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SCUOLA DI DOTTORATO DI RICERCA IN: DIRITTO INTERNAZIONALE
E DIRITTO PRIVATO E DEL LAVORO

**LEGAL PERSONALITY OF TRANSNATIONAL CORPORATIONS IN
GLOBALIZING WORLD**

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CHAPTER I

MAIN PERIODS OF TRANSNATIONAL CORPORATIONS' DEVELOPMENT

SUMMARY: 1.1. First period: evolution from colonial multinational companies to modern transnational corporations, formation of basic corporate law. - 1.2. Second period: new challenges for transnational corporations, World Wars and political instability. - 1.3. Third period: decolonization and new markets for expansion. - 1.4. Fourth period: scientific and technological progress, increasing competition in the global market. - 1.5. Concluding remarks.

Transnational corporations (TNCs) are perhaps one of the main phenomena of the contemporary “globalizing” world. The globalization is a the coincidental effect of three major changes: accelerated internationalization of production; increased mobility of capital; and greater mobility of knowledge or information (from communication of messages to the transfer of technology). There is little doubt that in various roles TNCs have been drivers, enablers and promoters of these processes¹. TNCs form a new system of the world economy, which has a great impact on the functioning and development of other actors and systems such as national economies, regional integration groupings etc.

TNCs are believed to be born in the XVI century from the major colonizing and imperialist ventures from Western Europe, especially England and Netherlands². Such companies (British East India Trading Company, the England and Dutch East India companies,

1 Hood, Neil, and Stephen Young. *The Globalization of Multinational Enterprise Activity and Economic Development*. 1st ed. Palgrave Macmillan UK, 2000. p. 4

2 Greer, J. and Singh, K. (2000). A brief history of transnational corporations. Global Policy Forum. Available at <https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html>. [accessed October 26, 2014]

the Muscovy Company, the Hudson's Bay Company, and the Royal African Company) traded goods and services across national boundaries and had a geographical reach rivaling today's largest TNCs³.

Since that time the influence of companies with international nature has been growing steadily. Their capability to accumulate the financial and human resources around the world and to use them in commercially beneficial activities made them the most outstanding form of business. One of such companies, namely the East India Company founded by merchants in London survived the changes of revolution and two different forms of national government and later emerged in the Restoration period as the most efficient and outstanding vehicle for English trade in Asia, bringing home silks, muslins, spices, and teas from China, Japan, the East Indies, and India to growing numbers of consumers⁴.

1.1. First period: evolution from colonial multinational companies to modern transnational corporations, formation of basic corporate law

Many researchers divide TNCs' history into several phases. V. Polyakov and R. Schenin it into five periods (so-called generations) which mark the significant phases of development of TNCs⁵. The first generation covers the period from early TNCs to the beginning of the World War I. The main aim of the first TNCs, which were mentioned above, was an investment in the production of food and raw materials in the colonial countries of Asia, Africa and America and then the sale of them in the European countries. They originated from Europe, mainly Great Britain and Netherlands, and were characterized by cross-border transactions

3 Ann M. Carlos and Stephen Nicholas (1988). Giants of an Earlier Capitalism: The Chartered Trading Companies as Modern Multinationals. *Business History Review*, 62, p. 398. doi:10.2307/3115542

4 Kathleen Wilson (1994). [Review of *The East India Company: A History* by Philip Lawson]. *The William and Mary Quarterly*, 51 (4), p. 800

5 Polyakov V. and Schenin R. *Мировая экономика и международный бизнес* [World economy and international business]. 5th ed. Moscow, 2008. p. 46

through sales or production branches in two or more countries⁶. For example, the first Dutch trading companies came to North America in the early XVI century. In 1615, the New Netherlands Company opened a trading post at Fort Nassau (now is close to Albany, New York). In 1624, the Dutch West India Company established one trading station at Fort Orange (now Albany, New York)⁷.

However, some researchers doubt that these early companies could be called TNCs. For example M. Wilkins argues that these early companies were different from modern TNCs in the amount of transactions as at the time when these enterprises were operating the communication took months and, therefore, troubled the coordination of many transactions. Therefore, the modern TNCs were developed only in the late XIX century when steamships, cables, railroads, and telegraphs united distant parts of the world⁸.

Another very important aspect in this question is the method of investment. To understand completely the point of view arguing that the modern TNCs were developed in late XIX century it is necessary to understand which type of investment is used by TNC's parent company and its affiliates.

It is common to divide intentional investment into two categories: international portfolio investment and foreign direct investment. The first category of investment is made purely for financial reasons and do not include any managerial control performed by the investor. It is merely an acquisition of the shares in the company⁹. On the contrary, in cases of foreign direct investment the investor's purpose is to gain an effective voice in the management of the

6 Ann M. Carlos and Stephen Nicholas (1988). *Giants of an Earlier Capitalism: The Chartered Trading Companies as Modern Multinationals*. *Business History Review*, 62, p. 398. doi:10.2307/3115542

7 Wilkins, Mira (2005). *Dutch Multinational Enterprises in the United States: A Historical Summary*. *The Business History Review*, 79(2). p. 193

8 Wilkins, Mira (1986). *Japanese Multinational Enterprise Before 1914*. *The Business History Review*, 60(2). p. 200

9 Ietto-Gillies, Grazia. *Transnational Corporations and International Production: Concepts, Theories, and Effects*. 2nd ed. Cheltenham, UK: Edward Elgar, 2005. p. 15

enterprise. The foreign entity or group of associated entities that makes the investment is termed the “direct investor”. International monetary defines the foreign direct investment enterprise as an incorporated or unincorporated enterprise in which a foreign investor owns ten per cent or more of the ordinary shares or voting power of an incorporated enterprise or the equivalent of an unincorporated enterprise¹⁰.

Thus, the FDI gives the investor opportunity to influence and control the transactions of its affiliates while international portfolio investment does not. The modern definition of TNC introduced by UNCTAD considers foreign direct investment as one of the main features of TNC.

J. Stopford states that in Victorian Britain portfolio investment was by far most important. These investments were principally in the form of bonds, preference shares, or small percentages of a foreign firm's ordinary shares and were not concerned with the management of the foreign enterprise. The Victorian era came to an end with the Queen Victoria's reign who died in 1901. So, the popularity of an international portfolio investment came to an end in late XIX – early XX centuries in Great Britain. According to J. Stopford, there was also third type of investment which existed before 1914. It is called “expatriate” investment. This investment involved a sense of management, but did not at the same time involved the strategic control. The good example of such investment is when an entrepreneur who emigrates, starts a firm in his new homeland and finances the venture with money raised in his old homeland. In 1913, portfolio investment of Great Britain could be estimated as 68 per cent, “expatriate” one as 22 per cent and direct investment only as “10” percent¹¹.

The Great Britain firms were among first ones that started expanding beyond the

10 International Monetary Fund Committee On Balance Of Payments Statistics And OECD (2004). Definition of foreign direct investment (FDI) terms. Issues paper (DITEG) #20. Art Ridgeway, Statistics Canada. Available at <https://www.imf.org/External/NP/sta/bop/pdf/diteg20.pdf> [accessed 17 March, 2015]

11 Stopford, John M. (1974). The origins of British-Based Multinational Manufacturing Enterprises. *Business history review*, 48(3). pp. 305 - 310

national level. It is possible to accomplish that other European countries were making the similar investment policy at that time. Both international portfolio investment and “expatriate” investment are not characteristics of modern TNC. That is why it is reasonable to argue that modern TNCs were developed only in the late XIX century.

Nevertheless, it is obvious that the British and Dutch firms of XVI-XVII centuries such as British East India Company had certain features of modern TNCs. The main feature is that they had offices abroad and operated in more than one country. However, even though the European trading companies of XVI-XVII centuries maintained trading offices to buy goods in Asia, and sold them to customers in Europe, their foreign offices were not established as separate companies because the corporate form was not adopted in other parts of the world¹².

K. N. Chaudhuri considered one of such early companies - the East India Company - as a “pre-modern multinational organization”¹³.

M. J. Peterson suggested that the companies such as the Dutch East India Company, the British East India Company shall be called “proto-multinationals”¹⁴.

Regarding the above mentioned features of the earliest European trading companies the opinions of K. N. Chaudhuri and M. J. Peterson seem to be logical. Thus, the first trading firms originated from Europe in XVI – XVII centuries and started expanding their business abroad could be called pre-modern TNCs or proto TNCs. Even so, it is no doubt they had a long-lasting impact on economy. For example, from the XVII century British and Dutch stock markets were closely connected, and even two centuries later in XIX century the USA

12 Peterson, M. J. (2008). Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering. Background reading. p. 1. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]

13 Chaudhuri, K. N. (1981). The English East India Company in the 17th and 18th Centuries: a pre-modern Multinational Organization. In Blusse, L. and Gaastra F. Companies and Trade. The Hague. p. 29

14 Peterson, M. J. (2008). Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering. Background reading. p. 1. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]

transactions were blended into the integrated British-Dutch market¹⁵. This fact shows the effect that the large companies with cross border business activities might have on the world economy.

The modern TNCs as we know them today have their origins in the second industrial revolution of the late XIX century¹⁶. Due to the contemporary economic thought during this period TNCs first began to emerge as part of the newly developing modern industrial economy¹⁷. The industrial revolution certainly influenced the pattern of the economy making it industrial and gave a basis for the development of modern TNCs. However, it was not the only one reason. The great impulse for the development of modern TNCs in the late XIX century was given by another factor which roots are in the legislation of the European countries of that time. The name of this factor is “limited liability”.

In 1844 all English enterprises except banks were allowed to incorporate freely under the Companies Act of 1844, and their investors obtained the limited liability in 1856. By the middle decades of the XIX century the major European economies followed the experience of England and used the “corporation” as a new form of enterprise. The main feature of this legal form of enterprise was the limited liability of investors which helped it to dominate the market-oriented economies¹⁸.

In the beginning of XX century, the countries of Western Europe and North America completed the process of formation of the basic corporate law and liberalization of the corporate forms of business¹⁹.

15 Wilkins, Mira (2005). Dutch Multinational Enterprises in the United States: A Historical Summary. *The Business History Review*, 79(2). p. 201

16 Guillen, Mauro F. and Garcia-Canal, Esteban (2009). The American Model of the Multinational Firm and the “New” Multinationals from emerging economies. *Academy of management perspectives*. p. 23

17 Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 10

18 Owen, Thomas C. *The Corporation under Russian Law: 1800-1917: A Study in Tsarist Economic Policy*. Cambridge U.a.: Cambridge U, 1991. pp. 3-4

19 Magadanov P. (2012). *История возникновения корпораций до начала XX в.* [History of

Thus, the new legal form of enterprise alongside with the rapid industrialization had the biggest impact on the growth of TNCs in the late XIX century. In scope of this question, it seems necessary to review the experience of major European countries of that period.

The Great Britain played enormous role in the development of TNCs. The first pre-modern TNCs were originating from this country. In 1850-1914 British investment could be found in railways, ranching, timber, and mining. The geographical destinations were primarily Canada, the USA, Australia, Argentina²⁰, Europe, New Zealand, and South Africa²¹. However, from the late XIX century, the situation tended to change. Some historians called the period from 1873 to 1896 the Great Depression in Britain, because of increasing protectionism, especially in Germany, France and the USA. The long-term growth rates – measured by such indices as industrial production, productivity, and per capita income – were lower than those in Germany, the USA, and in some cases, below those in France. By 1914 many British Empire markets were no longer the *chasse gardée* of the British. In some areas such as building ships the Great Britain remained leading position though²². The Great Britain remained as a big investor in late XIX century but due to the changing world economic pattern it had to slow down its activities, including investment.

At the same period, other European countries activated their investment initiatives. For example, in 1913, German Thyssen owned shares of mines operating in France, Russia, Norway, Morocco, Algeria, and India²³. German firms became dominant in chemicals, artificial textiles, and electrical goods²⁴. By 1914, patterns of German foreign direct investment establishment of corporations before XX century]. *Ars Administrandi*, issue 4. p.28.

20 Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 10

21 Stopford, John M. (1974). The origins of British-Based Multinational Manufacturing Enterprises. *Business history review*, 48(3). p. 308

22 Stopford, John M. (1974). The origins of British-Based Multinational Manufacturing Enterprises. *Business history review*, 48(3). pp. 312-314

23 Schroter, Harm (1988). Risk and control in multinational enterprise: German businesses in Scandinavia, 1918-1939. *The Business History Review*, 62(3). p. 430

24 Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 11

resembled those of the nation's competitors²⁵.

Dutch trade companies alongside with British ones were first pre-modern TNCs. In XIX century, one of the main areas of Dutch interest was the USA. Dutch capital was second after British one among the foreign investors in fashioning the extensive railroad network in mid – and late – XIX century America. Out of the 650 million of dollars invested by the Dutch in the USA in 1914, 125 million of dollars were direct investment which included real estate, mortgage companies, and trading outlets. Prior to 1914, several Dutch insurers did business in the USA. Before World War I, among the direct investors in the USA were the large Dutch (and Dutch-British) firms, such as Royal Dutch Shell and NV Philips²⁶.

In the late XIX century, not only Europe but also other two regions of the world began to develop their TNCs, namely the USA and Japan.

As it was mentioned before, the USA was a place of interest for European investment. However, till the late XIX – the early XX centuries the USA companies were not involved in the international business. M. Wilkins finds the reason for this in the absence of two important prerequisites in the American economy of that time: 1. speedy transformation and communication to distant places; 2. transformation of the American corporation into a national enterprise. She argues that businessmen had to learn to think on a national (as distinct from local or state) scale before they could consider the prospects of operations abroad²⁷.

In the middle of the XIX century, the situation changed. The rapid expansion of railroads in the 1840 and following years dramatically decreased unit transportation costs and reduced travel time. The telegraph achieved commercial practicability in the same period with coverage reaching Chicago, St. Louis, New Orleans, and San Francisco. Water and later steam

25 Schroter, Harm (1988). Risk and control in multinational enterprise: German businesses in Scandinavia, 1918-1939. *The Business History Review*, 62(3). p. 420

26 Wilkins, Mira (2005). Dutch Multinational Enterprises in the United States: A Historical Summary. *The Business History Review*, 79(2). p. 198-199

27 Wilkins, Mira (2005). Dutch Multinational Enterprises in the United States: A Historical Summary. *The Business History Review*, 79(2). p. 191

power sources were fueled by the discovery of new coal seams and enabled utilization natural resources in the west, and gave an impulse to the manufacturing firms in the East²⁸.

Thus, the second prerequisite for the involvement of the USA companies in the national business, namely the transformation of the local companies into national enterprises, was a consequence of the first prerequisite. In the 1870 to 1895 period, as the basic transportation and communication infrastructure was nearly completed, many American enterprises began to integrate mass production with mass distribution on the national market. Among them were makers of crude chemicals (Du Pont, General Chemical, International Agricultural Chemical and National Carbon), food processing enterprises (United Fruit, Nabisco, and Quaker Oats), meatpacking firms (Morris, Swift, and Wilson), metal firms (Alcoa; Bethlehem Steel, International Nickel and U.S. Steel), rubber companies (Firestone, Goodrich, Goodyear and United States Rubber), automobile firms (Ford, General Motors, and Packard), petroleum firms (Gulf, Shell, Standard Oil and Texaco), and a variety of firms producing technologically complex products (Singer Sewing Machine, Allis-Chalmers, American Radiator, Babcock and Wilcox, Computer-Tabulating-Recording (the forerunner of IBM), Eastman Kodak, General Electric, Ingersoll-Rand, International Harvester, Link-Belt Machinery, National Cash Register, Pittsburgh Plate Glass, Remington Typewriter, Western Electric, Westinghouse Air Brake, Westinghouse Electric), and others. M. Buchelli, J. T. Mahoney and Paul M. Vaaler associate this period with the transformation of the traditional enterprise to the modern vertically integrated firm, modern corporation²⁹.

The vertically integrated national companies starting from the middle of the XIX

28 Bucheli, Marcello, Mahoney, Joseph T. and Vaaler, Paul M. (2010). Chandler's living history: the visible hand of vertical integration in nineteenth century America viewed under a twenty-first century transaction costs economics lens. *Journal of management studies*, 47(5). p. 867

29 Bucheli, Marcello, Mahoney, Joseph T. and Vaaler, Paul M. (2007). Chandler's living history: The Visible Hand of Vertical Integration in 19th Century America Viewed Under a 21st Century Transaction Costs Economics Lens. *Illinois*. pp. 13-14. Available at http://www.business.uiuc.edu/Working_Papers/papers/07-0111.pdf [accessed January 26, 2015]

century took the further step for the expansion of business abroad. For example, the Singer Sewing Machine Company set up European production in Scotland in 1867³⁰, the United Fruit Company became a major shareholder of the Hamburg Line and Elders & Fyffes assuring control of the German and British markets³¹.

Some researchers consider the experience of American TNCs unique due to the size of the domestic market. The American model of TNCs is merely an expansion of business abroad using the experience in the domestic market. Advantages of these companies at home became the advantages in foreign countries³².

Thereby, in case of American national companies the final expansion abroad seems logical as the experience inside the country could be applied easily on the world market.

The impulse for the rapid growth of the American modern TNCs was also given by changes in legislation. During the colonial times the American corporations were established through the grant of the charter by the crown or by the governors as representatives of the crown. Up to 1837 charters were granted only through special acts of the legislation. In 1837, a business corporation act, drawn by Theodore Hinsdale was passed by the Connecticut legislature. This was the model for general enabling acts for business corporations passed by the other states for several years after³³. In the late XIX century, the legislation was further

30 Peterson, M. J. (2008). Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering. Background reading. p. 1. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]

31 Bucheli, Marcello, Mahoney, Joseph T. and Vaaler, Paul M. (2007). Chandler's living history: The Visible Hand of Vertical Integration in 19th Century America Viewed Under a 21st Century Transaction Costs Economics Lens. Illinois. p. 20. Available at http://www.business.uiuc.edu/Working_Papers/papers/07-0111.pdf [accessed January 26, 2015]

32 Wilkins, Mira (1986). Japanese Multinational Enterprise Before 1914. The Business History Review 60(2). p. 201

33 Wood, William Allen, and Louis B. Ewbank. Modern Business Corporations, including the Organization and Management of Private Corporations, with Financial Principles and Practices, and Summaries of Decisions of the Courts Elucidating the Law of Private Business Corporations, and Explanations of the Acts of Promoters, Directors, Officers and Stockholders of Corporations.

developed and impulsed the growth of TNCs. The legislation of New Jersey, in order to attract corporate licensing fees, liberalized corporate regulatory statutes and thus authorized businesses incorporated in New Jersey to own stock in any other corporation. This New Jersey statute was a key point in the history of the USA business. After other states followed the suit corporations started to occupy a leading role in the industry of the country and finally in the world economy³⁴.

The Japanese TNCs began to appear since the late XIX century³⁵. For example, Mitsui and Co (Mitsui Bussan in Japanese) company, which is the first company of the general trading, was founded in 1876. Mitsui and Co imported raw cotton and machinery needed by the industry, provided financing, and acted as an agent for its export sales³⁶. In the late XIX and till 1914 Japan invested mainly in China and also in the USA. In 1881, fourteen Japanese trading companies had branches in New York, and thirty-one Japanese employees lived in the city as representatives of these firms³⁷. By 1914 Japan just like the USA was the leader in its region and more developed than nearby located countries. However, in the late XIX and early XX centuries when American and Japanese modern TNCs first appeared, Japan was far behind the United States in the industrialization process. Therefore, the main industry for Japanese early TNCs was a textile industry³⁸, mainly silk. However, the Japanese banks were quite successful. They started opening branches abroad in the late XIX century. In 1878, the first Indianapolis: Bobbs-Merrill, 1906. Available at <http://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t2697816m> [accessed February 02, 2015]

34 Stephens, Beth (2002). The amorality of profit: transnational corporations and human rights. *Berkeley Journal of International law*, 20(1). p. 11

35 Wilkins, Mira (1986). Japanese Multinational Enterprise Before 1914. *The Business History Review* 60(2). p. 199

36 Mitsui & Co. The 100 year history of Mitsui & Co., ltd., 1876-1976 (translated by T. I. Elliott). Tokyo, 1977. p. 325

37 Wilkins, Mira (1986). Japanese Multinational Enterprise Before 1914. *The Business History Review* 60(2). p. 218

38 Wilkins, Mira (1986). Japanese Multinational Enterprise Before 1914. *The Business History Review* 60(2). p. 228-230

National bank in Japan named the Dai Ichi Ginko opened a branch in Korea, in 1896 Osaka bank and Bank of Japan opened a branch in Formosa (Taiwan). In 1899 one fifth of the Bank of Taiwan's capital was subscribed by the Japanese government, the rest one was subscribed by Japanese private capital³⁹. Japanese companies were first ones in the region to involve in foreign direct investment. The first host regions were neighbor countries and due to the lack of natural resources the main spheres were textile and banking.

