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Transnational corporations as instruments of human development

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November 2004

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I. Introduction

For all the sour feelings the acts of certain transnational corporations have aroused in developing countries where they have operated, there is one thing which, for a developing country, is even worse than to attract foreign direct investment : it is to attract none. Transnational corporations – corporations having business operations in countries other than their country of incorporation, either directly or through subsidiaries or affiliates[1] – have the potential to be important actors in development, not only in that they may contribute to the expansion of exchanges and therefore to economic growth, but also in that they may help fulfil a form of development oriented towards the expansion of human capabilities, of which human rights are both a main ingredient and a pre-condition[2]. At the same time, never have more concerns been expressed about the impunity of transnational corporations in the globalized economy : these « leviathans »[3] or « hydra-headed monsters »[4] occasionally commit serious human rights violations or are complicit in such violations, and despite their obligation under the international law of human rights to protect the human rights of populations under their jurisdiction, States hosting their investments appear too often unwilling or incapable to do so.

The complex relationship transnational corporations entertain vis-à-vis human rights in the countries in which they develop their activities is hardly surprising. Transnational corporations are simply agents of economic globalization. The very definition of economic globalization as the « integration of national economies into the international economy through trade, direct foreign investment (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology »[5] illustrates the essential function TNCs have to fulfil in this process, and this process is crucial to the economic growth and therefore also to the development of less industrialized countries. Economic globalization as such, however, is neither positive nor negative to human rights : whichever impact it has on their realization depends on the forms it takes and the kind of governance it is guided by. The argument of this paper is based on the recognition that the forms economic globalization may take are many, and that we are not bound to any one of these forms in particular, despite the sense of fatefulness which all too often accompanies debates on globalization. The kind of globalization advocated here proposes an enriched understanding of the obligation of transnational corporations to respect human rights. The paper moreover argues that this is, in fact, the direction in which we are moving, and that simply accentuating certain aspects of the current situation will bring us closer to this objective : transforming TNCs into instruments for a more humane kind of globalization, one which not only respects the full set of internationally recognized human rights, but which also ensures that they will be further realized, in combination with economic growth.

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[1] On the question raised by the definition of transnational corporations or, in his vocabulary, « multinational enterprises », see esp. Peter T. Muchlinski, Multinational Enterprises and the Law, Blackwell, Oxford, 1995, pp. 12-15.

[2] This richer understanding of development, which cannot be reduced today to industrialization and economic growth, dates from the 1990s. The most interesting conceptualizations may be located in the Report of the 1998 Oslo Symposium on Human Development and Human Rights, UNDP-Office of the UN High Commissioner for Human Rights – Royal Ministry of Foreign Affairs of Norway (Copenhagen, UNDP, 1998) ; Amartya Sen, *Development as Freedom*, New York, Anchor Books, 1999 ; United Nations Development Programme, Human Development Report 2000 – Human Rights and Human Development, New York, UNDP, 2000. In this study, it is this notion of development which is referred to under the expression « human rights-oriented (or driven) development ».

[3] Sarah Joseph, « Taming the Leviathans : Multinational Enterprises and Human Rights », Netherlands International Law Review, vol. XLVI, 1999, pp. 171-203.

[4] Emeka A. Duruigbo, Multinational Corporations and International Law. Accountability and Compliance Issues in the Petroleum Industry, Transnational Publ., Inc., 2003, p. xviii.

[5] Jagdish Bhagwati, In Defense of Globalization, Oxford Univ. Press, 2004, p. 3.

The general thesis is the following. Many tools have been proposed, since the mid-1990s, to ensure that companies comply with certain basic requirements in the areas of labor rights, respect for the environment, and human rights more generally, or to encourage companies to comply voluntarily with such requirements. But these tools, such as, for instance, the United Nations Global Compact proposed to the business community by UN General Secretary Koffi Annan[6] or the SA8000 social accountability system proposed and managed by Social Accountability International, essentially impose that, in the course of their operations, TNCs respect these internationally recognized standards. At best, they require therefore that the impact of the enjoyment of human rights be evaluated *ex ante* and *ex post*, both before the corporation enters into a particular project and in the course of the implementation of that project. An impact-analysis approach to foreign direct investment, where it remains confined to an examination of the impact of a particular investment or project on the human rights of the population concerned (what may be called « micro-analysis »), may however not be sufficient. The human rights perspective should and can be applied at the « macro » level of analysis – the level at which the contribution of foreign direct investment to development may be appreciated in its fuller dimension. Mirroring Article 28 of the Universal Declaration of Human Rights, the 1986 United National General Assembly Declaration on the Right to Development defines this right as « an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized »[7]. The question of which conditions are to be realized for foreign direct investment to contribute to the right to development, defined by the realization of human rights it facilitates, is quite distinct from the question whether, as foreign investors, transnational corporations respect the full panoply of internationally recognized human rights in their operations. One of the implicit proposals of this paper is that human rights lawyers should move from the « micro », where their presence is now well established, to the « macro », which is still largely unchartered territory for them – that they should propose mechanisms through which not only transnational corporations should respect human rights where they act, but through which moreover their presence can contribute to a form of growth conducive of the right to development[8].

There is no automatic relationship between the arrival of foreign investors in a country and the human rights-driven development of that country : even where the TNCs concerned respect the full range of labor rights, environmental standards and human rights which their activity could potentially affect, there is no certainty that their presence in the country will contribute to that country moving towards the full realization of human rights of all its population. We could, of course, leave it to the economists to study the conditions which have to be created to ensure that foreign direct investment is conducive not only of economic growth, but also of human development. This has been, in fact, the implicit division of tasks between human rights lawyers and development economists in the discussion about the regulation of the activities of TNCs : while the former have devised tools to oblige TNCs to comply with internationally recognized human rights, the latter have demonstrated which benefits can be expected from an expansion of the private sector and the inflow of foreign capital in developing economies. This paper, which is programmatic in that respect, seeks to identify the contours of a human rights approach as applied to – beyond the discrete activities of companies – the structural, macro-economic, questions raised by FDI. The legal framework of FDI, in particular, must be critically examined from that perspective. Otherwise there exists a real risk that, while we devote our energies to scrutinizing the activities of TNCs in developing States, we forget about the structural dimensions of their presence in those States, such as the pressure under which developing States are to attract FDI and the concessions they make to ensure that foreign capital flows in, or the consequences of FDI on the situation of local producers and investors or on the relative wages.

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[6] http://www.unglobalcompact.org

[7] U.N. G.A. Res. 41/128 of 4 December 1986.

[8] In her Presidential Lecture at the World Bank in December 2001, Mary Robinson noted : « Lawyers should not be the only voice in human rights and, equally, economists should not be the only voice in development. The challenge now is to demonstrate how the assets represented by human rights principles, a form of international public goods, can be of value in pursuing the overarching development objective, the eradication of poverty » (M. Robinson, « Bridging the Gap between Human Rights and Development », Presidential Lecture, World Bank, Washington, December 2001, http://www.unhchr.ch/development/newsroom.html. I am grateful to Manfred Nowak for providing me with this reference.

Once we adopt a human-rights approach to the question of foreign direct investment in its structural dimension – as distinguished, in this paper, from the question of specific activities of companies –, we are led to consider foreign direct investment also as a lever to promote human rights in the country where it is made, and identify the corresponding obligations not only of the private economic actors, but also of the States concerned and of multilateral lending institutions which finance the private sector. What is needed is to channel foreign direct investment (FDI) to ensure that it serves development, understood as a process ensuring the full enjoyment of all the human rights, rather than contradicts it. This requires a « macro-analysis » of the impact of FDI on developing countries, going beyond the examination of the impact of particular investment projects and their immediate consequences to the concerned communities, and enlarged to an analysis of the general context in which the investment is made and its consequences for a human rights-driven development of the country. This rejoins the conclusion recently presented by the 2003 Report on Trade and Investment published by the United Nations Conference on Trade and Development (UNCTAD), which states that « the contribution of FDI to capital formation, technical progress and growth depends crucially on the policies adopted by recipient countries vis-à-vis foreign investors »[9]. It also develops the view put forward by the World Commission on the Social Dimension of Globalization set up on the initiative of the ILO, the Final Report of which, released on 24 February 2004, calls for « a development-friendly multilateral framework of rules for investment »[10].

Sections II, III and IV of this paper examine what may be labelled the failings of the micro-analysis approach to include the responsibilities of TNCs towards human rights-driven development. The general thrust of these sections is as follows. Until recently, the mechanisms which existed to ensure a better accountability of transnational corporations for human rights violations they commit or make themselves complicit of essentially simply sought to ensure that, in the course of their activities, these corporations would not violate, or aid and abet in violating, human rights. This understanding of the responsibility of corporations, however, fails at three levels. It appears insufficient to guard against the risk that the investments of TNCs in developing countries, although not directly the source of human rights violations, will not contribute effectively to the development of that country, because of the way it is directed or the general context in which it is made (section II). It also does not ensure that the presence of the TNC in a developing country will contribute to improving the record of that country in the field of human rights, despite the fact that the investor may potentially encourage such improvements (section III). Finally, at a third level, such an understanding of the responsibility of TNCs towards human rights does not prevent that, as a consequence of interjurisdictional competition between States, the wages of the less skilled workers in more developed countries will be lowered, out of fear of the outsourcing of certain activities to developing countries with less demanding requirements and because of a diminished leverage power of the unions, and that, in the host country of the investment, inequalities will rise between the better paid, skilled workers and the low-skilled workforce (section IV).

Of course, the insufficiencies at each of these levels correspond to different concerns. The first insufficiency relates to the situation of a developing country which does not benefit as much as it should from the foreign direct investment, because of the conditions under which the investment is made and which the investor has been granted by exercising its bargaining power, or by relying on provisions from bilateral investment treaties or multilateral agreements on investment which favor the interests of investors. The second insufficiency relates to the situation of a developing country whose government commits human rights violations, which the foreign investor is or should be aware of, and could contribute to combating. The third insufficiency corresponds to the situation where the conditions which are or could be obtained by an investor in a foreign jurisdiction are used by that

[9] UNCTAD, Trade and Development Report 2003, Geneva, 17 October 2003, p. 76.

[10] The World Commission on the Social Dimension of Globalization (chaired by Ms Tarja Halonen and Mr Benjamin William Mkapa), 2004, p. 106. The World Commission on the Social Dimension of Globalization was created by a decision of the International Labour Organisation Governing Body in November 2001. Its mandate was to prepare a major authoritative report on the interaction between the globalization of economy and the world of work. The Commission has acted as an independent body and its members have been serving in their individual capacities.

investor, in more or less explicit ways, to pressure the workforce in industralized countries or the public authorities in those countries to lower certain requirements which impose costs on the investor and may lead it to relocate certain segments of production elsewhere. These concerns are quite distinct from one another. They present however one common departure point : they have their source in a refusal to consider that the consequences of economic globalization are automatically benevolent, for both the developing and the industrialized countries. Therefore TNCs, as vectors or channels of globalization, not only should be obliged not to violate human rights in the course of their operations. We should also identify ways in which they could be used as instruments to bring about positive changes, commensurate to the influence they already exercise *de facto*. In other terms, we should conceive of TNCs as a tool of international governance, which should be used to bring about the kind of globalization we believe will best contribute to the realization of the right to development.

