Corporate governance in the post-Westphalian, pre-global governance world order

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Abstract:

Multinationals are currently operating in what has been called the "post-Westphalian, pre-global governance world order", where nation-states can no longer effectively control them. The weakening nation-state governance has led to an increasing ambiguity of borders and jurisdiction, and the blurring of the responsibilities between the public and private spheres. It has also led to the emergence of multiple transnational norm-setting guidelines such as, e.g., the world's largest corporate citizenship initiative, the UN Global Compact and the OECD Guidelines for Multinationals, together with numerous sustainability reporting initiatives. The guidelines and initiatives are based on voluntary principles, norms and standards, and negotiated through so-called transnational norm-building networks. They have been criticized precisely for being voluntary and lacking teeth. Calls for legally binding international rules, international regulation and possibility for arbitration have grown especially from civil society organizations.

The complexity of operating across national boundaries, involving expectations from transnational organizations, and home and host country institutions, has increasingly made multinational business more challenging. Should multinationals follow Swedish laws in Uzbekistan? Should they uphold USA laws in Sweden? What are the responsibilities to uphold the voluntary transnational norms? Who should be the arbiter or sets the standards? Will this globalized, post-Westphalian, pre-global governance world order, result in a more sustainable society in advent of internationally binding rules, and will it be sustainable not least of all for business? Or will it result in a society where multinationals benefit and turn everything to their own advantage as they exert efforts to reduce costs, taking the form of a race to the bottom? Our study of Telia Company involves home and host country institutions, transnational norms, extra-territorial jurisdiction, corruption in Uzbekistan and a 1 billion USD Foreign Corrupt Practices Act settlement to explore how multinationals are making sense of our pre-global governance world order.

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> Swedish, Telia, and Finnish, Sonera, merged in 2003 establishing one of the largest telecom companies in the Nordic and Baltic region. The merged company is today known as Telia Company (Telia) and its shares are listed on the Nasdaq Stockholm and Helsinki exchanges with approximately 496,400 shareholders. The Swedish government holds 37.3% of the shares and the company is currently present in Azerbaijan, Denmark, Estonia, Finland, Georgia, Kazakhstan, Latvia, Lithuania, Moldova, Norway, Sweden, Turkey, and Uzbekistan. In 2012, a Swedish public service documentary revealed that Telia's business partner, Gulnara Karimova, the daughter of now deceased Uzbekistan President Islam Karimov, was paid SEK 2 billion as a bribe to establish itself with 3G and 4G licenses on the Uzbekistan market. In 2013, Telia's CEO and Board of Directors resigned after an independent audit contained harsh criticism to the company. In the following years a number of top executives involved in the Eurasian business were fired, many private and institutional shareowners reacting to corruption allegations divested their Telia shares and negative public media coverage continues to this day. In September 2017, Telia agreed to pay penalties of at least USD 965 million to US and international authorities to resolve the long-running investigation into the corrupt payments in Uzbekistan first uncovered in 2012. The settlement, under the United States Foreign Corrupt Practices Act (FCPA), also implicated Swiss authorities in money laundering for the payments made and thus involved institutional legal contexts in home and host countries, including Sweden, Finland, Uzbekistan, the US, and Switzerland. In addition to home and host nation jurisdictional institutions, a number of transnational norm-setting networks were involved: Sweden, Finland, the US, and Switzerland are all OECD and UN nations that have committed to ensure that their companies follow the OECD guidelines for multinationals (MNCs). Telia itself is a signatory to the UN Global Compact as well as to Transparency International.

The Peace of Westphalia in 1648 brought an end to the Thirty Years' War. Historically, the peace signaled the dissolution of the Holy Roman Empire and the advent in international law of the European *Staatensystem*, or system of the modern nation-state. For modern business scholars, the fundamental premise of the Westphalian system was that because nation-states maintained a monopoly of power within their jurisdiction, and because power politics played out wholly within nation-state systems, business insofar as they interacted with the political powers did so in an attempt to influence policy in a way that would benefit their economic interests. In a post-Westphalian, globalized world, however, the relationship of business to power politics has become considerably more multifaceted and complex (Falk 2002; Santoro 2010).

Multinationals therefore are operating in what has been coined a "global governance gap," where nation-states can no longer effectively control them. The weakening nation-state governance has led to an increasing ambiguity of borders and jurisdiction, and the blurring of the responsibilities between the public and private spheres. It has also led to the emergence of multiple transnational norm-setting guidelines such as, e.g., the world's largest corporate citizenship initiative, the UN

Global Compact (UNGC), the OECD Guidelines for Multinationals, Equator Principles, as well as a sea of sustainability reporting initiatives. These initiatives are mostly based on voluntary principles, norms, and standards and are negotiated within the auspices of so-called transnational norm-building networks. They have been criticized precisely for being voluntary and lacking teeth or jurisdiction. Calls for legally binding international rules, international regulation and possibility for arbitration has grown especially from civil society organizations. As the influence of transnational norm-setting networks have grown, the last twenty years has also witnessed an exponential growth in the number of civil society organizations and NGOs, not only growth in number, but also growth in their influence and impact on business, government, as well as on international authorities.

