Global laws for a global economy: A case for bringing multinational corporations under international human rights law

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Abstract

Economic globalization has created a governance gap, often leaving powerful corporations largely unregulated. The result has been frequent and gross violations of human rights that too often go unpunished. This article outlines the mechanisms that currently exist for regulating the activities of multinational corporations including: (i) corporate self-regulation; (ii) regulation within the state where a company is operating (the host state); (iii) regulation within the state where a parent company is incorporated (the home state); and (iv) codes of conduct at the international level. The advantages and insufficiencies of each level are highlighted, and an argument is subsequently made that the governance gap will only be filled if firms are subjected to binding international law. The article then turns to an examination of international human rights law and discusses the place of non-state actors within this framework. It finds that corporations do have obligations under international human rights law despite the fact that systems for enforcing these duties do not currently exist. The final section discusses the difficulties that might be associated with creating enforcement mechanisms. The article ultimately argues that binding regulation at the international level is necessary in the long run; however, due to the difficulties in achieving this objective, regulation should also continue to be improved at the company, industry, host-state, and home-state levels.

Keywords: multinational corporations; international law; human rights; corporate activity (regulation of)

Introduction

Multinational corporations (MNCs) are the principal forces behind today's global economy, and are the main controllers of international trade and investment. In fact, certain corporate enterprises are more significant economic actors than a number of states (Kinley & Nolan, 2007). These entities have the capacity to foster economic growth and development and increase standards of living. However, without proper regulation, they also have the ability to negatively impact the enjoyment of human rights for those affected by their operations. Traditionally, corporations have been regulated by national law. With economic globalization, companies are increasingly operating across national borders. International governance and law have not developed along with the international economy, creating a regulatory gap that allows corporations to act with impunity (Kinley &

Nolan, 2007). This article will address some of the issues that this governance gap has created, and identify and analyze potential methods for rectifying this situation.

In order to explore the issues surrounding international corporate regulation, it is first necessary to outline the approaches to regulating the activities of MNCs that currently exist, including mechanisms within corporations themselves, regulation within the state where a company is operating (the host state), regulation within the state where a parent company is incorporated (the home state), and codes of conduct at the international level. The first section of this article will highlight the advantages and insufficiencies of each level to demonstrate that transnational firms should be subjected to binding international law to close the governance gap.

The article will then examine international human rights law, focusing on the place of non-state actors within this framework. The final section will discuss the difficulties in creating enforcement mechanisms and will review existing proposals for how corporate human rights obligations could be enforced. Ultimately, binding regulation at the international level is essential for the protection of human rights. However, the complexities and obstacles facing binding international regulation are myriad and negotiations with stakeholders would be long and arduous; therefore, regulation must initially be improved at the company, industry, host-state, and home-state levels.

Self-Regulation

Many stakeholders from the corporate world argue that the best way to ensure that corporations take human rights into account is through corporate codes of conduct and self-regulation by businesses. Advocates of this approach argue that a company has an incentive to uphold human rights standards in order to protect its reputation (McBeth, 2010). Consumers in the West are becoming more socially conscious, and many would be inclined to buy products that they know are produced in a responsible manner. Likewise, socially-conscious investors are more likely to buy shares in a company that earns its money responsibly. This argument suggests that there is a business incentive for corporations to respect human rights because doing so will raise profits.

Corporate self-regulation in labour practices is also seen to be good for business. Upholding labour standards, some argue, produces a more stable workforce (McLeay, 2006). Further, advocates of this approach argue that corporate self-regulation can encourage host states to protect human rights. Once host countries see that corporations are voluntarily upholding codes of conduct, they will realize that human rights standards do not necessarily deter foreign investment. Companies that are acting in a socially-responsible manner may even begin to pressure governments to implement more stringent rules because doing so will ensure that other corporations will uphold the same standards, putting all companies on a level playing field. In addition, supporters of self-regulation claim that codes of conduct can be flexible to different business environments, as opposed to universal regulations which may not be appropriate in every situation (McLeay, 2006).

While corporate codes of conduct can be effective if companies are very committed to protecting human rights, this method is insufficient for several reasons. First and foremost, codes of conduct are entirely voluntary, meaning that corporations can simply choose not to take part. Many corporations do not adopt a code of conduct because they can produce items more cheaply if they do not have to uphold certain standards – for example, paying workers a decent living wage or maintaining basic safety standards (Stephens, 2002). Since not all consumers are informed about or concerned with the manner in which the products they

purchase are produced, many companies will find it economically beneficial to produce products as cheaply as possible, even if this means partaking in unethical business practices. If the costs of complying with the code outweigh the benefits, companies will not choose to adopt higher human rights standards.