The development of TNCs in the late XIX – early XX centuries in Russian Empire shall not be omitted, because this country was one of the largest at that time. Besides this, its strategic geographic position turned the country into the kind of a bridge between Europe and Asia. However, in the late XIX – early XX centuries the Russian Empire was mainly a host country for European investment and there were no TNCs originating from this country.

The reason for this was a difficult procedure of incorporation. As it was mentioned before in the middle decades of the XIX century the European countries realized the benefits of incorporation and ensured it by means of legislation⁴⁰. However, the Netherlands, the Russian Empire, and Turkey maintained the concession system with prior approval of the charter of corporation⁴¹.

The concession was a special law (legal act) of the public (state or municipal) authorities entitling the particular private entity or person the right to engage in certain business activities. This law was often beyond the scope of the general legislation. It gave the entrepreneur special rights and guaranteed against possible changes in the terms of concessions without his consent⁴².

39 Wilkins, Mira (1986). Japanese Multinational Enterprise Before 1914. *The Business History Review* 60(2). p. 224

40 Owen, Thomas C. *The Corporation under Russian Law: 1800-1917: A Study in Tsarist Economic Policy*. Cambridge U.a.: Cambridge U, 1991. p. 4

41 Magadanov P. (2012). История возникновения корпораций до начала XX в. [History of establishment of corporations before XX century]. *Ars Administrandi*, issue 4. p.28.

42 Maksimov I. (2011). Присутствие концессионного иностранного капитала в экономике

The law adopted in 1836 ensured the concessions right which basically meant that the private firms were able to conduct business limited in scope and duration by the public authorities. The appropriate Ministry and the Committee of Ministers were to examine the charter of the company. After that the charter had to be approved by tsar (monarch of Russian Empire at the time). Questions regarding the change of activities, financing, capital raising, and many others had to be agreed with the government. The Russian Empire until the events of 1917 had not ensured the legal conditions under which it would be able to establish and develop corporations, to attract capital and expand the scope of operations⁴³.

On the contrary to the European countries, the Russian Empire did not have an incorporation procedure. The scope, the duration of business, the liability of owners and other particular features of the firm had to be approved and decided by the tsar. The legislation of the Russian Empire of that time did not allow to expand the private sector and, therefore, did not correspond to the changes in the world economy. This was the main obstacle for the national business which could not fix its position within the country and consequently could not expand abroad.

In spite of the fact that the concession procedure was uncomfortable and time-consuming, in the late XIX – early XX centuries the Russian Empire was a host country for foreign investment which was usually performed in the form of foreign concessions. For example, the German firm Siemens und Halske opened a factory in Russia in 1855⁴⁴. These concessions were very important for the economic development of the Russian Federation, России в конце XIX–начале XX вв. Историко-экономические исследования [Presence of the foreign concessional capital in the economy of Russia in the end of XIX – beginning of XX centuries. Historical-economic research]. Историко-экономические исследования [Historical and economic research Journal], 12 (1). p. 162

43 Magadanov P. (2012). История возникновения корпораций до начала XX в. [History of establishment of corporations before XX century]. *Ars Administrandi*, issue 4. p. 26-30

44 Peterson, M. J. (2008). Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering. Background reading. p. 108. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]

particularly their presence was crucial in the sense of regional economic development. For example, a significant role in the economy of the Tsaritsyn city was played by Tsaritsynsky gun factory, a foreign concession of the British firm "Vickers Limited". Construction of the factory raised the importance of Tsaritsyn city on the national level⁴⁵.

Moreover, the concessions played a great role on the national level as well. In the sense of the "nationality" of the foreign capital, the Russian municipal concessions were distributed as follows: electricity and gas companies were the German capital; urban railways (trams) were the Belgian capital; phones were the Swedish-Danish capital⁴⁶.

The presence of foreign concession in the key structures of the country such as electricity and gas, railroads and communications shows their importance for the economy in general. The foreign concessions, in fact, were parts of the TNCs which parent companies were located in Europe. Thus, the Russian Empire was the important part of the development of first modern TNCs in the late XIX-early XX centuries.

The first phase in the growth of TNCs was very important. By 1914, there were several thousand manufacturing TNCs and hundreds of mining or plantation TNCs; the assets owned by TNCs comprised approximately one-third of all foreign investment in the world (the other two-thirds were bank loans to foreign customers or investor purchases of bonds issued by companies or governments in another country)⁴⁷.

45 Streshenets I. (2012). Иностраный капитал в оружейном производстве Царицына в начале XX века [Foreign capital in the gun production of Tsaritsyn in the beginning of XX century]. Вестник ВолГУ [Herald of Volgograd State University], 9 (10). p. 115

46 Maksimov I. (2011). Присутствие концессионного иностранного капитала в экономике России в конце XIX–начале XX вв. Историко-экономические исследования [Presence of the foreign concessional capital in the economy of Russia in the end of XIX – beginning of XX centuries. Historical-economic research]. Историко-экономические исследования [Historical and economic research Journal], 12 (1), p. 164

47 Peterson, M. J. (2008). Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering. Background reading. p. 1-2. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]

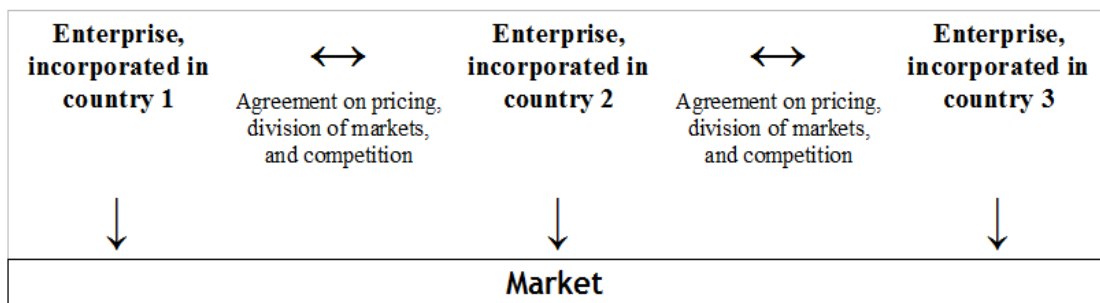
1.2. Second period: new challenges for transnational corporations, World Wars and political instability

The second generation of TNCs took a gap between two World Wars. This period is characterized by the continued development of the TNCs. However, in comparison with the late XIX – early XX centuries, the development was at slower rate due to the general instability in the world during this period, caused by the war disasters and the Great Depression⁴⁸.

Governments tried to deal with the instability through currency controls and higher tariffs, which led to fracturing of the world into separate currency blocs and hindered international trade and investment. Companies still collaborated, but preferred doing so through international cartels in which separate companies agreed on pricing and division of markets among themselves rather than through direct ownership⁴⁹.

Img.1. The difference between international cartel and TNC

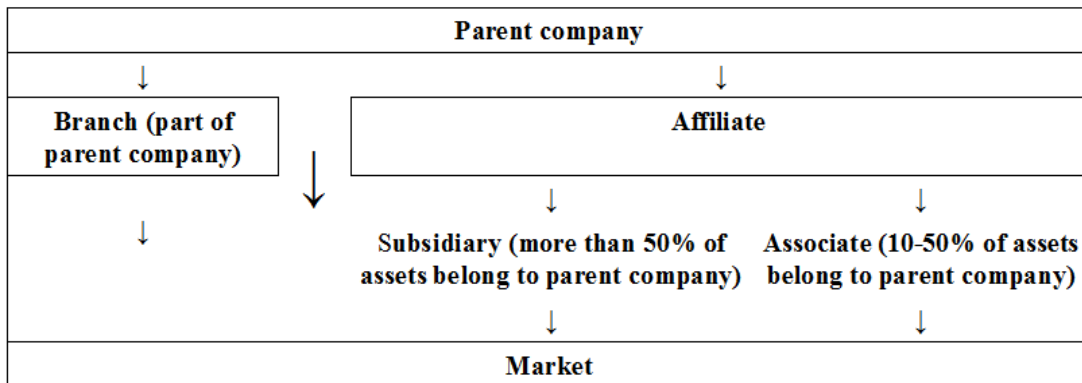
International cartel



TNC structure according to UNCTAD

⁴⁸ Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 12

⁴⁹ Peterson, M. J. (2008). *Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering*. Background reading, p. 1-2. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]



Moreover, the political situation of that period also influenced dramatically the development of TNCs. The revolution of 1917 in the Russian Empire and creation of the USSR brought the huge territory that occupied almost 1/6 of the Earth's inhabited land of 22,4 million sq. km outside the cross-border business flows and closed it for foreign investment. In the late 1920s – the beginning of 1930s after the change of political power in the country the foreign concessions, which used to take a significant part in the economy of the Russian Empire, were forced to leave the region. S. Zakharov mentions among the particular reasons lack of clear monetary and credit policy, continuous government monitoring, unfriendly judicial and local authorities, prejudice against Soviet citizens employed in a managerial work in the concessions, imprecise wording in the concession agreements, which eventually led to a breach of contractual terms and made work of concession companies unprofitable, etc.⁵⁰. Revolutionary government in Mexico took over foreign-owned assets in mining, oil, railways, to make them into state-owned enterprises. The growing nationalism made foreign-owned companies be targeted in many countries⁵¹. The changing political situation in the world put some territories out of TNCs' scope.

This period is also characterized as a time for TNCs to start dealing with the production

50 Zakharov S. Концессионная политика советского государства на урале в 20-е годы [Concessional policy of the Soviet country in Ural in 1920s]. Yekaterinburg, 2000

51 Peterson, M. J. (2008). Multinational corporations in transnational accountability. International dimensions of ethics education in science and engineering. Background reading, p. 1. Available at www.umass.edu/sts/ethics [accessed January 31, 2015]

of arms and military equipment in order to meet the military needs of the countries engaged in wars⁵². For example, Mitsui and Co., the first Japanese company of general trade became also a major arms importer⁵³. Even those TNCs that were not engaged in producing military equipment were likely to produce the products needed for military purposes.

During the second period of the TNCs' development, the XIX century model of international economic relations collapsed. The consequences of two World Wars and the Great Depression had the enormous impact on the economy and investment. The political situation of that time defined crucially the direction future business development: even though it was not favorable for TNCs, it opened new perspectives which marked the next stage of their growth.

1.3. *Third period: decolonization and new markets for expansion*

Many researchers agree that the third phase of TNCs' development takes its turn in the period after the end of World War II. Peter Muchlinski stresses the important role of the USA in the beginning of this period. American TNCs experienced a rapid growth since the end of the Second World War till the 1960s. During this period, they did not experience any appreciable international competition from countries other than Britain. The USA firms were in a favorable position to expand into overseas markets whether through exports or direct investment⁵⁴. In particular, the USA investment opened for Latin American economies the period of import-substituting industrialization. This meant the formation of a significant manufacturing sector with its entrepreneurial class, professional and technical group and industrial proletariat, as well as the necessary and ancillary government and private financial, marketing and educational agencies by the middle of the 1950s in large countries of the region.

52 Polyakov V. and Schenin R. *Мировая экономика и международный бизнес* [World economy and international business]. 5th ed. Moscow. 2008. p. 46

53 Mitsui & Co. *The 100 year history of Mitsui & Co., ltd., 1876-1976* (translated by T. I. Elliott). Tokyo, 1977. p. 325

54 Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 15

Besides this, the USA economy experienced changes in its structure. Government intervention expanded considerably within the USA, contributing to fast development of science and technology, this helped to produce large business conglomerates⁵⁵. The TNCs of the third generation were distributors of scientific and technical achievements in science and industry (nuclear energy, electronics, etc.). In the middle of the XX century, while Europe was still coming over the economic consequences of World Wars, the USA economy developed into the most powerful country in the capitalist world⁵⁶.

A significant change in the relationships between TNCs and the host countries happened after the independence of the colonies. The new states claimed that they were to have the exclusive right to exercise sovereignty over their natural resources. The position of TNCs in these countries was not favorable due to their involvement in the destabilization of countries and violation of human rights. Consequently in the period following World War II European investors suffered expropriation and nationalization of their TNCs in Algeria, Argentina, Bolivia, Brazil, Burma, Ceylon, India, Indonesia, Iran, Libya, Nigeria, Peru and other newly independent countries⁵⁷. Even though this period was contradictory transnational business kept general tendency for growing.

1.4. Fourth period: scientific and technological progress, increasing competition in the global market

Some researches include the period from 1970 till 1990 into the third phase of TNCs

55 Moran, Theodore H. and United Nations. Transnational Corporations and Management Division. Governments and transnational corporations. Edited by Theodore H. Moran. Routledge London; New York, 1993. p. 68

56 Polyakov V. and Schenin R. *Мировая экономика и международный бизнес* [World economy and international business]. 5th ed. Moscow. 2008. p. 46

57 Amao, Olufemi. *Corporate Social Responsibility, Human Rights, and the Law: Multinational Corporations in Developing Countries*. Milton Park, Abingdon, Oxon: Routledge, 2011. pp. 20-21

growth⁵⁸. However, others consider the period from 1970 till the end of XX century as another separate period in the development of the TNCs due to the fact that it has certain specific features such as strengthening global economic ties and the increasing competition on the market, accelerated process of mergers and acquisitions⁵⁹.

This period is remarkable due the European integration, which changed the global economic pattern. The European Communities⁶⁰ brought European countries to close economic integration, which helped to cope with the consequences of war. The following period of the 1960s is called as “a period of economic growth” for the European countries while the 1970s are called “a growing Community”⁶¹. The outward foreign direct investment of the European countries during these periods grew significantly. For example, the foreign direct investment outflows of the United Kingdom increased from 700 millions of US dollars in 1960 to 1 166 millions of US dollars in 1970; the foreign direct investment outflows of the Federal Republic of Germany increased from 116 millions of US dollars in 1960 to 686 millions of US dollars in 1970. The United Kingdom kept the position of the main investor among European countries. However, it did not show any significant rise as investment recipient, while some other European countries strengthened their positions as host countries. For example, foreign direct investment inflows into Italy' economy grew from 197 millions of US dollars in 1960 to 606 millions of US dollars in 1970⁶². During this period, the western Europe became alongside with the USA the main investor and also the new host region for investment.

The USA kept strengthening its position as well. The foreign direct investment outflows

58 Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 18. He calls the period between 1970 and 1990 “the period of renewed international competition”.

59 Polyakov V. and Schenin R. *Мировая экономика и международный бизнес* [World economy and international business]. 5th ed. Moscow. 2008. p. 46

60 The European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community

61 On the website of the European Union at http://europa.eu/about-eu/eu-history/index_en.htm [accessed January 18, 2015]

62 UNCTC (1973). *Multinational corporations in world development*. New York

from this country grew from 1 674 millions of US dollars to 4 765 millions of US dollars in a decade, from 1960 to 1970. By 1971, the USA was the major source of foreign direct investment outflows. In 1978, the USA was also the major host country foreign direct investment. By 1971, the USA was the world leader in terms of the amount of the largest industrial corporations (358 corporations). Second place was taken by Japan (74 corporations), the United Kingdom was on the third place with 61 corporations. The following 8 positions in the ranking were occupied by European countries. The Western Europe was the origin for 163 corporations in total⁶³. These economies (the USA, Japan, and Europe) are still major home countries for TNCs in the world.

This period is also known for the rapid development of the Asia-Pacific region. The inflow of foreign direct investment into Southeast Asia and Oceania quintupled from 531 millions of US dollars in 1970-72 to 2,4 billions of US dollars in 1978-80. The Asia-Pacific region became the new “growth-pole” of the global economy⁶⁴.

At the end of this period, several states with a closed planned economy started moving in the way of cross-border business cooperation. The dissolution of the USSR led to the formation of new 15 independent countries, which had started receiving their first foreign investment inflows in 1992 – 1993⁶⁵ and later became a prominent host region for many TNCs⁶⁶.

In general, the decade from 1970 to 1980 was marked by the fast growth of cross-border investment flows. The foreign direct investment inflows grew from 10 billions of US

63 UNCTC (1988). *Transnational Corporations in World Development: Trends and Prospects*. New York

64 Kowalewski, D. (1987). *Transnational Corporations and Asian Inequality*. *Pacific Affairs*, 60(4). p. 578. <http://doi.org/10.2307/2759184>

65 UNCTAD (1997). *World Investment Report*. *Transnational Corporations, market structure and competition policy*. New York and Geneva. pp. 3030-309. Available at http://unctad.org/en/docs/wir1997_en.pdf [accessed February 20, 2015]

66 The most prominent host countries were the ones, rich with natural resources, in particular oil and gas (Russian Federation, Kazakhstan, Azerbaijan)

dollars in 1970 to 50 billions of US dollars in 1984⁶⁷.

This period was also marked by the accelerating process of mergers and acquisitions, which gave a birth to the most powerful TNCs. A good example is the Bank of Tokyo-Mitsubishi UFJ. In 1996, the Mitsubishi Bank and the Bank of Tokyo merged to form the Bank of Tokyo-Mitsubishi. The combination of the Mitsubishi Bank's extensive network of domestic branches and the Bank of Tokyo's overseas strength created Japan's largest bank. In the beginning of the next century in 2002, the Sanwa Bank and the Tokai Bank along with the Toyo Trust & Banking Co. merged into the United Financial of Japan. Later in 2006, the Bank of Tokyo-Mitsubishi and the United Financial of Japan merged to form the Bank of Tokyo-Mitsubishi UFJ. Today, the Bank of Tokyo-Mitsubishi UFJ is Japan's largest bank and one of the world's largest banks, with offices in 40 countries besides Japan⁶⁸.

The fourth period of TNCs' development was formed under conditions of continuing scientific and technological progress. At the same time, it was shaped by the strengthening global economic ties and increasing competition in the global market, which caused the acceleration of the mergers and acquisitions process. As a result, some of the TNCs enlarged significantly and concentrated the enormous amount of capital and production. These specific characteristics prove that the period from 1970 till the late XX century should be considered as a separate phase of TNCs' development.

1.5. Concluding remarks

The XX century covered four generations of the TNCs and gave an incredible impulse to the development of this business form. Within this short period of only one century, TNCs actively contributed to the formation of global capital centralization tendencies, to the

67 UNCTC (1988). *Transnational Corporations in World Development: Trends and Prospects*. New York. p. 75

68 On the website of Mitsubishi UFJ Financial Group at <http://www.bk.mufg.jp/global/aboutus/origins/index.html> [accessed February 09, 2015]

integration of production, and to the formation of global market. Eventually, they became one of the most important actors of the world economy. As it was noticed earlier, the XIX century is famous for introducing the basic corporate law (Western Europe and the USA), which effect could hardly be overestimated. It formed a modern business in a way we know it now. H. Hansmann and R. Kraakman identify limited liability and legal personality as basic legal features of the business corporation, which are caused by the demands of the modern large business enterprises⁶⁹. Obviously, possibility to incorporate freely under the single legal act (not a monarch's charter) facilitated business activities. The limited liability for investors gave corporations an opportunity to attract a great amount of capital. As explained Joel Bakan, the genius of the corporation as a business form, and the reason for its remarkable rise was and is its capacity to combine the capital, and thus the economic power, of unlimited numbers of people⁷⁰.

Consequently, the changes in legislation of the countries of Western Europe and the USA in the middle of XIX century ensured the development of the domestic business and led to further expansion of activities abroad. Legal prerequisites were as important for the growth of TNCs as the economic ones. In this context, the good example is the Russian Empire. This country had brilliant economic prerequisites, it had huge labor market, rich natural resources, strong farming, and necessary educational background. However, in the late XIX – the early XX centuries it was completely not ready for legislative changes that would encourage business initiatives⁷¹. The inability to develop business contributed negatively to the economic development and most probably even played its part in the change of political regime. In XX

69 Kraakman, Reinier H. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. Oxford: Oxford UP, 2004

70 Bakan, Joel. *The Corporation*. London: Constable, 2005. Quoted in Elwell, Frank W. *Sociocultural Systems: Principles of Structure and Change*. Edmonton: Au, 2013. p. 153

71 The detailed problems of corporations under Russian law are described in: Owen, Thomas C. *The Corporation under Russian Law: 1800-1917: A Study in Tsarist Economic Policy*. Cambridge U.a.: Cambridge U, 1991

many strongest TNCs mainly originated from countries, which were first to develop the basic corporate law.

