, 2011) in order to promote a "better understanding of the relationship between economic and social upgrading" (Barrientos, Gereffi, Rossi, 2011). This has given rise to questions about how to enable workers to acquire a stronger voice in decision-making, and organisation within the global supply chain, also through trade unions.

In the words of Coe et al., "the multi-actor GPN approach has been explicit from the outset that workers, their collective organizations, and their civil society are an integral part of GPNs, not simply a production input or part of the background context" (Coe, Dicken, Hess, 2012). In this view "a key topic for future GPN research, is how to design cross-border interventions that yield benefits for poor workers and firms linked through involvement in the same GPN, but located in different countries". In this perspective it is necessary to intervene at different levels by means of: "independent trade union representation of workers; company-level initiatives (including buyer and multistakeholder codes of labour practice); government legislation; and multilateral initiatives (such as ILO and OECD guidelines)" (Barrientos, Gereffi, Rossi, 2012).

With regard to the contribution of legal scholars, the discussion revolves mainly around the actions to be taken to deal with the regulatory deficit in the global scenario (Kolben, 2011). First, most national legal systems are inadequate to tackle the challenges posed by the new forms of production on the global scale. Second, the interventions by international institutions are extremely soft both at the regulatory and at the implementation and enforcement level. Third, the responses by the countries where the companies operate, undoubtedly more interested in attracting foreign investors than being virtuous in terms of decent work, are weak and ineffective (Perulli, 2007).

While the crisis in 2008 revealed to the world the perverse effects of a system without rules or controls,[6] at the same time it should point to the need to fill the regulatory voids enjoyed by multinationals which have a particularly strong impact on worker rights and social protection (Weiss, 2013).[7]

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[6] According to WEISS 2013, "the change of paradigm should not be confined to financial markets: it should also be applied to labour markets".

[7] V. BACKER 2012. He observes that "contract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator" and as a result "in a world in which states will exist side by side with these non-state regulatory communities, law may lose some of its privilege".

As a result, we will attempt to demonstrate, on a more general theoretical level, a certain circularity between hard and soft law. According to Professor Ruggie (Special Representative of the Secretary General of the United Nations for Human Rights and Businesses) the challenge for the future will be to promote an "intelligent combination" of voluntary approaches and legislation in order to steer the economic actor towards "due diligence to identify, prevent, mitigate, and account for how they address their adverse impacts on human rights" (Ruggie, 2013). In other words, "in national legal systems, and under international law, the responsibility of business enterprises to conduct due diligence does not end at the legal boundary of the individual company. The rationale defining the reach of due diligence provisions in this way is to protect against situations in which respect for legal standards, such as environmental protection, labor rights, and anticorruption, may be undermined by the creative use of business relationships, the various forms of business entities and the organization or structure of corporate groups" (Ruggie, 2013).

2. Multinational Enterprises and their Impact on Legal Systems

In the legal literature, the multinational enterprise (MNE) is described as a complex organisational structure consisting of several legally separate but economically linked entities.[8] In most cases it is a group of companies registered in the country of the majority shareholder (usually based in economically advanced countries) operating through related companies located in a number of states, mostly selected on the basis of cost-effectiveness criteria (cost of labour and raw materials, tax benefits, fewer constraints in terms of environmental protection). The factors that combine to describe the Multinational Enterprise (MNE) include the element of control and, specifically, the fact that the company has control over the activities of undertakings located in other States tends to prevail. These companies are thus presented as internationalised in scope while they appear "nationalised" in terms of the applicable legal regimes, since they are required to comply with the various legal systems in the countries where they carry out their business. Thus, a gap arises between the transnational dimension of trade,

[8] According to the UN Guidelines (2011) "the term 'transnational corporation' refers to an economic entity operating in more than one country or a cluster of economic entities in two or more countries, whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively" (par. 20).

compared to the functional integration between the segments of the production process that are globally distributed, and the national dimension of the rules that apply to each part of the company. Although subject to local laws, the subsidiaries are controlled by the parent company, which adopts strategies for the centralisation of decision-making and, at the same time, the fragmentation of responsibilities. Each entity is legally independent from the others, and this inevitably favours the strategic and opportunistic choices of the parent company that will tend to build a complex network of control and dependency relationships, while maintaining separate liability for acts committed by the subsidiaries.

The multinational company also acquires an ability to control the global market, while states tend to cede power, intervening only in a fragment of that space. Moreover, if we consider that the choice of location is oriented towards developing countries (since the rule of law in these countries is weak and they attempt to maintain a low regulatory threshold so as to attract foreign direct investment), then it is clear that "without adequate governance structures, endemic corruption, and the financial clout of MNCs to wear out potential litigants, the victims of the regulatory gap are the host communities where MNCs operate" (Emeseh, Ako, Okonmah, Ogechukwu, 2010).