Since it is often more profitable for companies to produce goods unethically, only a small fraction of MNCs abide by a code of conduct. The Business and Human Rights Resource Centre (BHRRC), an independent international organization that monitors the human rights impacts of companies worldwide, keeps a running list of corporations that have adopted a formal company policy statement explicitly referring to human rights. The list contains approximately 300 companies out of a total of 5,100 companies that it monitors (BHRRC, 2013). Furthermore, even those companies that have formally adopted a policy statement do not necessarily comply with it.

Companies that claim to uphold codes of conduct can produce reports that are not necessarily reflective of reality (De Jonge, 2011). These reports are often not verified by a third party. This criticism can be addressed by adopting industry-wide standards and an independent verification mechanism. Once industry-wide standards are established, individual companies can then choose to comply and will often be given some type of recognition, such as a label to put on their product. However, even if codes are verified by a third party, there is still no legal redress for noncompliance, and companies can choose whether to sign on or not (De Jonge, 2011). Companies that do choose to sign on may have a competitive advantage amongst the “socially conscious” segment of the market, but holdouts will have a competitive advantage amongst the potentially much larger segment that is principally price conscious.

The content of corporate codes of conduct can also be problematic. Codes may be constructed with vague language and broad generalities (McBeth, 2010). Furthermore, industries can choose to include whatever human rights they want. This means that codes may not be comprehensive, but may instead include only the most achievable human rights norms (McLeay, 2006). A further problem arises with corporations that produce “intermediate” goods, such as metals. These companies may have less incentive to self-regulate because they are often not as concerned with their public image given that consumers do not buy their goods directly (McLeay, 2006). Likewise, small companies may avoid scrutiny for unethical practices. Consumers and human rights organizations are much more likely to target large corporations for their poor human rights records than less visible entities.

For the above reasons, voluntary codes of conduct are not enough to uphold socially-responsible corporate behaviour. While these mechanisms do have value, they should not be seen as alternatives to legal enforcement avenues, but rather as complementary to them.

Host-State Regulation

Since companies often do not self-regulate, outside rules are needed. Companies are required to abide by the laws within the state in which they are operating. Ideally, this system of sovereign states having control and maintaining order within their borders should function effectively. Generally, in developed states that have fully-functioning political and legal systems, companies operating within their borders do abide by standards that have been set by the government or when they do not, they are held accountable for their actions. States value their own sovereignty, and where states have the capacity to establish and enforce their own standards, they should be able to do so.

However, in many cases, particularly in developing countries, host-state regulation often does not work for several reasons (Ruggie, 2010). Host states may want to attract foreign investment, and see weak human rights standards as a comparative advantage. This can lead to a “race to the bottom” whereby countries avoid setting or enforcing human rights and labour standards in an attempt to attract MNCs seeking the location where they can operate as cheaply as possible. Even if states do wish to control MNCs, they may not have the legal or economic capacity to do so. Developing countries often do not have strong legal frameworks. Laws may not exist to control corporations, or the means to enforce laws may be lacking. Implementing regulatory frameworks is very expensive and requires expertise, and many countries do not have such resources.

Some governments or government officials may be in connivance with companies, and therefore may benefit from failing to enforce human rights and environmental obligations (Deva, 2003). As US economist and Nobel laureate Joseph Stiglitz explained: “In practice, companies in many industries pay bribes to get all manner of favors, such as [...] the overlooking of environmental or safety regulations” (Stiglitz, 2007). Further problems arise when formal land rights are not well established in the country. This can result in the government selling land to a foreign company that has been occupied for generations by individuals who have no access to a formal system of registering land ownership.

Home-State Regulation

Given that host-state regulation may be problematic, as discussed above, some critics have called for the implementation of mechanisms within the home states of corporations to regulate their international activities. Often MNCs are based out of developed states where higher standards and fully-functioning legal systems exist. Thus, home-state regulation would provide a forum for victims who are not able to achieve justice in their own countries to have their cases heard in the home state of the parent

company. Furthermore, the threat of litigation at home may push corporations to improve their human rights performances abroad.