Sections V and VI of this paper identify some mechanisms which could be used to move in the direction proposed. These sections lay the emphasis on the responsibilities of developed States and multilateral lending institutions. These are the actors which set the rules of economic globalization : these are the actors who should take action to ensure that, in the argot of the times, FDI become regulated by a development-friendly multilateral framework of rules. TNCs are to be incentivized to work to the good. But the current framework, in many respects, while protecting the rights of investors and strictly limiting the range of conditions which may be imposed on them by the host States, does nothing to facilitate this. TNCs are encouraged to seize upon the opportunities created for them by economic globalization : while they have to respect human rights in their activities, they are essentially to go about their business, without having to worry about the broader consequences of their presence or about whether or not their presence is conducive of the human development of the communities in which they operate. Because the imposition of further obligations directly on TNCs is fraught with difficulties – for instance, how should we define an obligation to contribute to contribute to the right to development ? –, the more promising path is to examine how the States where TNCs are incorporated and multilateral lending institutions could contribute to TNCs becoming, instead, the agents of a benevolent form of economic globalization, one which works in favor of human development and the eradication of poverty rather than simply contributes to economic expansion.

II. The incapacity of micro-analysis to tackle the notion of economic responsibility[11]

An understanding of the responsibility of TNCs which remains confined to an examination of the impact of a particular investment or project on the human rights of the population concerned is inadequate because it does not guarantee that such an investment will contribute to the realization of the right to development, i.e., will truly benefit the populations of the country where the investment is made. Although the imposition of human rights obligations on companies through an impact-analysis of each individual project may be adequate for imposing a responsibility vis-à-vis labour rights (social responsibility), the environment (environmental responsibility), or other human rights directly affected by the activities of the corporation (ethical responsibility), it fails to tackle adequately what may be styled the economic responsibility of the corporation, which we may define as its responsibility to act in order to contribute to the reduction of poverty in the country concerned. The Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies elaborated upon request of the UN High Commissioner for Human Rights mention that TNCs must « establish accessible, transparent and effective monitoring and accountability procedures in relation to *their poverty reduction and human rights responsibilities* »[12]. But it is striking, for instance, that where the responsibility of TNCs are

[11] The idea that an « economic responsibility » should be imposed on private transnational actors has been suggested to me by my colleagues from the Groupe de recherche sur les stratégies économiques alternatives (GRESEA), see www.gresea.be. I would like to take this opportunity to state my admiration and solidarity for the work done in that research centre, which has been a source of inspiration for me since many years.

[12] Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies, September 2002, para. 247 (my emphasis) (under Guideline 18 : « Monitoring and Accountaibility of Global Actors »). These guidelines were requested by Ms Mary Robinson, then UN High Commissioner for Human Rights, from three experts, professors Paul Hunt, Manfred Nowak and Siddiq Osmani. The initiative has been taken in July 2001 by the Chair of the United Nations Committee on Economic, Social and Cultural Rights, to ask the OHCHR to develop such guidelines for the integration of human rights into povery reduction strategies.

evoked today, very little attention is paid to the economic context in which they operate and the impact their investment may have on the general economic situation of the country concerned, for instance the level of unemployment or the debt-repaying capacity of the State. The following paragraphs offer four examples of such potential impacts, and of how these may depend on the framework regulating FDI.

The contribution of TNCs to capital flows

To take one first example, the form under which the FDI is made by the TNC makes a crucial difference to its impact on the local community, and yet it is a factor rarely if ever taken into account by the current tools for improving the accountability of TNCs towards human rights. Different channels of FDI ought, indeed, to be carefully distinguished[13]. FDI can be the result of *privatizations*. These were especially important during the 1980s and the first half of the 1990s, under the influence of macro-economic programs which sought to improve the debt-repaying capacity of the developing states *inter alia* by cutting down the public sector, especially by privatizing public enterprises for the sake of ameliorating productivity and efficiency. Often, in the absence of adequate accompanying measures, this led to more unemployment, because of the important layoffs this led to, without alternatives being created for the employees from the public sector suddenly considered redundant[14]. FDI also can take the form of *acquisitions of local private firms*, by mergers and acquisitions. Although this form of FDI has been rising since the early 1990s[15], its expansion has been continuing in the period 1998-present. Such FDI translates into the transfer of the property of local undertakings to foreign corporations, but not necessarily to new investments and growth. Finally, some FDI leads to the creation of new infrastructures, « investment in bricks and mortar »[16]. FDI in the latter form, sometimes referred to as « greenhouse investment », is the most promising from the point of view of capital formation and economic growth, but investments under this form have been steadily declining and have been selectively distributed among countries. Moreover, when such investments are made under special economic conditions set up with the specific purpose of attracting foreign investors, for instance through export processing zones (EPZs) where social and environmental regulations may be lighter or underenforced or where no or only minimal levels of taxes are imposed[17], they often represent short-term gains for the host country, in the job creations they imply. But these short-term gains may be offset by the departure of the investor to other, still more competitive jurisdictions. The International Confederation of Free Trade Unions (ICFTU) notes in this respect that the globalization of the economy « has accentuated competition for investment between the EPZs of the various countries. In the fight to secure investments, even greater financial rewards are offered to investors

[13] For a useful overview, see the background paper « International Investment and Human Rights : Political and Legal Issues », prepared by Rémi Bachand and Stéphanie Rousseau for the Think Thank of the Board of Directors of Rights & Democracy – International Centre for Human Rights and Democratic Development, « Investment in Developing Countries : Meeting the Human Rights Challenge », June 11, 2003, Ottawa, Canada. On the different forms of foreign direct investment, see esp. pp. 4-9.

[14] See, e.g., Joseph Stiglitz, Globalization and its Discontents, W.W. Norton & Co., 2002, chap. 1, and the reference to reports either internal to the International Monetary Fund or commissioned to external experts on this detrimental impact of the so-called « structural adjustment programs » : for a synthesis of these reports, see IMF Staff, Distilling the Lessons from the ESAF Reviews, Washington D.C., IMF, July 1998.

[15] See, e.g., David Kucera, « The Effects of Core Workers' Rights on Labour Costs and Foreign Direct Investment : Evaluating the 'Conventional Wisdom' », International Labour Organization, Decent Work Research Programme EP/130/2001, 2001, at p. 4 (reporting that for the least developed countries, the value of mergers and acquisitions in relation to total FDI inflows increased from about 15 to 30 percent from 1993 to 1998).

[16] UNCTAD, Trade and Development Report 2003, Geneva, 17 October 2003, p. 76.

[17] See geneerally on export-processing zones, the study of the International Labour Organization, « Free trade zones », in Employment effects of multinational enterprises in developing countries, Geneva, 1981 ; the joint study of the ILO and the United Nations Centre on Transnational Corporations, ILO/UNCTC, Economic and Social Effects of Multinational Enterprises in Export Processing Zones, Geneva, 1988 ; ILO, Labor and Social Issues Relating to Export Processing Zones, Geneva, 1998, TMEPZ/1998. The estimates are that in December 2002116 countries had such special economic zones, of which there are altogether 3000, providing employment for 43 million workers (of which 30 million in China alone). The phenomenon is inj rapid expansion. In 1995 for instance, 73 countries had such zones, of which there were 500 in total. In 1997, the first year for which this data is available, there were still only 22.5 million employes in EPZs. These figures are from ILO calculations based on a diversity of sources, and presented in the report presented to the Governing Body of the ILO in March 2003 (Employment and social policy in respect of export processing zones (EPZs), 286th session of the ILO Governing Body, GB.286/ESP/3, para. 4).

(resulting in lower gains for the country itself) or measures are taken to make workers even more compliant »[18]. It adds :

> « The growth of the global production network has made it possible for companies to source goods and services throughout the world and to reconfigure production lines quickly and easily, meaning that a country or a supplier can be cut out of the network if the conditions change and they are not able to react rapidly enough »[19].

Much of the empirical evidence that exists on the treatment of workers in export-processing zones in fact seems to show that the wages in those zones are higher than in comparable alternative employment in the country concerned[20]. Whether this evaluation would still be as positive after controlling for productivity differentials attributable, in particular, to the efficiency gains due to the technology of the TNC and to the economies of scale its organisation permits[21], remains to be seen ; and it may also be suggested that such higher wages are merely to be seen as a compensation for the compliance required from the workforce in EPZs and the long working-hours, with maximum flexibility and adaptability to new requirements, which the companies established in such zones generally expect from workers. But these debates miss the point which is made here. The question whether the presence of EPZs truly benefit the countries which create such incentives to attract foreign investors, beyond the immediate gains of employment creation and relatively higher wages for those who manage to be recruited, is distinct from the question whether the workers' rights are respected in such special zones, and whether the wages they receive are fair. In particular, the absence or quasi-absence of fiscal revenues for the host country from companies investing in such zones, or the uncertainty about the long-term presence of the investor which could easily relocate production elsewhere, seem to be in clear tension with the right to development of that country. These concerns have been clearly expressed by the Worker Vice-Chairperson of the ILO Governing Body, in the course of a discussion of export processing zones held in March 2003 on the basis of a paper prepared within that organization[22]. He noted[23] :

> Economic analysis was needed to evaluate the true impact of EPZs as there were open and hidden costs to EPZs. Companies were attracted by benefits and incentives leading to growth, but this came at a cost to government in terms of forgone tax revenues and payments for other services. The key issue was whether the costs exceeded the benefits. This was not a matter which could be asserted by intuition ; it was a matter for research and measurement based on downstream inputs and links to the local economy. Inputs sourced from a foreign country represented a loss for the host country. If companies imported technology and know-how which did not filter down through the rest of the supply chain, they would not have a sustainable economic impact.

It is a rather similar diagnosis the UNCTAD arrives at in its recent *Work Investment Report 2002 : Transnational Corporations and Export Competitiveness*, where it notes the difficulty of undertaking such a cost-benefit analysis as the one advocated by the ILO Governing Body Worker Vice-Chairman.

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[18] ICFTU, Export Processing Zones – Symbols of Exploitation and a Development Dead-End, September 2003, p. 10. See www.icftu.org. Other interesting reports on the situation of labour rights in export-processing zones include two reports from Human Rights Watch : *From the Household to the Factory : Sex Discrimination in the Guatemalan Labour Force*, February 2002 ; and *A Job or Your Rights : Continued Sex Discrimination in Mexico's Maquiladora Sector*, December 1998. A comparative analysis has been prepared by the International Labour Office, Committee on Employment and Labour Policy, *Employment and Social Policy in Respect of Export Processing Zones,* GB.285/ESP/5, Geneva, November 2002.

[19] Id.

[20] This seems to be confirmed by the recent work of the ILO on the employment and social aspects of EPZs, cited above (especially TMEPZ/1998), as well as by other studies, such as the report of the World Bank, The Philippines : The Case of Economic Zones, Washington D.C., World Bank, 1999, and D. Madani, « A Review of the role and impact of export processing zones », Policy Research Paper, Series No. 2238, Washington D.C., World Bank, 1999, p. 45. .

[21] On this feature of transnational corporations, see James R. Markusen, « Multinationals, Multiplant Economies, and the Gains from Trade », Journal of International Economics, vol. 16 (1984), pp. 205-226.

[22] Cited above, n. 17.

[23] International Labour Office, Governing Body, 286th session – fifteenth item on the Agenda : « Report of the Committee on Employment and Social Policy » (GB.286/15), Geneva, March 2003, para. 61.