Between home and host country jurisdictions in the post-Westphalian system on the one hand, and the global governance gap on the other, a new form of global governance devised in individual nation-states but with extra-territorial jurisdiction has recently become more salient and, we argue, in many ways contributes to resolving the global governance gap yet poses significant challenges from a power perspective. In the introductory vignette, Telia and the settlement in the FCPA is an example of this extra-territorial global governance when a foreign company can be prosecuted under US law for dealings in other countries. Thus, US laws dictates how non-US companies should behave in other countries on the basis that they also pursue business in the US market. Similar and more recent extra-territorial laws such as the UK Bribery Act (2010) and the UK Modern Slavery Act (2015) likewise attempt partially filling the global governance gap.

While public international law regulates, and is legally binding, for states that interact with each other or when state and non-state actors (such as firms and other organizations) cross paths, the formal legislation we are concerned with here is of a slightly different order. The former is based on consent and implies "equal sovereign rights [that] both constitutes and guarantees state law's independent constitutional identity and autonomy" (Ip 201: 637) and much the same is true of private international law. We are instead concerned with cases where a state has the capacity to unilaterally assert its own laws beyond its own territory, that is, potentially on someone else's, and in particular when it is directed at non-citizens. In this paper we discuss how such extra-territorial laws goes a way to resolve the global governance gap as well as pose some important concerns to the development.

The nation-state and globalization

The nation-state has long been considered the principal agent in the modern world system where the role of the nation-state in globalization is a complex one in part due to the varying definitions and shifting concepts of globalization (Hirst and Thompson, 1999; Lechner and Boli, 2015). While it encompasses many social and economic systems, is much debated and has been defined in many different ways (Bauman 1998; Giddens 1999; Beck 2000a; Lechner and Boli, 2015), globalization is generally recognized as the fading or complete disappearance of economic, social and cultural borders between nation-states. Some scholars have theorized that nation-states, which are inherently divided by physical and economic boundaries, will be less relevant in a globalized world while others question whether globalization is rather a myth than reality (Hirst and Thompson, 1999).

An essential link between globalization and the nation-state is the concept of sovereignty, a term dating back several centuries, well before the nation-state system was established in 1648 with the Peace of Westphalia. Sovereignty as a spatial concept persists even in an age of globalization -- and is manifested in such functions as national currencies, the right to collect taxes, the promulgation of domestic law, the conduct of foreign policy, the regulation of commerce, and the maintenance of domestic order. These are all functions that are reserved exclusively to the state, a condition that regional cooperations such as the European Union is challenging today in many dimensions of governance, but has by no means yet overcome.

There is no universally-agreed definition of the term, rather globalization can be seen as an elusive concept including process, capitalism, market, time, space, state and directionality (Hamelink, 1998). More concretely and relevant to our paper, globalization simply refers to a largely commercial process involving rapid increases in the exchange of goods, capital, and services across national frontiers. It is particularly important in writings about the role of multinational or transnational corporations, with their global networks of vertically-integrated subsidiaries and affiliates. And especially important in the locus of governance across nation state sovereignty.

In terms of globalization's impact on the role of the nation-state, three broad positions have emerged: the 'hyperglobalists', 'sceptics' and 'transformalists' (Fjäder 2014). The 'hyperglobalists', for instance Kenichi Ohmae (1990) and Susan Strange (1996), though with opposing normative views on the impact of globalization, viewed globalization as a fundamental challenge to the role of nation-states and argued that globalization constitutes a challenge to the nation-state through the evident loss of control over territory, which in turn leads into the loss of sovereignty. Moreover, the 'hyperglobalists' assumed that because the nation-state's capability to offer public goods,

including security, and regulating the economy, had declined, or even all but disappeared, the nation-state has become an obsolete construct in the age of globalization. Beck (2000b), for instance, has argued that globalization represents the weakening of state sovereignty and state structures whilst Strange (1996) argues that the process of deterritorialisation is an integral part of the process of globalization, producing an 'end of geography' and thus, eroding of the core of the nation-state's power over its most central function, the control over territory.

The 'sceptics', for instance Paul Hirst and Grahame Thompson (Hirst and Thompson, 1999), and Stephen Krasner (1999), on the other hand, have principally argued that globalization has in fact produced little new to territoriality and state sovereignty, rejecting the notion of the nation-state as a 'victim' of globalization. Economic geographers such as Yeung (1998) argue forcefully that a 'borderless world' is not possible because of "the *dialectical* process of homogenization and differentiation, constituted by the relativism of scale." (1998: 292). As Yeung sees it, the tendencies towards homogenization and differentiation reflect continuous tensions between capital and the state in the (re)production of space.