Bill C-300 was a Canadian attempt to provide a means by which Canadian mining, oil, and gas companies could be held accountable for their operations abroad. Bill C-300 was a private member's bill introduced by Liberal MP John McKay on February 9th, 2009 (Mining Watch Canada, 2009). It proposed criteria for extractive companies to be eligible to receive funding and political support from Export Development Canada, the Department of Foreign Affairs and International Trade, and the Canada Pension Plan. It also included the creation of a mechanism whereby complaints could be filed with the Department of Foreign Affairs and International Trade. If the complaint was accepted by the Minister, an investigation would be conducted into the company's compliance with the guidelines, and a public report on the findings would be released within eight months of receipt of the complaint. A company found to be non-compliant with the guidelines could lose the support of the government. Bill C-300 reached the third reading in the House of Commons but was defeated by a narrow margin (Gomes, 2010).

One of the main arguments against Bill C-300 was that it would give Canadian companies a disadvantage when competing globally with companies that were not subject to this type of regulation. Bills with similar goals to those of Bill C-300 were proposed in the United States and Australia in 2000 and in the United Kingdom in 2003 (Kinley & Tadaki, 2004). However, these bills also were not passed due to objections similar to those voiced against Bill C-300.

In the United States and the United Kingdom, lawsuits have been filed against corporations for human rights violations abroad (Jägers, 1999). In the United States this is possible under the Alien Torts Claims Act (ATCA). The ATCA gives federal courts in the United States jurisdiction in cases of torts committed anywhere in the world, both by state and non-state actors, against aliens in violation of international law (Jägers, 1999). In civil law, a tort is an action that unfairly causes someone else loss or harm. A landmark lawsuit was filed in US federal district court by Burmese citizens against the Union Oil Company of California (UNOCAL). UNOCAL was charged with complicity in numerous human rights violations after developing an oil pipeline through Burma to Thailand. In 1997, this complaint was declared admissible, creating the possibility that private corporations could be held liable for violations of international law (Jägers, 1999). A similar landmark case occurred in Britain in 1995 and paved the way for future lawsuits when the company Thor was accused of adopting unsafe working practices abroad (Jägers, 1999). Despite the importance of these developments, they remain insufficient. It is very difficult and expensive for aggrieved parties to bring a lawsuit to court in another country. This is particularly true in cases where there tend to be many

jurisdictional objections, making the process very long. For many plaintiffs, this cost is insurmountable (Jägers, 1999).

Further problems may also arise due to the complex structure of large multinational corporations (Wilson, 2006). The concept of separate legal personality allows large companies to create subsidiaries within the states in which they are operating. These subsidiaries are technically separate entities, and are incorporated in the host state. This separation of legal identity makes it very difficult to hold a parent company accountable for the actions of its subsidiary. Furthermore, in some cases, large MNCs are cross-listed on multiple stock exchanges and their registered head office may be located in a jurisdiction that is different from where their actual operations and assets are; thus, the concept of a home state may be meaningless altogether.

International Regulation

Given the difficulties faced in regulating multinational corporations at the state level, another option is to develop regulatory mechanisms at the international level. Global governance and international law have not developed to the same extent that the global economy has, often leaving multinational corporations largely unregulated. Individual states are frequently reluctant to place corporations at a comparative disadvantage by adopting stricter human rights standards than other countries, or do not have the capacity to do so. Therefore, international regulations that place all corporations on a level playing field may be a better option.

There are several initiatives at the international level that aim to regulate the activities of MNCs. One mechanism is through the Organization for Economic Cooperation and Development (OECD). The OECD Guidelines for Multinational Enterprises came into effect in 1976 and were revised in 2000. These guidelines provide recommendations for multinational corporations that “provide principles and standards of good practice” (OECD, 2008). While these guidelines are sound, their efficacy is doubtful. The main problem is the lack of an enforcement mechanism. The guidelines clearly state that “observance of the Guidelines by enterprises is voluntary and not legally enforceable” (OECD, 2008). A second mechanism, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, was introduced in 1976 by the International Labour Organization (ILO). This declaration offers guidelines to MNCs in “such areas as employment, training, conditions of work and life, and industrial relations” (ILO, 2006). However, these recommendations are also voluntary.