CHAPTER II

STATUS OF TRANSNATIONAL CORPORATIONS IN INTERNATIONAL LAW

SUMMARY: 2.1. Analysis of definition. - 2.2. Problem of international legal personality of transnational corporations. - 2.3. Most common informal types of transnational corporations. - 2.4. Concluding remarks.

2.1. Analysis of definition

In the XX century the development of TNCs was so rapid and significant that in 1973 the United Nations Economic and Social Council entrusted the “Group of Eminent Persons” in order to advise on the nature and activities of TNCs and their role and impact on the development process. According to the data presented by the Group of Eminent Persons, the total value of international production controlled by TNCs in 1974 exceeded that of international trade. By that time the spread and growth of these business conglomerates had been outstanding, and in many countries, outside the centrally planned economies they had significantly increased their share of national output⁷². The Group of Eminent Persons made recommendations that led to the establishment of a permanent Programme on Transnational Corporations in 1974 in order to create the forum for deliberations on issues that are related to TNCs. The Programme was carried out by the United Nations Commission on Transnational Corporations till 1992⁷³.

⁷² UN Group of Eminent Persons (1974). *The Impact of Multinational Corporations on Development and on International Relations*. U.N. Doc. E/500/Rev. 1, St/ESA/6

⁷³ UNCTAD (2014). *List of publications on Foreign Direct Investment and transnational corporations (1973-2003)*. New York and Geneva. p. ii. Available at http://unctad.org/en/Docs/ite20041_en.pdf [accessed October 15, 2014]

The main period in TNCs development was XX century, that is why this business form is relatively new and there is no definite and complete theory of TNCs. Even the name and definition of this business form are still a subject for discussion.

The term “corporation” (universitas; also corpus or collegium) was originally derived from Roman law. According to Roman law at the time of Justinian, the term “corporation” referred to the states (even though the state was not a subject to the civil law; the imperial treasury did have rights of ownership and other civil rights and obligations, and could sue and be sued in the ordinary courts), municipalities (they had right to own property and make contracts, to receive gifts and legacies, to sue and be sued), and also to private associations, including organizations for maintaining a religious cult, burial clubs, political clubs, and guilds of craftsmen or traders (the extent of their rights depended on privileges and liberties granted by the emperor)⁷⁴.

Later with the development of incorporation procedure and limited liability concept this legal form was adapted for the purposes of business. In the beginning of the XX century W. A. Wood gave a “corporation” the following definition: According to contemporary practices, a corporation is an association of natural persons, or of other legally constituted persons (other corporations), authorized by law to act as a unit, under a corporate name, for the accomplishment of certain definite and prescribed purposes. It is a “person” constituted by law, separate and distinct from its stockholders, and, in a certain sense, is a citizen⁷⁵.

In the XX century with the development of the cross-border business activity some

74 Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, MA: Harvard UP, 1983. p. 215

75 Wood, William Allen, and Louis B. Ewbank. *Modern Business Corporations, including the Organization and Management of Private Corporations, with Financial Principles and Practices, and Summaries of Decisions of the Courts Elucidating the Law of Private Business Corporations, and Explanations of the Acts of Promoters, Directors, Officers and Stockholders of Corporations*. Indianapolis: Bobbs-Merrill, 1906. p. 1. Available at <http://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t2697816m> [accessed February 01, 2015]

corporations became involved in the foreign direct investment and since that time were named in the scientific and journalistic literature “transnational” or “multinational” corporations.

The history of the definition of this form of business took several decades. For the first time the term “multinational” in relation to a corporation was used by David Lilienthal, who, in April 1960, gave a paper to the Carnegie Institute of Technology on “Management and Corporations 1985” which was later published under the title “The Multinational Corporation” (MNC). Lilienthal defined multinational corporations as “corporations... which have their home in one country but which operate and live under the laws and customs of other countries as well”⁷⁶.

The UN Group of Eminent Persons in 1974 used the term “multinational corporations” for business conglomerates, which owned or controlled production or service facilities outside the country in which they were based and which were not always incorporated or private; but could be also co-operatives or state-owned entities⁷⁷.

United Nations Center on Transnational Corporations (UNCTC) in its first report of 1973 named “UN Dept of Economic and Social Affairs, Multinational Corporations in World Development” (first paragraph of the Chapter I) explained why the term “multinational corporation” was preferred. The UNCTC pointed out that the term “enterprise” was more preferable than “corporation” as it clearly included a network of corporate and non-corporate entities in different countries joined together by the ties of ownership. However the “corporation” term was adopted due to its common usage. The “multinational” meant that the activities of these “corporations” involved more than one nation. The activity in this case could refer to assets, sales, production, employment, or profits of foreign branches (part of an enterprise that operates abroad) and affiliates (enterprise under effective control by parent company: subsidiaries or associates). It was noted in the report that even though many

⁷⁶ Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. p. 5

⁷⁷ UN Group of Eminent Persons (1974). *The Impact of Multinational Corporations on Development and on International Relations*. U.N. Doc. E/500/Rev. 1, St/ESA/6

corporations themselves preferred the terms “transnational” or “international”, the term “multinational” was adopted as in a broad sense it covered all enterprises control assets – factories, mines, sales offices and the like – in two or more countries. This definition (“multinational corporation”) was believed to have the advantage that no important aspect of the phenomenon (e.g. finance or service) or of the problem (e.g. questions associated with nationally-oriented enterprises or small firms) was arbitrarily excluded⁷⁸.

Researches of that time tended to use the term “multinational corporation” or “multinational enterprise”. The definitions, though varied. For example, according to J. Dunning, multinational enterprise was a company executing foreign direct investment, as well as receiving profits in more than one country⁷⁹.

R. Vernon supposed that such institute as a multinational enterprise due to its complexity and diversity cannot be characterized as having clear goals. It is mainly a coalition of interests, whose members cooperate in a number of the areas to achieve common goals⁸⁰.

V. Perlmutter marked as one of the main factors necessary for enterprise for being qualified as a multinational corporation (which is also called “multinational firm” in his work) the level of global management, i. e. the ability of managers to think globally and manage the company in a global manner⁸¹.

Some researchers even tried to use as qualifying factor for a multinational corporation a number of countries, in which the corporation operates.

For example, according to R. Matthews, a multinational corporation was the one which had large and wide branched operations in other countries, considerable own production

78 UNCTC (1973). *Multinational corporations in world development*. New York. p. 4

79 Dunning, John H. *Economic Analysis and the Multinational Enterprise*. London: Allen & Unwin, 1974. p. 1

80 Vernon, R. (1968). *Economic Sovereignty in Bay*. Foreign Affairs. p. 11

81 Perlmutter, H.V. (1969). *The Tortuous Evolution of the Multinational Corporation*. Columbia Journal of World Business. pp. 17-18

facilities and carried out its activities not less than in six countries⁸².

While J. Fayerweather supposed that for the multinational corporation it was enough to operate in more than two countries⁸³.

So, it is obvious that the term “multinational corporation” (with some variations like “multinational enterprise” or “multinational firm”) was preferred in the beginning of 1970s by international institutions (like UNCTC) and many researchers.

However, in 1976 UNCTC started using the term “transnational” instead of “multinational”. In its report “Information on transnational corporations: preliminary report of the secretariat” of 1976 it was admitted though that there is no rigorous definition of a TNC and generally it is synonymous with the agent of foreign direct investment and exercises some degree of control in foreign enterprises⁸⁴.

In 1992-1993 the Programme on Transnational Corporations was first transferred from UNCTC to the United Nations Department of Economic and Social Development and later to the United Nations Conference on Trade and Development (UNCTAD). Now it is implemented by UNCTAD's Division on Investment, Technology and Enterprise Development. The UNCTAD keeps using the term “transnational corporations” and gave it the following definition: “TNCs are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake”⁸⁵.

82 Matthews, R. A. (1970). *The Multinational Corporation and the World of Tomorrow*. Toronto : Canadian Institute of International Affairs, 29 (3-4), 1970.-P. 12

83 Fayerweather, John. *International Business Management: A Conceptual Framework*. New York: McGraw-Hill, 1968. p. 13

84 UNCTC reports from 1976 till 1992. Available at <http://unctc.unctad.org/data/ec1011a.pdf> [accessed January 26, 2015]

85 On the website of United Nations Conference on Trade and Development at [http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx) [accessed January 27, 2015]

The Draft United Nations Code of Conduct on transnational corporations (version 1983) which was actually never approved proposed two possible definitions of TNCs: “The term “transnational corporation” as used in this Code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others” or “The term "transnational corporation" as used in this Code means an enterprise whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others”⁸⁶.

Thereby, the “transnational corporations” term is adopted by the United Nations Organization (UN) to define the cross-border business associations in a broad sense.

It is necessary to point out that the economists, however, tend to use the term “multinational enterprises” and not “transnational corporations”. Particularly the Organization for Economic Cooperation and Development (OECD) in its Guidelines for Multinational Enterprises, which were adopted in 1976 and then have been reviewed 5 times, uses term “multinational enterprises”. In the very first version of this document the “multinational enterprises” were defined as those that usually comprise companies or other entities whose

86 UNCTAD (1996). International Investment Instruments: A Compendium. Volume I. Multilateral Instruments. New York and Geneva. 1996. p. 151. Available at http://unctad.org/en/docs/dtci30vol1_en.pdf [accessed December 15, 2014]

ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others⁸⁷.

In the last version of 2011 the definition has not been changed much and the up-to-date definition of the “multinational enterprises” given by the OECD sounds as: “These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed”.

Besides this the institutions dealing with the social impact of TNCs tend to use the “multinational enterprise” term as well. The Tripartite declaration of principles concerning multinational enterprises and social policy of 1977 gave such a definition to the “multinational enterprises”: “Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned”⁸⁸.

87 OECD (1976). Guidelines for Multinational Enterprises. Available at <http://mneguidelines.oecd.org/text/> [accessed January 27, 2015]

88 International Labour Organization (2002). Tripartite Declaration Of Principles Concerning Multinational Enterprises And Social Policy. International Labour Organization (ILO): Tripartite Declaration Of Principles Concerning Multinational Enterprises And Social Policy. International Legal Materials, 41(1), pp. 186–201. Available at <http://www.jstor.org/stable/20694222> [accessed January 27, 2015]

There is no decision has been made on the unified name for the business of new formation. There are several reasons for that. Firstly, many institutions, organizations, and researchers worldwide work on different aspects connected with such businesses. Secondly, the scope of activities of these new business conglomerates is very broad and involves various areas of the world economy. Thirdly, in spite of the dynamic and fast growth, these corporations are relatively new part of the economy, therefore the theory on them is not complete and definite. It is obvious that the definitions given by different institutions are similar in general. Modern definitions of “transnational corporations”, “multinational corporations”, “multinational enterprises” refer to the business form that operates in more than one country, consists of the parent company or companies that take control over companies, so-called branches and/or affiliates (subsidiaries and/or associates) in foreign countries. The term “transnational corporation” is the newest, though. It tends to be used more often than other terms. It is adopted by the United Nations, the organization which contribution in the survey and research of TNCs has probably been the most significant. Therefore, the term “transnational corporation” will be used for the purposes of this work.

At the same time it is necessary to say that due to legal nature of TNCs, the term “corporation” does not seem appropriate. In fact, from the legal point of view TNC is not a single entity, but rather a system of separate legal entities. Therefore, such term as “corporation” could be replaced by, for example, “group” or “alliance” which would be more close to the nature of this business form.

2.2. Problem of international legal personality of transnational corporations

It is obvious that the concept of TNC as a single unit exists in economic science because the activities of TNCs shape the world trade and have a significant impact on the economy indices. At the beginning of this century, TNCs controlled 870 000 foreign affiliates and

employed directly more than 53 million workers in their foreign affiliates around the world⁸⁹.

TNC as a unit is an important concept in political science. Many TNCs are more powerful economically than some countries where their affiliates operate. For example, in the beginning of the XX century, some of largest TNCs (such as ExxonMobil and General Motors) were comparable to economies of such countries as Chile or Pakistan in terms of value added⁹⁰. TNCs influence in some certain aspects the policy performed by developing countries.

The approach of other sciences to TNC also implies it is a single unit. For example, TNCs are investigated in sociology. It is not surprising. The amount of people employed by TNCs exceeds the population of some countries. Therefore, the activities performed by the TNCs influence the social aspects of different countries.

However, from the standpoint of legal science, TNC is not a unit. As it was noticed earlier TNC is an organization that usually consists of a parent company and affiliates and/or branches.

According to UNCTC, a foreign branch is a part of an enterprise that operates abroad while an affiliate is an enterprise under effective control by a parent company and could be either a subsidiary (when parent company owns majority or at least 25 percent control of the voting stock) or an associate (when parent company owns less than 25 percent control of the voting stock)⁹¹.

89 UNCTAD (2003). Forty years of UNCTAD research on FDI by Torbjorn Fredriksson. 12 (3). New York and Geneva. p. 8. Available at http://unctad.org/en/Docs/iteiit35v12n3a1_en.pdf [accessed February 20, 2015]

90 UNCTAD (2003). Forty years of UNCTAD research on FDI by Torbjorn Fredriksson. 12 (3). New York and Geneva. p. 8. Available at http://unctad.org/en/Docs/iteiit35v12n3a1_en.pdf [accessed February 20, 2015]

91 UNCTC (1973). Multinational corporations in world development. New York. pp. 4-5. However, the approaches of some TNCs in defining the amount of voting control needed for affiliates are different. In the Annual Report 2013 of the Agfa-Gevaert Group it is stated that an associate is an entity in which the company has significant influence which is presumed to exist when the company holds between 20% and 50% of the voting power of another entity. While a subsidiary is an entity which company controls, i.e. has the power to govern the financial and operating policies of an entity so as to

Therefore, from the legal standpoint, a foreign affiliate is a foreign legal entity, established in accordance with the foreign law and permitted to operate on the territory of the host country while an affiliate of the TNC is a national legal entity, established under the law of the host country.

Thus, for the modern legal science legal personality of a TNC is basically reduced to the legal personalities of legal entities comprising the structure of this TNC.

For example, affiliates of a TNC are dependent on the parent company economically, however, from the legal standpoint they are separate legal entities, which nationalities are identified according to the legislation of the country in which they are incorporated.

From this perspective, the term “transnational corporation” is most probably not appropriate, as it does not reflect the nature of these conglomerates, which consist of several legal entities, separately incorporated in various countries. In this situation most probably the term “corporation” shall be replaced by for example the term “group”, which would reflect the absence of legal incorporation of the conglomerate as one entity and show that it consists of several legal entities.

J.-P. Robé noticed that even though the economic or political reality of the existence of enterprises such as IMB, Toyota, Elf Aquitaine and others is not questioned by anyone, the enterprises themselves do not exist as such in positive law⁹². A characteristic feature of TNC is the disparity between the economic content and the legal form when a production unit is formalized by legal multiplicity⁹³. TNCs occupy important positions in the world economy and international business. The economic, political and many other sciences admit the unified

obtain benefits from its activities (without any precise amount of voting shares). Agfa-Gevaert Group (2013). Annual Report. Available at http://www.agfa.com/movies/annual_report_2013/pdf.pdf [accessed February 15, 2015]

92 Teubner, Gunther. *Global Law without a State*. Aldershot: Dartmouth, 1997. p. 52. Available at http://works.bepress.com/jean-philippe_robe/3 [accessed February 20, 2015]

93 Попова А. *Международное частное право. Краткий курс* [International private law. Short course]. St.Petersburg, 2009. p. 78

nature of TNC, however, the concept of TNC has no legal content, and the legal science does not recognize it as a unit.

In order to answer the question, whether a TNC has an international legal personality, it is necessary to identify the features of the subject of international law.

According to Advisory Opinion of the International Court of Justice of 11 April 1949, the subject of international law is capable of possessing international rights and duties, capacity to maintain its rights by bringing international claims⁹⁴.

This is the traditional approach to the criteria of legal personality. It has been modified in different ways by some researchers⁹⁵, but still the constant criterion for international legal personality is the capability to possess rights and duties.

It is obvious that TNCs do not have any rights and obligations under international law since their activity is regulated at the international level only by “soft law”, which will be discussed later in this chapter. The “soft law” is not a law in the strict sense of the word. At the same time in binding sources of international law, the legal status of TNCs is not defined. Therefore, TNCs do not meet the criteria of the subject of international law.

Thus, from the position of strict logic the absence of international legal personality of TNCs seems right. However, it is difficult to deny the evidences of TNCs' “international” character. It seems that the traditional theory in the frame of which only states and international organizations are subjects of international law does not correspond anymore to the reality. As V. Chetail notices, even though the state is the primary subject of international

94 Reparation for injuries suffered in the service of the United Nations. Advisory Opinion, International Court of Justice. April 11, 1949. p. 9. Available at <http://www.icj-cij.org/docket/files/4/1835.pdf> [accessed December 10, 2015]

95 For example, according to D. Feldman, international personality shall meet the following criteria: 1. possession by the participant of its own international rights and duties in relation to other international person; 2. participation in international legal relations; 3. autonomous will of the participants of international legal relations. Feldman, David (1985). *International Personality*. 191 Recueil ADI 1985, part III. pp. 358–359

law in every sense of this word, it must contend with a multitude of other international actors, including multinational enterprises, international organizations, non-governmental organizations, and individuals. In this context, public international law is no longer a neutral instrument of adjustment between sovereign states⁹⁶.

Such non-correspondence of international law theory to reality seem to be well reflected in the words of Immanuel Kant: “...the theory might be incomplete, and can perhaps be perfected only by future experiments and experiences ... It is, therefore, not the fault of the theory if it is of little practical use in such cases. The fault is that there is not enough theory”⁹⁷.

Thus, the traditional concept of legal personality in international law most probably has to be improved or extended. It is needed to say that some researchers proposed theories that recognize TNCs as subjects of international law or some different type of law designed to replace the international law in a certain way. The most famous theory is the one created by Ph. C. Jessup. According to his position, the international law is not able to regulate the very broad range of events and activities that go beyond the boundaries of one state. Nevertheless, they shall be somehow regulated. This is how the concept of transnational law was born. According to this theory, the transnational law includes private and public international law as well as other rules that do not fully fit into standard categories⁹⁸. As a consequence, the actors of transnational law are states, international organizations, corporations, individuals and whoever could enter such cross-border relations. Thereby, due to this theory, a TNC has legal personality in the frame of transnational law, which includes international law.

96 Chetail, Vincent (2013). *The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward. Unity and Diversity of International Law. Essays in Honour of Prof. Pierre-Marie Dupuy*, pp. 105-130, D. Alland, V. Chetail, O. de Frouville & J.E. Vinuales, eds., Martinus Nijhoff, 2014. Available at <http://ssrn.com/abstract=2364450> [accessed March 15, 2015]

97 Kant, Immanuel, and Hans S. Reiss. *Kant's Political Writings*. Cambridge, England: University Press, 1970. p. 61

98 Jessup, Philip C. *Transnational Law*. New Haven: Yale UP, 1956. p. 113

A theory proposed by W. Friedmann in his work “The changing structure of international law” is also interesting. The author argues that the international law develops on three different levels:

1) the international law of coexistence of sovereign states, i. e. classical theory of international law, which determines the existence of states, regulates diplomatic relations between states and solution of international conflicts;

2) the international law of cooperation at the universal level, which contains the set of legal rules governing the universal human interests. This includes both international law and national law of the various states;

3) the international law of cooperation within regional groups⁹⁹.

Due to this theory, TNCs have legal personality in the frame of international law of cooperation and, therefore, in the frame of the international law in general.