Cautioning against a « race to the top » in terms of incentives to attract foreign capital, the UNCTAD report notes that « successful EPZs should not be judged solely on their capacity ro attract FDI or increase experts and foreign-exchange earnings. They should also be assessed by the extent to which they help meet broader economic and social objectives »[24]. However the kind of analysis this would require – what we may call « macro-analysis », in the distinction proposed at the beginning of this chapter –, the Report notes[25], is

> difficult to undertake. In particular, some potential long-term and structural contributions to the local economy are more difficult to appraise as they derive from dynamic gains that can only be realized over time and through deliberate effort, such as learning and absorbing foreign technologies and transforming the pattern of economic growth from an inward-looking to an outward-looking one (…). Furthermore, costs such as environmental degradation and foregone revenues are difficult to quantify and may reveal their extent only over time. An additional cost and danger is the risk of 'leakage' of duty-free goods into the domestic. This has the potential to undermine the development of backward linkages by preventing local enterprises from emerging or it can even destroy local enterprises.

Rémi Bachand and Stéphanie Rousseau add an even more fundamental critique, which replaces the consequences of FDI on the global relationship between industrialized countries and developing countries and, again, questions the contribution of FDI to sustainable development. They note that

> FDI from industrialized countries typically comes in the form of loans taken out with host country banks ; when the debt is repaid and the profits are repatriated to the investors' countries of origin, what was originally classified as an export becomes an import of capital and wealth into Northern countries. FDI, then, does not always have the effect of capitalizing the host country ; it may, on the contrary, cause a flight of the wealth and capital so necessary to the effective protection of human rights such as the right to health and education[26].

The crowding out of local producers and investors

Or consider the argument, put forward in its most recent annual report on Trade and Development by the United Nations Conference on Trade and Development, that the arrival of FDI can have very negative effects on local producers or investors, if no accompanying measures are adopted and if the sequencing and rythm of the opening up of the country to foreign investments are not carefully considered. According to the UNCTAD, « transnational corporations (TNCs) operate in highly imperfect markets, where their financial and technological strengths enable them to crowd out domestic producers or pre-empt their investment opportunities »[27]. In the course of a discussion held at Rights & Democracy, it was mentioned for instance that the opening in 1996 of the gold mine of Bulyanhulu in Tanzania, owned by a Canadian undertaking, led to the eviction of local artisanal miners without any compensation for the loss they incurred or to faciliate their resettlement – moreover all the benefits from this mine are repatriated to Canada, therefore hardly serve to promote the economic development of Tanzania[28]. Such examples could be multiplied : whether or not they respect human rights in their sphere of influence, the impact of the presence of transnational corporations on sustainable development in the host country, far from being automatic, depends on the conditions in which takes place and the regulatory framework in place.

The contribution of TNCs to technology transfers

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[24] UNCTAD, *Work Investment Report 2002 : Transnational Corporations and Export Competitiveness*, cited above, p. 244.
[25] Id., at p. 215.
[26] « International Investment and Human Rights : Political and Legal Issues », cited above, p. 9.
[27] UNCTAD, Trade and Development Report 2003,17 October 2003, p. 76.
[28] Rights & Democracy (International Centre for Human Rights and Democratic Development), *Concilier investissement direct à l'étranger et droits humains*. Rapport du groupe de réflexion de Droits et démocratie, Ottawa, 11 June 2003, p. 14. This example has been put forward in the discussion by Joan Kuyek, the national co-ordinator of Mines Alert Canada.

The question of technology flows offers another example. In many cases, TNCs possess technologies which companies in host countries do not have. One of the advantages the host country may expect from the presence of TNCs therefore is that these technologies be transferred, and that local producers will be able to improve their efficiency by acquiring them. Not infrequently however, the TNC will seek to protect its technological advance. It may preserve technological secrets with the parent company and transfer only limited parts of the technology to local affiliates or subsidiaries. It may reserve technological secrets to the personnel from the home country. It may equip the activities which are outsourced to local subsidiaries or affiliates with outdated machinery, in order to limit the risk of technology being diffused within local producers, who may be perceived as potential competitors. The technological superiority of the TNC therefore does not automatically result into the transfer of technology to the country hosting its investment, even if the conditions for FDI are liberalized and the presence of TNCs, thus, encouraged.

The limitations imposed on the exercise by the host government of its regulatory powers

Still a further question is raised by the so-called 'stability' clauses in agreements between the foreign investor and the host State which provide that the latter will not impose further regulations on the investor which would diminish the profitability of the investment[29]. This constituted one of the most disputed aspects of the Baku-Tbilisi-Ceyhan pipeline project, which may serve here as an illustration. This 3.6 billion US dollars-worth project[30] is for a consortium led by British Petroleum (BP) to build two 1,760 km-long pipelines (oil and gas) from the Caspian sea through Azerbaïdjan, Georgia and Turkey. The pipeline is expected to function for at a minimum 40 years, and possibly up to 60 years. The legal framework is constituted by one Inter-Governmental Agreement (IGA) concluded between the three countries countries and three Host Government Agreements (HGA)[31], with disputes being subjected to the International Centre for the Settlement of Investment Disputes (ICSID). The HGA concluded between the consortium and Turkey in October 2000, which will be in force for 40 years and may be extended for a further period of 20 years, contains the following provisions :

> Art. 21.2. The Parties hereby acknowledge that it is their mutual intention that no Turkish Law now or hereafter existing (including the interpretation and application procedures thereof) that is contrary to the terms of this Agreement or any other Project Agreement shall limit, abridge or affect adversely the rights granted to the MEP Participants or any other Project Participants in this or any other Project Agreement or otherwise amend, repeal or take precedence over the whole or any part of this or any other Project Agreement.
> Art. 7.2 (vi). …if any domestic or international agreement or treaty; any legislation, promulgation, enactment, decree, accession or allowance; any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, privileges, exemptions, waivers, indemnifications or protections granted or arising under the Agreement or any other Project Agreement it shall be deemed a Change in Law under Article 7.2(xi) [which, if it affects the 'economic equilibrium'[32] of the project, will require Turkey to pay compensation].

These clauses create the impression that Turkey has committed itself not to impose further regulations on the Project participants, for instance in the areas of labour or environmental rights or human rights generally, which could lead to economic losses for the consortium – unless that loss is compensated

[29] See in particular F. V. Garcia Amador, « State Responsibility in case of 'Stabilization' Clauses », Journal of Transnational Law and Policy, Spring 1993, p. 23.
[30] See www.caspiandevelopmentandexport.com
[31] These agreements were made public due to the insistance of the International Finance Corporation, the private-sector lending institution which is part of the World Bank group, after it was requested to contribute to financing the project.
[32] The « economic equilibrium » of the project refers according to an Appendix to the HGA to « the economic value to the Project Participants of the relative balance established under the Project Agreements at the applicable date between the rights, interests, exemptions, privileges, protections and other similar benefits provided or granted to such Person and the concomitant burdens, costs, obligations, restrictions, conditions and limitations agree to be borne by such Person ».

for –. This would of course imply a considerable restriction to the regulatory powers of Turkey, agreed to in the name of the protection of the rights of the investors[33]. However, these clauses of the Turkish HGA should be read in combination with Article IV of the IGA which stipulates that the « standards and practices generally prevailing in the international petroleum industry for comparable projects » which the project shall comply with must be at least as stringent as those applied within the European Union. The IGA has precedence above the HGAs in cases of conflict, so that any challenge to the exercise by Turkey of its regulatory powers when this would lead to disrupt the « economic equilibrium » of the project could be contested by Turkey, if it does no more than seek to impose standards equivalent to those in force in the EU. Moreover, confronted to a large number of reports from civil society organisations hostile to the project – a project which these organisations accused of creating social and environmental damage and of creating disincentives for the host States to develop their commitments under human rights treaties –, the three States concerned, with the consortium BTC, signed a joint statement on 16 May 2003 containing a number of commitments, including compliance of the project participants with the OECD Guidelines on Multinational Enterprises, confirming that the references in the project to EU standards are references to those standards as they evolve in time, and that all parties are committed to specified labour standards and to any other international labor standards which may be in force in a Project State from time to time. On 22 September 2003, a « BTC Human Rights Undertaking » was published, under which BTC stated, *inter alia*, that it would not contest any regulation by the relevant host government of the human rights or health, safety and environmental aspects of the project « in a manner (1) reasonably required by international labor and human rights treaties to which the relevant Host Government is a party from time to time, and (2) otherwise as required in the public interest in accordance with domestic law in the relevant Project State from time to time, provided that such domestic law is no more stringent than the highest of European Union standards as referred to in the Project Agreements, including relevant EU directives (…), those World Bank standards referred to in the Project Agreements, and standards under applicable international labor and human rights treaties ». In that same undertaking, BTC confirmed that it would not seek compensation under the « economic equilibrium » clause of the HGAs « in connection with (…) any action or inaction by the relevant Host Government that is reasonably required to fulfill the obligations of the Host Government under any international treaty on human rights (including the European Convention on Human Rights), labor or HSE in force in the relevant Project State from time to time to which such Project State is then a party ».

These clarifications seem to constitute adequate answers to the concerns expressed about the legal regime created for the BTC pipeline[34]. In fact, the « BTC Human Rights Undertaking » is not unsimilar to the « overriding clause » proposed by Amnesty International just a few months earlier for the HGA between Turkey and BTC, which would have read « Nothing in this [Agreement] shall be interpreted or applied by the parties in a way that would make it more difficult for Turkey to satisfy its international human rights obligations, at present or in future, as they arise under customary international law or under specific treaties or other instruments to which Turkey is a party ». But, however we evaluate the final outcome of the wide-ranging public debate on the BTC pipeline, the episode illustrates the risk that investors, under agreements concluded directly with host States, or *mutatis mutandis* under bilateral investment treaties or regional free trade agreements, will seek to protect their investments by challenging, as a form of expropriation, any use by the host government of its regulatory powers which may lead to certain economic losses for the investor, in comparison to which gains could be anticipated at the moment the investment was made. V.L. Been and J.C. Beauvais have documented this risk in detail in their study of Chapter 11 of the North American Free Trade Agreement, which relates to the rights of investors[35]. No doubt similar studies could be produced about the consequences of other legal frameworks protecting the right of foreign investors to

[33] See, in particular, the report by Amnesty International, « Human rights on the line. The Baku-Tbilisi-Ceyhan pipeline project », May 2003, www.amnesty.org.uk/business

[34] See International Finance Corporation, *BTC Pipeline and ACG Phase 1 Projects, Environmental and Social Documentation – IFC Response to submissions received during the 120-day Public Comment Period*, 27 October 2003, esp. pp. 22-23.

[35] V.L. Been and J.C. Beauvais, « The Global Fifth Amendment : NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine », NYU L. Rev., vol. 78 (2003), p. 1.

be immune from expropriation, as this notion is understood to go beyond nationalization – the transfer of property by unilateral decision of the host State – and may extend to economic losses subsequent to the exercise by the host State of its regulatory powers[36].

The contours of an economic responsibility

The implication of these examples for the understanding of the responsibilities of transnational corporations is clear. We cannot satisfy ourselves with the fact that, in the particular project concerned, the corporation will not violate human rights. We also have to ask whether, in seeking to invest in the most favourable conditions from the point of view of its profitability – in other to satisfy its shareholders –, the TNC is not contributing to a situation which is detrimental to the host country, for instance by immiserizing its population in making it more difficult for the State authorities to finance certain public programs by taxing foreign investment, or by raising unemployment due to the privatization of certain public sectors taken over by private economic actors. It is perfectly plausible for a TNC to respect all the social, environmental, and human rights standards we believe it is bound by under international law, and nevertheless for its presence to be, on balance, detrimental to the population of the country where it extends its activities, at least in the short run. We therefore have to identify the contours of a form of economic responsibility, understood as a responsibility towards the eradication of poverty and towards development, beyond the banale and outdated conception of development as economic growth. The precise extent of this economic responsibility and the mechanisms through which it could be imposed on private corporations are questions still awaiting answers. But it will already be an important step forward if we acknowledge that such a responsibility weighs on TNCs, as one of the primary agents of globalization : to ensure that globalization works to the benefit of the populations whose needs are greatest, and that it contributes to reducing inequalities between countries rather than accentuates such disparities.