Until now, the issue has provoked mixed reactions. On the one hand, a strong stance has been taken by the international community towards past and current scandals involving the large multinationals. On the other hand, business demands have shaped the theoretical frame of reference of the markets and, above all, of governments that are increasingly in favour of labour market deregulation in order to attract foreign direct investment. The Italian system is a case in point if we consider the repeal of Article 18, Act no. 300/1970, seen by many as a factor of rigidity with a negative impact on foreign direct investment.

This raises many concerns from a strictly legal point of view. Since space constraints do not allow us to examine such concerns in depth, here we draw attention to two central issues in the debate.

The first point refers to a question that is not easy to answer, i.e. whether or not the conditions exist for bringing multinationals under an effective legal umbrella which creates minimum standards of obligations. It is well known that international law is essentially state-centric and thus considers multinational enterprises as an object and not

as a subject of the regulatory system. International law is reluctant to act on the assumption that multinationals lack legal personality and consequently do not fall within the personal scope of regulation. In this perspective, "international human rights law, for all its diversity and size, places direct legal obligations only on states" (McCorquodale, 2002) while "non-state actors are treated as if their actions could not violate human rights, or it is pretended that states can and do control their activities" (McCorquodale, 2002).

Nevertheless, it has recently been argued that "just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world".[9] As De Schutter notes, "the recognition of an international legal personality to transnational corporations should not be seen as a prerequisite to the imposition of obligations on such entities, just like it has not been considered a prerequisite for the recognition of rights to these actors, for instance, under free trade agreements or investment liberalization agreements" (De Schutter, 2005).

The second issue relates to the liability of the parent company, the conduct of affiliated and subsidiary companies, and the consequent possibility of introducing control mechanisms over the activities of subsidiaries located mainly in countries where inspections and sanctions are lacking. The attempts in some countries, aimed at laying down a duty of supervision on the part of the parent company, are still embryonic, reflecting the strong resistance by companies and governments that assert their power of governance and control within national borders (Hannoun, Schiller, 2014). This is against a background of extraterritoriality of the rule of law[10] and the separate legal personality of the affiliated companies.

3. Tradition and Innovation in the Role of States

The issues raised above have become increasingly evident in recent years but have been amplified as a consequence of globalisation and its dynamics. Here, mention should be made of the latest in a long series of interventions aimed at holding corporations

[9] International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, 2002, 10.

[10] DE SCHUTTER 2006. For the latest debate see especially the "*Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*" by ETOs for Human Rights beyond Borders, 2013.

accountable with regard to fundamental rights: the report on "The Guiding Principles on the issues of human rights and transnational corporations and other business enterprises" followed, in 2011, by "the UN Guiding Principles on Business and Human Rights".[11] Although the document has no legal value, it differs from the previous ones since it emphasises the active role not only of states, that are required to protect the rights of individuals faced with unlawful conduct by businesses, but also the role of corporations that have a duty to respect fundamental rights regardless of government intervention.

There have been attempts to introduce a universal scheme applicable to multinationals but the question primarily remains the responsibility of individual states that need to ensure compliance with standards, including labour protection standards, and intervene with appropriate inspections and sanctions. The UN Guidelines (2011) provide that "states have the primary responsibility to promote, secure the fulfillment of, respect, ensure resect of and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights".

In the first place, host countries should play a decisive role in the fight against the exploitation of workers and the violation of fundamental rights (the host country control model). Host countries have the power to regulate and inspect multinationals within their territory and decide on a discretionary basis whether and how to regulate access, lay down any duties or restrictive measures and, moreover, reinforce the standards for the protection of labour and human rights.

To rely solely on this type of regulation to combat the opportunistic practices of multinationals presents evident risks, given that these countries, in competition with each other, seek to increase production in their territory by attracting foreign capital and are willing to do anything to attract this investment. Let us consider as an extreme case the establishment of free trade zones in many parts of Africa, Latin America and Asia where companies benefit from tax relief as well as savings in labour costs due to the absence of adequate worker protection. This regulatory dumping reflects the exposure to competition for the establishment of productive activities with the complicity of state

[11] RUGGIE 2008.

authorities. Furthermore, if we consider the protection provided by bilateral investment treaties for foreign investors, the difficulty for the host state to control international investors becomes evident.