A third initiative that was put forward by the United Nations (UN) in 1999 is the Global Compact, which consists of ten principles in the areas of human rights, labour, the environment, and anti-corruption (UN Global Compact Office, n.d.) Acceptance of these principles is once again voluntary. Companies that claim to embrace the Compact are required to submit an annual report, but there is no monitoring mechanism to observe their practices and ensure

that their reports are accurate. Companies may, therefore, accept the Compact as a public relations strategy while not actually improving their operations. Furthermore, the wording of the ten principles is very broad, so corporations could easily comply with them without having to improve their standards. For example, companies are asked to “embrace, support, and enact [the principles], within their sphere of influence” (UN Global Compact Office, n.d.) In instances where a contractor violates one of the principles, the company could claim that the practices of the contractor are beyond its sphere of influence.

Another UN initiative was the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” produced by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003 (Ruggie, 2007). The Draft Norms represented a significant departure from previous initiatives dealing with business and human rights. Unlike previous frameworks, the Draft Norms were intended to be mandatory and to create direct obligations for MNCs (Miretski & Bachmann, 2012). Furthermore, the Draft Norms included guidelines for their implementation, including internal regulation within corporations; periodic monitoring by the UN and other international and national mechanisms; establishment of the necessary legal and administrative framework within states to ensure implementation by corporations; and the requirement for companies to provide reparations to those adversely affected by failure to comply with the Norms. Unfortunately, under intense pressure from many states and the business community, the UN Commission on Human Rights did not adopt the Norms and they were abandoned in 2005 (Miretski and Bachmann, 2012). The Commission requested that the UN Secretary-General appoint a Special Representative to clarify “the roles and responsibilities of states, companies, and other social actors in the business and human rights sphere” (UN, 2010). In 2005, Professor John Ruggie of Harvard University was assigned to this post.

In 2008, after three years of research and consultation, Ruggie presented a framework that aimed to clarify the various actors' responsibilities (UN, 2010). The “Protect, Respect, and Remedy Framework” rests on three pillars: “(1) the state duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) the need for greater access by victims to effective remedy, judicial and non-judicial” (Ruggie, 2007). The Human Rights Council unanimously welcomed the framework, and extended Ruggie's mandate by three years so that it could be implemented. Ruggie's second mandate ended in 2011 when he submitted the “Guiding Principles on Business and Human Rights.”

While a lot of progress has been made, more needs to be done to uphold corporate responsibility. Ruggie's framework still relies heavily on states to govern the activities of corporations, and the principles remain voluntary. For this reason, critics have called for the direct

imposition of obligations on corporations under international law. For example, six human rights organizations including Amnesty International, Human Rights Watch, and the International Commission of Jurists, which had extensive dialogue with Ruggie leading up to his report, issued a joint statement in response to Ruggie's framework after his final submission in 2011. This statement was subsequently endorsed by 49 additional organizations. It argued that the Guiding Principles do not go far enough in establishing assessment and enforcement mechanisms and that ultimately, an international legal instrument must be developed (Amnesty International et. al., 2011).

International Human Rights Law

There are two main sources of international human rights law. The first source is treaties. For example, most of the rights expressed in the Universal Declaration of Human Rights (UDHR) have been expressed in two treaties, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since these two treaties were ratified in 1966, several more treaties that elaborate on certain rights contained in the ICCPR or ICESCR have been concluded. A number of other organizations, such as the ILO, have also concluded human rights treaties.

Treaty obligations are only binding on states that have ratified the agreement. Non-state actors cannot ratify treaties, and therefore cannot be directly bound by them. However, if the state that has jurisdiction over a non-state actor ratifies an accord, obligations for non-state actors can still be created by the treaty (McBeth, 2010). Furthermore, if a provision of a human rights agreement is accepted as a norm of customary international law, it binds the entire international community, regardless of whether or not each state has ratified the treaty (Meron, 1989).

Customary international law is the second source of international human rights law. For a norm to become customary international law, practice of that norm must be widespread, and states must believe that they are bound by the norm (McBeth, 2010). A norm of *jus cogens* is a universal rule that cannot be contracted out of (McBeth, 2010). The purpose of *jus cogens* is to protect fundamental values in the international community; therefore, many norms of *jus cogens* have to do with the protection of human rights. A norm of *erga omnes* is an obligation in international law that is deemed so important that it is owed to the international community as a whole (De Jonge, 2011). These norms affect essential interests of the entire international community. Genocide, slavery, and torture are considered norms of *erga omnes*, and arise primarily out of rules of *jus cogens* (De Jonge, 2011).