Even though the aforementioned theories try to solve the problem of the international legal personality of TNCs there are some certain minuses that shall be mentioned. In fact, transnational law does not constitute a separate legal system, it does not create any new norms, it is basically a conglomerate of legal rules taken from the national law of various states and international law. Besides this, the main minus of the theories, in my opinion, is that even if the theory of transnational law or the theory of international law of cooperation are accepted the legal personality of TNC as an entity would not be still resolved, because states and international organizations enter into relationships (for example, investment agreements) with certain legal entity that is a part of TNC, not with TNC as a unit. From the logical standpoint, this certain legal entity, and not TNC as a whole, would become a subject of transnational law or international law of cooperation, for example. Therefore, TNC as a unit would not anyways have legal personality as long as from the legal standpoint it is not a unit, but a group of legal

⁹⁹ Friedmann, Wolfgang. *The Changing Structure of International Law*. New York: Columbia UP, 1964. p. 251

entities.

2.3. Most common informal types of transnational corporations

It is obvious that currently existing legal forms of incorporation do not meet the needs of such conglomerates as TNCs. Therefore, the forms in which several legal entities, composing one single TNC, operate are legally informal. It is worth to review these operational forms in order to get a clearer image of TNCs' nature. According to P. Muchlinski, there are three types of TNCs (equity based corporate groups): the Anglo-American “pyramid”, the European transnational mergers and the Keiretsu¹⁰⁰.

The first type implies that a parent company exercises control over its wholly or majority-owned subsidiaries.

The second type falls in the middle between “pyramid” type and joint ventures of independent enterprises. This type includes a single holding company structure and a joint holding company structure. In the first case, the founding parent companies create a single holding company with a unified management board which controls the national subsidiaries. In the second case, the founding parent companies create a twin holding company with a joint management committee based on joint shareholding which controls the national subsidiaries.

The third type - “Keiretsu” - means a group with the inner cross-shareholdings which form a some kind of a network. The control is performed by means of management conferences. This is a typical Japanese type of TNC. It was created in the second half of the XX century to replace “Zaibatsu” (ancient family monopolies)¹⁰¹.

A good example of the first type is the USA originating Ford. In 2013 it had several

¹⁰⁰ P. Muchlinski calls them equity-based multinational enterprises. As it was mentioned in the first chapter the foreign direct investment leading to at least 10 per cent of equity ownership is one of the main characteristics of TNCs. Therefore, such equity-based multinational enterprises could be called TNCs. Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Oxford UP, 2007. pp. 56-65.

¹⁰¹ Lobo, Rita. Keiretsu for a new age. World finance web-site. June 26, 2012. Available at <http://www.worldfinance.com/strategy/keiretsu-for-a-new-age> [accessed on February 15, 2015]

majority-owned subsidiaries with the percentage of ownership ranging from 50% to 100% (such as Changan Ford Automobile Coporation, Ltd; FordSollers Netherlands B. V.; AutoAlliance (Thailand) Co., ltd; Getrag Ford Transmission GmbH; Ford Romania S. A.; OE Connection LLC; Forso Nordic AB; FFS Finance South Africa (Pty) Limited)¹⁰².

The Agfa-Gevaert Group, which is one of the world leaders in the imaging industry, is an example of the second type. The history of this TNC starts in the XIX century with the establishment of two firms Aktiengesellschaft für Anilinfabrikation (AGFA) in 1867 in Berlin and L. Gevaert en Cie in 1894 in Antwerp. 1964 was the year of the merger between Agfa and Gevaert. Two new partners each held a 50% stake: Gevaert-Agfa N.V. in Mortsel (Belgium) and Agfa-Gevaert AG in Leverkusen (Germany)¹⁰³.

Nowadays the ultimate parent of the Agfa-Gevaert Group is Agfa-Gevaert NV located in Belgium, which had in 2013 about 100 subsidiaries around the world with the amount of voting shares ranging from 51% to 100%. Among the subsidiaries it is possible to distinguish three sub-business groups such as Agfa Graphics (subsidiaries are Agfa Graphics Ltd. (United Kingdom), Agfa Graphics Ireland Ltd. (Ireland), Agfa Graphics S.r.l. (Italy), etc.), Agfa HealthCare (subsidiaries are Agfa HealthCare - Knightsbridge GmbH (Austria), Agfa HealthCare AG (Switzerland), Agfa HealthCare Colombia Ltda. (Colombia), etc.) and Agfa Specialty Products (Agfa Materials Corporation (USA), Agfa Materials Japan Ltd. (Japan), Agfa Materials Ltd. (United Kingdom), etc.). Even though the whole business is ruled by the twin holding company, the structure itself seems to be multistage. There is even the concept of the “jointly controlled entity” in the accounting policies of the Agfa-Gevaert Group, which means an entity over whose activities the Group has joint control, established by contractual

102 Ford Motor Company (2013). Annual Report. U.S.A. p. 95. Available at <http://corporate.ford.com/content/dam/corporate/en/investors/reports-and-filings/Annual%20Reports/2013-annual-report.pdf> [accessed February 15, 2015]

103 On the website of the Agfa-Gevaert Group at http://www.agfa.com/co/global/en/internet/main/about_us/history/index.jsp [accessed April 22, 2015]

agreement¹⁰⁴.

Even though transnational mergers are pointed out as the European type of equity-based corporate group, they take place as well in other parts of the world. For example, in 1998, the merger between Daimler AG (Germany) and Chrysler Corporation (the USA) resulted in new automobile group DaimlerChrysler AG which had the subsidiaries around the world and existed till 2009¹⁰⁵. Another good example is the merger between the Bank of Tokyo-Mitsubishi and the United Financial of Japan in 2006 described in the first chapter.

As for the third type, it is necessary to point out that the “Keiretsu” replaced another form of business named “Zaibatsu” in the second half of the XX century. Among main reasons for that was art. 9 of the Japanese Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947), which said: “(1) Any corporation, which may be to cause excessive concentration of economic power through holding of the stocks (including shares held by a member; the same shall apply hereinafter) of other corporations in Japan, shall not be established. (2) A corporation (including a foreign corporation; the same shall apply hereinafter) shall not become a corporation which may be to cause the excessive concentration of economic power in Japan through acquisition or holding of the stocks of other corporations in Japan. (3) The term "excessive concentration of economic power" in the preceding two paragraphs means a situation in which the extreme largeness of comprehensive business scale over a considerable number of fields of business of a corporation and its subsidiaries and other corporations in Japan whose business activities are controlled by the said corporation through holding of their stocks, the remarkably strong power of the said corporations to influence other entrepreneurs due to transactions pertaining to the

104 Agfa-Gevaert Group (2013). Annual Report. Belgium. pp. 69, 142-144. Available at http://www.agfa.com/movies/annual_report_2013/pdf.pdf [accessed February 15, 2015]

105 On the website of Daimler AG at <http://www.daimler.com/company/tradition/history-of-daimler> [accessed April 25, 2015] In 2009 Daimler AG relinquished the percent stake which it had initially retained in Chrysler Corporation.

funds of, or the occupancy of influential positions over a considerable number of interrelated fields of business by the said corporations, has a large effect on the national economy and impedes the promotion of fair and free competition. (4) Any other corporation in Japan of which majority of voting rights of all stockholders is held by a corporation and any one or more of its subsidiaries, or by any one or more subsidiaries of a corporation, shall be deemed as a subsidiary of the said corporation”¹⁰⁶.

The provisions of this article did not allow a single corporation to have the majority of shares in other enterprises. Therefore, the net structure with small cross-shareholdings was the most appropriate for the Japanese TNCs. J. R. Lincoln after having compared the Mitsubishi Group with Daimler-Benz (Germany) of late 1980’s pointed out that the Mitsubishi group was absolutely different from the certainly-managed corporate group of Daimler-Benz. It was composed loosely of independently managed firms bound together by a net of usually small cross-shareholdings, employee transfers, overlapping boards, and common business culture. The only formal group-wide “governance” structure was the shacho-kai - the weekly meeting councils of member company presidents (called kinyu-kai or “Friday club” in Mitsubishi’s case). However, “Keiretsu” played a significant role in the international broad-based partnerships between Mitsubishi and Daimler-Benz in manufacturing, distribution, extraction, and other spheres¹⁰⁷.

Another example of the “Keiretsu” type would be Mitsui. At first, it was a family-run business which traces could be tracked to the late XIX century as it was mentioned in the first chapter. Later as many other “Zaibatsu” it was transformed into “Keiretsu”, the center of which was the Mitsui Bank. It later merged with Tayo-Kobe Bank to form Sakura. Sakura in its turn

106 Japanese Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, No. 54. art. 9, unofficial translation of UNCTAD is available at http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_ncl_Japan_en.pdf [accessed February 16, 2015]

107 James R. Lincoln. (2009). Strategic Alliances in the Japanese Economy: Types, Critiques, Embeddedness, and Change. IRLE Working Paper No. 189-09. Available at <http://irle.berkeley.edu/workingpapers/189-09.pdf> [accessed February 25, 2015]

merged with Sumitomo Bank, the central bank in another “Keiretsu” which resulted in Sumitomo Mitsui Banking Corporation (SMBC)¹⁰⁸, which nowadays has 15 branches around the world, and is the center of a bigger “Keiretsu” named Sumitomo Mitsui Financial Group¹⁰⁹.

2.4. Concluding remarks

TNCs are complicated corporate groups organized in certain operational forms. These forms explicitly show strong economic ties and interdependence between separate parts of TNC. At the same time, these forms are not recognized as a unit from the legal standpoint. In the legal science, the legal personality of a TNC is basically reduced to the legal personalities of the entities comprising the structure of this TNC. Affiliates of a TNC may be heavily dependent on the parent company, however, from the legal standpoint, they are separate legal entities, which nationalities are identified according to the legislation of the country in which they are incorporated. In this question the economy is far ahead of the law.

In this regard, the reasonableness of the terms “transnational corporation” or “multinational enterprise”, which are adopted by the United Nations and other international organizations, seems rather doubtful. The term “group” seems to be more appropriate, as it would reflect the absence of legal incorporation of a TNC as one entity and show that it consists of several legal entities.

The regulation of TNCs could hardly be performed with the legislative instruments of one country. Parts of TNC are located in different countries, but still are economically interdependent and perform activities as a unit. At the same time, TNCs are also hard to be

108 Lobo, Rita. Keiretsu for a new age. World finance web-site. Web June 26, 2012. Available at <http://www.worldfinance.com/strategy/keiretsu-for-a-new-age> [accessed May 1, 2015]

109 The Sumitomo Mitsui Banking Corporation is a “core member” of Sumitomo Mitsui Financial Group and “works together with other members of the Group to offer customers highly sophisticated, comprehensive financial services”. This formulation suggests the SMBC is the center of “Keiretsu”. On the website of Sumitomo Mitsui Financial Group at <http://www.smfg.co.jp/english/aboutus/profile/smbc.html> [accessed May 1, 2015]

regulated at the international level due to the absence of international legal personality. International regulative standards can only impose obligations upon subjects of international law and, therefore, cannot directly address TNCs. The theories mentioned in this chapter (transnational law theory, international law of cooperation theory) tried to solve the problem of the international legal personality of TNCs but have serious weak points. In this situation, the main purpose of international standards is to harmonize national legislation of adhering countries in order to work out single approach towards regulation of TNCs. However, it seems hard to perform due to the large disparity between modern countries in terms of economic development and political regimes. The detailed analysis of existing international regulative instruments will be made in the next chapter.

CHAPTER III

REGULATION OF TRANSNATIONAL CORPORATIONS' ACTIVITIES

SUMMARY: 3.1. Self-regulation trend: from corporate social responsibility towards corporate social accountability. - 3.2. International standards for the regulation of transnational corporations. - 3.2.1 First attempts to codify the standards of foreign investment: from the League of Nations' Convention on the Treatment of Foreigners to the OECD Draft Convention on the Protection of Foreign Property. - 3.2.2. The OECD Guidelines for Multinational Enterprises: the most comprehensive government-backed code of conduct. - 3.2.3. Draft United Nations Code of Conduct on transnational corporations: unfulfilled grand promises. - 3.2.4. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: United Nations' attempt to establish guidelines for transnational corporations. - 3.2.5. Tripartite declaration of principles concerning multinational enterprises and social policy: contribution of the International Labor Organization into the regulation of transnational corporations. - 3.2.6. United Nations Global Compact: new approach towards the role of transnational corporations and their activities at international

level. - 3.3. Concluding remarks.

3.1. Self-regulation trend: from corporate social responsibility towards corporate social accountability

J. L. Siqueiros in the 1980s defined three main types of regulation of TNCs on the basis of the territorial scope¹¹⁰:

1. internal regulation which includes national legislation of host country and national legislation of home country,
2. bilateral regulation which includes agreements between host country and home country, agreements between host country and TNC,
3. multilateral regulation which could consist of uniform law, model or draft law, code of conduct, international treaty.

The above mentioned system of regulation seems to be reasonable in general. However, this “territorial” hierarchy should be adapted to main changes in the world. First of all, the second level of regulation shall include regulation within regional groupings, because tendency for regional integration has become increasingly popular in the past decades. Secondly, the hierarchy shall start with the social responsibility and accountability of TNCs, which could be considered as self-regulation. This concept has also become very popular lately.

The concept of corporate social responsibility is believed to be born in 1960¹¹¹. There are

110 Snyder, Frederick E., and Surakiart Sathirathai. *Third World Attitudes toward International Law: An Introduction*. Dordrecht: M. Nijhoff, 1987. p. 578

111 Richard T. De George believes the corporate social responsibility was born in 1960 as a response of big business to the public attack and criticism for such things as the exploitation of workers, child labor, pitifully low wages in less developed countries, etc. The USA Civil Rights Act of 1964 was the first legislative act which helped to develop the business ethics movement. De George, Richard T. (2005). *A history of business ethics*. Materials of Markkula Center for Applied Ethics. Available at <http://www.scu.edu/ethics/practicing/focusareas/business/conference/presentations/business-ethics-history.html> [accessed May 03, 2015]

However, according to Tricia D. Olsen, the initial phase of corporate social responsibility

many currently existing definitions of corporate social responsibility. However, they all seem to be coinciding to each other. The 37 definitions presented in the work of A. Dahlsrud allow to define the corporate social responsibility as a voluntary commitment of companies to behave ethically, contribute to sustainable economic development of countries, improvement of quality of life and respect of the employees, protection of environment, avoidance or minimization of the negative impacts of their operations¹¹².

The corporate social responsibility is some kind of self-discipline based on a voluntary basis. It comprises the voluntary codes of conduct and principles adopted by TNCs themselves. Even though this type of regulation does not put any legal responsibilities on TNCs, it seems to be well encouraged by the modern governments and international organizations.

In 1992, during the Earth Summit in Rio de Janeiro, the UN-sponsored recommendations on TNCs' regulation were rejected in favor of a voluntary self-regulation, which was proposed by a coalition of companies named the World Business Council for Sustainable Development. It was endorsed by the US, the UK and other western governments¹¹³.

development is widely viewed as unsuccessful due to the failure of creating either long-standing or widely agreed upon sets of standards. Olsen, Tricia D. (2013). The Business of Human Rights: Patterns and Remedies in Corporate Abuses in Latin America. Paper of American Political Science Association Conference Annual Meeting.

According to Christian Aid NGO, the modern corporate social responsibility was born during the 1992 Earth Summit in Rio de Janeiro, gave a great impulse to already existing concept of corporate social responsibility by attracting the attention of the governments international organizations and world community to it. Christian Aid NGO (2004). Behind the mask. The real face of corporate social responsibility. p. 2 Available at http://www.humanrights.ch/upload/pdf/050816_csr_behindthemask_2004.pdf [accessed May 03, 2015]

112 Dahlsrud, Alexander (2008). How corporate social responsibility is defined: an analysis of 37 definitions. *Corp. Soc. Responsib. Environ. Mgmt.* 15, 1–13 (2008). DOI: 10.1002/csr. Available at <http://onlinelibrary.wiley.com/doi/10.1002/csr.132/epdf> [accessed February 29, 2015]

113 Christian Aid NGO (2004). Behind the mask. The real face of corporate social responsibility. p. 5. Available at http://www.humanrights.ch/upload/pdf/050816_csr_behindthemask_2004.pdf [accessed May 17, 2015]

The results of the summit gave an impulse to the concept of non-binding voluntary self-regulation. The same year, the Business of social responsibility organization was created. It currently works with more than 250 of the world's most influential companies and describes its main aim as the acceleration of changes within business and promotion of the collaboration between companies and their stakeholders for the systemic progress towards a just and sustainable world¹¹⁴.

Two years later in 1994, the business leaders developed the Caux Round Table Principles for Business as a foundation for action for business leaders worldwide¹¹⁵. In 1996, the Corporate social responsibility Europe (former the European Business Network for Social Cohesion) was formed¹¹⁶. In 1997, the Global Reporting Initiative was established. It created a sustainability reporting guidelines, which aimed at encouraging the companies to publish the reports, which would reflect the economic, environmental and social impacts, caused by their daily activities¹¹⁷. In 1990, the Dow Jones Sustainability Indices were launched as the first global sustainability benchmarks, which tracked the stock performance of the world's leading companies in terms of economic, environmental and social criteria¹¹⁸.

It is obvious that the corporate social responsibility has been a popular trend since 1992. It gives grand promises in the field of TNCs regulation. For example, the Caux Round Table Principles for Business provide seven principles of business based on two ethical ideals, named

114 On the website of Business of social responsibility organization at <http://www.bsr.org/en/about/bsr> [accessed May 17, 2015]

115 On the website of Caux Round Table at <http://www.cauxroundtable.org/index.cfm?menuid=8> [accessed May 26, 2015]

116 On the website of the Corporate social responsibility Europe at <http://www.csreurope.org/history> [accessed May 26, 2015]

117 On the website of the Global Reporting Initiative at <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx> [accessed May 27, 2015]

118 On the website of the Dow Jones Sustainability Indices at <http://www.sustainability-indices.com/about-us/dow-jones-sustainability-indices.jsp> [accessed May 27, 2015]

Japanese kyosei (living and working together for the common good enabling cooperation and mutual prosperity to coexist with healthy and fair competition), and human dignity (sacredness or value of each person as an end, not simply as a mean to the fulfillment of others' purposes or even majority prescription). The principles are: 1. to respect stakeholders beyond shareholders; 2. to contribute to economic, social and environment development; 3. to build trust by going beyond the letter of the law; 4. to respect rules and conventions; 5. to support responsible globalization; 6. to respect the environment; 7. to avoid illicit activities. The Principles also include detailed Stakeholder Management Guidelines, covering each of the key stakeholder dimensions of ethical business practices: customers, employees, shareholders, suppliers, competitors, and communities. For example, according to these Guidelines, the responsibility of business towards employees include a wide range of principles, such as provision of jobs and compensation, which contribute to improved living standards; provision of working conditions, which protect each employee's health and safety, enhance each employee's well-being as citizens, family members, and capable and caring individuals; avoidance of discriminatory practices and provision of equal treatment, opportunity and payment regardless of gender, age, race, and religion; support of the employment of differently-abled people in places of work, where they can be productive; avoidance of illicit or abusive child labor practices; etc.¹¹⁹

Nowadays the concept of corporate social responsibility is widely respected on the governmental level. A good example is the European Union Council Resolution of 6 February 2003 on corporate social responsibility (2003/C 39/02). This legislation act provides the main principles of promoting corporate social responsibility among which the very first one is “recognition of the voluntary nature of corporate social responsibility”¹²⁰.

119 On the website of the Caux Round Table at <http://www.cauxroundtable.org/index.cfm?menuid=8> [accessed May 27, 2015]

120 European Union Council Resolution of 6 February 2003 on corporate social responsibility. Official Journal of the European Union. C 39/02, 18.02.2003

Even though the corporate social responsibility has been a popular trend lately, it is questionable whether the corporate social responsibility can be an effective instrument of TNCs' regulation. This doubt is expressed by many non-governmental organizations. Some consider the concept of self-regulation negatively¹²¹.

Others argue that even though the idea of the corporate social responsibility is positive, this type of regulation cannot fulfill its grand promises. The Christian Aid organization points out that some companies will take social responsibility only in case if they have to, i.e. if there is the regulation to make them do so. At the same time the organization notices that some companies use the corporate social responsibility as an effective PR instrument to the extent it brings profit to them (attracting customers, shareholders, etc.)¹²².