In contrast, the direct involvement of the country in which the multinational undertaking has its registered office (home country control), also with regard to the conduct of subsidiaries, could be decisive in terms of monitoring and enforcement. This argument has met with strong opposition, both among legal scholars and in case law, due to the limit of extraterritoriality and because experiences in this regard are extremely limited (De Schutter, 2006).

In recent years attempts have been made by some governments to introduce extraterritorial regulation to make multinational companies more responsible.[12] In the past the best known example is undoubtedly the Alien Tort Claims Act (ATCA) of 1789, granting the U.S. federal courts "original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States".[13]

The *raison d'être* of this measure has given rise to conflicts of interpretation that remain unresolved as shown by the judgments of the US courts, that are very few in number, in which the rule was invoked. An initial problem concerns the extraterritorial jurisdiction of the American courts, as it may be seen as an attempt to impose their own cultural and legal model overseas. An additional problem, mainly raised by legal scholars, concerns the passive legitimisation of companies and the possibility that this rule can also be used in the case of violations by private actors, not only by states.

This provision, that remained silent for years, was invoked in *Doe vs. Unocal* (1996). This US multinational company was held legally responsible, under ATCA, for acts committed abroad in violation of fundamental rights and in complicity with the government of the country concerned. However, the oil company defended itself by

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[12] See the proposal for a Corporate Code of Conduct Bill, HR 4596, 106th Cong. (2d Sess. 2000), http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.4596; the Australia Corporate Code of Conduct Bill, http://www.comlaw.gov.au/Details/C2004B01333; the UK proposal for a Corporate Responsibility Bill, in http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf. See MCBETH 2004; Deva 2013.

[13] According to KOLIEB 2014, three aspects of these ATCA cases are noteworthy from a transitional justice perspective: first, they are civil suits (as opposed to criminal prosecutions); second, they are levelled not merely against government officials but against multinational corporations; and third, they are brought in US courts, not in local courts in or near the conflict-zone. These characteristics distinguish ATCA as a novel transitional justice mechanism, and taken together, challenge the 'traditional' or paradigmatic models of transitional justice processes, in terms of location, type of mechanism and targets of such actions.

claiming that it had no way of knowing about the atrocities being perpetrated by the Burmese army, nor could it prevent them or be held responsible for them. In 2002, after years of testimony, pleadings and hearing, the court in San Francisco declared the case "admissible" under the Alien Torts Claims Act. Two years later Unocal agreed to enter into negotiations in order to avoid appearing before the US courts.

The subsequent case law followed the interpretation of *Doe,* while noting the risks of a certain approach in the American legislation.[14] This cautious "non-invasive" approach seems to prevail in the most recent developments in American case law. In particular, *Kiobel v. Royal Dutch Petroleum Co. 569 US* (17 April 2013) may be seen as a worrying setback in lawsuits against the conduct of American multinationals through their affiliated and subsidiary companies to the detriment of foreign nationals (Shapiro, 2014). The Court favoured a restrictive reading of ATCA, excluding its applicability to disputes between foreign nationals in relation to actions taking place outside of US territory. According to the Court, the link between the Nigerian subsidiary and the United States was not so close as to be able to establish the competence of the American courts in the case.

On the other hand, the rulings in the cases immediately following *Kiobel* favoured the opposite interpretation, upholding the liability of companies under US law. This gave rise to a conflict of interpretation, resolved by the Supreme Court by means of the "presumption of exclusion of extraterritoriality": only a law that *expressly* provides for its extraterritorial application can be interpreted in this sense. This means that ATCA "does not rule directly on any conducts or grants protection but grants to federal courts to recognize the validity of legal rights based on international standards that are sufficiently defined". It has been observed that "American Principles of state action (...) cannot simply be transferred to the international arena" (RATNER, 2009).

As a result, the use of ATCA as a lever for holding multinationals liable for events taking place outside U.S. territory has given rise to major problems. At the same time its forward-looking approach cannot be set aside nor overcome. This norm is "capable of enforcing obligations against corporations under international human rights law in domestic courts" and, in this connection, it shows that "international law can indeed

[14] By way of example see *Sosa vs Alvarez-Machain Case* (2004); *Estate of Rodriguez v. Drummond Co. Case* (2003); *Sinaltrainal v. Coca Cola Case* (2009); *Doe v. Exxon Mobil Corp.* (2005); *Coca Cola* (2009); *Drummond Company* (2008); *Occidental Petroleum* (2009). For a summary of these cases see HUTTO, JENKINS 2010.

have a role in regulating the behaviour of corporations, and that the development of an effective enforcement mechanism for international human rights law against corporations is indeed plausible" (McBeth, 2004). Above all "if states can show such political will in relation to dealing with economic matters (e.g. securities, taxation, and antitrust) and serious crimes (e.g. terrorism, sex trade and torture), there is no sound reason why that cannot happen in the area of universal human rights" (Deva, 2013).

