Transnational Supply-Chain Regulation – Between the Fight against Corporate Impunity and the Risk of Interference in States' Regulatory Sovereignty

By:

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Transnational Supply-Chain Regulation

Transnational supply-chain regulation **(TNSC Regulation)** comprises measures adopted by one State in reaction to business practices abroad it considers to be undesirable. The most obvious examples of TNSC Regulation are the French Duty of Care Act and proposals for similar legislation in countries such as Germany, Switzerland and Luxembourg. TNSC Regulation can deal with environmental protection in supply chains, or workers' rights, or any other issue that determines how supply chains operate. Some transnational supply-chain regulation measures were specifically taken to fight abuse in supply chains.

Since business practices within transnational supply chains have often had negative human rights and environmental effects, including on African host States, with corporate accountability generally lacking, initiatives that push for higher standards in transnational supply chains should be welcomed.

However, TNSC Regulation may also be at odds with values and domestic policies in third States that are affected by it, which raises the question whether at a certain point the laudable fight against corporate impunity risks becoming an interference in those third States' **regulatory sovereignty**. This question, of course, presupposes a broad approach to the notion (and analysis) of regulatory sovereignty. This is because "regulatory sovereignty" is usually referred to in the realm of international investment law, with discussions centering on legal obstacles for host States to freely implement policies in light of obligations on the State *vis-à-vis* the investor, and its home State, respectively. What this article proposes is broadening the understanding of regulatory sovereignty to include consequences of TNSC Regulation and ask whether African States' power to regulate domestic situations could be *de facto* limited by transnational supply-chain regulation imposed by foreign States.

International law as a shield against undesired foreign TNSC Regulation?

Under what circumstances TNSC Regulation is factually capable of limiting African States' power to regulate is not necessarily a legal question since the answer depends mostly on whether the regulating State has enough political and economic power to effectively make businesses comply – even abroad. From the legal perspective, the question to be looked at will be a different one: to what extent does public international law allow States to introduce TNSC Regulation, *i.e.*, to regulate extraterritorial parts of transnational supply chains?

The legal framework for making TNSC Regulation could be divided into a layer of **rules of general public international law** and, depending on the specific TNSC Regulation measure, a second layer of rules pertaining to **particular areas of international economic law** (such as WTO law). Neither of the two have been thoroughly discussed in academia, which is not surprising since the very concept of TNSC Regulation as understood here has not been used before either.

General public international law protects States against foreign TNSC Regulation in two ways: first, by putting limits on the regulating State's exercise of jurisdiction and second, by the prohibition to intervene in the internal affairs of other States. These two precepts are both fundamental and difficult to grasp in practice. For example, the exercise of jurisdiction is said to be legal under public international law as long as there is a recognised link between the regulating State and the situation it seeks to regulate. But what does that mean for TNSC Regulation like the French Duty of Care Act that is formally addressed to French companies (recognised link) but at the same time extraterritorial in that it aims at changing also the way foreign companies that are part of the supply chain operate (abroad!)? Or as regards the non-intervention principle: how much sense does it make to apply the International Court of Justice's Nicaragua criteria and texts like the Friendly Relations Declaration to the assessment whether pushing for better standards in foreign parts of highly complex transnational supply chains constitutes an undue interference in internal matters?

The African perspective

In theory, any State could become the target of another States' TNSC Regulation. Assuming that Regulating States will most often use companies seated in their territory with corporate control over foreign entities (like the French Duty of Care Act), or access to their market (like the EU does), to effectuate TNSC Regulation, global FDI, and trade data becomes particularly relevant.

A State's ability to impose TNSC Regulation is mainly conveyed through either of two links: the **FDI/'foreign activity' link** whereby the regulating State, as home State, uses companies seated in its territory in order to implement TNSC Regulation in third (host) States where they control other businesses or otherwise carry out activities, or the **trade link** whereby the regulating State, as importing State, forces foreign companies to comply failing which they suffer market access restrictions.

Africa does not host a single one of the 500 largest companies of the world. Global annual outward FDI flows originate mostly from Europe, the United States, Japan and China. Only 1,2 percent of accumulated global outward FDI stock is attributable to African investors. Trade data equally highlights the dependency of African business on legislation imposed by foreign down-stream legislators: 83 percent of African exports are directed to jurisdictions outside of Africa. This data, although far from being conclusive, indicates that due to its position in global economic networks, Africa is at particular risk of becoming subject to TNSC Regulation imposed by foreign legislators. Nevertheless, the adoption of the 2014 Malabo Protocol, whose Article 46C would vest the African Court of Justice and Human and Peoples' Rights with jurisdiction over corporate crimes (once the protocol enters into force), shows that promising TNSC Regulation initiatives are underway on the African continent too.

More awareness – more research – more involvement

More research will be required to understand what TNSC Regulation is, how effective it is in improving the human rights and environmental performance of businesses, and where public international law limits its legality in order to protect legitimate policy spaces of other States. For all that to happen, a shift in perception will be inevitable: Governments need to be aware of the fact that their legislation concerning domestic production processes competes with foreign TNSC Regulation. African stakeholders and policymakers should

evaluate their economies' current and potential status as a regulating or target State and consider developing a common African position in order to prevent undesired loss of regulatory power.

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