The concept of international legal personality applies to entities that can exercise rights and bear obligations under international law directly, without needing

another entity to act as an intermediary (McBeth, 2010). Whether non-state actors such as corporations can have international legal personality is a topic that has been greatly debated. Until recently, most scholars have argued that international human rights law places obligations on states alone. McCorquodale (2002) is typical of this position:

International human rights law, for all its diversity and size, places direct legal obligations only on states. The international human rights law system is a state-centred system, a system in which the law operates in only one area: state action. It ignores actions by non-state actors... 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.

However, the United Nations and other international organizations have been recognized as subjects of international law (De Jonge, 2011). Furthermore, when describing its list of human rights, the Universal Declaration of Human Rights (UDHR) states that “every organ of society...shall strive...to secure their universal and effective recognition and observance” (UN, 1948). Many of the bodies responsible for monitoring human rights treaties have acknowledged the obligations of non-state actors. For example, the Committee on Economic, Social and Cultural Rights (CESCR) (2000), the committee responsible for monitoring the ICESCR, stated:

While only states are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals,... intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities regarding the realization of the right to health.

The role of non-state actors has also been recognized in relation to the rights to privacy, freedom from discrimination, freedom of movement, adequate housing, adequate food, education, the rights of women, of indigenous people, and disabled persons (McBeth, 2010).

Furthermore, human rights are almost always expressed as entitlements vested in human beings. The state is not the only body that is capable of violating human rights. A violation of human rights, no matter who the perpetrator, is a violation of international law. As Theodor Meron explains: “When a human rights treaty establishes an obligation of result, and that result may be frustrated by private action, the arguments for an interpretation reaching private action are compelling” (Meron, 1989). Thus, McBeth has persuasively argued that “private entities, such as corporations, can be said to have obligations under

international human rights law, even though those obligations are not readily enforceable under present arrangements” (McBeth, 2010).

Enforcement Issues

Having established that obligations under international human rights law do exist for corporations and other non-state actors, it is now necessary to examine some of the challenges in creating an enforcement mechanism for these obligations.

The concept of separate legal personality presents an obstacle for the enforcement of corporate human rights obligations. As previously mentioned, separate legal personality allows companies to incorporate subsidiaries to carry out particular components of a venture. If the subsidiary is then exposed to liability, the parent company and the shareholders are protected. This can mean that if a wholly-owned subsidiary's activities attract a lawsuit under the direction of the parent company, the parent company could escape legal liability (Meeran, 1999). This can make it extremely difficult to determine responsibility. If international enforcement mechanisms are to be created for human rights, this corporate veil must be lifted. Multinational corporations should be treated as one entity in order to avoid this problem, while still limiting the liability of individual shareholders. Stiglitz (2007) suggested that this could be done by creating a rule that states that in certain classes of liabilities, any entity owning more than, for instance, 20 percent of the shares of a company could be held legally liable. This would be the case even if the corporation went bankrupt.

A second challenge arises from the concept of complicity. Multinational corporations are often involved in human rights abuses in close relation with a state actor (Tófaló, 2006). This is particularly true where corporations are operating in conflict zones. There are many questions surrounding the concept of complicity: In order to be considered complicit, must corporations directly violate human rights in concert with the state? Must they assist the government in the design and implementation of repressive policies? Or, if these companies are simply operating in an area where human rights abuses are widespread and do not protest these violations, is this enough to attribute complicity? For human rights obligations of multinational corporations to be enforceable, these questions must be addressed.

Reaching consensus on an appropriate body to enforce the international obligations of corporations poses another set of difficulties. Several proposals for enforcement have been made to date, but none exist without a set of challenges that must be carefully considered.

A possible avenue could be to expand the mandate of the United Nations Human Rights Council. The Council already has a mandate on “human rights and transnational corporations and other business enterprises” (Human Rights

Council, 2007). To add an investigative function to this mandate would not be overly radical. The complaints procedure of the Human Rights Council is designed “to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world under any circumstances” (Human Rights Council, 2007). The procedure was established on the assumption that complaints would be filed against states. However, it does not explicitly exclude violations by non-state actors (McBeth, 2010). The Human Rights Council would only be an appropriate forum for dealing with the most serious human rights abuses by corporations, meaning that complementary mechanisms would be required for dealing with the majority of violations.