3.1 On the Duty of Control and Supervision of the Multinationals: any sign of change?

In terms of the most recent public policy developments to combat the opportunistic behaviour of multinationals and the repeated episodes of exploitation and violence, reference should be made to a proposal put forward in France in November 2013. It is particularly significant as it aims to impose a duty of care on the parent company with respect to transactions carried out by subsidiaries and regardless of the place of production (Cuzacq, 2014).

This proposal aims to make corporations responsible for their action introducing "*un levier pour orienter les conduites des acteurs en leur proposant des modèles pour l'action ; comme si la réalisation de l'objectif assigné à la règle ne pouvait reposer sur la seule peur de la sanction*" (Bargain, Berthier, Sachs, 2014). Its objective is to combine "*une logique de prévention et une logique d'indemnisation*" (Bargain, Berthier, Sachs, 2014).

It was proposed to introduce a new article in the French Commercial Code (L.223-41) according to which "I. As part of their activities, those of affiliated companies or branches, companies are obliged to prevent damages and risks relating to health and the environment. These obligations also apply in the case of violation of fundamental rights. II. Company liability, in the above-mentioned cases, is established unless the company proves the impossibility of preventing the occurrence of the incident which has caused the damage on the grounds of the power and means that were at its disposal". This article is to be accompanied by the new Articles 1386-19 of the Civil Code under which the liability of the company is assumed unless it can prove that it took all necessary measures to prevent the harmful event. Finally, the Criminal Code should provide sanctions against this type of behaviour.

The proposal attracted widespread criticism from business leaders, who feared the loss of competitiveness of French firms. At the same time a number of business leaders welcomed the proposal, describing it as a foundation stone on which to build business law as "*droit solidariste dans lequel la société civile se constitue comme une collectivité responsable d'elle-même*" (Hannoun, 2014).

The proposal, discussed on 29 January 2014, was referred back to the committee, and at the end of March the National Assembly adopted the revised provision. The final version lays down a duty of care on the part of large companies giving rise to the obligation of providing a monitoring plan in order to identify and prevent any violation of human rights and fundamental freedoms, as well as any health and environmental risks and those associated with corruption. The debate in the Economic Affairs Committee resulted in an extension of the scope of the provision in that the monitoring obligation is extended to all subsidiaries of the parent company as well as to contractors and sub-contractors maintaining a stable business relationship with the parent company.

However, the problematic issues concerned, above all, the independent legal personality of the affiliated companies in relation to the parent company. Legal scholars observed that the provision would have resulted in setting aside the criterion of imputation based on civil liability, disregarding the principle that companies in the group have independent legal personality. Vicarious liability limiting the autonomy of the affiliated companies would have been introduced.

The time does not appear to be ripe to adopt this approach. However, the interdependence between the parent company and its subsidiaries may be used as a reason to justify assigning direct responsibility to the parent company. Since global business has evolved in the last decades, "the law need not be blind to business reality. Obligations can clearly be placed on the parent company, and its directors, which can extend to the worldwide activities of the firm, to the extent that these activities are under their *de facto* control" (Picciotto, 2003).

Though rare, there are precedents on this point. In particular, in *Amoco Cadiz* the courts held Standard Oil liable for the environmental damage caused in France by a subsidiary on the premise that "as an integrated multinational corporation which is engaged through a system of subsidiaries in the exploitation, production, refining, transportation and sale of petroleum products through the world, Standard is responsible

for the tortious acts of Its wholly owned subsidiaries and instrumentalities".[15] In this case, the liability of the subsidiary extended to the parent company as a result of their strong control relationship leading to the preclusion of a real autonomy of action of the subsidiary in comparison to that of the parent company.[16]

However, public policy justifications for measures to hold the parent company liable for the conduct of the subsidiaries can be identified. Hannoun observes that "*la pression des objectives fondamentaux promus par la société et l'opinion publique peut faire évoluer les régles et justifier l'obligation de vigilance des sociétés mères dont le principe semble raisonable, y compris pour la majorité des grands groupes concernés. Mais si les justifications ne manquent pas, c'est la mesure de l'obligation qui reste à définir*" (Hannoun, 2014).