III. The incapacity of micro-analysis to impose an obligation to promote human rights in the host country

There is a second reason why we should try to move beyond an understanding of the human rights responsibilities of transnational corporations which limits itself to imposing negative obligations on these actors, *not to violate human rights directly or indirectly* in the course of a particular investment. Transnational corporations not only are powerful actors when measured by how much they « weigh » as vis-à-vis States[37] ; they exercise – more importantly – an important pressure on the States where they consider investing in order to obtain the most favorable conditions. The coercion, naturally, is mutual : not only the corporation, but also the host State seeks to conclude the agreement which, in each partner's view, will be the most advantageous possible. But although the situations which will present themselves are as a matter of course extremely diverse, there will be situations where the corporation will seek to squeeze out as many advantages as possible from its negotiation with the host State, and will obtain most of what it has sought, simply because of the need in which the State is of foreign investment and because of the expectations the State has as to the consequences of the arrival of the investor : such an investment, the host State authorities may be hoping, will lead to the creation of quality and well-paid employment ; it may lead to the transfer of new technologies or, at least, know-how, to local producers ; it may be beneficial to local producers also in that the hosted TNC may sub-contract more or less important parts of the production process to local firms. What matters however is not that such an agreement between the host State and the TNC deciding to invest in that State will be in the mutual interest of both parties – in fact, that it is in their mutual interest may be

[36] « International Investment and Human Rights : Political and Legal Issues », cited above, pp. 16-22.
[37] The comparison between the economic power of States and that of multinational corporations has led to some debate, revolving around the validity of such comparisons and, specifically, on whether the GNP of countries should be compared with the sales volumes of TNCs or with their added values (or profits). See Jagdish Bhargwati, In Defense of Globalization, cited above, p. 166. Such comparisons however fail not only for the lack of adequate, generally agreed, methodological criteria to perform them. The « power » of States – their ability to exercise control on other actors – has to do, rather than with their economic weight, with the exercise of their regulatory functions, i.e., with their sovereignty, which TNCs are deprived of.

said to be a pure tautology, for how otherwise could the agreement be concluded ? – ; it is that the framework under which the negotiation takes place, defining the respective bargaining powers of both parties, may dramatically affect the outcome of the negotiation process, and thus, in the final instance, the impact on human rights of the private investment.

The imposition on TNCs of direct obligations under international law may be seen as an attempt to modify precisely this framework, as the effect of affirming such obligations is that certain elements relating to labor rights, the environment or human rights will simply not be treated as items open up for negotiation. Again however, these obligations can be conceived of in two different ways. We may insist that TNCs are bound to respect certain social, environmental, and ethical standards, and that remedies must be created for the benefit of those whose corresponding rights have been violated as a consequence of their activities. Alternatively, we may require that TNCs use their influence to promote human rights in the countries where they operate and with the authorities of which, therefore, they interact : we may seek to ensure that TNCs, as agents of globalization, contribute to globalization being benign, and working in favor of reducing the inequalities between countries and within countries, rather than being negative and accentuating inequalities, even where it contributes to economic growth. The imposition of positive obligations on TNCs to promote human rights implies that, where their bargaining power allows them to do so, TNCs will be under an obligation to use the leverage they have to seek improvements in the situation of human rights in the country where they invest. In this context, the influence TNCs may exercise on the developing States in which they invest is not simply a means for these corporations to obtain the best conditions possible for their investment ; it also should be made to work for the benefit of human rights.

This, I would submit, is the direction which we have been taking recently. The *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by the UN General Assembly in March 1999[38], essentially seeks to affirm the importance of the role of human rights defenders, and the protection they must be guaranteed in the States where they operate. However the language unmistakingly refers to a positive obligation of all actors to protect and to promote human rights, which goes beyond an obligation to respect – i.e., not to violate – those rights. It states that « Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes »[39]. Building on Article 28 of the Universal Declaration of Human Rights, it refers to the « important role and responsibility » of private actors « in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized »[40]. Quite apart from the question of the legally binding *vel non* character of this Declaration – which, formally speaking, is not as such the source of legal obligations –, the formulations are interesting in that they demonstrate that positive obligations (obligations to act in order to protect and fulfil human rights) may be imposed not only on States, despite the primary duties they have in this respect due to the sovereign powers they are attributed, but also on private actors, to the extent that they may contribute to human rights in their sphere of influence.

The *Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights* adopted on 13 August 2003 by the Sub-Commission on the Promotion and Protection of Human Rights[41], and presently pending for adoption by the UN Commission on Human Rights, move further in this direction. According to their Preamble, these Norms are based on the

[38] UN Doc. A/Res/53/144, adopted on 8 March 1998.
[39] Article 18(2).
[40] Article 18(3).
[41] Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (UN Sub-Commission on the Promotion and Protection of Human Rights, fifty-fifth session, E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003).

understanding that TNCs[42] « have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including (…) relationships with suppliers and consumers, interactions with Governments and other activities ». The capacity of the TNCs to contribute positively to human rights is seen as a source of obligations no less than their capacity to produce harm. Although the Norms reaffirm that the States have the « primary responsibility » to « promote, secure the fulfilment of, respect, ensure respect of and protect human rights », they clearly index the obligations of TNCs on the influence they may exercise. Paragraph 1 of the Norms stipulate :

> « Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups ».

The Commentary to the Norms indicate that TNCs shall « use their influence in order to help promote and ensure respect for human rights ». This, I would submit, goes beyond a simple obligation – also stated in the Commentary – imposed on TNCs to « inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses ». Where TNCs are required to « use their influence », they are required to interfere with the course of policies pursued in the countries where they operate, and thus to contribute to ensuring that their presence in those countries will facilitate a human rights-driven form of development. The reference in title E of the Norms to « respect for national sovereignty and human rights » should not discourage us from identifying such an obligation imposed on TNCs to promote human rights wherever they operate. In paragraph 10 of the Norms, where this title is explicitated, the concern for « national sovereignty » appears clearly subordinated to the requirement that TNCs contribute to the right to development. It states :

> « Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate ».

The commentary to this provision of the Norms mentions that TNCs are under a duty to « encourage social progress and development by expanding economic opportunities – particularly in developing countries and, most importantly, in the least developed countries ». The right to development which TNCs must respect is undertstood broadly as comprising « the right to enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized and in which sustainable development can be achieved so as to protect the rights of future generations ». Thus, although the enterprises to which the Norms are addressed must respect the authority of the countries in which they are present, they are encouraged to act so as to influence the direction these countries are taking. Wherever they can to an extent commensurate to their influence, they are invited to favor the right to development rather than to remain passive in the face of governmental policies, including the policies the government pursues vis-à-vis foreign investors, which fly in the face of that right – a right which we should conceive of as a right of the local populations rather than as a right of governments to determine without any outside influence the course of their evolution.

[42] The expression is used here as a shorthand for the larger set of adressees of these Norms proposed by the UN Sub-Commission on the Promotion and Protection of Human Rights. Strictly speaking, these Norms are intended to apply not only to transnational corporations, but also to « other business enterprises » having any relation with the transnational corporation, the impact of the activities of which is not purely local, or – even where neither of these conditions is fulfilled – where their activities involve violations of the right to security. See para. 21 of the Norms for a fuller description of their scope of application *ratione personae*.

That corporations operating in foreign jurisdictions may be under a positive obligation to contribute to the improvement of human rights in those jurisdictions, and therefore to leave the position of the silent observer complying with the local norms, may sound like a bold proposition. The difficulty is not only that one hardly sees how, practically, such an open-ended obligation could be satisfactorily translated in legal terms, and by which mechanisms it could be implemented. This is a difficulty which shall be returned to. But the main problem is, if the term fits, of an ideological nature.

First, since the early 1970s, the emphasis has been put on the requirement that corporations do not interfere with internal policies of the States in which they have operations. This has been, in fact, one of the aspects of the call for a « new international economic order » by newly decolonized states[43], who feared that the end of colonialism would be followed by a form of « neo-colonialism » from the Northern States, a less visible but not necessarily less damaging form of domination of which private economic actors were seen as among the most important instruments. Well-known historical episodes, such as the influence of the U.S.-based corporations ITT, Pepsi-Cola and the Chase Manhattan Bank in the coup d'Etat which put Pinochet into power in Chile or the role of the Union Minière in the secession of Katanga from Congo in the months following the declaration of independence from Belgium, contributed widely to this perception[44]. The Draft UN Code of Conduct on Transnational Corporations for instance, the latest version of which dates from 12 June 1990 but the work on which was launched in 1974 following a call from the UN Economic and Social Council[45], stipulates that corporations must abstain from involving themselves in domestic policies and respect the priorities of the host government in the countries in which they operate in the fields of employment, the environment and socio-economic policy[46]. Therefore a first difficulty with imposing on TNCs an obligation to promote improvements in the democratic regime, in the human rights record of the host State, and in its good governance is that this seems to modify the balance between the corporation and the State, whose sovereignty it must respect and whose laws it must comply with. A second difficulty is that the imposition of such an obligation seems, to some extent, to affect the very nature of the TNC as an organization instituted to make profit – to ensure a return on their investments to the shareholders – and whose business, to use the famous formula attributed to Milton Friedman, is not to promote good, but to do business.

The view that foreign investors should abstain from any kind of interference with internal policies, however, appears both outdated and verging on hypocrisy. The emergence of the notion of corporate social responsibility, if it means anything at all, means that the goal of profit-making cannot be the sole objective of the corporation, exclusive of any other. The notion that respect for the internal affairs of the State constitutes an obstacle to the imposition of internationally recognized human rights has lost the currency it once had. It may be symptomatic, for instance, that the OECD Guidelines for Multinational Enterprises, after their revision in 2000, state in paragraph 2 of the chapter on General Policies that « enterprises should take fully into account established policies in the countries in which they operate, *and consider the views of other stakeholders*. In this regard enterprises should : (…) respect the human rights of those affected by their activities *consistent with the host government's international obligations and commitments* ». The formulations which have been underlined indicate not only that the drafters of the guidelines considered – rightly – that the interests of the communities affected by the activities of TNCs should not be defined exclusively by the government, but also that the obligation of these corporations to respect the sovereignty of the host States – in particular, by complying with the local regulations and by abstaining from interfering with public policies – is subordinated to the obligation of the host State to comply with its international human rights obligations. This is in contrast with the original version of the OECD Guidelines, which emphasized

[43] See the Resolution adopted by the UN General Assembly on 1 May 1974 : UN Doc. A/Res/3201 (S-VI).
[44] See Jagdish Bhagwati, In Defense of Globalization, cited above, p. 168 (and the reference to research by Christopher Hitchens, « The Case Against Henry Kissinger », at http://archive. 8m.net/hitchens.htm) ; and Nicola Jägers, Corporate Human Rights Obligations : in Search of Accountability, Intersentia, Antwerpen-Oxford-New York, 2002, pp. 100-101 and p. 120.
[45] UN Doc. E/5500/Rev.1/Add. 1 (Part 1), 24 May 1974.
[46] Articles 7-11, 13 and 16 of the Draft Code (UN Doc. E/1990/94).

the non-interference by corporations in the policies of the countries in which they operate, without mentioning an obligation to comply with international human rights or, *a fortiori*, to promote them[47].