The 'transformalists', including scholars like Anthony Giddens (1999), David Held and Anthony McGrew (1998; 2007), reject the 'hyperglobalist' view, but concede that globalization produces a spatial reorganization of economic, political, cultural and social life that impacts on the role of the nation-state. The 'transformalists', however, argue that globalization does not automatically diminish the nation-state's importance, but that instead the potential impact depends on the state's own reaction to it. Indeed, Hirst and Thompson (1999) argue that true globalization is a myth not least of all because the major economic powers, the G3, having the capacity to exert powerful governance pressures. "Global markets are thus by no means beyond regulation and control, even though the current scope and objectives of economic governance are limited by the divergent interests of the great powers and the economic doctrines among their elites." (1999: 2-3). Further, globalization means politization of the firm (Beck 2000a; Scherer *et al* 2014).

The development and impact of extra-territorial jurisdiction

The Foreign Corrupt Practices Act (FCPA) was passed in 1977 by the United States and addressed two unlawful corporate activities: bribery and false or inaccurate accounting. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share responsibility and enforcement of the act, which has since been amended in 1988 and 1998. The Watergate scandals played a key role in the enactment of FCPA in 1977 (de la Torre 2016; SEC 2012). In the wake of these scandals, American global corporations were scrutinized, and the SEC found that over 400

American companies had paid bribes to foreign government officials in excess of hundreds of millions of dollars. The act then applied to 1) US persons and businesses, 2) US issuers (U.S. and foreign public companies listed on stock exchanges in the US or that are required to file period reports with the SEC) and 3) foreign individuals and businesses operating within US territories.

In 1988, two amendments were passed to the act through the Omnibus Trade and Competitiveness Act and the International Anti-Bribery Act. In 1988, Congress called for the President to negotiate with members of the Organization for Economic Co-operation and Development (OECD). These negotiations resulted in the Convention of Combating Bribery Officials in International Business Transactions in 1997, known as the Anti-Bribery Convention. When FCPA was amended again in 1998, it was to conform to the requirements of this convention. These amendments were implemented in 1999. The act expanded to 1) include payments made to secure "any improper advantage", 2) reach foreign individuals who commit an act in furtherance of a foreign bribe while in the US 3) cover "foreign officials", 4) add an alternative basis for jurisdiction based on nationality, and 5) apply criminal penalties to foreign nationals employed by or acting as agents of US companies (SEC 2012).

Since the first passing of the act in 1977, it moved from being centered on domestic concerns to being considerably widened. Wholly foreign payments between wholly foreign parties would be included in the scope of FCPA, if there was so much as a phone call, e-mail, text message, or wire transfer from, to, or through the US. In one case, e.g., a Japanese corporation not listed in the US and not being a domestic concern for FCPA, settled a 218 million dollar fine to the US government for bribing Nigerian officials. The only connection to the US was that the corporation had conspired with an American joint-venture partner and that wire transfers to and from foreign accounts had passed through a New York bank (de la Torre 2016). By extending the reach of the FCPA, the focus moved from ensuring that American companies did not commit actions of corruption abroad, to ensure that many companies on foreign soil had to conform to and abide American law, thereby attempting to avoid American companies being disadvantaged in competition in relation to foreign companies that would not be covered by the FCPA before 1999. Indeed, this change raised a number of ethical and foreign-policy issues and evokes the question if extra-territorial jurisdiction should be seen as a form of legal imperialism.

The political and symbolic aspects of this type of legal imperialism aside, it also has considerable monetary implications. From 2008 to 2017, FCPA enforcement fines added up close to 11 billion dollars from a total of 143 companies. The average fine was 76,4 million US dollars and 2016 noted the highest total of yearly fines, amounting to 2,48 billion US dollars (FCPA blog 2018a). The Telia company settlement of 965 USD million in 2017 is to date the highest paid settlement for a

violation of the FCPA, followed by an 800 USD million fine for the German company Siemens in 2008 and a fine for the Dutch company VimpelCom of 795 USD million in 2016 (FCPA blog 2018b). The amounts convicted companies have had to pay for singular correupt acts are high enough for any executive of an MNC to seriously take into account, yet it is only one of several extra-territorial laws that could potentially have great impact on decision making in these firms.