In the background there is an attempt to "*dépasser l'ingénierie juridique utilisée par les multinationales pour organiser leur irresponsabilité*" (Bargain, Berthier, Sachs, 2014) and thus to promote a model of corporate governance reflecting not only the interests of the shareholders, but also those of workers and, more generally, of all stakeholders.

3.2. Hybrid Mechanisms for the Promotion of Human Rights Due Diligence

Previously we identified a variety of state mechanisms to regulate the behaviour of corporations in relation to social and human rights. These public actions are influenced by endogenous factors and by the interests that play a fundamental role in global dynamics.

In addition to the "command and control" method, we can identify a new approach to regulation based on "human rights due diligence" that creates a link between the state's duty to protect human rights and corporate social responsibility to respect human rights. An examination of national and international legal provisions shows that human rights due diligence is adopted by a number of legal regimes to overcome the obstacles to effective regulation posed by complex corporate structures and trans-jurisdictional activities.

In the report on "Human Rights Due Diligence: the Role of States" (De Schutter O., Ramasastry A., Taylor M., Thompson R.C., cit., 2012), the main conclusion is that states

[15] In Re Oil Spill by the Amoco Cadiz", 1984, U.S. Dist. LEXIS 17480, 136. See WINKLER 2008.
[16] See also the case *Lubbe et al. v. Cape Industries*, 2000.

should use a range of instruments to improve human rights in general, and implement due diligence for human rights in particular. "States have therefore developed a range of techniques by which to ensure that business enterprises seek to integrate considerations that are not purely short-term and profit-driven into their decision-making processes: they have imposed various obligations to act with due diligence with regard to a range of values such as consumer protection or the protection of the environment, or the fight against money laundering or human trafficking; or they have created strong incentives to encourage companies to design ways of taking these concerns into account. Human rights now must be given the same degree of attention". However, the authors found few explicit references to human rights in the due diligence regimes in the legal systems of most states.

According to the above-mentioned Report, we can observe a general trend to combine public and private regulation mechanisms, such as "promotional legislation" granting subsidies to corporations to take into account the interests of stakeholders. In this connection in the US the Public Company Accounting Reform and Investor Protection Act (2002), was enacted after the Enron and WorldCom scandals.[17] EU Member States have adopted norms of this type to ensure that businesses respect established standards.[18] Recent decades have seen a proliferation of initiatives to promote due diligence by means of regulatory compliance, incentives and benefits (state support, trade preferences, public procurement, export credit, labelling schemes), transparency and trust (consumer protection law, CSR reporting).

Public reporting is required to take into account the environmental and social impact of business activities, and this reporting is intended as a means to promote corporate accountability. "This means, in many cases, replacing single bottom line (i.e. profit-based) thinking and practices with triple bottom line (i.e. social, environmental, economic) thinking" (Nolan, 2006).

The economic regulations adopted in France in May 2001 require all companies listed on the *"premier marché"* to report on a template of social and environmental issues, including human resources, community issues, social engagement and labour

[17] H.R. 3763 Sarbanes-Oxley Act, 2002 (US).

[18] See EU Compendium on Corporate Social Responsibility. National Public Policies in the European Union (2007); European Roadmap for Businesses 2005; CSR Navigator – Public Policies in Africa, the Americas, Asia and Europe (2007); Public Policies Report on CSR in EU Member States (2008) by the European Sustainable Development Network.

standards. These regulations have their limits but "represent a milestone in triple bottom line reporting by attempting to enumerate the relevant social and environmental issues that affect business". They recognise the "indivisibility of business activities and social and environmental concerns" (Nolan, 2006).

To mention a few other examples relating to this issue, in Sweden, pursuant to the Public Pension Funds Act, every year the national pension funds are required to publish a report to show the ethical, social and environmental dimension of their investments. In Denmark, the Financial Statements Act introduced an efficacy reporting system for corporations to show whether or not a company has a CSR policy. In the same perspective the UK enacted the Company Act, renewed in 2006. According to this Act corporations have a duty to publish a periodical report outlining their actions in terms of corporate social responsibility. To comply with the UN Guiding Principles, the UK launched an action plan for business and human rights in September 2013. The government also introduced an amendment to the Companies Act requiring large companies to report non-financial information, including disclosures on human rights. Mention should also be made of the Norwegian Accounting Act (1998) which lays down the same requirements.

Recently the European Parliament and the European Council voted on a reform to the EU Accounting Directives requiring "public interest entities" to report annually on environmental, social and employment-related matters, respect for human rights, and anti-corruption measures. The report also needs to consider supply chain practices. This reform represents a step towards embedding in corporate social responsibility respect for human rights and the environment.