A second option within the UN could be to allow the Advisory Committee of the Human Rights Council to investigate complaints (De Jonge, 2011). This could occur by establishing a working group dedicated to such a function. The predecessor to the Advisory Committee, the Sub-Commission on the Promotion and Protection of Human Rights (2003), considered establishing this type of working group as part of the implementation of the UN Norms:

The Commission on Human Rights should consider establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms. The Sub-Commission on the Promotion and Protection of Human Rights and its relevant working groups should also monitor compliance with the Norms and the developing best practices by receiving information from non-governmental organizations, unions, individuals and others...

However, the Commission felt that such an enforcement mechanism was premature, “and that the Sub-commission should not perform any monitoring function in this regard” (Commission on Human Rights, 2004).

This type of system is attractive because it does not rely on states and therefore avoids problems associated with the lack of political will or capacity for enforcement in a given country. However, imposing meaningful and effective remedies for violations may be problematic. The existing human rights bodies do not have the power to impose binding remedies on states, and instead rely on non-binding recommendations. More coercive measures would most likely not be possible for a system built within the existing human rights bodies (McBeth, 2010).

Another possibility would be to create a new international tribunal to enforce human rights obligations directly on corporations. This tribunal would have the capacity to impose binding remedies on multinational corporations. It could be established by a treaty that would be ratified by states, thereby subjecting corporations incorporated in those states to the tribunal's jurisdiction. This

tribunal would not replace the state as the enforcer of human rights obligations; instead, the state would still have primary jurisdiction but the international forum would be used in cases in which national enforcement was not feasible. A drawback of this approach is that it relies on states to opt in, and there is no mechanism for pressuring them to do so. If not all states were to participate, this could create a race to the bottom.

International criminal law provides a major precedent for direct enforcement of international law upon non-state actors. The International Criminal Court has the power to imprison an individual for life by directly applying norms of international law (McBeth, 2010). The ICC obtains jurisdiction over individuals based upon ratification of the Rome Statute by their states. Similarly, the proposed tribunal would obtain jurisdiction over MNCs incorporated in states that ratify its treaty. The OECD Guidelines operate in much the same way. Corporations are subjected to complaints about their human rights performance if their home or host state has signed onto the Guidelines. The difference is that the Guidelines are non-binding. The major challenge facing the establishment of such a tribunal is therefore not a conceptual problem – it is a lack of political will.

An alternative but very controversial approach would be to establish a role for the World Trade Organization (WTO) in protecting human rights. The WTO is the primary international forum for trade negotiation and dispute settlement. The purpose of the WTO is to facilitate trade (Marrakesh Agreement, 1994):

with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development...

The goals outlined in this statement are the ends toward which the trade agreements and dispute settlement processes of the WTO should strive.

One main difference that sets the WTO apart from its counterparts in other fields of international law is its dispute settlement system. This system allows a contracting party to file a complaint if that party considers that (General Agreement on Tariffs and Trade, 1947a):

any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of a) the failure of another contracting party to carry out its obligations under this agreement, or b) the application by another contracting party of any measure, whether or not it conflicts with the provisions

of this agreement, or c) the existence of any other situation.

The affected party may be entitled to compensation from the party whose practices were challenged, or may be allowed to use retaliatory trade measures against that party. These sanctions give real teeth to the rules set out by the WTO, unlike most other types of international law that lack effective enforcement mechanisms.

Under these arrangements, it is possible that a party could argue that by not fulfilling its human rights obligations, another party is giving itself a competitive advantage (McBeth, 2010). This could constitute an impairment of benefits for the complainant. The non-compliant party could then face trade sanctions. If the dispute settlement system were utilized in this manner, it could encourage states to uphold human rights standards and ensure that companies operating inside their borders comply with human rights regulations. This interpretation would be much more successful in meeting the WTO's stated goal of improving standards of living than the present arrangement, which encourages states to lower human rights standards in an attempt to improve market efficiency.

Another manner in which the WTO could encourage observance of human rights is through import restrictions or tariffs. This would involve the imposition of minimum standards for a product to be allowed duty-free into a market (Zagel, 2005). This strategy differs from general trade sanctions that target an entire country with a poor human rights record. Country-wide sanctions have been criticized for causing unemployment and decreasing living standards, because they can cut off the income source of the victims that the policy is attempting to protect (De Jonge, 2011). By targeting specific products from specific companies, this type of import restriction minimizes potential for such collateral damage.