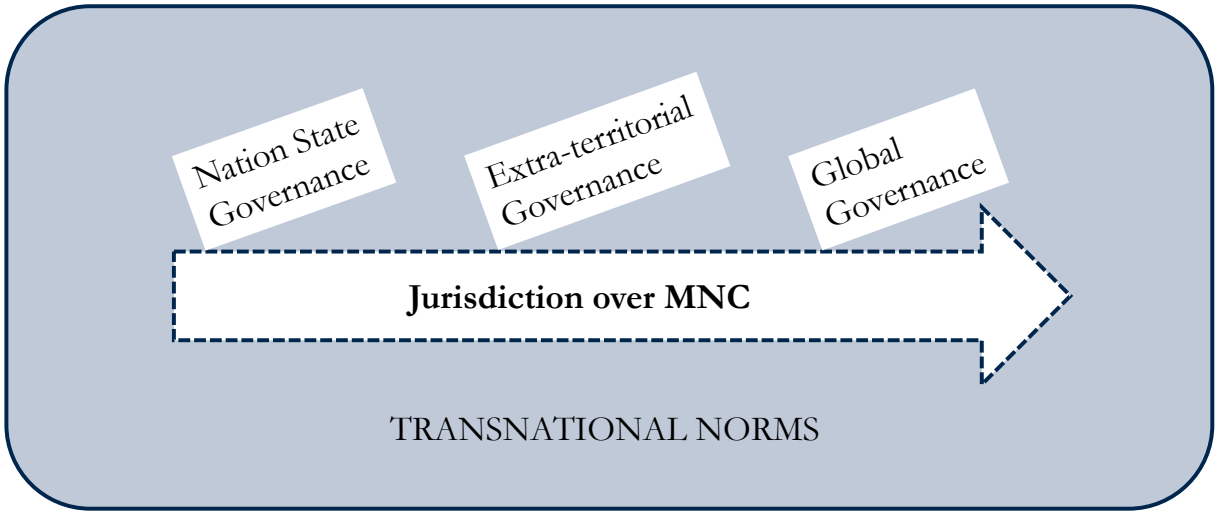
In the last decade, United Kingdom has passed two acts with similar extra-territorial reach: The Bribery Bill in 2010 and The Modern Slavery Bill in 2015. The Bribery Act applies to both UK countries operating abroad and foreign companies with a business, or part of a business, in any part of the United Kingdom. It came into effect in 2011 and is seen as a stricter legislation than the US FCPA. Contrary to the FCPA, the UK Bribery Act prohibits both the giving and the accepting of bribes. The Bribery Act does not, e.g., require the person offering a bribe to have a corrupt intent and goes further than the FCPA for failure to prevent bribery through corporate procedures. The Bribery Act also extends the responsibility beyond employees and agents to so called "associated persons", i.e., anyone who performs services for, or on behalf of, the organization. Penalties are also stricter in The Bribery Bill. A convicted person may face up to ten years imprisonment, compared to five years under the FCPA, and fines are unlimited (Bribery Act 2010).

The Modern Slavery Bill was passed in 2015 in the United Kingdom and aims to ensure responsibility for a corporation's operations as well as its supply chain. It ensures that all companies with an annual turnover exceeding 36 million GBP must publicly disclose information of the steps they have conducted to prevent and identify that no modern slavery takes place in their company or any of their suppliers. This act has extra-territorial reach since it applies to parent and subsidiary companies whether or not they are based in the United Kingdom, as well as foreign companies carrying out business, or part of a business, in the United Kingdom. The definition of modern slavery includes 1) slavery, servitude and forced or compulsory labor, 2) sexual exploitation, 3) removal of organs etc., 4) securing services etc. by force, threats or deception, and 5) securing services etc. from children and vulnerable persons. Vulnerable persons refer to children, mentally or physically ill or disabled people, or people with a family relationship with a particular person, which has been approached or to undertake action that an adult, without the illness, disability, or family relation, would be likely to refuse (Modern Slavery Act 2015).

The development and impact of extra-territorial jurisdiction evokes several questions. Will the development of extra-territorial jurisdiction expand? What then does it imply for decision-makers of MNCs as well as politicians in countries that are affected by the jurisdiction? Is there a risk that other countries that have not yet imposed extra-territorial jurisdiction will do so in an act of retaliation? And what does it moreover mean for the development of jurisdiction over MNCs in

between the ideas of nation-state sovereignty and the forward-thinking ideas of a global governance? Figure 1 depicts the continuum between nation-state governance to global governance, where global governance is an ultimately visionary state. Transnational norms under the auspisces of transnational norm setting networks such as the UN Global Compact or the OECD Guidelines for Multinational Organizations negotiate "soft laws" that serve to impact and are impacted by "hard laws".

Figure 1: Between the nation states of the Westphalian system and the utopian ideal of global governance extra-territorial jurisdiction and governance arise.