Why is it important to insist that the presence of the TNC in a country should serve to improve its human rights record ? Empirical studies performed separately by Dani Rodrik and David Kucera have demonstrated that FDI flows are encouraged where the country of destination respects civil and political rights, and therefore preserves social and political stability[48]. This conforms with surveys of managers of transnational corporations which indicate the importance of such stability for the choice of where to invest in foreign jurisdictions[49]. Therefore governments whose human rights records are good are rewarded by higher foreign investment flows. This constitutes an incentive for governments to ensure an investment-friendly environment by offering the adequate legal framework for the benefit of their populations : the attractiveness of jurisdictions whose human rights record is good confers on them a competitive advantage, which is only partially offset by the fact that, in such jurisdictions, the wages will generally be higher[50]. In fact, the positive correlation between TNC investment and human rights has led William H. Meyer to postulate that, on the average, the presence of TNCs has a positive effect on the level of respect for human rights in the host country[51]. However, the results of this research have been questioned[52] and, today, Meyer sees « no reason to challenge the validity or reliability » of the study of his contradictors[53], and has turned his thoughts instead to the methodological difficulties in testing the validity of theories in international relations[54]. In fact, although better governance may attract higher levels of foreign direct investment, the sensitivity to this dimension may be relativized in certain industries, particularly in extractive industries, where the foreign investor may not have the same choice as to the location of the investment or may have difficulties relocating – it may not be surprising, in that respect, that certain of the most striking examples of investments made in countries with a bad human rights record, leading to accusations of complicity with the regime in place of the foreign investor, have occurred in the oil or the mining sectors. More importantly, David Kaufman has shown, in an accompanying essay in this volume, that any positive correlation we might identify between the level of FDI in a particular country and the indicators of good governance do not demonstrate that the presence of FDI is the causal factor leading to improvements in governance. On the contrary, the direction of causality may be exactly opposite : though good governance attracts FDI, FDI may not contribute to good governance where it has not

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[47] See also, alluding to this evolution, Nicola Jägers, Corporate Human Rights Obligations : in Search of Accountability, cited above, p. 104. Jägers comments further : « …the emphasis has shifted from non-interference by corporations in the countries in which they operate to requiring corporations to take a more active stance regarding labour rights and human rights » (p. 106).

[48] See Dani Rodrik, « Democracies pay Higher Wages », Quarterly Journal of Economics, vol. 114 (1999), pp. 707-738 ; David Kucera, « The Effects of Core Workers' Rights on Labour Costs and Foreign Direct Investment : Evaluating the 'Conventional Wisdom' », cited above. These studies and the study mentioned in the following note are cited by the helpful review of the literature made by Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, « The Effects of Multinational Production on Wages and Working Conditions in Developing Countries », Research Seminar in International Economics, School of Public Policy of the University of Michigan, discussion paper n° 483, August 2002. See http://www.spp.umich.edu/rsie/workingpapers/wp.html

[49] Fabrice Hatem, *International Investment : Towards the Year 2001*, United Nations, 1997.

[50] As pointed out by Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, at p. 51 of the working paper cited above, this constitutes one of the most interesting results from the research by David Kucera for the International Labour Organization : « FDI is attracted to countries with a higher civil liberties index of one point (on a 10-point scale), controlling for wages, is associated with a 18.5 percent increase in FDI flows. When the negative impact of increased wages in democracies is factored in, a one-unit increase in the civil-liberties index raises FDI inflows by 14.3 percent. So even though democracies pay higher wages for a given level of worker productivity, they still provide an attractive location for foreign investors ».

[51] William H. Meyer, « Human Rights and MNCs : Theory v. Quantitative Analysis », Human Rights Quarterly, vol. 18(2), (1996), pp. 368-397 ; and William H. Meyer, Human Rights and International Political Economy in Third World Nations : MNCs, Foreign Aid and Repression, Westport, Connecticut, Praeger, 1998, esp. Chap. 3.

[52] Jackie Smith, Melissa Bolyard and Anna Ippolito, « Human Rights and the Global Economy : A Response to Meyer », Human Rights Quarterly, vol. 21(1), 1999, pp. 207-219.

[53] William H. Meyer, « Activism and Research on TNCs and Human Rights : Building a New International Normative Regime », in Jedrzej G. Frynas and Scott Pegg (eds.), Transnational Corporations and Human Rights, Palgrave Macmilla, 2003, chap. 2, pp. 33-52, at 35.

[54] William H. Meyer, « Confirming, Infirming and 'Falsifying' Theories of Human Rights : Reflections on Smith, Bolyard and Ippolito through the Lens of Lakatos », Human Rights Quarterly, vol. 21(1), 1999, pp. 220-228.

taken hold otherwise. The absence of such an automaticity between the presence of FDI in the country and the improvement of the human rights record of that country encourages us to identify the need to impose on TNCs an affirmative duty to contribute to such an improvement, by taking the initiatives required to bring about such an evolution.

Another reason why we need to think further about this dimension of the responsibility of TNCs is that the conditions under which they may be found liable for doing business in a repressive regime remain undefined, which creates a situation of legal uncertainty. International criminal tribunals have considered that the « moral support » given by the accomplice to the principal perpetrator of the crime could suffice to constitute the *actus reus* of aiding and abetting in international criminal law[55], and that the *mens rea* of aiding and abetting could consist simply in the accomplice accused being « aware that one of a number of crimes will probably be committed » – indeed, if one of those crimes is then indeed committed, the accomplice « has intended to facilitate the commission of that crime »[56]. As a result, under these standards, a company may be found to be complicit in the commission of an international crime where its presence in the State where such a crime is committed may be interpreted as offering a form of « moral support » to the perpetrator of that crime, at least insofar as the company could have anticipated the commission of the crime in question. Even before it could be tested in international criminal law with respect to corporate actors, this understanding of the notion of complicity has influenced the regime of civil liability of those actors under national law, in particular in the context of the United States Alien Tort Claims Act 1789[57]. It results in a situation where any corporation doing business in a repressive state and not speaking out to denounce the human rights violations committed by the organs of that State or left unpunished, may potentially be held liable for being complicit in those violations, if it was in a position to exercise influence on the organs directly responsible for those violations and did not do so.

A notion of « silent complicity » has emerged[58]. It does not amount to a total prohibition for TNCs from being present in certain States because of their repressive regime. But it does seem to require that, if TNCs do choose to be present, they use their influence to promote changes. Although it offered a clear distinction in its Final Report between « first order involvement » of business under the apartheid regime in South Africa (where it played « a central role in helping to design and implement apartheid policies »), « second order involvement » (where companies « made their money by engaging directly in activities that promoted state repression »), and « third order involvement » (which refers to « ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society »)[59], the South African Truth and Reconciliation

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[55] See International Tribunal for the Former Yugoslavia, Prosecutor v. Furundzija, IT-95-17/1-T (December 10, 1998) (38 I.L.M. 317 (1999), para. 235 ; International Criminal Tribunal for Rwanda, Prosecutor v. Musema, ICTR-96-13-T (January 27, 2000), http://www.ictr.org/, at para. 126.

[56] Furundzija, at para. 245. These standards pre-date the cited cases. Indeed, the *Furundzija* Tribunal bases its understanding of complicity on decisions by the American and British military courts and tribunals dealing with Nazi war crimes, and on the cases decided by the German courts created at the end of the Second World War in the British and French occupied zones of Germany.

[57] Now codified as 28 U.S.C. § 1350. In its judgment of 18 September 2002 in the case of John Doe I and others v. Unocal Corp. and others, the United States Court of Appeals for the Ninth Circuit considered in the face of allegations from the plaintiffs that the defendants had aided the Burmese military in subjecting them to forced labour in the course of the contruction of the Yadana pipeline, that « given that there is (…) sufficient evidence in the present case that Unocal [the California-base corporation which participated in the pipeline consortium] gave assistance and encouragement to the Myanmar Military », it did not need to decide « whether it would have been enough if Unocal had only given moral support to the Myanmar Military ». The discussion of the Court of Appeals leaves however little doubt that the answer to this question would have been affirmative.

[58] See on the degrees of proximity which may exist between a corporation and a repressive regime the typology proposed by Margaret Jungk, « A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad », in Michael K. Addo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations, The Hague, Kluwer Law International, 1999, pp. 171-186. On the notion of complicity in evaluating the liability of corporations for human rights violations, see esp. Andrew Clapham and Scott Jerbi, « Towards a Common Understanding of Business Complicity in Human Rights Abuses », background paper for the Global Compact Dialogue on the role of the private sector in zones of conflict, New York, 21-22 March 2001, http://www.globaldimensions.net/articles/cr/complicity.html

[59] See the Final Report of the Truth and Reconciliation Commission (South Africa), vol. 4, chap. 2, « Business and Labour », at para. 23-36.

Commission considered that all businesses active under apartheid South Africa should be responsible for restitution, to the extent that they did not use their power to promote change. The Commission noted that « overwhelming economic power resided in a few major business groupings with huge bargaining power vis-à-vis the State. This power could have been used to promote reform »[60]. It answered to a submission from South African businesses according to which

> Any notion that business could have acted as a watchdog of the government as far as human rights violations are concerned is totally unrealistic and should be dispelled. Business [under the apartheid regime] was unable to act in that way in the past and will not be able to do so in the future (…) government is so powerful and dominant that a business organisation will seriously jeopardise its prosperity of success by crossing swords with politicians

that

> While there are clear constraints imposed by political power, to say that business was incapable of crossing swords with politicians is to deny the power (and responsibility) that accompanies financial muscle and personal contacts[61].

Although the final destination remains unknown, the general direction which we are taking emerges clearly from these developments. At a minimum, an obligation not to co-operate with repressive regimes is imposed on TNCs. Such an obligation has been defined by N. Jäger as an obligation that « requires from the corporation operating in States where widespread and systematic human rights violations occur, to either abstain from operations or to take measures to ensure that its operations do not amount to complicity in these human rights violations »[62]. But even outside situations of widespread and systematic human rights violations, corporations, especially TNCs, are increasingly expected to contribute to bringing about positive evolutions by using their influence on the governments in the States where they invest. The fact that it is in their business interest to work in a politically and socially stable climate will contribute to accelerating this development. However, before an obligation of the TNC to exercise influence on the authorities of the host State can be concretized, many questions remain to be answered. How is the influence of the TNC on the host State's government to be measured ? Which requirements of transparency in the financial and contractual relationships between the TNC and that government should be imposed to ensure that this influence can be evaluated with precision ? Which forms should the exercise of that influence take, and for instance, should the pressure put by the TNC on the host government be public, or may it remain confidential ? Should we expect from the TNC that it make its continued presence in the country conditional upon certain changes in the attitudes of the local authorities towards human rights ? Should we impose conditionalities on the use of the revenues accruing for the government from the presence of the TNC – for instance, that it be spent on education, health, or other social services ? The incapacity of the existing tools to impose human rights obligations on TNCs operating in developing countries, here, also is a consequence of the lack of generally agreed criteria, and of the absence of the methodology we would require to apply such criteria once they are agreed upon.