In their approach to human rights due diligence, states should also address the potential environmental and social impact and risks arising from applications for officially supported export credits as an integral part of their decision-making and risk management. In this connection states can improve corporate social responsibility, by granting financial support for corporations exporting to developing countries only if the corporations respect national and international standards (see, for instance, the Norwegian model adopted by the Norwegian Forum for Development and Environment, based on the Guidelines concerning Human Rights and Environment for Norwegian Companies Abroad).

Mention should also be made of the OECD Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (June 2012). As De Schutter et al. observe, "for the first time, the Recommendation refers to both environmental and social impacts, the latter of which includes human rights" (De Schutter et al. 2014). However, "the integration of human rights considerations into the policies of export credit and investment guarantee agencies remains in its infancy. A study reviewing twenty-five publicly held agencies offering overseas investment insurance found that only four required labor or employment-related standards of their clients" (Penfold, 2012).

In a similar perspective, states encourage business to carry out human rights due diligence by granting benefits to corporations that promote social and economic standards in developing countries.[19] With the same aim, fiscal policy could play a crucial role in promoting good business practices. In the UK the Community Investment Tax Relief scheme grants tax relief to corporations investing in Community Development Finance Institutions or supporting public interest activities.

As a number of well known cases in the past show, consumer protection laws are another important instrument to encourage transparency in business and to prevent unfair competition (*Kasky v. Nike* is a well known case).[20] In Europe reference should be made to the latest amendments to Directive 84/450/EC164 and the Unfair Commercial Practices Directive (2005/29/EC) requiring EU Member States to adopt "legal provisions under which persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may: (a) take legal action against such unfair commercial practices; and/or (b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings" (Article 11). By way of example, the Directive was implemented with the *Gesetz gegen den unlauteren Wettbewerb* in Germany (2010) and with the Consumer Protection from Unfair Trading Regulations in the UK (2008).

As a final remark, whereas, on the one hand, "the realization of human rights is a collective goal shared by all states, and the responsibility assigned to each state to accomplish this goal within their territories is only one way to achieve the said goal"

[19] For instance the Netherlands legislation with the Trade and Industry Tool (2012).
[20] Kasky v. Nike, 27 Cal 4th 939 (2002), Supreme Court of California.

(Deva, 2013), on the other hand, states must be supported by international institutions to deal with regulatory gaps at national level.

This action is much more important in the developing countries where juridical systems are weak and ineffective. In this critical scenario it is essential to promote interventions at different levels. Clearly we are speaking of separate regulatory tools in terms of efficacy, provisions, and legal value, but in the end each of them is part of the same framework. The main aim is to encourage the responsibility of each player in the global market and to promote cooperation between them, also in terms of positive linkages between hard and soft law. It is also important to stress that the approach to due diligence"cuts across national boundaries (so the role of states cannot be limited to the national territory) and, at the same time, it is necessary to implement mechanisms applicable to the entire global supply chain.

4. The contribution of Soft Law

It has been said that the soft law gives rise to a sense of vertigo in those seeking to interpret it, who find themselves between the desire for discovery and the fear of losing certainties laboriously achieved (Duplessis, 2007). The topic of soft law gives rise to mixed responses: whereas, on the one hand, we need to consider the virtues of soft law as a social response to the complexity of the modern era, on the other hand we need to be aware of the dangers of soft law as a source of uncertainty for the system, capable of overshadowing the traditional regulatory model based on "command and control".

In the perspective of national law, soft law is described as a source of regulation that destabilises the system by increasing the level of complexity and thus reducing legal certainty. In the supranational perspective, however, greater emphasis tends to be given to its potential while pointing out some of its limits. Furthermore, the international context is an ideal observation point because it is from here that the debate on soft law has developed and because it is conceived as a regulatory framework with a multifaceted potential in terms of regulatory agents and instruments.

At a strictly definitional level, it is difficult to identify the limits and potential of soft-law instruments, due to the proliferation of texts, the multiplicity of non-binding rules, guidelines, recommendations, technical standards, good practices, social charters and codes of good conduct. In short, the current crisis of regulation in the traditional sense is

accompanied by processes of diversification of regulatory sources that result in an emphasis on "*droit mou*," "*droit soft*" and "*droit à l'état gazeux*" (Richard, Cytermann, 2014). This is accompanied by an accent on flexibility, modernisation of labour law and regulatory processes with a complex matrix increasingly involving the international institutions and economic operators.