The resource-based view and global corporate governance

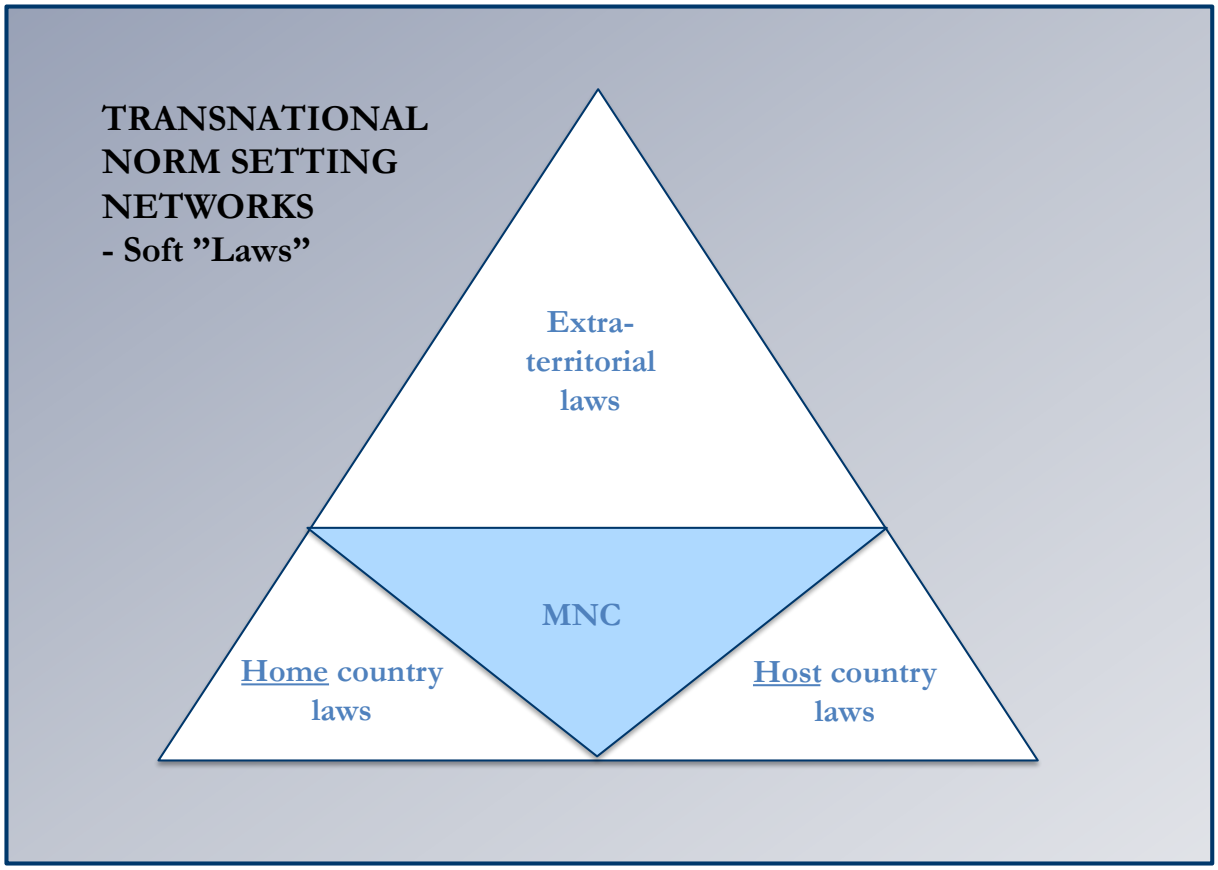
Although the dominant focus on home-country institutions may have begun to yield to one where host-country institutions are granted greater attention—be it in the form of liabilities or advantages of foreignness (Zaheer 1995; Kostova 1999; Edman 2009; Regnér and Edman 2014; Saka-Helmhout *et al.* 2016), discussion on institutional comparative advantages (Ahmadjian 2006; Jackson and Deeg 2008; Witt and Jackson 2016), or the institutional arbitrage firms may find it profitable to engage in (Boisot and Meyer 2008; Arregle *et al.* 2013)—as of now it appears that international business (IB) scholars have not put much effort into the study of the nature and extent of extra-territorial legislation. This is in market contrast both to legal scholarship and to the efforts of the IB and CSR research communities to sort out the intricacies of norm-setting initiatives based on voluntary participation (Scherer *et al.* 2006). Indeed, Scherer *et al.* (2015: 376) suggest that "[i]nasmuch as the nation state loses part of its regulation capacity and enforcement power, the premises of the theory of the firm need to be changed and developed further," yet no

mention is made of the parallel process whereby nation-states project their own laws beyond their own territory.

It is clear, however, that the frameworks most easily at hand, including the resource-based (Penrose 1959; Wernerfelt 1984; Barney 1991), knowledge-based (Kogut and Zander 1992) and institution-based (Peng *et al.* 2008) views of business strategy, do not quite capture the extent to which firms might find themselves under the influence of legal provisions that are extra-territorial in nature. Focusing on firm-specific resources and competences, on the immediate context within which business operations are set, understates the need to think about the wider context and its potential influence on the range of action that firms may enjoy. Following the dynamic capabilities route of Teece *et al.* (1997: 516), who emphasize "the firm's ability to integrate, build, and reconfigure internal and external competences to address rapidly changing environments," could potentially have resolved that problem had it not been equally keen to concentrate on the internal workings of the firm at the expense of understanding those "rapidly changing environments." In short, existing IB frameworks reduce firms to react to such changes irrespective if they issue from shifts in markets or regulatory frameworks. There is little sense that businesses can leverage it to their own advantage unless they turn out to be better able than their competitors to weather the consequences of the changes afoot.