IV. The incapacity of micro-analysis to evaluate the consequences on relative wages of the international division of labour

Where they invest in foreign jurisdictions, the motivation of TNCs may be to penetrate the local market, in which case the choice to proceed to that investment is considered to be a better alternative than to export the same goods from the home country (or any other country where the TNC produces the same goods) or to franchise its production to a local firm in the host country. Such strategy will be preferred, for instance, where tariffs are imposed which would render the exported goods less competitive on the local market, or where the franchising of a local firm would require controlling the

[60] Id., para. 39.
[61] Id., para. 142-143.
[62] Nicola Jägers, Corporate Human Rights Obligations : in Search of Accountability, cited above, p. 94.

quality of its performance or giving away protected technology. However, in most cases, the investment by TNCs in foreign jurisdictions is motivated by the aim to produce goods for the global markets at the most competitive prices, by dividing the production process into different segments, located in different countries, in the most efficient way possible[63]. In that case, the TNC will be moved in its decision to invest by the comparison of the endowments in production factors of different possible locations for the investment. Where the benefits of outsourcing outweigh the costs in communication, transport, and coordination of the production process, and any reputational costs involved in choosing a location whose human rights record is contesed, it will be the preferred option.

That the international division of labour depends on the respective endowments of the different countries reminds us, of course, of the ricardian analysis of the benefits of international trade. But we have long ceased to inhabit the world where England produces cloth and Portugal wine, and where both countries exchange for their mutual benefit. With the exception of extractive industries, most of the inflows of FDI into developing countries today are in the sectors of manufactured goods or of services[64], for which the attractiveness of particular locations to foreign investment typically depend – rather than on natural endowments of the countries concerned – on the level of economic development and, especially, on the regulatory context. This is one of the explanations put forward by Jagdish Bhagwati for the exacerbation of competition under the current form of globalization, and the growing worries of producers in all jurisdictions that their competitors situated abroad are receiving un « unfair » advantage because of the standards under which they operate. He writes[65] :

> « …today, in most commodities and activities, technology matters and has diffused greatly, both because many have access to similar pools of knowledge and because multinationals can take scarce knowledge almost everywhere if they choose, as they often do, and they do produce globally. The buffer [between competitors situated in different countries, due to the differences in natural conditions and therefore in the relative costs of production] has therefore shrunk dramatically in most activities, and international competition is fierce and feared. The inevitable effect has been to prompt firms everywhere to worry about 'fair trade'. Each looks over his foreign rival's shoulder to see if any difference in domestic policy or institutions gives this competitor an 'unfair' advantage. The result has been a growing demand for ironing out any such differences, including in labor and environmental standards, as firms seek 'level playing fields', ignoring the fact that it is differences, whether of climate or skills or of domestic institutions and policies reflecting local conditions, that lead to beneficial trade among nations ».

Fears have been regularly been expressed about « regulatory competition » and, therefore, about the risk that we will be facing a « race to the bottom » in the areas of labour rights and environmental standards, as each country will seek, by deregulating in these areas, to attract foreign investors, induced by the perspective to be able to produce at economically more favorable conditions. The available empirical studies seem to demonstrate that these fears have not yet translated into reality, at least concerning the basic labour rights[66]. Whether this is attributable to the more demanding scrutiny from civil society or international unions federations under which transnational corporations operate or whether it is due, as appears more likely, to the understanding by businesses that an investment in jurisdictions where legislation does not adequately protect labour rights is more risky, these studies indicate that, in general, a legal environment which secures these rights is preferred by investors. This

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[63] On this distinction, see Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, « The Effects of Multinational Production on Wages and Working Conditions in Developing Countries », cited above, pp. 25-26.

[64] In his study mentioned above, David Kucera notes that in 1997, « 50.1 percent of FDI flows into LDCs went to manufacturing (down from 66.8 percent in 1988), compared to 41.3 percent to services (…) and 4.6. percent to the primary sector », the rest being unspecified (p. 17).

[65] Jagdish Bhagwati, In Defense of Globalization, cited above, p. 12.

[66] See, in particular, Linda Y.C. Lim, The Globalization Debate : Issues and Challenges, Geneva, International Labour Organization, 2001 ; William Cooke and Deborah Noble, « Industrial Relations Systems and U.S. Foreign Direct Investment Abroad », British Journal of Industrial Relations, vol. 34 (1998), pp. 581-609.

conclusion has been spectacularly confirmed in a much-publicized OECD study from 2000[67]. From their useful review of this literature, Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern conclude : « Labor rights that promote political stability and enhance labor quality may in fact make a particular location attractive to foreign investors »[68]. More recently, a report commissioned by the International Finance Corporation – a member of the World Bank Group to which this paper returns in section VI – arrives at the conclusion that, in order to appear attractive to foreign investors, developing countries should invest in the development and effective enforcement of laws on corporate social responsibility[69].

Labor costs, and particular the level of wages, constitute however an entirely different matter. The difference in wages, and therefore of labor costs, constitutes a major determinant of the location of foreign investment. TNCs typically pay their workers wages situated comfortably above both the legally required minimum and the wages which the same workers would receive for equivalent alternative employment in local firms – a bonus which is only partially explained by the improved productivity of the workers hired by the TNC and thus benefitting its superior technology and the economies of scale the multinational character of the production authorizes –. Nevertheless, at least for labor-intensive fragments of the production, FDI accrues, all other things being equal, to the countries where the wages are the lowest[70]. This constitutes an incentive for the developing countries to keep the costs of labor down, and thus to preserve their attractiveness to foreign capital. Moreover, the easiness with which capital can be moved from one location to another – and thus the FDI be redirected in the relatively short-term – diminishes the bargaining power of workers' unions, thus pressuring wages to fall or, more precisely, not to raise in the proportions it would were the threat of relocation not available to the employing company[71]. In other terms, although FDI will generally raise the average level of the wages in the host country, this rise remains limited by structural conditions linked to the multinational character of the investor. Even more important, FDI may accentuate the wage gaps between the high-skilled labour and the low-skilled labour, both in the home country (the "North") and the host country (the "South"). Indeed, in the countries from where capital is moved – the home countries –, the less skilled labour is most often victim of such a relocation, as the production segments which are labor-intensive and require relatively low skills are most easily outsourced in developing countries. In the host country, FDI will benefit instead the most skilled segment of the workforce, which will be in the highest demand from the TNC[72].

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[67] OECD, International Trade and Core Labour Standards, Paris, OECD, 2000.

[68] Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, « The Effects of Multinational Production on Wages and Working Conditions in Developing Countries », cited above, p. 50.

[69] « Race to the top : Attracting and enabling global sustainable business », produced by Political and Economic Link Consulting for the IFC-World Bank Group, October 2003. I believe however that the report betrays serious methodological flaws. For instance, although the surveys made for the report tend to show that businesses may prefer local with high and especially reliable regulatory standards, they express this preference only all other things being equal : the relative weight of CSR considerations and other more classical determinants of the investment choices is not examined. In fact,certain data from the report itself seem to demonstrate that when they choose in favor of better CSR regulatory standards, they may be moved by the risk of legal sanctions, for example because of the requirements set by the legislation of their home State – this being the case, especially, for US corporations. Therefore preference for CSR would not be spontaneous, but the result of strong legal mechanisms. The market will not take care of itself in respect of CSR, by rewarding the most requiing of the developing countries.

[70] In fact, this is precisely why a number of international free trade economists have opposed the mandatary imposition of labor standards or the imposition of wages are certain levels deemed reasonable : this would lead a number of least developed countries to lose the comparative advantage they have in this respect, and could induce firms to seek out lower cost production locations, at the detriment of precisely those workers which such mandatary requirements sought to help. See, e.g., the position of the Academic Consortium on International Trade (ACIT) against the « anti-sweatshopp » campaign in the United States, which the ACIT considers to be motivated by protectionist purposes and, in the final instance, to constitute a danger for precisely those – workers in developing countires – the conditions of which such campagns seek to improve.

[71] Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, « The Effects of Multinational Production on Wages and Working Conditions in Developing Countries », cited above, p. 37.

[72] Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, « The Effects of Multinational Production on Wages and Working Conditions in Developing Countries », cited above, p. 29. Thesee authors also cite some empirical evidence for this phenomenon. See for instance Robert C. Feenstra and Gordon H. Hanson, « Foreign Direct Investment and Relative Wages : Evidence from Mexico's Maquiladoiras », Journal of International Economics, vol. 42 (1997), pp. 371-393. In fact, Brown, Deardorff and Stern are careful to indicate that this is just one of possible consequences on the relative wages of skilled and unskilled labor in the countries concerned by the flow of capital : on the basis of their theoretical discussion, they conclude

Therefore there is a real possibility that FDI will actually accentuate inequalities in both the country of origin and in the host country, even where the TNC pays wages in the latter country which are above the wages which would accrue to alternative employment in a local firm. Accompanying measures should be devised to limit such consequences. For instance, workers in industrialized countries who suffer the consequences of delocalization could be granted forms of vocational training which would facilitate their reemployment in higher skilled, better-paid positions. The consequences of the FDI on relative wages in the host country could be mitigated by the training to non-skilled workers, which the TNC making the investment should be made to provide, so that the arrival of the TNC will not lead to a sudden increase in the demand for relatively skilled labor without any compensation. The loss of the bargaining power of workers' unions, in a context of economic globalization, could be compensated for at least to some extent by the development of framework agreements between TNCs and global union federations[73] ; the wage policies of the TNC should not be excluded, as a matter of principle, from the ongoing dialogue such framework agreements seek to encourage between the parties.

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The preceding arguments have sought to highlight that an analysis of the human rights obligations of transnational corporations, as long as it remains confined to an analysis of the obligations of TNCs not to violate those rights in the course of the operations they undertake, fails to address the wider impact of the activities of TNCs as a channel of economic globalization. It fails, especially, to realize the potential TNCs present to ensure that globalization contributes to a human rights-driven form of development. Such a « micro-analysis », conducted at the level of each individual project, cannot guarantee that – by their way of acting, by the form under which they decide to invest, by the conditions under which they negotiate with the host country – the TNCs will contribute to guaranteeing the right to development. Questions such as under which form the TNC has made its investment (for instance, in the context of a privatization programme of the host country, by acquiring one or more local firms, or by bringing in fresh capital), which technologies have been transferred to the host country and therefore been made available to local producers, or which prohibitions are imposed on the government of the host country to impose certain regulatory obligations on the TNC, are generally not asked when we remain at such a level of analysis. Neither do we ask how the TNC could contribute, by the influence it may exercise on the host government, to improving its record in the field of human rights, or more generally, its governance. Finally, the question of relative wages is usually not addressed, except for the general obligations not to pay wages under the legal minimum prescribed under the laws of the host country and not to substract wages for disciplinary reasons. Instead, what we require is to identify the building blocks of a legal framework for foreign direct investment which would ensure that FDI will truly benefit the populations of the host countries – that, in other terms, economic globalization will serve development, and not only contribute to economic growth. What we require is for human rights lawyers to turn their efforts to another level of analysis : beyond that of individual investment projects, which of course have to comply with human rights, they should ask where the rules of the game of economic globalization are unfavorable to human development, and where this is the case, how they can be modified.

In the course of the preceding discussion, we have identified a list of obligations which could be imposed on TNCs to ensure that they will be responsible actors in the process of economic globalization – that, apart from not violating human rights in the course of their activities, TNCs will contribute to the promotion of human rights by the activities they perform, and thus favor a form of globalization more conducive of human development. This is the common denominator of obligations such as to accept a form of economic responsibility for the consequences of the impact foreign direct

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that no unambuiguous conclusions can be derived from the examination of the consequences of FDI on wages (at the end of section III of their paper), and therefore they examine the empirical evidence in detail in section IV. They do assert, however, that the reinforced disparity between the wages of relatively unskilled labor and the wages of relatively skilled labor is, according to empirical evidence, « exactly what a great deal of FDI into developing countries actually does » (p. 29).