An extensive global survey found that two-thirds of people reported that they would like companies to contribute to social goals beyond shareholder wealth; another survey found that 52 percent of responders seek information about companies' corporate social responsibility records¹²³. In the last decades, several companies have found themselves the targets of campaigns by human rights, labor rights, religious or consumer organizations emphasizing

121 J. Karliner, and K. Bruno argue: "Governments in Rio [de Janeiro World Summit of 1992] embraced big business, allowing corporations to avoid a binding legal framework on their activities, opting instead for a voluntary approach to sustainable development. As a result, the first Earth Summit failed to confront the central corporate role in environment and development problems in any meaningful way. Instead, some of the worlds worst corporate polluters were given special access to the Earth Summit process, establishing a trend of UN-corporate collaboration that has intensified since that time". Karliner, Joshua and Bruno, Kenny (2002). USA: Corporate Responsibility vs. Accountability. International Herald Tribune. Available at <http://www.corpwatch.org/article.php?id=3110> [accessed May 29, 2015]

122 Christian Aid NGO (2004). Behind the mask. The real face of corporate social responsibility. p. 2. Available at http://www.humanrights.ch/upload/pdf/050816_csr_behindtheface_2004.pdf [accessed May 17, 2015]

123 Kitzmueller, Markus, and Jay Shimshack (2012). Economic Perspectives on Corporate Social Responsibility. *Journal of Economic Literature*, 50(1). p. 51. DOI: 10.1257/jel.50.1.51

allegations of human rights abuses¹²⁴. The biggest concern of non-governmental organizations and ordinary people is that TNCs merely try to persuade the society in following the corporate social responsibility principles in order to reduce the negative impact of such campaigns and to satisfy investors' and consumers' concerns.

The main argument of corporate social responsibility opponents is that this type of regulation is merely a tool to protect the reputation and general image of TNCs rather than the result of their consciousness.

The voluntary nature of corporate social responsibility reinforces doubts about its effectiveness. Sometimes even market forces are not strong enough to make TNCs take corporate social responsibility. TNCs are believed to self-report only when they expect that there will be consequences for non-compliance¹²⁵. In many parts of the world workers and local communities still experience the large number of abuses attributable to TNCs. At the same time traditional instruments for securing workers' rights, such as unionization, have weakened. The political trends that tend to reduce state intervention in the economy and increase the scope of private sector activity also contribute to the ineffectiveness of TNCs' self-regulation¹²⁶.

The phrase said by Lord Chancellor of England two centuries ago seems to be reasonable to a certain extent¹²⁷, as self-regulation should be based on consciousness which is

124 Office of the United Nations High Commissioner for Human Rights (2000). *Business and Human Rights: A Progress Report*. Geneva. p.4, Available at <http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf> [accessed June 28, 2015]

125 Santner, A. L. (2011). *Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future*. 43 *Geo. Wash. Int'l L. Rev.* p. 378. Available at <http://heinonline.org> [accessed June 28, 2015]

126 International Council on Human Rights Policy (2002). *Beyond Voluntarism. Human rights and the developing international legal obligations of companies*. p. 7. Available at http://www.ichrp.org/files/reports/7/107_report_en.pdf [accessed July 2, 2015]

127 Edward Thurlow (1731-1806) said: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?". Coffee, J. C. (1981). *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*. *Michigan Law Review*, 79(3), p. 386. Available at <http://doi.org/10.2307/1288201> [accessed February 28, 2015]

impossible to expect from a legal entity. The company is ruled by individuals, therefore the application of self-regulation depends on the consciousness of these human beings and, therefore, is not as unsuccessful as it was expected to be.

ENRON case is a good example of the failure of pursuing the corporate social responsibility. Corporation "ENRON" emerged in 1985 from the merger of two gas companies from Texas and Nebraska. In 1989 and within few years it became the largest trading gas company in the USA, with a huge network of foreign subsidiaries, which comprised 21000 employees in 40 countries. The management of this corporation developed and put into practice an elaborate scheme to conceal certain data not only from the public but also from shareholders and investors. This was done in order to distort the true financial position of the corporation which allowed to keep the prosperous image, the value of shares and a number of investment inflows and eventually led to the enrichment of the corporation's management. In 2001 further concealment of debts was impossible. The real amount of corporation's debt and losses became known which led to one of the largest bankruptcies in the world history with the sharp drop in the value of shares, dismissal of thousands of employees in the USA and abroad, loss of retirement savings¹²⁸.

Despite being accused in ineffectiveness, the corporate social responsibility is still a popular trend. Many modern TNCs try to develop their codes of conduct. The World Bank estimated that ten years later the Rio de Janeiro World Summit, in 2003, there were 1 000 codes of conduct in existence, developed by TNCs on a voluntary basis, depending on firms' business needs. Among TNCs having individual codes of conduct are BP p.l.c., Canadian Natural Resources Ltd., ChevronTexaco Corporation, Eni S.p.A., Exxon Mobil Corporation,

128 Li, Yuhao (2010). The case analysis of the scandal of Enron. *International journal of business and management*, 5 (10), 2010; Petrache, Ana-Maria (2009). The collapse of ENRON, a classic case of corporate social irresponsibility. *Investment and economic recovery international conference*; Daniels Fund Ethics Initiative. Is the CEO responsible and accountable for the Firm's ethical performance and the conduct of its employees. Debate paper. University of New Mexico

Galp Energia, SGPS, S.A., Marathon Corporation, Norsk Hydro ASA, Occidental Petroleum Corporation, Odebrecht S.A., Schlumberger Limited, Shell International Limited, Adidas-Salomon AG, Gap Inc., IKEA Services LEGO Company, NIKE, Inc., Pentland Group p.l.c., Phillips-Van Heusen Corporation, Pou Yuen Vietnam Enterprise, Ltd., Reebok International, Ltd., and many more¹²⁹.

Besides this, there are also codes of conduct designed by the groups of certain enterprises. For instance, the Code of Conduct is adopted by the Infant Nutrition Council Ltd, which is merely an association of the Infant Formula Manufacturers' Association of Australia and the New Zealand Infant Formula Marketers' Association¹³⁰. Another example is the Code of Practice of the International Federation of Pharmaceutical Manufacturers & Associations, which comprises leading international companies as well as national and regional industry pharmaceutical associations in both developing and developed countries¹³¹.

The codes of conduct designed by TNCs or associations of TNCs' on voluntary basis seem to be the most popular tool for implementing the corporate social responsibility. As K. Sikkink notices, such codes of conduct are often preemptive codes that respond to criticism of industry practices and try to ward off external regulation by showing that the industry is capable of regulating itself¹³².

However, due to the fact that there are no single requirements for codes of conduct, they

129 The World Bank Group (2003). Company codes of conduct and international standards: an analytical comparison. Part I , p. 2, Part II, p. 3. Available at http://siteresources.worldbank.org/INTPSD/Resources/Angola/Angola_CompanyCodesofConduct.pdf, and http://siteresources.worldbank.org/INTPSD/Resources/CSR/Company_Codes_of_Conduct.pdf [accessed March 10, 2015]

130 Infant Nutrition Council ltd. Code of Conduct. Available at <http://www.infantnutritioncouncil.com/about-us/> [accessed March 15, 2015]

131 International Federation of Pharmaceutical Manufacturers & Associations (2012). Code of Conduct. Available at http://www.ifpma.org/fileadmin/content/Publication/2012/IFPMA_Code_of_Practice_2012_new_logo.pdf [accessed March 15, 2015]

132 Sikkink, Kathryn (1986). Codes of conduct for transnational corporations: the case of the WHO/UNICEF code. *International organizations* 40 (4). p. 817

contain only those provisions that seem necessary to their authors. Therefore, the efficiency of such codes is doubtful. Even when such codes of conduct declare the respect for human and labor rights, protection of environment and contribution to economic and social development etc.¹³³, it is hard to check the compliance of real actions with these statements¹³⁴. The reality, in fact, may radically differ from what is declared in the code of conduct. The Nike Inc. activity is an example of such contradiction.

According to Nike Inc.'s Code of Conduct, the company appreciates the following principles:

- employment shall be voluntary. The contractor shall not use forced labor, including prison labor, indentured labor, bonded labor or other forms of forced labor. The contractor shall be responsible for employment eligibility fees of foreign workers, including recruitment fees.

- employees shall be age 16 or older. Contractor's employees shall be at least age 16 or

¹³³ See, for example, ENI code of ethics, available at http://www.eni.com/en_IT/governance/governance-model-policies/code-of-ethics/code-of-ethics.shtml; or Chevron Business Conduct and Ethics Code, available at http://www.eni.com/en_IT/governance/governance-model-policies/code-of-ethics/code-of-ethics.shtml, or Exxon Mobile Code of Ethics and Business Conduct, available at <http://corporate.exxonmobil.com/en/investors/corporate-governance/code-of-ethics-and-business-conduct/our-code>; or Adidas Group workplace standards, available at http://www.adidas-group.com/media/filer_public/2013/07/31/english_workplace_standards_en.pdf [all accessed March 16, 2015]

¹³⁴ For more detailed data on individual codes of conducts of different TNCs see the documents of the World Bank Group:

World Bank Group (2004). Company codes of conduct and international standards: an analytical comparison. Part II. Oil and gas, mining. Available at http://siteresources.worldbank.org/INTPSD/Resources/Angola/Angola_CompanyCodesofConduct.pdf;

World Bank Group (2003). Company codes of conduct and international standards: an analytical comparison. Part I. Apparel, footwear and light manufacturing, agribusiness, tourism. Available at http://siteresources.worldbank.org/INTPSD/Resources/CSR/Company_Codes_of_Conduct.pdf [all accessed July 15, 2015].

The authors though point out that it is just a comparison of policies declared by TNCs and not their real practices.

over the age for completion of compulsory education or country legal working age, whichever is higher. Employees under 18 shall not be employed in hazardous conditions.

- contractor shall not discriminate. Contractor's employees shall not be subject to discrimination in employment, including hiring, compensation, promotion or discipline, on the basis of gender, race, religion, age, disability, sexual orientation, pregnancy, marital status, nationality, political opinion, trade union affiliation, social or ethnic origin or any other status protected by country law.

- harassment and abuse shall not be tolerated. Contractor's employees shall be treated with respect and dignity. Employees shall not be subject to physical, sexual, psychological or verbal harassment or abuse.

- working hours shall not be excessive. Contractor's employees shall not work in excess of 60 hours per week, or the regular and overtime hours allowed by the laws of the manufacturing country, whichever is less. Any overtime hours shall be consensual and compensated at a premium rate. Employees shall be allocated at least 24 consecutive hours rest in every seven-day period.

- the workplace shall be healthy and safe. The contractor shall provide a safe, hygienic and healthy workplace setting and takes necessary steps to prevent accidents and injury arising out of, linked with or occurring in the course of work or as a result of the operation of contractor's facilities. The contractor shall have systems to detect, avoid and respond to potential risks to the safety and health of all employees¹³⁵.

The Nike Code of Conduct was created as a response to the report of the activist Jeff Ballinger published in 1991 which is known as first documented a low wages and poor working conditions in Indonesian factories¹³⁶. For more than two decades from that time

135 Nike Inc. (2011). Code of conduct. Available at http://www.nikeresponsibility.com/report/uploads/files/COC_CLS_-_Employment_is_Voluntary.pdf [accessed September 11, 2015]

136 Jeff Ballinger documented low wages and poor working conditions in Nike factories in

accusations of Nike for “irresponsible” corporate behavior occur periodically. In particular, Nike has been accused of physical abuse, forced labor, discrimination, low wages, etc.¹³⁷. In other words, the behavior of this company was opposite to the provisions of its code of conduct.

Business Insider UK claimed that Nike through posting its commitments, standards, and audit data as part of its corporate social responsibility reports solved its sweatshop problems and saved its image¹³⁸. In the light of continuing human rights breach by this company, it seems inappropriate to say that the problem of sweatshop was “solved”. However, the source might be right stating that the commitments, standards, and audit helped to save the image. That is why the main problem of corporate social responsibility is that TNCs might use it as a tool to create a positive image while serious problems keep to be alert.

TNCs nowadays are the main actors of this new transnational civil society and, therefore, perhaps the most effective problem-solving organizations in a capitalist society¹³⁹.

Indonesia. Ballinger, Jeff. How Nike Solved Its Sweatshop Problem. Business Insider UK. Web May 09, 2013. Available at <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5?IR=T> [accessed September 11, .2015]

137 For instance, see:

How Nike treats its Vietnamese workers. Workers' liberty. Web February 28, 2003. The source describes physical abuse and salaries lower than the minimum standard. Available at <http://www.workersliberty.org/node/11>;

Nike workers 'kicked, slapped and verbally abused' at factories making Converse. Daily Mail UK. Web July 13, 2011. The source describes physical abuse, low wages, discrimination etc. Available at <http://www.dailymail.co.uk/news/article-2014325/Nike-workers-kicked-slapped-verbally-abused-factories-making-Converse-line-Indonesia.html>;

Nike workers claim military paid to intimidate them. ABC News. Web January 15, 2013. The source describes labor forced by military personnel. Available at <http://www.abc.net.au/news/2013-01-15/nike-accused-of-using-military-to-intimidate-factory-workers/4465058> [all accessed September 10, 2015]

138 Ballinger, Jeff. How Nike Solved Its Sweatshop Problem. Business Insider UK. Web May 09, 2013. Available at <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5?IR=T> [accessed September 11, .2015]

139 Fitch, H. Gordon (1976). Achieving corporate social responsibility. The Academy of

Their influence on the modern world could not be overestimated. However, the self-regulation of these enterprises does not fit in the traditional legal theory, which adheres the states as lawmakers and does not even recognize the existence of TNCs. In the first part of XX century, law professor E. Ehrlich said: “The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time”¹⁴⁰. Therefore, some researchers argue that trans-nationalization and self-organization of civil society (TNCs are one of the results of such self-organization) would play a significant role in the transformation of international law and bring a challenge to the monopoly of state law-creation, precisely the capacity of states to produce effective norms¹⁴¹.

However, nowadays the real effectiveness of corporate social responsibility is still low. The corporate social responsibility had to be a grand event in the regulation of TNCs, but the time shows that it has serious disadvantages and TNCs seem to be unprepared for the proper implementation of it. Perhaps, the self-regulation would be an effective regulative tool in the future decades, but nowadays it definitely has to be accompanied by stronger regulation instruments.

The lack of corporate social responsibility's efficiency led to the creation of corporate social accountability, which implies that TNCs shall be legally obliged to follow business ethics and reduce the negative impacts of their activities in the economic, social, environment and other spheres. The term “corporate accountability” was endorsed by the international community at the 2002 World Summit on Sustainable Development¹⁴².

The corporate accountability refers to more confrontational or enforceable strategies of influencing corporate behavior. While corporate social responsibility is used to indicate

Management Review, 1(1). p. 46

140 Quoted in: Teubner, Gunther. Global Law without a State. Aldershot: Dartmouth, 1997. p. 3

141 Teubner, Gunther. Global Law without a State. Aldershot: Dartmouth, 1997. p. 49.

142 Morgera, Elisa (2012). From Corporate Social Responsibility to Accountability Mechanisms: The Role of the Convention on Biological Diversity. Edinburgh School of Law Research Paper No. 2012/06. p. 2. Available at <http://dx.doi.org/10.2139/ssrn.1995521> [accessed September 15, 2015]

voluntary approaches supported by market enforcement, corporate accountability means that corporate behavior is influenced by pressure exerted by social and governmental actors beyond the corporation itself. Such actors can adopt a range of strategies, including but not limited to the mobilization of legal mechanisms to enforce social standards¹⁴³.

In the beginning of XXI century, there have been taken certain steps in the way of ensuring the corporate accountability. In 2005, the Parliament of Great Britain approved the Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations 2005¹⁴⁴. These Regulations covered the companies, whose equity share capital had been included in the official list in accordance with the provisions of the Financial Services and Markets Act 2000 and which were officially listed in an European Economic Area State, or were admitted to dealing on either the New York Stock Exchange or the exchange known as Nasdaq. The Regulations imposed on these companies the obligation to present a Director's report and Operating and Financial Review every financial year.

One of the most important parts of these Regulations is the provisions covering TNCs. In particular, the Regulations substitute the section 234 of the 1985 Act ("Duty to prepare directors' report") by the following:

(2) For a financial year in which—

(a) the company is a parent company, and

(b) the directors of the company prepare group accounts,

the directors' report must be a consolidated report (a "group directors' report") relating, to the extent specified in the following provisions of this Part, to the company and its subsidiary undertakings included in the consolidation.

¹⁴³ Marshall, S. and Macdonald, K. What is corporate accountability. p.1, Available at <http://corporateaccountabilityresearch.net/files/2011/09/What-is-corporate-accountability.pdf> [accessed September 15, 2015]

¹⁴⁴ SI 2005/1011 The Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations 2005. Available at http://www.legislation.gov.uk/uksi/2005/1011/pdfs/uksi_20051011_en.pdf [accessed March 03 2015]

Besides this, Regulations supplement the 1985 Act by section 234AA (“Duty to prepare operating and financial review”) which says:

(3) For a financial year in which—

(a) the company is a parent company, and

(b) the directors of the company prepare group accounts,

the operating and financial review must be a consolidated review (a “group operating and financial review”) relating, to the extent specified in Schedule 7ZA, to the company and its subsidiary undertakings included in the consolidation.

Thus, in case a TNC's parent company is registered under UK law it must present annually a consolidated report and a consolidated review which will cover not only information related to the business activity of the parent company, but also the subsidiaries.

Notably, the Regulations demand companies to disclose the information related to their commercial activity, such as description of the principal risks and uncertainties facing the business, alongside with the environmental matters, information about the company's employees, information about social and community issues – the fields on which TNCs' activities usually have the most negative impact¹⁴⁵.

It is obvious that corporate social responsibility is not enough to regulate TNCs. There is an urgent need for governments' and international organizations' monitoring in order to hold liable TNCs neglecting or ignoring the negative consequences of their activities. The reports voluntarily published by TNCs on the basis of corporate social responsibility are usually all about the positive impact of their activities while the negative one is not disclosed or information about it is minimized. Therefore, legislated requirements for reporting on TNCs activities help the society to distinguish between truly responsible behavior, and manipulative

¹⁴⁵ Director's report shall include information relating to environmental matters and employee matters. Operating and financial review shall include information about environmental matters, company's employees, and social and community issues. SI 2005/1011 The Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations 2005

public relations¹⁴⁶.

The corporate accountability may be sometimes encouraged indirectly but still make corporations act responsibly. For example, several countries changed the requirements of investment policy performed by pension funds in the way, which stimulates TNCs interested in such the investment to act properly. France (2001 year), Belgium (2003 year), Germany (2001 year) and United Kingdom (1999 year) passed laws that require pension funds to disclose the extent to which they take ethical, social, and environmental information into account in constructing their investment portfolios¹⁴⁷.

In particular, the UK Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations of 1999 completed the investment principles with the following:

9A.—(1) An administering authority must, after consultation with such persons as they consider appropriate, prepare, maintain and publish a written statement of the principles governing their decisions about investments.

(2) The statement must cover their policy on—

(f) the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments¹⁴⁸.

The corporate accountability is a relatively recent concept. It seems that it was born due to the incapability of the corporate social responsibility to regulate TNCs' activities effectively

146 Taskforce on Business and Industry NGO (1997). *Minding our business: The role of corporate accountability in sustainable development*. Report to the UN Commission on Sustainable Development. Available at <http://isforum.org/tobi/accountability/mindbusiness97.aspx> [accessed 02 October, 2015]

147 Cynthia A. Williams and John M. Conley (2007). *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the U.K.* 31 *Wm. & Mary Env'tl. L. & Pol'y Rev.* 317. pp. 326-327

148 SI 1999/1849 Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations 1999. Available at http://www.legislation.gov.uk/uksi/1999/3259/pdfs/ukxi_19993259_en.pdf?text= [accessed March 03 2015]

in the frame of increasing globalization. H. Gordon Fitch notices that when the corporate social responsibility is not voluntarily accepted, it is likely to be forced upon the corporation through the extraorganizational model of government regulation¹⁴⁹.

However, some researchers express the opinion that the corporate accountability and the corporate social responsibility compliment each other. Just like the individuals in society need both morals and laws to guide their behavior, corporate social responsibility and corporate accountability are both necessary to guide TNCs' behavior¹⁵⁰. While corporate social responsibility is conduct that is encouraged, corporate accountability is behavior that is required. Thus, corporate social responsibility is a choice of business while corporate accountability is an obligation of government and civil society. At the same time, both these responsibilities are merely the first level regulation of TNCs, which is obviously not enough and has to be accompanied with the legal regulation of higher levels, such as regional and international ones.