For illustrative purposes, however, we have chosen to set out from the resource-based view (RBV) simply because it is the oldest and most widely applied. It is after all the contrast between internal resources or capabilities and the nature of the changing environment we are interested in investigating. For instance, focusing on one class of initiatives that may serve to close the global governance gap, that of extra-territorial law, allows us to think in terms of remaining gaps and their consequences for firms as much as those that are filled; firm-specific navel-gazing would allow nothing of that sort. In figure 2 we illustrate a resource based view of multinational corporations within a globalizing world.

Figure 2: A resource based view of corporate governance between nation-state soverigneity and global governance



Globalization Favors Westernization?

It is impossible to study globalization without giving close attention to the role of power in economic life where power determines the relationship between authority and market (Strange 1994; Beck 2000a). One commonly debated position on globalization is that it favors Westernization, meaning that other nation-states are at a disadvantage when dealing with the Americas and Europe (c.f., Sen 2002). Another potential effect is that nation-states are forced to examine their economic policies in light of the many challenges and opportunities that MNCs and other entities of international commerce present. Multinational corporations, in particular, challenge nation-states to confront the unique issue of foreign direct investments, forcing nation-states to determine how much international influence they allow in their economies. At the same time, globalization also creates a sense of interdependence among nations, which could create an imbalance of power among nations of differing economic strengths.

Peng *et al.* (2008) argue that the industry-based and resource-based view of the firm can be criticized for overlooking formal and informal institutions in the environment in the firm, treating it as

"background" or as a "given". They therefore bring to attention a growing literature of international business studies (IB) with an institution-based view. This institution-based view of international business strategy studies leans towards a plethora of studies with an institutionalist perspective from both sociological institutional theory (e.g. March & Olsen 1989, Scott 1995, Oliver 1997) and institutional economics (e.g. North 1990, Williamson 2000). Peng *et al.* (2008) takes a particular interest in emerging economies and focus on areas where Western and emerging countries' jurisdictions, on for example antidumping, tariffs, and antitrust, can bring about important implications for MNCs. They show, for instance, how US jurisdiction on dumping and predatory pricing (that aims to first sell products below cost and then increase prices when local competitors have been eliminated in an attempt to monopolize) led to attention-grabbing legal reasoning in the case of a Chinese crayfish growers operating in the US. Although the Chinese firm could show the authenticity of their wages of their employees, and hence could not be said to price below costs, US (and EU) law still makes it possible to complain that these prices were not fair, since China could be seen as a non-market economy. The US legal system instead compared what hypothetical costs crayfish growers would have in a market economy, and (arbitrarily) chose to compare it to the Spanish market and therefore found the costs of the Chinese firm to be unfair. This example alone highlight how foreign firms can be discriminated against by legal institutions of Western countries and calls for studies with an institutions-based view.

Munir (2015) goes one step further and concludes that also an institutionalist perspective falls short of addressing power from a critical point of view. Sociological institutional theory tends to not problematize unequal power distributions, and thereby marginalizes or neglects important issues of power, oppression, and exploitation. Although institutional theory should be well-equipped to analyze power on micro and macro levels, there is a tendency to leave out , e.g., class struggles or workers' rights from the management discourse and conceal issues of hegemony and ideology by instead discussing them in terms of "taken-for-grantedness" and "logics". This standpoint is implicitly conservative and does not grasp the full potential of institutional analysis.

Indeed, this body of literature is not only politically conservative but also suffers from a great deal of Western-centrism. The literature of institutional logics, for example, is focused almost entirely on the Western type state, assuming democratic participation as the main source of state legitimacy and welfare capitalism as the default economic system (Thornton, Ocasio and Lounsbury 2012). Needless to say, a number of the world's largest economies, e.g., China, India and Russia are former socialist states with characteristics that differ from Western liberal states. Many smaller emerging economies, moreover, lack traditional properties of the Western liberal state. Yet studies of state

logics in socialist states or residual socialist logics in post-socialist states stands out by its absence in the literature.

Another assumption of the institutional logic of the state is citizenship as a basis of norms (Thornton, Ocasio and Lounsbury 2012). As dominant Western countries move towards imposing extra-territorial jurisdictions, the obligations of citizens in the home country are enforced on foreign citizens with (strong, or) weak ties to the home country and bears those responsibilities on foreign soil. The hegemony and ideologies of Western states are hence extended beyond the home country's borders and inflicts on the autonomy of other states, in particular smaller and economically weaker states.