[73] See for a list of such agreements www.global-unions.org

investment has on the populations of the host country, to avoid crowding out local producers or investors, to transfer technology when operating in developing countries whose local firms lack knowledge about certain production processes, to abstain from challenging the right of the host State to exercise its regulatory functions in the public interest, to promote human rights in the host country by exercising its influence, or to limit the impact of outsourcing on the relative levels of wages in both the country of origin and the host country – other examples, of course, could further enrich this preliminary listing.

Thus, it would be tempting to simply expand the list of obligations imposed on TNCs, perhaps by identifying which obligations could correspond to a « right to development » of the populations of the countries in which they conduct their activities. The *Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights* adopted by the Sub-Commission on the Promotion and Protection of Human Rights go some way in that direction. For instance, the Commentary to the Norms indicate that TNCs « shall respect, protect and apply intellectual property rights in a manner that contributes to the promotion of technical innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, in a manner conducive to social and economic welfare, such as the protection of public health, and to a balance of rights and obligations »[74]. But the facile, albeit implicit, reliance on the notion of abuse of rights, and the resulting vagueness with which the Norms define the obligation of TNCs vis-à-vis the exercise of intellectual property rights, illustrate the obstacles we face once we seek to impose on corporate actors legal obligations which require from them that they abstain from doing precisely what they are set up for : to benefit from the opportunities offered by economic globalization. More generally, the obligations of TNCs which have been identified above all remain relatively open and undefined, either because – like the obligation formulated in the *Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights* on intellectual property rights and the need to balance their exercise against the right to health – they require from TNCs that they renounce using those opportunities to their full extent, or because they do not correspond to clearly identified internationally recognized human rights, as they seek, rather, to promote a kind of social and international order in which the rights and freedoms of the Universal Declaration of Human Rights can be realized[75]. In such a context, simply to affirm the existence of such obligations and attempt to list them will not suffice ; it is necessary to identify mechanisms through which compliance with such obligations may be encouraged.

Rather than expanding the list of obligations which should be imposed on TNCs on the basis of the existing international law of human rights – many of the obligations mentioned above could only be related to those rights with some artificiality, and in a rather indirect fashion –, we should turn to the other major actors of the globalization process : States and international organisations. Of course, the State receiving the foreign direct investment has the primary responsibility to ensure that the FDI, as it directed, is conducive of the well-being of its population. But this is a point too obvious to be elaborated upon, and moreover this again does not appear to be the most promising route. Our preceding discussion has identified two typical situations : either the developing State is in need of foreign investment, and will seek to appear as attractive as possible to potential investors by identifying their expectations and trying, as far as possible, to satisfy them[76] – his negotiating capacity, therefore, will be weak ; or the State is prone to commit human rights violations and to repress its own populations, and although it may need the presence of foreign investors, it will not be its priority to ensure that the arrival of FDI will truly benefit its population – in which case, whether or not the State has a strong negotiating position vis-à-vis the TNC which has expressed its interest to invest on its territory, it will be illusory to count on the State to ensure that FDI is channelled towards the satisfaction of the needs of the population. More generally, the current context of economic

[74] Commentary to Norm 10, (d).
[75] Article 28, UDHR.
[76] This is not tantamount to saying that the State seeking to attract foreign capital will necessarily be tempted to deregulate in the social and environmental areas : as we have seen, a strong and – especially – reliable legal framework in these fields may in fact prove an advantage, rather than a liability, for the State offering such a framework, in the race to attract foreign investors.

globalization and, especially, the international legal regime of investment, would in many cases make it impossible for the developing State to impose on the foreign investor the kinds of obligations mentioned above, even where this would be its intention. It is not the developing States seeking the arrival of foreign investors, but the industrialized countries from which those investors originate, and inter-governmental organisations, which have set the rules of globalization. It is they which have the power to modify them.

V. Promoting a framework for foreign direct investment conducive of human development : the role of the developed States

Consider, first, the responsibility of industrialized countries, from which the overwhelming majority of TNCs originate, in organizing the legal framework of foreign direct investment in the way most favorable to the interests of the foreign investors. Bilateral investment treaties (BITs) represent the main tool in this regard. Such treaties have proliferated since a number of years[77]. They form today a vast array of agreements creating a legal framework favorable to investment[78]. This network of agreements now appears *de facto* as a substitute for the failed multilateral agreement on investment (MAI), negotiated within the OECD until it failed in 1999 under the pressure of a large coalition of civil society organisations ; it is complemented by regional free trade agreements such as the North American Free Trade Agreement, which often have served as models for the preparation of such treaties ; and it anticipates further liberalization of investment negotiated under the auspices of the World Trade Organisation, beyond the existing agreement on Trade-Related Investment Measures (TRIMs). The bilateral investment treaties typically contain national treatment and most-favoured-nation clauses in favor of investors from the other Party ; they prevent States hosting the investment from imposing performance requirements on foreign investors, for example to require that the production contains a certain percentage of domestic content, that it uses a certain amount of goods or services purchased on the territory of the host State, or that the investor transfers technology or knowledge about production processes to a person on that territory. However, as noted in the report prepared for *Rights & Democracy* : « When States are prevented from requiring investors to attain certain levels of domestic content or purchase domestic products and services, they are deprived of an important means of ensuring that private economic activity has an impact of social development and, a fortiori, on the progressive realization of human rights »[79]. Obviously, this is even more the case where, under the pretext of protecting the foreign investors from forms of expropriation which amount the « regulatory takings », the host States agree to renounce the exercise of their regulatory powers in certain areas such as labor rights or the protection of the environment, to avoid inflicting unexpected economic losses on the investors. As we have seen from the example of the Baku-Tbilisi-Ceyhan pipeline project, this risk is not present only in intergovernmental agreements : it is also a risk entailed in the negotiation and conclusion of agreements between the foreign investors and the host governments.

The *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies* insist, on the contrary, that « When a developing State is engaging in bilateral, multilateral or corporate negotiations, the State should give the most careful attention to its international human rights obligations to the poor in its jurisdiction. The State may wish to argue that these obligations constitute an international minimum threshold below which individuals and groups within its jurisdiction may not fall and that, therefore, it is impermissible for the State to conclude any agreement that is inconsistent with the international human rights it owes to the poor in its jurisdiction »[80]. It is of course the responsibility of the State hosting the foreign investment to ensure that the conditions attached do

[77] 2099 BITs were inventoried as being in force at the end of 2001. See UNCTAD, World Investment Report 2002, United Nations, Geneva, 2002, p. 8.

[78] Important studies on these treaties include G. Sacerdori, « Bilateral Treaties and Multilateral Instruments on Investment Protection ». Recueil des cours de l'Académie de droit international, vol. 269 (1997) ; and Kenneth Vandevelde, « Investment Liberalization and Economic Development : The Role of Bilateral Investment Treaties », Columbia J. of Transnational Law, vol. 36 (1998), p. 501. .

[79] « International Investment and Human Rights : Political and Legal Issues », cited above, p. 18.

[80] *Draft Guidelines on a Human Rights Approach to Povery Reduction Strategies*, para. 222.

not constitute an obstacle to its full compliance with its international human rights commitments. But it is also the responsibility of all States not to pressure developing countries, in need of foreign direct investment for their economic growth, to accept agreements which lead to creating such an obstacle. A first step towards ensuring that foreign direct investment truly promotes human development in the countries towards which it is directed would be to review the full range of existing bilateral investment treaties and to examine which clauses of those instruments conflict with the ability of the receiving States to comply with their human rights obligations and to realize the right to development. Similarly, the other instruments which industrialized States resort to in order to facilitate investment in other countries by TNCs incorporated in their jurisdiction and to protect the rights of these investors should undergo such a scrutiny. A concern for human rights should be proactively included in such instruments, for example in the conditions imposed by state export credit agencies.

The reason for imposing such obligations on the industrialized countries is not that the acts of transnational companies incorporated under their laws would necessarily be imputable to those States, under the rules of international responsibility – indeed, such acts of private actors in principle are not attributable to the State, under those rules in their current state of development. Rather, the justification for requiring from industrialized countries that they take steps to ensure that the liberalization of foreign direct investment will truly serve as an instrument for human development – as it will not automatically have that effect – is that, under Article 28 of the Universal Declaration of Human Rights, all States must contribute to a social and international order in which the rights and freedoms of the Declaration can be realized[81]. As noted by the International Council on Human Rights Policy, the question of whether there exists an « *obligation to act* should be considered separately from the question of *responsibility for the abuse*. Where a party is responsible for violations, it has a duty to change its policies and behaviour so that the violations cease. However, in many circumstances outsiders have an obligation to help end violations of economic, social and cultural and other rights abroad even when they have no responsibility for causing them. Indeed, in many cases of unfulfilled ESC rights, there is no clear perpetrator »[82].

Although any particular developed country may not be responsible either for the constraints facing a developing country in need of FDI and prepared therefore, in order to attract foreign investors, to sacrifice certain social objectives which it would be in the interest of its population to fulfil, or for the behavior of the foreign investors themselves, even when they are TNCs incorporated under its jurisdiction, each developed State nevertheless arguably is under a duty to facilitate the achievement by developing States of their human development objectives, in particular the eradication of poverty and more specific objectives in the areas of health, education, housing or nutrition. This obligation cannot be simply ignored, or put between brackets, when developed States negotiate bilateral investment treaties, when they sponsor their champion transnational corporations by granting loans or by insuring their investments against risk, or when they act in multilateral negotiations : in such contexts, developed States are obliged to put their international human rights obligations and those of the developing countries concerned at the centre of their preoccupations.

This shared responsibility for human development, in particular the elimination of poverty, is clearly affirmed in the United Nations Millenium Declaration of 2000, in which some 150 heads of state and government confirmed that States parties to international human rights treaties have obligations that go beyond their own territory, and asserted their common resolution « to create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty ». Moving towards that same end, the *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies* explicate, under the Guideline relating to the right to international assistance and cooperation, that this right « should not be understood as encompassing only financial and technical assistance : it also includes an obligation to work actively towards equitable multilateral

[81] See the commentary by Asbjϕrn Eide on this provision, in G. Alfredsson and A. Eide (eds.), The Universal Declaration of Human Rights, The Hague, Kluwer Law International, 1999, p. 597.
[82] International Council on Human Rights Policy, *Duties sans Frontières. Human Rights and Global Social Justice*, Geneva, 2003, p. 41.

trading, investment and financial systems that are conducive to the reduction and elimination of poverty »[83]. And, as elements of a strategy for realizing the right to international assistance and cooperation, the Draft Guidelines refer to the formulation by developed States of an *international* poverty-reduction strategy, defined as « a strategy for poverty reduction beyond [national] borders ». Under such an international poverty-reduction strategy, developed States are expected to take measures to ensure that their international human rights obligations are coherently and consistently applied in their international policy-making processes ; this should be understood especially by « those in finance and trade who represent the State in international negotiations on those issues ». Under this strategy, developed States moreover are to « take reasonable measures to ensure that the overseas operations of companies headquartered in their jurisdiction are respectful of the international human rights obligations of both the home and the host State »[84].