3.2. International standards for the regulation of transnational corporations

The international regulation usually is higher than the regional one in traditional TNCs' regulation hierarchy. However, regional regulation, that is closely connected with the regional integration tendency that has been quite popular lately seems to have more perspectives in comparison with the international one in the future, and might become even more important. Therefore, in the frame of this work international regulation will be analyzed first.

3.2.1 First attempts to codify the standards of foreign investment: from the League of

¹⁴⁹ Fitch, H. Gordon (1976). Achieving corporate social responsibility. *The Academy of Management Review* 1(1). p. 46

¹⁵⁰ Taskforce on Business and Industry NGO (1997). *Minding our business: The role of corporate accountability in sustainable development*. Report to the UN Commission on Sustainable Development. Available at <http://isforum.org/tobi/accountability/mindbusiness97.aspx> [accessed 02 October, 2015]

Nations' Convention on the Treatment of Foreigners to the OECD Draft Convention on the Protection of Foreign Property

A TNC is usually a system of several legal entities, which separately are subjects of the national law of various states. However, it is difficult to regulate the activities of a TNC on the national level of one particular country, as economically TNC operates as a unit regardless of its legal multiplicity. Therefore, the reality necessitates regulation instruments of the international character. However, this necessity meets a reasonable question: how can such a regulation be implemented in the absence of international legal personality of TNCs?

Currently, the international regulation of various aspects of TNCs' activities is carried out by a sufficiently large number of international instruments, so-called soft law. It is necessary to bear in mind that the essential part of TNC is foreign direct investment. Therefore, the regulation of TNCs on the international level started with the idea of foreign investors' protection. The foreign investment in XX century mainly originated from developed countries as it is shown in the first chapter of this work. For the economies of countries-recipients, these foreign investment inflows were very important. However, the political situation in many of that states was unstable, and the legislation was not designed to serve the needs of the business.

The very first attempts to codify the standards for foreign investment were taken between two World Wars by the League of Nations agencies¹⁵¹. During the 1920s, the League of Nations held economic conferences, attempting to codify international property law¹⁵². In 1929, the League of Nations Committee drafted "Convention on the Treatment of Foreigners", which manifested the principle of national treatment in fiscal matters, regulating freedom of

151 Fatouros, A. A. (1961). An International Code to Protect Private Investment-Proposals and Perspectives. The University of Toronto Law Journal, 14(1). p. 79. Available at <http://doi.org/10.2307/825387> [accessed March 09, 2015]

152 Lipson, Charles. Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries. Berkeley: U of California, 1985. p. 75

circulation, residence, carrying on of trade, industries, exercise of civil, judicial, and succession rights¹⁵³. In 1930, the League of Nations held the Codification Conference in the Hague, which focused on three main subjects of public international law, including the responsibility of States for damage caused in their territory to the person or property of foreigners¹⁵⁴. In 1931, the International Chamber of Commerce at its Washington Congress adopted a resolution stating that the Chamber considers it necessary to frame international legal Conventions expressly guaranteeing the protection of private property belonging to nationals of Contracting States on the territory of the other States¹⁵⁵. However, all these inter-war period attempts to codify the standards concerning foreign investment were not successful.

After the Second World War studies of the question became more active. In 1948, the United Nations Conference on Trade and Employment, which was held in Cuba, resulted in Havana Charter for an International Trade Organization. The Charter admitted the importance of the foreign investment for the global economy and the fact that it should be stimulated¹⁵⁶.

153 Cutler, J.W (1933). The Treatment of Foreigners: In Relation to the Draft Convention and Conference of 1929. *The American Journal of International Law*, 27 (2). pp. 226-227

154 According to G. H. Hackworth, the League of Nations considered the three main subjects of international public law were nationality, territorial waters, and responsibility of states for damage caused in their territory to the person or property of foreigners. Hackworth, G. H. (1930). Responsibility of States for Damages caused in their Territory to the Person or Property of Foreigners: The Hague Conference for the Codification of International Law. *The American Journal of International Law*, 24(3). p. 500.

155 Snyder, E. (1961). Protection of Private Foreign Investment: Examination and Appraisal. *The International and Comparative Law Quarterly*, 10(3). p. 472

156 Havana Charter for an International Trade Organization March 24, 1948. United Nations Conference on Trade and Employment, Final Act and Related Documents. U.N. Doc. E/Conf. 2/78. United Nations publication, Sales No. 1948.II.D.4 (hereinafter cited as Havana Charter)

Art. 1 of Havana Charter: THE PARTIES to this Charter...pledge themselves, individually and collectively, to promote national and international action designed to attain the following objectives: (2) To foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment.” Article 12: “The Members recognize that: (a) international investment, both public and private, can be of great value in promoting economic development and reconstruction, and

The Charter consisted of provisions recognizing the investment-receiving countries' rights of regulating the foreign investment inflows¹⁵⁷. On the other hand the Charter's position on the protection of foreign investors' rights was not clear. That is why the Charter was not in the interests of the countries which had significant investment outflows. The Charter eventually was not ratified by several signatory states and never became effective¹⁵⁸.

Another important conference on international law issues was Ninth Conference of American States held in Colombia in 1948. The result of this Conference was the Economic Agreement of Bogota which like the Havana Charter emphasized the importance of foreign investment and contained provisions regulating it. The Agreement's provisions on investment issues were one of the main parts of the document (the whole IV Chapter was dedicated to private investment) while the Havana Charter paid much less attention to this question. Agreement of Bogota reaffirmed the rights of countries receiving investment inflows to regulate coming foreign capital. In fact, art. 24 of the Agreement repeated some conditions of the Havana Chapter¹⁵⁹. However, the Agreement, unlike the Havana Charter, contained

consequent social progress.

157 Art. 12 of Havana Charter: (1) (c)...a Member has the right: (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies; (ii) to determine whether and, to what extent and upon what terms it will allow future foreign investment; (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments; (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments.

158 Fatouros, A. A. (1961). An International Code to Protect Private Investment-Proposals and Perspectives. *The University of Toronto Law Journal*, 14(1). p. 80. Available at <http://doi.org/10.2307/825387> [accessed March 09, 2015]

159 Economic Agreement of Bogota May 2, 1948. *La Novena Conferencia Internacional Americana*. Available on the Organization of American States website at <http://www.oas.org/juridico/spanish/tratados/a-43.html> [accessed October 24, 2015] (hereinafter cited as the Economic Agreement of Bogota)

Art. 24 of the Economic Agreement of Bogota: The states reaffirm their right to establish, within a system of equity and of effective legal and judicial guarantees: a) measures to prevent foreign investments from being utilized directly or indirectly as an instrument for intervening in national politics

provisions protecting the investors rights¹⁶⁰, including the prohibition of discriminatory actions leading to deprivation of property rights, payment of fair compensation for legal expropriation. Even though this time the interests of foreign investors were protected, the Agreement of Bogota was not efficient. A. Fatourus argued that the provisions of the Agreement had lost their importance due to the constant use of indefinite terms such as “appropriate”, “unjustifiable”, “just” or “equitable”¹⁶¹.

Later, in 1956 ECOSOC expressed its position on foreign investment, which implied that governments of capital-exporting and capital-importing countries are both interested in continuing the efforts to develop international confidence conducive to private investment, in conformity with the principles of the Charter of the United Nations¹⁶².

The 1957, is famous for the International Industrial Development Conference, convened in San Francisco, which main theme were the preferred means of stimulating the flow of private capital to the less developed areas of the world, and also for the "International

or for prejudicing the security or fundamental interests of the receiving countries; and b) Standards with respect to the extent, conditions, and terms upon which they will permit future foreign investments.

160 Art. 22 of the Economic Agreement of Bogota: ... They [the States] recognize that the international flow of such capital will be stimulated to the extent that nationals of other countries are afforded opportunities for investment and security for existing and future investment. Foreign capital shall receive equitable treatment. The states, therefore, agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied. The States shall reciprocally grant appropriate facilities and incentives for the investment and reinvestment of foreign capital, and they shall impose no unjustifiable restrictions upon the transfer of such capital and the earnings thereon. The States agree not to set up within their respective territories unreasonable or unjustifiable impediments that would prevent other States from obtaining on equitable terms the capital, skills and technology needed for their economic development.

161 Fatouros, A. A. (1961). An International Code to Protect Private Investment-Proposals and Perspectives. The University of Toronto Law Journal, 14(1). p. 81. Available at <http://doi.org/10.2307/825387> [accessed March 09, 2015]

162 ECOSOC. Resolution 619 (XXII) Financing of Economic Development. U.N. Doc. E/2929. 22nd Sess., Official Records, Supp. No. 1, Aug. 17, 1956

Convention for the Mutual Protection of Private Property Rights in Foreign Countries", which was drafted by the "Advance the Protection of Foreign Investments", an organization of businessmen in West Germany¹⁶³. In 1958, another convention on foreign investments was drafted by the group of European international lawyers headed by Sir Hartley Shawcross¹⁶⁴. This initiative alongside with the one of the "Advance the Protection of Foreign Investments" mentioned earlier were combined into a single draft convention which was later taken up by OECD and led to the OECD Draft Convention on the Protection of Foreign Property, which, however, failed to be ever signed¹⁶⁵. The OECD Council Resolution of October 12, 1967, highlighted that the Draft Convention "embodies recognized principles relating to the protection of foreign property" and that it "will be a useful document in preparation of agreements on the protection of foreign investment"¹⁶⁶. Thus, even though the Draft Convention on the Protection of Foreign Property was not signed it made a certain contribution to the part of the international law dealing with foreign investment.

Despite being unsuccessful, the first attempts to codify the standards of foreign investment played a significant role in international law. They raised the question. In other words, they gave an impulse for making research and analysis on how foreign investment could be regulated by international law, prepared an international ground for dialog on this topic, formulated general concepts of essential obligations and rights of both investors and recipients of investment, and paved the way for future more detailed and advanced documents such as OECD Guidelines on multinational enterprises and UN Draft Code of Conduct for

163 Miller, Arthur S. (1959). Protection of Private Foreign Investment by Multilateral Convention. *The American Journal of International Law*, 53(2). pp. 371-372

164 Alvarez, Jose E. and Sauvart, Karl P. *The Evolving International Investment Regime: Expectations, Realities, Options*. Oxford University Press. 2011. p. 33

165 Wälde, T. W. (1996). *The Energy Charter Treaty: An East-west Gateway for Investment and Trade*. Kluwer Law International Ltd. p. 210

166 Newcombe, Andrew and Paradell, Lluís (2009). *Law and Practice of Investment Treaties: Standards of Treatment*. Kluwer Law International BV. p. 30

transnational corporations.

3.2.2. The OECD Guidelines for Multinational Enterprises: the most comprehensive government-backed code of conduct

In the early 1970s, the wide-scale unethical and illegal activities performed by TNCs urged the United Nations, International Labor Organization (ILO) and Organization for Economic Cooperation and Development (OECD) to focus on regulation of their behavior¹⁶⁷. In particular in June 1976, the OECD held the Meeting at the Ministerial level, which aim was to extend cooperation among member countries in the area of international investment and TNCs. This meeting resulted in the adoption of the Guidelines for multinational enterprises as part of OECD Declaration and Decisions on International Investment and Multinational Enterprises. The document consists of recommendations addressed by governments to TNCs operating in or from adhering countries. Since the initial adoption, the OECD Guidelines have been reviewed five times. The latest update took place in 2011 with the active participation of business, labor, non-governmental organizations, non-adhering countries and international organizations¹⁶⁸.

The purpose of the OECD Guidelines' recommendations is to promote positive contributions by enterprises to economic, environmental and social progress in countries, from which a large share of international direct investment originates and which are home to many largest TNCs. The document provides voluntary principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized norms. The countries adhering to the OECD Guidelines make a binding

167 Salzman, James (2000). Labor rights, globalization and institutions: the role and influence of the Organization for Economic Cooperation and Development. 21 Michigan Journal of International Law. p. 788

168 OECD (1976). OECD Guidelines for multinational enterprises. Foreword. p. 5. Available at <http://mneguidelines.oecd.org/about/> [accessed March 08, 2015]

commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. According to the “Concepts and Principles” of OECD Guidelines, governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the OECD Guidelines wherever they operate, while taking into account the particular circumstances of each host country¹⁶⁹. The Guidelines stress out that the very first obligation for TNCs is obeying domestic laws. The Guidelines do not overrule the national law and regulation and should be implemented to the extent which does not place them in violation of domestic law¹⁷⁰.

In other words, the OECD Guidelines are the kind of a “soft law”, and TNCs are not legally obliged to follow its recommendations.

The OECD Guidelines (last edition of 2011) consist of two parts. The first one contains recommendations for responsible business conduct in a global context, including preface and following chapters: I. Concepts and principles; II. General policies; III. Disclosure; IV. Human rights; V. Employment and industrial relations; VI. Environment; VII. Combating bribery, bribe solicitation and extortion; VIII. Consumer interests; IX. Science and technology; X. Competition, XI. Taxation.

The most important chapter of this first part seems to be the “General Policies” which contains the specific recommendations for TNCs, that are necessary to be listed in full:

A. Enterprises *should*:

¹⁶⁹ OECD Guidelines for multinational enterprises, 2011. Available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> [accessed March 08, 2015]

There are 44 countries that adhered the OECD Guidelines for multinational enterprises, including: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, USA. Data from <http://www.oecd.org/daf/inv/mne/48004323.pdf> [accessed March 08, 2015]

¹⁷⁰ “Concepts and principles” of the OECD Guidelines for multinational enterprises, 2011.

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the internationally recognized human rights of those affected by their activities.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labor, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are

addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

13. In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

15. Abstain from any improper involvement in local political activities¹⁷¹.

It is clear that the character of these recommendations is rather broad. It is common for the “soft law” standards. At the same time the evolution of recommendations is obvious. In particular in 1976 the OECD started with 9 recommendations. In 2000 it came with 11 updated ones. Ten years later in 2011 5 new recommendations were first introduced (from 10 to 14). The most important and concrete among them is risk-based due-diligence recommendation which was especially approvingly met¹⁷².

171 Chapter II (“General policies”) of the OECD Guidelines for multinational enterprises, 2011

172 Ruggie, John G. (2010). Remarks at OECD Investment Committee. Paris. Available at <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-OECD-Investment-Committee-4-Oct-2010.pdf>

According to professor J. G. Ruggie, Special Representative of the UN Secretary-General for Business and Human Rights: “2....If a company does not know, and cannot show, that it respects human

In 2011 the “General Policies” were complimented with two more proposals for TNCs which are less important than recommendations:

B. Enterprises are *encouraged* to:

1. Support, as appropriate to their circumstances, cooperative efforts in the appropriate form to promote Internet Freedom through respect of freedom of expression, assembly and association online.

2. Engage in or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management while ensuring that these initiatives take due account of their social and economic effects on developing countries and of existing internationally recognized standards¹⁷³.

A chapter called “Human rights” was introduced in 2011 update of the OECD Guidelines. It contains recommendations for TNCs to respect human rights, to avoid causing or contributing to adverse human rights impacts, to seek ways to prevent or mitigate adverse

rights, then the claim that it respects rights is just that—a claim, not a fact. And making a claim that is not supported by facts can have bad consequences for the company and for stakeholders who rely on it being true. It is impossible for a company to know and show that it respects rights unless it has processes in place to assess and address the human rights risks of its activities and relationships. This isn’t a matter of law, but of logic. Of course, the scale and complexity of these processes will vary with the size of companies and the circumstances of their operations. 3. Heightened due diligence is required in weak governance zones, in areas affected by conflict, and where the human rights of vulnerable groups may be at particular risk... I welcome the efforts made in the proposed update of the Guidelines in these directions”.

Evan, John (2011). Responsible business conduct: Re-shaping global business. Columbia FDI perspectives 50. Available at http://ccsi.columbia.edu/files/2014/01/FDI_50.pdf [all accessed September 13, 2015]

J. Evans (General Secretary of the Trade Union Advisory Committee to the OECD (TUAC), the voice of labor at the OECD in 2011) agreed that due diligence principle is over-arching principle for responsible business conduct. He as well pointed out that update of 2011 in general delivered significant improvements in the content of the Guidelines.

173 Chapter II (“General policies”), Part I of the OECD Guidelines for multinational enterprises, 2011

human rights impacts, to have a policy commitment to respect human rights, to carry out human rights due diligence, etc.

Thus, the OECD Guidelines are a permanently developing document with the amendments introduced roughly each decade in order to meet the emerging concerns related to the activities of the TNCs in a corresponding period.

This Guidelines in spite of being “soft law” has the certain influence on the transnational society. M. Schekulin calls the OECD Guidelines “the most comprehensive government-backed code of conduct”¹⁷⁴.

The whole second part of the OECD Guidelines is dedicated to implementation procedures, which main part is National Contact Points idea. The OECD Guidelines were enlarged by provisions concerning the National Contact Points in adhering countries, including those that strengthen the importance of mediation and conciliation in 2011¹⁷⁵. The National Contact Points shall undertake promotional activities, handle inquiries and contribute to the resolution of issues that arise in connection with the implementation of the OECD Guidelines in specific instances, taking account of the procedural guidance, prescribed by the Guidelines¹⁷⁶.

The significant influence that OECD Guidelines have on the governments could be seen from the Badger case. The Badger Company, Inc. was founded in 1949. It dealt with the chemical, petrochemical, petroleum, pharmaceutical, food processing and fertilizer industries. In 1974, the Badger Company had a staff of almost 2000 worldwide with services and facilities

174 Schekulin, Manfred (2011). Shaping global business conduct: The 2011 update of the OECD Guidelines for Multinational Enterprises. Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment 47. Available at http://ccsi.columbia.edu/files/2014/01/FDI_47.pdf [accessed March 15, 2015]

175 Chapter IV (“Human rights”), Part I of the OECD Guidelines for multinational enterprises, 2011

176 Chapter I (“National Contact Points”), Part II of the OECD Guidelines for multinational enterprises, 2011

located in Belgium (Antwerp), Canada (Toronto), The Federal Republic of Germany (Frankfurt/Main), France (Paris), Italy (Milano), Japan (Tokyo), Turkey (Ankara), South-Africa (Johannesburg), United Kingdom (London — Brentford), the USA (Cambridge, Massachusetts; Houston, Texas; Tampa, Florida; Lakeland, Florida), etc. In 1977, the Badger Belgium Naamloze Vennootschap (BBNV), a subsidiary of the Raytheon's Badger Company, Inc., was declared bankrupt by the Antwerp Commercial Tribunal. Around 250 employees lost their work. The net worth which was left after the bankruptcy was approximately a half of the legally required indemnification for the discharged staff. The Belgian government in response to the trade union pressure contended that the BBNV's parent was liable for this shortfall, and legitimized this contention by citing the OECD' Guidelines which said: "the entities of a multinational enterprise located in various countries are subject to the laws of these countries". The Belgian Secretary of State in order to circumvent the limited liability principle and justify the government's position claimed that the BBNV was not a legally independent enterprise which determined its own destiny and made independent decisions. Therefore, the misbehavior negates limited liability especially when all decisions including the closure of a company were made by the parent firm. Moreover Belgian Government sought and received clarification from the Committee that the OECD Guidelines are addressed to both parent company and affiliate, and that both share a "special responsibility" for the livelihood of the latter's employees in the event of a shutdown. The parent shares responsibility for giving reasonable notice of a shutdown and for "mitigating the adverse effects of a shutdown on the employees dismissed" - that is, for paying legally prescribed indemnities. No specific reference was made to the Badger case in this clarification. Shortly after that, however, the Badger Company, Inc. worked out a compromise settlement in negotiations with Belgian government and trade union representatives¹⁷⁷.

177 Blanpain, R. *The Badger Case and the OECD Guidelines for Multinational Enterprises*. Deventer: Kluwer, 1977. pp. 57-69;

Kujawa, Duane (1980). *The Badger Case and the OECD Guidelines for Multinational*

This is a good example of how “soft law” may influence the actors that have the real legislative power to control TNCs or, at least, some of the parts of such corporate conglomerates.

The OECD Guidelines implement their norms through National Contact Points, which shall be set up by each adhering country and endowed with human and financial resources. The National Contact Points act as a forum for discussion of all matters relating to the Guidelines¹⁷⁸.