Challenges

Very much a process in the making, the proliferation of legislation of an extra-territorial nature is an expression of the need to close the global governance gap. Whether this is a good or bad thing, however, defies easy categorization. It does help resolve some of the issues that often emerge in the wake of the activities of MNCs, but it similarly raises a number of concerns both with respect to theory in international business and empirically, indeed also morally. Addressing or at least acknowledging these concerns may well improve our understanding of current developments and it may enhance our appreciation of the difficulties and trade-offs that are an inevitable part of a process that has several traits of both of trial and error and the projection of power.

Starting with the theoretical dimension of the proliferation of extra-territorial hard law (i.e. as opposed to the soft laws of norm-setting networks based on voluntary approval and participation), it is quite clear how it moves beyond the current state of research in international business. We have already noted that RBV, and the extensions and modifications that have followed in its trail, may well be a useful starting point, yet in case we would want to move further it is one that is found wanting. Its focus on internal resources is neither matched by a realization of the changes external to the firm that are afoot nor a sense of agency on part of the firm and the scope for purposive action. The global governance gap, however, both allows for such action and may require it. The institution-based approach of Peng *et al.* (2008) decidedly goes some way toward understanding the opportunities and difficulties of firms negotiating institutional environments characterized by incomplete or contradictory governance but leaves us at a loss to explain institutional change or other aspects of the context that might be relevant. Importantly, agency is not only something that firms can display—for instance in instigating or participating in initiatives in the form of voluntary

global governance schemes—but also a capacity of states and non-firm organizations, including civil society actors.

This will have consequences for how we think of MNCs, their behavior, and their choice of strategy. Although one may well approach it from the point of view of how MNCs address their (changing) environment and the pressures that it generates (e.g., Oliver 1997), it leaves out any purposeful attempts to influence that environment (other than, perhaps, as a form of rear guard action). Yet any organization, or the individuals that manage them, can engage in strategically meaningful activities that may have an effect on the context within which the organization operates. This, of course, is not a new revelation. Lobbying, the activities that we subsume under the heading corporate citizenship or engaging in institutional entrepreneurship all betray a capacity to act and to act not just preemptively but to do so to gain advantage—be it in the expectation of stealing a march on the competition or to circumvent existing regulation, or both. The core point is that, analytically, we cannot leave the fate of firms to the sources of their sustainable competitive advantage, at least not if we are to understand the full range of their actions. Also, as we recognize, with Barney (1991: 107), that "firms [are] intrinsically historical and social entities .. the ability [of which] to acquire and exploit some resources depends upon their place in time and space," it bears pointing out that firms are engaged (or entangled) in relational processes that cannot be reduced to corporate networks alone (e.g., as in Dyer and Sing 1998 or Lavie 2006). Instead, we opt to (selectively) use and adapt the relational economy approach of Bathelt and Glückler (2011: 6–7, emphasizing in particular their process focus, the role of agency (as opposed to space and, by analogy, organization), the call to view economic action as social action, and for analytical purposes moving across spatial scales of analysis as appropriate given the phenomenon or phenomena at the center of attention.

It also helps us to think about the consequences of the manner in which the global governance gap is (partially) filled. Two issues stand out. The first one relates to the economic system within which firms operate, be it at home, abroad, or both. What we have in mind is the core quality of individual market economies of a capitalist bent, that which is nicely captured by Hodgson's (2015) legal institutionalism: its focus on the rule of law. Does extra-territoriality support the rule of law, for instance by making it more difficult for MNCs to engage in activities that would not be permissible at home? Can it reduce the very temptation to engage in such institutional arbitrage? Does it make for a more level playing field? Or does it run counter to the requirements of the rule of law, including equality before the law, that laws themselves are just, and that transparency, accountability, and the needs of access to impartial conflict resolution are catered for? If it does, what are the implications for the economic system that have seen MNCs thrive?

The second one is about the nature of extra-territorial legislation in itself. There are some basic principles recognized in international law that may support extra-territorial application—some of these principles are generally accepted, others are controversial (Ryngaert 2015: Ch. 4)—but our focus is on a particular set where this might not apply. Those are instances where it is not immediately clear that the laws of one country "accurately implements extant international law," in which case the application of "prescriptive jurisdiction anywhere in the world can be reconceptualized from an exercise in extra-territorial jurisdiction to an exercise of territorial jurisdiction" (Colangelo 2014: 1333), but on where unilateral prescriptive legal norms are applied to activities that take place on the territory (or within the jurisdiction) of another state.

Businesses, of course, may well engage in political activities (lobbying, policy formulation, etc.) and they are always the subject of law. However, MNCs in particular can to a degree shop around, that is, engage in institutional arbitrage. So, can individuals, but as citizens individuals can be charged precisely because they are formal members of a given nation-state with a certain set of rights and obligations. Thus, irrespective of where the felony might take place, a case can often be made for bringing them to court at home, just as might happen if they run foul of host-country rules in which case host-country courts may wield their power. But what about MNCs?