Import restrictions could take the form of a ban or tariff on items that are produced in a way that does not meet minimum standards for labour conditions, treatment of protesters, methods of acquiring land and natural resources, and/or protection of the environment and consequent effects on health, food, and water (McBeth, 2010). Developing countries have been resistant to the idea of these types of restrictions because they see them as protectionist measures that would prevent poorer countries from utilizing their comparative advantages, such as cheap labour. However, it should be possible to agree on minimum standards in many areas. For example, countries should be able to agree on certain health and safety standards, maximum working hours, and bans on child labour, as well as respect for other fundamental human rights that are largely uncontroversial. Agreeing on other standards may be more difficult. For instance, setting a standard minimum wage may not be possible because the cost of living varies greatly from country to country, and cheap labour is a legitimate comparative advantage for many countries.

Article I of GATT requires that equal treatment be given to imports of like products from all WTO member states, meaning that the use of higher tariffs or quantitative restrictions on equivalent products is prohibited (General Agreement on Tariffs and Trade, 1947b). However, this issue could be resolved by treating products that are produced in a way that does not meet minimum standards as “unlike” a product that is made in accordance with minimum standards (McBeth, 2010). Differential treatment could then not be considered arbitrary discrimination. These trade restrictions have the potential to be very effective in changing the production methods of corporations. If there is no longer demand for items that are produced in a manner that violates human rights, this will create a powerful incentive for standards to improve. Tariffs also have the potential to create an incentive for countries to sign on, provided they will receive a portion of the revenues.

The first step would be for the WTO to interpret its trade laws in a way that would allow states to implement human rights-based import restrictions if they choose to do so. However, a more effective development would be for the WTO to require that all member states implement these restrictions. This would overcome the problem identified above regarding the lack of a mechanism for pressuring states to sign onto a human rights treaty that would bind their corporations. If membership in the WTO were conditional upon signing the treaty, this would provide a powerful incentive for states to opt in.

In order for this system to function, a body that specializes in human rights, like the international tribunal discussed above, would need to be established to hear complaints about the production methods of companies. These complaints could be brought by corporations, NGOs, states, victims, or other individuals. The body would establish appropriate sanctions for different types of violations. These sanctions would include tariffs and import bans on products. Once a complaint was adjudicated and verified, all WTO member states would implement the appropriate sanction on the product.

Using the WTO to promote human rights observance by multinational corporations is desirable because it demonstrates that violating human rights is unfair trading practice, and it provides a meaningful sanction to corporations that abuse human rights. However, the WTO, at least in the foreseeable future, is unlikely to accept a role that involves enforcing human rights standards. The WTO has been very hesitant to recognize the place of human rights in international trade law. Changing this attitude will not be easy. There is no external body that can force the organization to change its approach to trade and its interpretation of trade law. Change must therefore come from within the organization and within member states. This would take a strong resolve by the leaders of the G20 to direct their trade representatives to make this a priority.

States have made extensive joint efforts through the OECD to prevent corporations from practicing tax arbitrage, which is the use of transfer pricing to move profits to

subsidiaries in low-tax jurisdictions (OECD, 2010). Similar solutions have not yet been applied to human rights or environmental arbitrage, whereby corporations set up operations in jurisdictions with low human rights or environmental standards. The solutions to these issues are not dissimilar. They require international cooperation, and that all components of an MNC be treated as one entity. Rather than working together to tackle only one set of issues that have arisen from economic globalization, it would be ideal if the international community worked together on all such problems with similar causes and solutions in one comprehensive package.

Conclusion

Economic globalization has created a governance gap that has left individuals and communities vulnerable and powerless to exert their rights in the face of commercial operations. It is clear that self-regulation by corporations and regulation in the home and host states often does not work. For this reason, it is necessary to pursue regulation at an international level to complement corporate codes of conduct and state-level protection of human rights. Corporations have obligations under international human rights law; however, under present arrangements, these obligations are not legally enforceable. In the long run, an enforcement mechanism would ideally be created whereby the UN would codify a comprehensive set of human rights obligations for corporations in the form of a treaty, member states would ratify the treaty, the UN Human Rights Council or a new international tribunal would adjudicate complaints about corporate violations of the standards, and the WTO would implement sanctions for those found guilty of violating the standards. However, experience with the UN Norms has demonstrated the political difficulties associated with placing binding obligations directly on companies. The establishment and implementation of the multi-layered system proposed here would be even more challenging. Therefore, regulation should continue to be developed and improved at the company, industry, host-state, and home-state levels, in addition to the international level. Collectively, these approaches offer the best way forward for maximizing the benefits and minimizing the costs of transnational corporate activity.

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