Another example involving Marks & Spencer company shows the National Contact Points' role in the implementation of the OECD Guidelines. In 2001 the French national trade unions, Confédération française démocratique du travail and Force Ouvrière brought a complaint under the OECD Guidelines against Marks & Spencer company due to its failure to consult with trade unions about the decision to close its stores in France. The French National Contact Point organized several meetings with trade unions and management representatives. It also consulted the UK National Contact Point and met with the Belgian one where a case had also been brought by trade unions. The French National Contact Point found that Marks & Spencer had not properly consulted with the trade unions in France about the closure and violated the OECD Guidelines. However, the Marks & Spencer found a buyer who acquired its stores in France (Galeries Lafayette), and the problem was settled as employees were given the choice between a new job or severance pay. The opinion of the French trade unions is that the OECD Guidelines did play a part in achieving this acceptable settlement¹⁷⁹.

Enterprises. Book Review. *Journal of International Business Studies*, 11 (2). pp. 139-140; and

Dowling, Peter J., Festing, Marion and Engle, Allen. *International Human Resource Management*. 5th ed. Singapore: Seng Lee Press, 2007, p. 258

178 Part II of the OECD Guidelines for multinational enterprises, 2011

179 Trades Union Congress (2003). *Holding multinationals to account. Using OECD Guidelines to protect workers' interests*. London: Trades Union Congress. p. 10. Available at <https://www.tuc.org.uk/sites/default/files/extras/oecdguidelines.pdf> [accessed March 29, 2015];

Cases filed by trade unions under OECD Guidelines are available on the website at <http://www.tuaoecdmguidelines.org/CaseDescription.asp?id=94> [accessed September, 2015]

Besides this, the recommendations of the OECD Guidelines go beyond the borders of the adhering countries due to the specific nature of the TNCs. According to the document, it shall be addressed by governments to TNCs operating in or from adhering countries. As the concept of TNC assumes the system of several legal entities located in different countries, it is evident that the binding power of the OECD Guidelines covers more space than just the territories of the adhering countries.

In fact, the OECD itself encourages the implementation of the Guidelines beyond the borders of adhering countries. In particular the OECD Observer states that the National Contact Points are expected to respond to inquiries from governments of non-adhering countries and to take steps to develop an understanding of the issues at stake, for instance through contacts with the management of the firm in the home country or with officials in the non-adhering country¹⁸⁰.

It is important to know that almost half of the cases brought by trade unions and NGOs in front of National Contact Points from 2000 till 2012 concerned corporate conduct in non-adhering countries¹⁸¹. Therefore, the effectiveness of the OECD Guidelines on the territories of such countries is especially interesting.

The example of such “beyond OECD area action” would be Choi Shin to OECD Korean National Contact Point case. In 2002 the Brussels-based International Textile, Garment, and Leather Workers' Federation lodged a complaint with the OECD, accusing the Korean-owned Choi Shin plants in Guatemala of serious breaches of the OECD Guidelines, in particular, the

180 OECD Observer (2001). The OECD Guidelines for Multinational Enterprises. p. 7. Available at <http://www.oecd.org/investment/mne/1903291.pdf> [accessed March 10, 2015]

181 Brown, Ronald C. East Asian Labor and Employment Law: International and Comparative Context. Cambridge: Cambridge UP, 2012. p. 203

The list of cases filed by NGOs in 2011-12 is contained in: Institute of Human Rights and business. Department for business, innovation & skills. (2013). Update on the role of OECD National Contact Points with regard to the extractive sectors. London. pp. 3-4. Available at http://www.ihrb.org/pdf/IHRB-NNCP-OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf [accessed March 15, 2015]

provisions dealing with human rights, employment, combating bribery. The claim listed several violations of the Guidelines made by management in order to prevent workers from entering the trade union: offering bribes, threatening workers with blacklisting, hiring gunmen to stalk workers in their neighborhoods, organizing the fear campaign that resulted in lynching and beating the trade union supporters inside the factory by their co-workers¹⁸².

In this case, the Belgium-based association of trade unions has filed a complaint against South Korean TNC which subsidiary failed to comply with the OECD Guidelines in Guatemala, the country that did not adhere the OECD Guidelines. This case shows that the OECD Guidelines somehow influenced the Guatemala-based subsidiaries of TNCs, which parent company originates from the country which signed the Guidelines. In other words, the territorial scope of the OECD Guidelines is sometimes broader than could be imagined at first sight.

At the same time the OECD Guidelines not just encourage states to regulate TNCs' activities, but also to create a friendly area for the transnational business. In fact, the principle of national treatment is given a high importance in the OECD Guidelines. In particular, the OECD Declaration and Decisions on International Investment and Multinational Enterprises, which contain the OECD Guidelines, consider the principle of national treatment a core element of the relationships between foreign investors and host countries. According to this Declaration, adhering governments should, consistent with their needs to maintain public

¹⁸² For details see:

Labor Law beyond Borders: ADR and the Internationalization of Labor Dispute Settlement: Papers Emanating from the Fifth PCA International Law Seminar, May 7, 2002. The Hague: Kluwer Law International, 2003. p. 144

OECD (2003). Annual Report on the OECD Guidelines for Multinational Enterprises: Enhancing the Role of Business in the Fight Against Corruption. Paris: OECD Publications Service. p. 96. Available at <http://www.oecd-ilibrary.org/> [accessed October 28, 2015]

The website of the Clean Clothes Campaign (an alliance of trade unions and non-governmental organizations in 15 European countries) at <https://archive.cleanclothes.org/newslist/609> [accessed October 28, 2015]

order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises. Moreover, adhering governments shall consider applying national treatment in respect of countries other than adhering governments and shall endeavor to ensure that their territorial subdivisions apply national treatment. At the same time, the Declaration does not affect the right of adhering governments to regulate the entry of foreign investment and the procedure of establishing foreign enterprises¹⁸³.

Thus, the OECD Guidelines besides introducing the recommendations for TNCs represent their interests and encourage the states to respect them. However, it is necessary to notice that some researchers have an adverse approach to such character of the OECD Guidelines. In particular, R. Jenkins states that the OECD Guidelines do not represent a genuine attempt to control TNCs, but were rather designed to deflect criticism of their activities¹⁸⁴.

Despite negative approach, the character of the OECD Guidelines seems to be right because the society of XXI century tends to see only one side of TNCs. The scandals involving human rights abuse, environment pollution, corruption, interference in political affairs of host countries and other types of corporate misbehavior performed by TNCs have been given a significant attention of mass media during last decades and eventually created a negative

183 OECD (2011). OECD Declaration and Decisions on International Investment and Multinational Enterprises. Provision II. Available at <http://www.oecd.org/investment/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm> [accessed October 30, 2015]

184 Jenkins, R. (2001). Corporate Codes of Conduct. Self-Regulation in a Global Economy. Technology, Business and Society Programme Paper N. 2. United Nations Research Institute for Social Development. p. 4

image of these business conglomerates. The international organizations, NGOs, governments and society stress the importance of regulation of their business activities. At the same time, these enterprises are the real engines of technical progress, economic stability, and major employers. Therefore, the documents aiming at regulating activities of these business units should contain the provisions protecting their interests as well.

It is possible to conclude that in spite of being “soft law”, the OECD Guidelines have certain impact world-widely. Adhering countries have to implement the Guidelines and “address” their recommendations to TNCs. Therefore, Guidelines could be regarded as an instrument which may be used in order to establish the general trend of developing national legislation in different countries and harmonize some legal provisions regulation the activities of TNCs. A common vector which could be indicated by the Guidelines for national legislation of adhering countries may become an efficient solution in the absence of the codified international standards of regulation.

3.2.3. Draft United Nations Code of Conduct on transnational corporations: unfulfilled grand promises

The United Nations has been concerned about the question of TNCs' regulation from the beginning of the 1970s. In particular, in December 1974, it adopted Charter of Economic Rights and Duties of States under the Resolution 3281 (XXIX). The Charter contained several provision relating to TNCs¹⁸⁵. In 1973, the United Nations Economic and Social Council

¹⁸⁵ UN General Assembly. Charter of Economic Rights and Duties of States December 12, 1974. U.N. Doc. A/RES/29/3281. 29th Sess. Available at <http://www.un-documents.net/a29r3281.htm> [accessed November 12, 2015] (hereinafter cited as the Charter of Economic Rights and Duties of States)

Art. 2 of the Charter of Economic Rights and Duties of States: 2. Each state has the right: (a) to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities...; (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its

entrusted the “Group of Eminent Persons” in order to advise on the nature and activities of TNCs and their role and impact on the development process¹⁸⁶. This Group made recommendations, which led to the establishment of a permanent Programme on Transnational Corporations in 1974 in order to create the forum for deliberations on issues that are related to TNCs, and to the creation of Commission on Transnational Corporations alongside with United Nations Center on Transnational Corporations (UNCTC)¹⁸⁷. At the conclusion of its meeting, in March 1975, the Commission “decided that among the various tasks it would undertake in the next few years the priority would be assigned to the formulation of the code of conduct...”¹⁸⁸. In March of 1976, the Commission during its second session in Lima (Peru) established the Intergovernmental Working Group on a Code of Conduct which started its work in 1977¹⁸⁹.

For almost two decades till 1992 the Intergovernmental Working Group had been working on the Draft UN Code of Conduct on transnational corporations. Three executive

economic and social policies. Transnational corporations shall not interfere in the internal affairs of a host State, Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph; (c) to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation shall be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent...

186 UN Group of Eminent Persons. The Impact of Multinational Corporations on Development and on International Relations. Chapter 1. 1974. U.N. Doc. E/500/Rev. 1, St/ESA/6

187 UNCTAD (2004). List of publications on Foreign Direct Investment and transnational corporations (1973-2003). New York and Geneva. p. ii. Available at http://unctad.org/en/Docs/ite20041_en.pdf [accessed October 15, 2014]

188 Davidow, J. and Chiles, L. (1978). The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices. *American Journal of International Law*, 72(2). pp. 251-252

189 ECOSOC (1981). Work related to the formulation of a code of conduct. Fourteen session of the Intergovernmental Working Group on a Code of Conduct. UN Library, E/C.10/79. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N81/173/30/PDF/N8117330.pdf?OpenElement> [accessed March 19, 2015]

directors presided over the UNCTC during this period¹⁹⁰. Each of the major political blocs (developed countries, lesser developed countries and socialist states) treated differently TNCs and, therefore, proposed diverse standards of regulation while negotiating the Draft UN Code of Conduct¹⁹¹. Developed countries were major home countries for TNCs and, therefore, tried to protect the interests of business through foreign investment protection, favorable national treatment, fair compensation in case of expropriation, etc. At the same time, they insisted on a voluntary code of principles in the form of recommendations. On the contrary, the group of 77 developing countries which participated in negotiations over Draft UN Code of Conduct demanded an international instrument of rules with normative status legally binding on both transnational corporations and states¹⁹². This position rooted most probably in the colonial past of many developing countries, which saw TNCs as instruments of former colonialists to keep the influence.

The socialist bloc supported the group of 77 developing countries, however, had the specific position. The socialist countries had their corporations performing business abroad, and they insisted that these corporations should not be covered by the Code and be a subject to direct government control. However, Western countries insisted that there should be no

190 Moran, T. H. (2009). The United Nations and transnational corporations: a review and a perspective. *Transnational Corporations*, 18(2). p. 93

191 Thomas, R. M (1983). Host state treatment of transnational corporations: formulation of a standard for the United Nations Code of Conduct on transnational corporations. *Fordham International Law Journal*, 7(3). p. 470

192 ECOSOC. The realization of economic, social and cultural rights: the question of transnational corporations. Written statement by the Indian Movement "Tupac Amaru" and the Indigenous World Association, which are non-governmental organizations in consultative status. Un Library. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/132/70/PDF/G9813270.pdf?OpenElement> [accessed March 15, 2015].

For more contradictions between different political blocs on the UN Draft Code of Conduct: Moran, T. H. (2009). The United Nations and transnational corporations: a review and a perspective. *Transnational Corporations*, 18(2). p. 92

difference between them and privately owned enterprises¹⁹³. Finally, in 1990, the Draft UN Code of Conduct was produced. It aimed at being an essential element in the strengthening of international economic and social cooperation¹⁹⁴. However, despite great investment made into the developing of the Draft UN Code of Conduct, the government representatives were unable to reach a consensus on the nature and legal status of it. Eventually, in 1992, upon the request of the USA, they agreed to drop discussion of one of the most burning issues of “industrial civilization”¹⁹⁵. This decision seems illogical as the United Nations Organization was alarming the necessity and importance of the unified document that could regulate the activities of TNCs¹⁹⁶. Moreover, it planned the future actions to implement the provisions of the adopted code¹⁹⁷.

193 Sauvart, Karl P. (2015). The Negotiations of the United Nations Code of Conduct on Transnational Corporations. Experience and Lessons Learned. The journal of world investment & trade, 16. p. 21

194 Keller, H. (2008). Corporate codes of conduct and their implementation: the question of legitimacy. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 194. DOI 10.1007/978-3-540-77764-9_12. p. 226. Available at http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf [accessed March 19, 2015]

195 ECOSOC. The realization of economic, social and cultural rights: the question of transnational corporations. Written statement by the Indian Movement “Tupac Amaru” and the Indigenous World Association, which are non-governmental organizations in consultative status. Un Library. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/132/70/PDF/G9813270.pdf?OpenElement> [accessed March 15, 2015]

196 In fact, in 1990, only 2 years before the suspension of the Draft Code discussion, the UN General Assembly adopted the Proposed medium-term plan for the period 1992-1997 (A/45/6 (Prog.23)) which contained programme 23 dedicated to transnational corporations. The programme 23 said: 23.10 In light of ...the trends and prospects relating to the activities of transnational corporations and their role in world development, the United Nations programme on transnational corporations will consist of the following subprogrammes: (a) Securing an effective code of conduct and other international arrangements and agreements relating to transnational corporations...23.11 Among the multiple tasks entrusted to the programme, **priority** will be given to the formulation of an effective, comprehensive, generally accepted and universally adopted code of conduct on transnational corporations.

197 The programme 23 (A/45/6 (Prog.23)): 23.16 If the code of conduct is adopted during the period 1992-1997, the Centre [UNCTC] will assist the United Nations Commission on Transnational

The Draft UN Code of Conduct on transnational corporations had great promises. However, contradictory positions of different political blocs were main obstacles for the approval of it and eventually led to its failure.

Nevertheless, it is still worth to review the main provisions of the Draft UN Code of Conduct, because the process of its drafting had taken the significant amount of time and effort. This document was intended to become the centerpiece in the regulation of TNCs¹⁹⁸. Moreover, though it did not itself achieve a UN imprimatur, it resulted in a “springboard effect”, providing a template for codes that followed¹⁹⁹.

As it was noticed earlier, socialist countries were insisting that their TNCs shall be excluded from the regulation of the UN Code of Conduct, because they are not privately owned. However, the Draft UN Code of Conduct (version 1983) did not satisfy this demand. In particular two possible definitions of a transnational corporation given in the document do not

Corporations in the implementation, follow-up and review of the code. During the first two years after its adoption, the efforts of the Commission and the Centre will concentrate on disseminating, publicizing and explaining the instrument; on working out the details of its follow-up mechanisms at the enterprise, national and international levels; and on establishing a reporting system. Once a mechanism for implementation of the code is established, the active involvement of transnational corporations, labour movements, as well as Governments is envisaged.

198 Sauvart, Karl P. (2015). The Negotiations of the United Nations Code of Conduct on Transnational Corporations. Experience and Lessons Learned. *The journal of world investment & trade*, 16. p. 19. According to K. Sauvart, the Draft Code of Conduct had the umbrella nature in terms of architecture, in the fact that the draft included cross-references to a number of other documents (Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO); Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UNCTAD); Declaration on International Investment and Multinational Enterprise (OECD), International Code of Conduct on the Transfer of Technology (UN)) making these separate instruments in a sense ‘chapters’ of the United Nations Code.

199 Keller, H. (2008). Corporate codes of conduct and their implementation: the question of legitimacy. *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, 194. DOI 10.1007/978-3-540-77764-9_12. p. 226. Available at http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf [accessed March 19, 2015]

make any difference between public, private or mixed owned corporations²⁰⁰. During last years of drafting the Code position of most powerful socialist country USSR was weakening. The country was focused on economic reforms and later faced significant political changes that eventually led to its collapse. Therefore, the initial “socialist position” was not properly defended.

Other two positions of developed industrialized countries bloc and the group of 77 developing countries were quite strong. Therefore, the Draft Code attempted to maintain the balance between these two powers. The Draft Code contained the provisions regarding both the regulation of TNCs' activities (Chapter “Activities of transnational corporations”) and their treatment by host states (Chapter “Treatment of transnational corporations”).

In general, the structure of Code of Conduct is following:

1. “Definitions and scope of application”. This section defines the TNCs' definition. The essential features of this definition have already been discussed earlier. Therefore, there is no need to analyze it again. However, apart from the definition of TNC the section reveals the definitions of other words used in the document. In particular, it specifies the terms “entity” (parent entity and other entities), “home country” (a country in which the parent entity is located), “host country” (a country in which an entity other than the parent entity is located), “country in which a transnational corporation operates” (a home or host country in which an entity of a transnational corporation conducts operations). There was no unified final decision upon the scope of application of the Code. However, in general, it seems that the Code aimed to address all TNCs, home, and host states²⁰¹.

2. “Activities of TNCs” section, which includes two chapters, namely “General and political” and “Economic, financial and social”. These two chapters cover a broad variety of provisions,

200 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Available at http://unctad.org/en/docs/dtci30vol1_en.pdf [accessed on December 15, 2014]

201 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. “Definitions and scope of application”

which would be analyzed further.

3. “Treatment of TNCs” section, which includes three chapters, namely “General treatment of transnational corporations by the countries in which they operate”, “Nationalization and compensation”, “Jurisdiction”. These chapters will also receive an analysis further.

4. “Intergovernmental co-operation”. This section of the Code declares that states agree to exchange information on the measures they have taken to give effect to the Code, consult on a bilateral or multilateral basis. Besides this states agree not to use TNCs as instruments to intervene in the internal or external affairs of other states²⁰².

5. “Implementation of the code of conduct” section, which includes following chapters: “Action at the national level”, “International institutional machinery”, “Review procedure”. This section contains provisions relating to the implementation of the Code by states at the national level, including publication and dissemination of the Code, implementation of the Code on the corresponding territory, reporting to the UNCTC on the action taken in the frame of the Code implementation, taking actions to reflect the support for the Code when introducing implementing and reviewing laws, regulations and administrative practices on matters dealt with in the Code. The section also recognizes that the UNCTC shall assume the functions of the international institutional machinery for the implementation of the Code and act as the focal international body within the United Nations system for all matters related to the Code. Besides this the UNCTC shall make recommendations to the General Assembly for the purpose of reviewing the Code²⁰³.

As it was noticed above, section “Activities of TNCs” includes two chapters, namely “General and political” and “Economic, financial and social”. The first one states that TNCs shall respect human rights and fundamental freedoms in the countries in which they operate

202 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Section “Intergovernmental co-operation”.

203 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Section “Implementation of the code of conduct”

alongside with the right of each state to regulate and monitor accordingly the activities of their entities operating within its territory. The chapter ensured that TNCs shall not interfere in the intergovernmental relations as well as internal affairs of the countries in which they operate. It also prescribed TNCs to refrain from activities undermining the political and social systems in host countries, to abstain from corrupt practices, not to collaborate with racist minority regimes in southern Africa, etc.²⁰⁴.

The great attention was paid to the economic, financial and social activities of TNCs. In particular, the Draft UN Code of Conduct contained the provisions dealing with the balance of payments and financing, transfer pricing, taxation, competition and restrictive business practices, transfer of technology, consumer protection, environmental protection. The important part of this chapter is paragraph “Disclosure of information”. Particularly, it stated that TNCs should disclose to the public in the countries in which they operate, by appropriate means of communication, clear, full and comprehensible information on the structure, policies, activities and operations of the transnational corporation as a whole. The information had to include both financial and non-financial items and be made available annually, normally within six months and in any case not later than twelve months from the end of the financial year of the TNC. Besides this, TNCs in accordance with the Draft Code had to make available a semi-annual summary of financial information. The financial information included a range of documents, among which: a balance sheet; an income statement, including operating results and sales; a statement of allocation of net profits or net income; a statement of the sources and uses of funds; significant new long-term capital investment; etc.