Firms have a legal identity, and various affiliates may or may not share that same legal identity; by virtue of their domicile they belong to a certain jurisdiction. Wrongdoing outside that particular jurisdiction is naturally subject to the laws where it all took place. And just as individual citizens might under certain circumstances be answerable also at home for breaches of law committed elsewhere, the same would apply to legal entities such as organizations of various forms. But the laws that we have discussed in this paper are of such a nature that the laws of for instance, the US, are applied to Telia from Sweden active in Uzbekistan, and this irrespective of the felony as defined by the US being viewed as such in Uzbekistan (or for that matter in Sweden). In the examples we have looked at, and where universal jurisdiction based on some common interest rationale is not immediately self-evident, it would seem that it either reflects beliefs in some inalienable rights—and hence an object of moral philosophy rather than anything else—or that it becomes an issue of the ability of projecting one's power.

Leaving the first possibility aside, thereby avoiding a discussion on things that we are singularly ill-prepared to delve into, we will focus on the importance of power. Thus, although international relations scholars were long ago taken to task for neglecting the importance of MNCs (notably by Strange 1988), here it would seem that business scholars err on the other side—that of underestimating the power of states and their elongated arm. For although it might well be true that globalization step by step erodes the position of nation-states (and this is primarily an empirical

issue), it does not necessarily imply that states are made powerless. Strange's analysis of the effects of political authority, including that issuing from states, on markets and vice versa are still pertinent, albeit that power in the interim may seem to have shifted in favor of MNCs.

Perhaps this is why we have seen this particular class of legislation become more prominent. It is a way in which states can reign in the increasing freedoms of MNCs, should the latter's behavior run counter to the interest of states or to the prevailing sense of what is just. If so, it is a more forceful parallel to the voluntary schemes such as the UN Global Compact and the OECD Guidelines for Multinationals that also address gaps in global governance, and perhaps not just a parallel but a competing system.

An ability to enforce such rules, however, is not a given. In part, it will depend on the nature of the relationship that a e.g., the Swedish MNC such as Telia has to the US. That is not for the MNC to decide, though, but is the prerogative of the legislature and judiciary in the US. Yet clearly, the greater the involvement or attachment that the MNC has in the US, the greater the power of the US over the MNC: It becomes a peculiar instance of Vernon's (1971) obsolescing bargaining model, which might not therefore have outlived its usefulness as some IB scholars contend (Dunning 1993; Luo 2001), yet an instance that is not well covered by the alternative, the political bargaining model, proposed by Eden *et al.* (2005). It does not necessarily stop at current activities, though. For while law is often about the present or things done in the (not so distant) past, it may also serve a preemptive function. If the MNC plans to establish itself or in other forms engage with US markets, or using US firms as partners or intermediaries, the Swedish MNC (in this case) will have to think twice about what it does in a third country.

This in turn suggest that the market potential, so to speak, of the US matters: the greater the importance or attraction to the business of the MNC, the more careful it has to be. Hence, the ability not just to enforce regulation but actively prevent certain actions will depend on considerations such as the size of the economy, the sophistication, desirability or reach of its products and services, or other benefits of being present there. This of course is the stuff of both the international relations and international political economy literature, with which IB scholars might want to engage more intimately if they are to understand the actions and predicaments of the firms they made a living out of studying.

Conclusion

The growing impact of extra-territorial jurisdiction is a phenomenon that has received little scholary attention in the international business literature, despite being a relatively well researched topic in

international relations and legal studies. This lacuna is unfortunate since understanding extra-territorial jurisdiction holds implications to the theory of the firm and international business, also significant managerial implications for MNCs as well as nation-state policymakers.

As Scherer *et al* (2014) posit, the nation-state governance system is unable to effectively regulate global business and the 'soft laws' of transnational norm-setting networks or corporate codes lack requisite transparency and accountability to fully comprise a global governance system (Florini 2003; Hale 2008). Extra-territorial laws such as the FCPA can be understood on the continuum between nation-state jurisdiction and the global governance gap and as MNCs are confronted with increasing societal demands for protecting and producing public goods, they have increasingly become political actors potentially requiring scholars to revisit the theory of the firm within a globalizing world (Scherer *et al* 2014).

There are a number of managerial implications to MNCs of the growing importance of extra-territorial laws. Many, if not most, MNCs will face increasing complexity deciphering a multitude of home, host and extra-territorial jurisdictions. Currently many MNCs organize themselves in geographical or regional markets, thus unable to see the more complex geo-political interdependence beyond their focal market. The same applies to nation-state policy makers within a continued concept of sovereneity and multilateral agreements are negotiated.

Moreover, the hegemonic position of, for instance, the US and the UK within global trade are not only present in the extra-territorial jurisdictions, they are potentially also subject to fierce contestation. Claims of 'legal imperialismen' or the 'westernization of globalization' is ever more debated in a time of "the new nationalism"(Economist 2016) involving trade wars and attempts of enforcing nation-state norms and regulations beyond sovereign borders.

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