In institutional terms, among the most significant interventions representing an international regulatory framework overseeing the conduct of multinationals with particular reference to human rights and labour, the following should be mentioned: the OECD Guidelines (1976, revised in 2000 and 2011); the ILO Declaration on Fundamental Principles and Rights at Work (1977, revised in 2000 and 2006); the UN Global Compact (2000); and most recently the UN Guiding Principles on Business and Human Rights (2011). In the background the attempt to "moralize" the activities of businesses through instruments that, albeit non-binding, lay down guidelines and/or standards of business conduct for companies and governments. These instruments are the outcome of shared principles, and serve as potential models for multinationals, in drafting codes of conduct, and governments for establishing internal policy guidelines and drawing up implementation regulations. In this perspective, codes of conduct can serve to promote the rule of law by referring to international labour standards and reflecting a shared response involving the governments and the entire international community. As Nolan observes, "initiatives that have relied on the development of soft law via such tools as codes of conduct can play a vital role in internalising human rights norms within corporations and solidifying the notion that corporations have duties with respect to shareholders and stakeholders (including workers in their supply chain)".[21]

However, if we examine the limits of these instruments, it is clear that the critical factors involve monitoring procedures and enforcement mechanisms since they simply introduce procedural obligations for states in order to prevent the violation of international labour standards by companies operating on their territory.

In contrast, if we investigate the soft law instruments adopted by companies, a prominent place belongs to codes of conduct (also known as codes of ethics, good

[21] NOLAN 2006. At this point it is fundamental to stress the UN Guidelines (2011): "companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies" (par. 58).

practices, and self-regulation)[22] and if we investigate the latest trends the transnational agreements are the first to attract the attention of business leaders and legal experts.[23]

Codes of ethics express the values underpinning the company, the company's mission, the rules of conduct, undertakings towards stakeholders and the entire production chain, and the objectives to be pursued in order to satisfy the interests of shareholders. Such codes are evidently of a soft nature since they are mostly developed by company management and consist of commitments freely entered into by the company. The adoption of codes of ethics by leading companies is the result of pressure from the international community, consumers and non-governmental organisations, as well as an awareness of the need to promote confidence and credibility within and outside the company, projecting the image of a responsible actor with regard to relations with suppliers and business partners and internal relations with employees. The validity of the reasons put forward by companies is a matter for debate, and there is a widespread belief on the part of the general public that codes of conduct are a company marketing tool. However, there are several virtuous practices adopted by companies showing that CSR is seen as not just a cost but a long-term investment. There is a risk that this has more to do with "ethical trends" than with an "ethical awakening". However, there may be a point of convergence between a propensity for altruism (the ethical approach) and a tendency to self-interest (the functional approach).

In examining the business practices and the motivations behind codes of conduct, a degree of ambivalence is apparent. In particular, there are major differences with regard to: the issue at hand (ranging from human rights to environmental policies, from the rights of workers to business strategy forecasting, from corporate citizenship to functional mechanisms for environmental and territorial protection). The nature of the clauses (ranging from a statement of corporate culture to detailed rules that in the most virtuous cases refer to the ILO fundamental standards or to the UN Global Compact*);* monitoring and control procedures; enforcement mechanisms; their application within the entire supply chain or only to certain parts; the level of transparency.

In general we can observe that, in the wide range of codes adopted by major multinationals, best practices appear to be: mechanisms for transparency and dissemination of the code along the entire production chain; the adoption of appropriate

[22] TEUBNER 2010; Id., 2009; POSNER, NOLAN 2003.
[23] PAPADAKIS 2011; THOMAS 2011.

and effective control mechanisms,[24] and finally, the setting up of monitoring procedures that may result in sanctions (e.g. the termination of the business relationship or cancellation of orders) or incentives (such as measures to benefit those who enforce the code).

In other words soft law instruments have their limits but at the same time they "entail a degree of formalization of normative expectations and practices and, even if they do not directly take the form of law, they may have indirect legal effects. The challenge is to design a framework or architecture which combines the strengths of corporate codes and formal law" (Picciotto, 2003).

With regard to transnational agreements, legal scholars see them as an advanced form of self-regulation, involving trade unions, governments and international institutions, albeit with various methods and forms. They are "a co-operative international code" (McBeth, 2010) that go beyond self-regulation – in the sense of being self-referential – to be found in the codes of ethics drawn up by individual companies and, as a result, reflect a sharing of actions and intentions (Anner, Bair, Blasi, 2014).