VI. Promoting a framework for foreign direct investment conducive of human development : the role of the multilateral lending institutions

We should equally pay careful attention to the obligation of multilateral lending organisations (MLIs) to create a framework for foreign direct investment which will ensure that it effectively contributes to the objective of human development. In its statement on globalization and its impact on the enjoyment of economic, social and cultural rights, the UN Committee on Economic, Social and Cultural Rights urged international organisations « to take whatever measures they can to assist Governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights »[85]. To the extent that MLIs contribute to shape the framework under which FDI is channelled towards developing States, they are under an obligation to take into account the human rights obligations of those countries. They should not only abstain from creating conditions which will make it more difficult or even impossible for them to comply with those obligations, but also actively promote such compliance within their sphere of influence. In their final report to the UN Sub-Commission on the Promotion and Protection of Human Rights on « Globalization and its impact on the full enjoyment of human rights », J. Oloka-Onyango and Deepioka Udagama consider that international organisations « must, at a minimum, *recognize, respect, and protect* human rights »[86]. An obligation to protect is a positive obligation to ensure that any actor whose behavior the MLI effectively influences, will not violate his own human rights obligations. MLIs must use their influence, in other terms, to encourage compliance with human rights, within the sphere in which that influence may be exercised.

With respect to the private sector, the most relevant MLI is the International Finance Corporation (IFC), a member of the World Bank Group alongside the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the Multilateral Investment Guarantee Agency (MIGA). The IFC invests in projects led by the private sector, in particular by granting loans. In the selection of the prospective projects, the IFC not only verifies whether the projects comply with the local requirements, but also whether they comply with the environmental, health and safety guidelines imposed on all the projects of the World Bank Group or, in sectors for which no such guidelines exist, with the internationally recognized standards applicable. Each project is evaluated according to a complex, potentially time-consuming procedure, to ensure that it is environmentally and socially sound[87]. The departure point for this process is, for all projects

[83] *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies*, para. 216.
[84] *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies*, para. 218.
[85] Statement on globalization and its impact on the enjoyment of economic, social and cultural rights, adopted by the UN Committee on Economic, Social and Cultural Rights at its eighteenth session (1998) (E/1999/12-E/C.12/1998/26, para. 515).
[86] E/CN.4/Sub.2/20903/14, 25 June 2003 (at para. 39). As the authors recognize themselves, « Left out of this formulation are the obligations to promote and fulfil, which we believe are obligations that properly belong to the State ». This restriction is apparently linked to the need to respect the principle of specialty of international organisations, whose powers do not go beyond those attributed to them by the States who have created them by international agreement, and whose goals are limitatively defined by that instrument – whether a charter, articles of agreement, a statute, or any other form. This of course does not mean that the mandate of the organisation cannot include such goal, nor that human rights considerations may be relevant to the policies pursued by the international organisation within the limits of its mandate.
[87] See for a description www.ifc.org/enviro

except those which are likely to have minimal or no adverse environmental impacts (category C projects), the preparation of an environmental assessment, addressing a wide range of issues – including for instance occupational health and safety, socioeconomic impacts, land use and involuntary resettlements, all dimensions of the project for which the notion of an « environmental » assessment may be too restrictive in its wording –, and on the basis of which a consultation of the stakeholders is organized. The example set by this framework (the IFC Sustainability Framework) has contributed to the adoption on 4 June 2003 of the « Equator Principles », a set of principles which a number of leading banks have agreed to follow in their investment decisions, to ensure that the projects they finance will be socially and environmentally responsible. Apart from the scope of the initiative measured in terms of the financial weight of the participating financial institutions or the range of sectors concerned, the importance of these Principles is that they constitute a clear recognition from these institutions, including the IFC, that, as they exercise in fact an influence on the borrowers, they must use this influence to promote socially and environmentally responsible development.

Again however, it is perfectly possible that a private-sector project will be environmentally and socially sound when considered in isolation, and still not contribute to human development in the country where it is conducted. To ensure that it will be conducive of human development, the financiers have to use their leverage power – and that power is considerable – to impose forms of conditionalities which go beyond not only the economic viability of the project, but also beyond compliance with the social and environmental standards mentioned above. Such conditionalities could translate, for instance, into guarantees that accompanying measures will contribute towards the development of the affected communities. Or they could ensure that the revenues accuing to the governments concerned will be wisely spent.

The example of the Baku-Tbilisi-Ceyhan pipeline project again may serve to illustrate this. When the promoters of the BTC project addressed themselves to possible lenders , including the European Bank for Reconstruction and Development (EBRD), a number of export credit agencies from Europe, the United States and Japan, and others – in total, the financing sought amounted to 2.6 billion U.S. dollars –, they also turned to the International Finance Corporation. As one of the major aspects of the BTC pipeline concerns the expropriation of approximately 17,700 parcels of land and the resettlement of the landowners, the IFC required from the consortium that they develop three comprehensive Resettlement Action Plans (RAPs), one for each country, although these RAPs are linked together by one overaching document ensuring parity across the project. These RAPs provide that compensation will be offered to the households affected by the pipeline, at a rate significantly higher than the prevailing local market rates. The IFC document released in October 2003 in response to submissions received on the project comments that « In communities with limited opportunities to acquire cash income this has enabled many households to acquire additional agricultural equipment/machinery, livestock and to afford increased agricultural inputs (such as fertilizer), which will hopefully result in increased production and returns and improved livelihoods. Compensation payments are also being used for a number of other purposes, which will ultimately result in developmental benefits (e.g. education, setting up of small household enterprises, improving homes, acquiring vehicles for transportation of agricultural produce and other goods, etc.) »[88]. The land acquisition and compensation procedures moreover have led to clarify the existing land rights and to improve the capacity of local organisations, instituted for the purpose of dialoguing with the project promoters. The IFC believes that « the project's standards of compensation, consultation and contribution to development impact associated with involuntary resettlement will 'raise the bar' considerably in [all three affected countries : Azerbaidjan, Georgia and Turkey]. These standards will be benchmark and expectation for similar projects involving land acquisition in the future »[89].

[88] International Finance Corporation, *BTC Pipeline and ACG Phase 1 Projects, Environmental and Social Documentation – IFC Response to submissions received during the 120-day Public Comment Period*, 27 October 2003, p. 10.
[89] Id.

Still other precautions taken by the project promoters upon the insistance of the IFC deserve highlighting. Confronted in the course of the public consultation it organized with allegations of corruption of the SOCAR – the Azerbaijan State Oil Company –, IFC responded that BTC Co. has agreed to « publish what they pay » and that – more importantly - « Azerbaijan has agreed to 'publish what they receive'. This fiscal transparency together with the commitments made to the entire donor community under the Poverty Reduction Strategy Programs is in IFC's view one of the most effective ways to ensure that revenues will be wisely spent. In addition, IFC has worked closely with the World Bank with respect to the State Oil Fund of Azerbaijan's operations including the use of outside auditors. Furthermore, IFS continues to work with the World Bank and the IMF, advocating the need for ongoing transparent management and utilization of Azerbaijan's oil revenues »[90].

We may identify why these conditions imposed by the IFC and other lenders to the project are worth highlighting without it being necessary to take a position on the adequacy of these responses to the many concerns raised by non-governmental organizations in the context of the BTC pipeline project. By imposing conditions such as the inclusion of development aspects in the resettlement action plans in the context of land acquisitions or the adoption of a poverty reduction strategy program ensuring that the revenues going to the public authorities will be « wisely » spent, i.e., invested in development-related benefits to the population, the IFC in fact recognizes that it may use the leverage power it exercises on the borrowers to ensure that they will impose, in turn, certain conditions on the countries concerned which will contribute to fulfilling the development potential of the project.

What emerges is a chain of conditionalities, in which each actor is acknowledged to have an obligation to promote a form of human rights-oriented development in its sphere of influence. If the BTC project is indeed, as asserted by the IFC, exemplary in the standards it sets for the future, it may be in precisely this respect. For instance, just in the same way that the countries receiving loans from the International Bank for Reconstruction and Development are required to produce poverty reduction strategy papers describing by which economic, social and structural programmes they intend to reduce poverty[91] – a requirement also imposed on recipients of debt relief under the « Heavily indebted poor countries » (HIPC) initiative –, the IFC could condition funding of private sector projects for which its support is requested to the adoption of such a programme by the country concerned, and to its approval of the PRSP by the Board of the World Bank. This is especially important as most PRSPs adopted to date insist on the importance of the private sector in contributing to growth and thus to development, on the necessary inclusion into the world economy of the country concerned, and on the need, consequentially, to encourage foreign direct investments. Whether the macroeconomic components of the actual PRSPs actually contribute to a form of development directed towards the full realization of the internationally recognized human rights may of course be contested – and indeed, it has been contested. But what deserves attention is that support from the international community of donors or lenders to private sector projects, no less than support to governmental projects, may be conditional upon certain undertakings of the receiving State. The question therefore naturally arises as to what responsibility should be imposed on the institutions which are in a position to influence indirectly the behavior of those States, via the influence they exercise directly on the project partners they finance, to encourage these States to use the resources accruing from the investment in a way conducive to the realization of the human rights which it is internationally bound to respect. Where we accept that such a responsibility may exist in principle, we are led to ask not only whether the individual project is socially and environmentally responsible, but also how it may be used as an instrument to promote change in the receiving State. It is in precisely this sense that, in the kind of international governance we are presently inventing, TNCs may be made to become agents for the transformation of economic globalization into a process genuinely oriented towards human development.

[90] Id., at p. 23.
[91] For preliminary appraisals, see J. Klugman, Poverty Reduction Strategy Papers : Objectives, process and experience to date, Washington D.C., World Bank, 2003 ; and IMF and World Bank, « Povert Reduction Strategy Papers – Detailed Analysis of Progress in Inplementation », http://www.worldbank.org/poverty/strategies/progrep.htm

VII. Conclusion

The power of transnational corporations fascinates. Our reaction to this power has been fed by much-publicized situations in which, effectively controlled neither by their State or incorporation nor by the State where they operate, these global actors seemed to be able to commit human rights violations in complete impunity : our reaction has been to restrain that power, by imposing on transnational corporations obligations to comply with internationally recognized human rights. But, as we have discovered when we undertook to impose positive obligations on the State to protect and to fulfil human rights, power is not unidimensionally evil. It may also be exercised in the name of the good. TNCs could be seen also as a potential tool – and a powerful one no doubt – for the realization of the right to development.

This however will not result from the initiatives of some enlightened corporations : apart from the still very exceptional circumstance where it may be accused of « silent complicity » with a regime where widespread and systematic human rights violations occur, a corporate actor generally will accept a responsibility only for the human rights impact of its particular operations – but it will deny that it has a role in contributing to the development of the countries where it operates, and that, in particular, it should accept an « economic responsibility » for the consequences of its economic decisions whether and when to invest or to disinvest, under which form, and with which accompanying measures, if any. Indeed, these are not issues TNCs need to worry much about : the tools which exist today to ensure the accountability of TNCs focus on the impact of their activities on the enjoyment of human rights, but no equivalent tools address the structural, often macro-economic, questions raised by the presence of FDI in developing countries and by the legal framework under which such investment is made.

Change, if it is to occur at all, must probably come from elsewhere. A first step towards channeling TNCs in the direction of becoming agents of human development is for the developed States to recognize the paradox of the situation they have created. Although they insist that developing States should fully comply with their international human rights obligations, the developed States, in both their bilateral and their multilateral international policy-making, have consistently sought to protect the rights of investors. They have thus made it impossible or very costly – illegal even, in many cases – for developing States to effectively seek to impose on TNCs obligations in order to ensure that their presence will benefit human development in the countries where they operate. Multilateral lending institutions, too, have a responsibility to effectuate this change. They already see private investment as an opportunity not only for economic growth, but for improvements in the modes of governance of the countries in which such investment is made. They should go further in including such conditionalities in their lending policies. The more such measures will be taken, the more incentives will be devised to encourage TNCs to contribute to realizing the development aims of the countries where they operate, the more they will appear as the driving belts of this other economic globalization we anticipate – one which works for the poor.