The document on Voluntary Principles on Security and Human Rights (2000) is a good example of this type of instrument. These principles are the outcome of a dialogue between multinational enterprises, NGOs, business representatives and trade unions (McBeth, 2010). In the financial sector mention should be made of the "Equator principles" (2003). As Nolan has argued, "the adoption of the Equator principles reflects the increasing scrutiny that project sponsors and lenders face in dealing with environmental and social issues which surround projects in emerging markets, and can be seen as a direct response, by the adopting banks, to criticism from NGOs and others relating to their past lending practices" (Nolan, 2005).

More recently the debate has focused on the agreements adopted in response to the catastrophic fire and collapse of Rana Plaza on 24 April 2013.[25] The first agreement, the Accord on Fire and Building Safety in Bangladesh, concluded on 13 May 2013, involves more than 150 international brands and retailers (mainly European) and two global union federations (IndustriALL and UNI Global). The agreement also involves

[24] Concerning monitoring system see the original approach by GARCÌA-MUNOZ ALHAMBRA, TER HAAR, KUN 2013.

[25] For more details see HOSSAIN MD., SEMENZA 2014.

trade unions (transnational and local), the supplier factories, international organisations (such as the ILO and the OECD), NGOs, regional and local authorities. This is a good example of cooperative networks promoting cooperation among stakeholders at all levels. The Accord lays down obligations for the signatory companies, and a specific inspection system. The ILO has an important role to implement the Agreement in terms of control, technical assistance and training. It may be said that the ILO is the neutral chair of the Coordination Committee.[26]

As Moreau observes, "*l'accord-quadre ne concerne pas ici une enterprise multinationale donnée mais est ouvert à la signature de toutes les enterprises multinationales (….). Il devient par la multiplicité des signatures une forme d'accord-cadre transnationale à dimension collective et par son contenu à dimension institutionnelle*" (Moreau, 2014).

The second agreement, the Alliance for Bangladesh Worker Safety Action Plan, concluded on 10 June 2013, involves 26 American MNCs and is supported by several American employers' associations. Compared to the other agreement, it remains an essentially private initiative, promoting collaboration with other private organisations in inspection and training.

These two agreements present both advantages and disadvantages. However, in a wider perspective, they represent a new challenge for MNCs in low-wage manufacturing industries. Above all it is important to stress the new approach which motivates this type of agreement. As Van der Heijden et al. observed, the network approach highlights "various aspects of the ways in which transnational actors connect and construct networks and regulatory framework to address a common challenge" (Van der Heijden, Zandvliet, 2014). In this perspective "the myriad of post-Rana Plaza initiatives involving numerous stakeholders applying notably different approaches, reflects a broader trend in global governance referred to variably as network society, disaggregated sovereignty, global administrative law or creative coalitions" (Van der Heijden, Zandvliet, 2014).

[26] According to MOREAU 2014, 421 "en créant ce comité, cet accord-cadre crée une petite révolution juridique dans les principes du contrôle, soumis à une structure indépendante de la souveraineté du pays et garantie par une institution internationale".

5. Concluding remarks

The complexity of the processes taking place requires a range of responses, involving a number of actors in the global arena (governments, businesses, international organisations, NGOs, consumers) creating a hybrid system of intervention including hard and soft law measures. The scenario is characterised by interaction between the regulatory sources sometimes leading to innovative approaches.

Soft law standards can help to plug the loopholes in law by becoming at the same time a factor promoting hard law instruments. It is worth mentioning, in this connection, the role of business codes, that are instruments embedded in legally indeterminate contexts to define the rules applicable to the enterprise and encourage a responsible and informed approach in the management of relations with stakeholders. In particular, codes of conduct, incorporating the model of the external regulation codes elaborated by international institutions promoting compliance with international norms, must be interpreted in a promotional perspective. Moreover, in the context of non-institutional forms of regulation, we can also include transnational agreements characterised by a collective matrix. In these situations the collective actor can be a key partner for institutions and businesses, encouraging participation and joint approaches, while the agreements promote *"un système international de régulation sociale privée du travail répondant largement aux aspirations des entreprises transnationales"* (Moreau, 2014).

In other situations, hard law can intervene in an attempt to deal with the lack of enforceability and effectiveness of soft law. For instance, we should consider those cases in which a legal provision refers to the code of conduct, recognising its value as a parameter for granting incentives or implementing reward systems. We can also take into consideration the driving role played by the courts, in enforcing the law against unfair competition to sanction companies that fail to comply with the undertakings laid down in the code of conduct.

In other words, it appears that the relationship between the different regulatory instruments seems to favour approaches that are integrative and inclusive, rather than exclusive and hostile, becoming part of an overall design that looks increasingly similar to a "travelling theatre, which mounts its scenes each time in a different way, in different places, using texts and even actors variable for each recitation" (Ferrarese, 2013).

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