The Draft UN Code of Conduct also required TNCs to make available non-financial documents, including the structure of the transnational corporation, showing the name and location of the parent company, its main entities, its percentage ownership, direct and indirect,

204 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Section “Activities of transnational corporations”, Chapter “General and political”

in these entities, including shareholdings between them; the main activity of its entities; employment information; accounting policies used in compiling and consolidating the information published; etc.²⁰⁵.

It seems that most probably this “disclosure of information” provisions were among main causes of disputes during the preparation of Draft UN Code of Conduct. A wide range of documents that had to be disclosed would put TNCs in very strict frames and would leave little space for hiding certain actions.

It is necessary to point out that just like the OECD Guidelines on multinational enterprises the Draft UN Code of Conduct declared the prevailing force of domestic laws, i.e. the core obligation of TNCs in all their activities are to comply with national legislation. Notably, the document declared the right of each state to regulate and monitor accordingly the activities of their entities operating within its territory. Besides this, it encouraged the introduction into the contracts between TNCs and states, especially long-term ones the clauses regarding the review and renegotiation²⁰⁶. This provision was in favor of host states especially developing ones as allowed them to vary the conditions, under which TNCs operate in their territories in accordance with the changing economic situation.

The part of the Draft UN Code of Conduct concerning the treatment of TNCs (Section “Treatment of transnational corporations”) is relatively smaller than the part regarding the regulation of their activities. Among most prominent provisions of this part are those establishing equitable treatment for TNC, which shall be not less favorable than that accorded to a domestic enterprise; free transfer of payments relating to TNCs' investments; prompt, adequate and effective compensation in case of expropriation. It is important to point out that the Draft UN Code of Conduct declared states' right to nationalize or expropriate foreign-

205 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Section “Activities of transnational corporations”, Chapter “Economic, Financial, and Social”

206 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Section “Activities of transnational corporations”, Chapter “General and Political”, Provision 11

owned property in their territory for a public purpose under the condition that it is not discriminatory, is made in accordance with due process of law, contract or other agreement, and is accompanied by compensation²⁰⁷.

The provisions regarding TNCs' interests in host states seem to have rather broad, not an explicit character. The part concerning states' obligations towards TNCs is obviously weaker than the one regarding regulation of TNCs' activities. Bearing in mind the demands of different political blocs that accompanied the process of drafting the Draft UN Code of Conduct it is clear that the position of the developing countries was favored more than the one of the developed states. It is most likely, the developed countries which are generally home states for many TNCs could not see the adequate representation of their interests in the document.

In this regard, it is important to notice that in 1980s, the position of host countries was greatly weakened by the problems of their international debt. This made foreign investments much more attractive for developing countries. As a result, the position of TNCs in comparison to host country governments became much stronger in the 1990s²⁰⁸. Maybe this was one of the reasons, which prevented the realization of the Draft UN Code of Conduct on transnational corporations.

Many provisions that are contained in the document seem to be still relevant in the modern world, even though they have been developed several decades ago. The TNCs' influence in the world is growing, and the need for the regulation of their activities has become even more urgent. Therefore, the main value of the Draft United Nations Code of Conduct is in establishing the general trend in TNCs' regulation and in attracting the attention to this important question.

207 United Nations (1983). United Nations Draft Code of Conduct on transnational corporations. Section "Treatment of transnational corporations"

208 McKern, R. B. and United Nations. Transnational Corporations and Management Division. Transnational corporations and the exploitation of natural resources / edited by Bruce McKern Routledge London; New York. 1993. p. 11

3.2.4. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: United Nations' attempt to establish guidelines for transnational corporations*

Another document of the United Nations Organization, which was adopted in order to regulate TNCs, is Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003))²⁰⁹.

The document draws the line between the responsibilities that must be assumed by TNCs, on the one hand, and by "other business enterprises", on the other.

The document contains detailed provisions, relating to such concepts as respect for the principle of equal opportunities and non-discrimination, personal safety, workers' rights, protection of the interests of consumers and environmental protection.

It provides an explanation for the level of corporate responsibility of TNCs: "Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment 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".

Such actions as "to promote, to secure the fulfillment of, to respect, and to protect" shall be understood as follows: TNCs shall respect the human rights of all people, refrain from interfering with the enjoyment of such rights. The obligation to protect requires TNCs to prevent violations of such rights by third parties. The obligation to secure the fulfillment requires TNCs to take appropriate measures towards the full realization of such rights. The

²⁰⁹ United Nations. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Available at <http://www1.umn.edu/humanrts/business/norms-Aug2003.html> [accessed December 03, 2015]

obligation to promote means that TNCs are to encourage the fulfillment of such rights in all spheres.

The obligation to “ensure respect” is a more difficult concept than the ones mentioned above. This obligation means in general that TNCs shall undertake actions that indirectly contribute to the fulfillment of human rights. For example, TNCs shall refrain from any activity which supports, solicits, or encourages States or third parties to abuse human rights. Moreover, under such obligation TNCs are to ensure that their goods and services will not be used for human rights abuse.

Even though the document addresses enterprises, it proclaims that the attention shall not be distracted from the international obligations of states: “States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights... Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law”

Nevertheless, some representatives of business community expressed a negative opinion on the document. In this regard, it is worth to mention the Joint views of the International Chamber of Commerce (ICC) and International Organization of Employers (IOE) on the document. In particular, the critics state: “As the Executive Director of Human Rights Watch, has observed, “international [human rights] standards apply formally only to governments, not to corporations themselves.”²¹⁰ States are the duty-bearers of obligations under the international human rights law. However, the Norms declare that private businesses have the duty to “secure the fulfillment of,” “protect,” etc. the rights that are recognized in the various United Nations human rights treaties. This might confuse the public”²¹¹.

Such position seems reasonable and logical due to the fact that there is no international

210 Power, Samantha, and Graham T. Allison. *Realizing Human Rights: Moving from Inspiration to Impact*. New York: St. Martin's, 2000. pp. 225, 235

211 Full text is available at <http://business-humanrights.org/en/joint-views-of-the-ioe-icc-on-the-un-human-rights-norms-for-business#c48690> [accessed December 05, 2015]

legal personality of TNCs. Therefore, this document, in fact, is not binding for TNCs, it is merely a recommendation while the form of presentation of text creates an impression that it is normative. This is confusing.

It is worth to say that the Norms contain arguments for relevancy of imposing obligations upon TNCs under international law. Thus, at the very beginning of the document it is mentioned that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive. In this context, transnational corporations are regarded as “organs of society” for which the Universal Declaration of Human Rights is binding.

However, business structures could hardly be named organs of society as their primary goal is profit, and their interests are located in the sphere of economy. Therefore, it is obvious that the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights are not binding on them.

It is necessary to bear in mind that TNCs are not those subjects that shall promote, secure the fulfillment of, protect, and ensure respect for human rights. These obligations shall not be transferred to private business structures as enterprises are not created for social purposes, but for profit purposes. TNCs shall respect human rights, if not they shall be sued in court under the relevant national law. Therefore, the modern tendency, which imposes upon them responsibilities traditionally carried by states, seems absurd.

3.2.5. Tripartite declaration of principles concerning multinational enterprises and social policy: contribution of the International Labor Organization into the regulation of transnational corporations

The Tripartite declaration of principles concerning multinational enterprises and social policy (the Tripartite declaration) was adopted in 1977 by International Labor Organization, which is the United Nations' agency dealing with labor issues. The principles laid down in this

universal instrument offer guidelines to multinational enterprises, governments, employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations²¹². The Tripartite declaration is “soft law”, which has no normative force for TNCs. Even so, the MNE declaration has a certain value, because it contains a coordinated approach of governments, employers and workers towards the regulation of TNCs' activities in the social and labor spheres.

The preamble of the Tripartite declaration states the importance and significant role of TNCs in the economy of most countries and in international economic relations. At the same it notices that TNCs' operations might lead to abuse of concentrations of economic power as well as to conflicts with national policy objectives and the interest of the workers. In this regard, the Tripartite declaration determines its purpose as follows: “to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the establishment of a New International Economic Order, as well as subsequent developments within the United Nations, for example, the Global Compact and the Millennium Development Goals”²¹³.

The Tripartite declaration is a document consisting of 59 provisions, which contains the preamble (provisions 1-7) and following five sections:

1. “General Policy” section (provisions 8-12). This section obliges all parties to whom the declaration is addressed to respect the sovereign rights of States, obey the national laws and regulations, to comply with the norms of national and international law;

212 On the website of International Labor Organization at http://www.ilo.org/empent/Publications/WCMS_094386/lang—en/index.htm [accessed December 12, 2015]

213 International labour organization. Tripartite declaration of principles concerning multinational enterprises and social policy (MNE declaration) 2006. Geneva. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf [accessed December 12, 2015]

2. “Employment” section, including “Employment promotion” (provisions 13-20), “Equality of opportunity and treatment” (provisions 21-23), “Security of employment” (provisions 24-28). This section of the declaration contains recommendations for TNCs in the sphere of employment. It is proclaimed that TNCs shall endeavor to increase employment opportunities and standards, give priority to the employment of citizens of the host countries, be willing to conclude contracts with national enterprises, eliminate any discrimination based on race, color, sex, religion, political opinion, national extraction or social origin. Besides this, TNCs shall endeavor to provide security of employment, such as income protection for workers whose employment has been terminated, etc.;

3. “Training” section (provisions 29-32). This section is related to the development of national policies for vocational training and guidance, closely linked with employment, including encouragement for TNCs to participate in different programs and special funds;

4. “Conditions of work and life” section, including “Wages, benefits and conditions of work” (provisions 33-35), “Minimum age” (provision 36), “Safety and health” (provisions 37-40). This section deals with wages, benefits and conditions of work, proclaiming that TNCs shall provide the best possible wages, benefits and conditions of work, within the framework of government policies. Besides this, the section states that TNCs shall respect the minimum age for admission to employment or work, maintain the highest standards of safety and health, cooperate fully with international organizations, competent authorities, concerned with international security and health standards, the representatives of the workers.

5. “Industrial relations” section, including “Freedom of association and the right to organize” (provisions 42-48), “Collective bargaining” (provisions 49-56), “Consultation” (provision 57), “Examination of grievances” (provision 58), “Settlement of industrial disputes” (provision 59). The provisions of this section include several important points. First, TNCs are required to observe standards of industrial relations not less favorable than those observed by comparable employers in the country concerned. TNCs are expected to respect workers' right

for freedom of association and the right to have representative organizations recognized for the purpose of collective bargaining, right to submit grievance without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure. Moreover, TNCs shall seek to establish voluntary conciliation machinery in order to assist in the prevention and settlement of industrial disputes between employers and workers.

The Tripartite declaration's annex contains a list of 17 ILO Conventions and 24 ILO Recommendations, which set specific standards in the social and labor spheres and are referenced in the text of the declaration. Besides this, there are two addenda to the Tripartite declaration. The first one contains a list of international labor Conventions and Recommendations adopted since 1977. The second addendum proclaims that the objectives of the ILO Declaration on Fundamental Principles and Rights at Work shall be taken into account during the implementation and application of the Tripartite Declaration.

In general, the nature of the Tripartite declaration is not legally binding. Its principles could be followed by TNCs or states in case of their will. At the same time, the Tripartite declaration contributes to the general trend of the popularization of business conducted in accordance with ethical norms. It also attracts the attention of the global society to the importance of TNCs' regulation.

3.2.6. United Nations Global Compact: new approach towards the role of transnational corporations and their activities at international level

In 1999 Kofi Annan, the UN Secretary-general at that time proposed Global Compact during the world economic forum in Davos, Switzerland²¹⁴. He encouraged world business leaders to help in building the social and environmental base needed for the sustainable global

214 UN Press release SG/SM/6881, February 01, 1999. Available at <http://www.un.org/press/en/1999/19990201.sgsm6881.html> [accessed October, 02. 2015]

economy and for making globalization work for the world's people.

This initiative marked a new trend in the regulation of business on the international level. The world society admitted the important role of large business and encouraged it to contribute to the world development through complying with certain principles. The main idea was to show TNCs that proper behavior is advantageous for them, to motivate them to such behavior instead of forcing them. The reason for this is most probably rather unsatisfactory results of preceding international regulative instruments, which did not succeed in search for effective enforcement mechanisms.

This initiative was met both with enthusiasm and critical restraint. It was positively received by the countries which had benefited most from the globalized economy, but also recognized its disadvantages and their responsibility for taking necessary actions. It was taken negatively by those countries that believed that the global economy alongside with TNCs were harmful to their development²¹⁵.

The Global Compact consists of ten principles covering the issues of human rights, labor, environment, and anti-corruption. These principles were derived from several documents, namely, the Universal Declaration of human rights, the International Labour Organizations' Declaration on fundamental principles, and rights at work, the Rio de Janeiro Declaration on Environment and Development, the UN Convention against corruption.²¹⁶

The first two principles of the Global Compact are related to protection of human rights. They encourage TNCs to support and respect the protection of internationally proclaimed human rights as well as not to be complicit in human rights' abuses. Business is expected under these principles to provide full support for government initiatives in the field of human rights

215 King, Ambassador B. (2001). UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations. Speech given for the Cornell International Law Journal 2001 Symposium. Available at http://heinonline.org/HOL/Page?handle=hein.journals/cintl34&div=20&g_sent=1&collection=journals#489 [accessed March 18, 2015]

216 On the website at <https://www.unglobalcompact.org> [accessed March 18, 2015]

protection. In accordance with the provisions set out in principle 1 of the UN Global Compact, the corporate responsibility to respect human rights is one of the three independent but interrelated pillars of the “Protect, Respect and Remedy” Framework²¹⁷. The principle states that business has to realize its ability to make both positive and negative impact on all human rights. Therefore, it recommends companies to get acquainted with main documents in the sphere of human rights' protection, including the International Bill of Human Rights and the core International Labour Organization Conventions. Companies should consider three sets of factors in determining the scope of their responsibility to respect human rights or, in other words, the risk of potential negative impacts on human rights in connection with the conduct of their business. In order to determine the scope of responsibility TNCs have to consider three factors:

1. country and local context which could be received from NGOs, government, international trade unions and international organizations;

2. considering whether the company is causing or contributing to adverse human rights impacts through their own activities within that context. Companies should then address those impacts by adjusting their policies and practices to prevent the infringement from occurring;

3. analysis of the company's relationships with government, business partners, suppliers and other non-state actors to consider whether they might pose a risk for the company in terms of implicating it in human rights abuse.

Besides this, the first principle of the UN Global Compact explicitly recommends businesses to adopt a statement of policy as a public commitment to fulfill their responsibility to respect human rights, approved by their board or equivalent²¹⁸.

This provision of the Global Compact's first principle was most probably encouraged

217 This pillar establishes the ‘Responsibility to Respect’ as the minimum global standard on human rights for all businesses wherever they operate. The other two pillars are the State duty to protect human rights (Pillar I) and access to remedy for victims of human rights abuses (Pillar III).

218 1st Principle of UN Global Compact, 2000

many TNCs to introduce in their individual codes of conduct (codes of ethics), rules dealing with human rights protection²¹⁹ or even to establish separate human rights statements (human rights policies)²²⁰.

Moreover, the first principle of the UN Global Compact raises the question of human rights due diligence, saying in particular that a company should undertake due diligence in order to ensure and demonstrate its responsibility to respect human rights. Notably, an enterprise shall assess human rights impacts to understand how current and proposed actions may cause or contribute to human rights impacts, as well as how the company's operations may be directly linked to such impacts. Integration of human rights policies throughout a

219 ENI S.p.A. (2014). ENI code of ethics. Available at http://www.eni.com/en_IT/governance/governance-model-policies/code-of-ethics/code-of-ethics.shtml;

Chevron Corporation (2015). Chevron Business Conduct and Ethics Code. San Ramon: Chevron Corporation. Available at <http://www.chevron.com/documents/pdf/chevronbusinessconductethicscode.pdf>;

Shell International Limited (2014). Shell International Limited code of conduct. Charterhouse Print Management. Available at <http://s06.static-shell.com/content/dam/shell-new/local/corporate/corporate/downloads/pdf/codeofconduct-english-2010.pdf>;

Chiquita Brands International, Inc (2013). Chiquita Ethics & Code of Conduct. Available at <http://www.chiquita.com/Code-of-Conduct-PDF/ChiquitaCode-FINAL-EN.aspx>;

Volvo Group (2012). Volvo Group code of conduct. Available at http://www.volvogroup.com/SiteCollection/Docs/VGHQ/Volvo%20Group/Volvo%20Group/Our%20values/code_of_conduct_eng.pdf [all accessed March 20, 2015]

220 Hitachi, Ltd. (2013). Hitachi Group Human Rights policy. Available at <http://www.hitachi.com/New/cnews/130524.pdf>;

ExxonMobil Corporation (2015). ExxonMobil statement on labor and the workplace. Available at <http://corporate.exxonmobil.com/en/community/human-rights/respecting-rights/statement-on-labor-and-the-workplace?parentId=620f92f4-5de7-47af-bea7-0a490fbc0f8a>;

Gold Fields Limited. Human rights statement. Available at https://www.goldfields.co.za/pdf/human_rights_policy.pdf

The Coca-Cola Company (2006). Coca-Cola Company Human rights statement. Available at http://assets.coca-colacompany.com/e9/c2/f1c4a6314f93bd7545fe43934621/human_rights_statement.pdf [all accessed March 20, 2015]

company is also encouraged within the UN Global Compact. This means that the personnel shall be trained to foster their capacity to respond appropriately when unforeseen situations arise. The important part of due diligence is taking the appropriate action that is cessation or prevention of the impact when it is caused by the company or utilization of available leverage to prevent or mitigate the impact in case the company is directly linked to the impact through its business relationships. The last but not least parts of companies' human rights due diligence include performance and communicating/reporting on performance. In particular, the Global Compact requires companies to communicate their progress on an annual basis in a form that would be accessible to the intended audience and provide enough information for stakeholders to evaluate the adequacy of the company's response to impacts²²¹.

Such encouragement of business to report on its due diligence resonated in TNCs' annual reports. Nowadays many of them contain data on companies' contribution to human rights protection²²².

Principle 1 of the Global Compact also provides some certain examples of how companies may support and respect human rights through their daily activities in the workplace (safe and healthy working conditions, freedom of association, non-discrimination in personnel practices, non usage of forced labor or child labor, access to basic health, education and housing for the workers and their families, etc.), in the community (prevention of the

221 1st Principle of UN Global Compact, 2000

222 For example: Royal Dutch Shell plc (2014). Annual Report and Form 20-F for the year ended. Available at http://reports.shell.com/annual-report/2014/servicepages/downloads/files/entire_shell_ar14.pdf;

ENI S.p.A. (2013). Annual Report. Italy: Tipografia Facciotti Srl. available at http://www.eni.com/en_IT/attachments/publications/reports/reports-2013/Annual-Report-2013.pdf;

Adidas Group (2013). Annual report. Germany: Adidas AG. available at http://www.adidas-group.com/media/filer_public/2014/03/05/adidas-group_gb_2013_en.pdf;

Procter&Gamble Company (2014). Annual report. Available at http://www.pginvestor.com/interactive/lookandfeel/4004124/PG_Annual_Report_2014.pdf; [all accessed March 21, 2015]

forcible displacement of individuals, groups or communities, protection of the economic livelihood of local communities, contribution to the public debate, creation of new markets, ensuring opportunities for girls to be educated, etc.)²²³. This part of the first principle seems to inspire TNCs elaborate workplace standards.

The second principle of the Global Compact deals with human rights as well. It introduces the “complicity” concept, which basically means being implicated in a human rights abuse that another company, government, individual, group etc is causing. Complicity consists of 2 elements:

1. an act or omission (failure to act) by a company, or individual representing a company, that “helps” (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse; and

2. the knowledge of the company that its act or omission could provide such help²²⁴.

This principle is not less important than the first one. In fact, there have been many situations where companies have faced accusations of complicity in human rights abuses. For instance, a 2003 report by the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources from the Democratic Republic of Congo alleged that international corporations exploiting the natural resources caused widespread violations of human rights. Corporations that dealt with lucrative natural resources in the Democratic Republic of Congo were believed to have financed the groups which carried out these violations. Another example is banks that were sued in the USA with respect to the dormant bank accounts of Holocaust victims and their heirs. It was stated that the banks facilitated the Nazis’ robbery and retention of wealth. The banks were portrayed as “fences” for the Nazi regime. Besides this, South Africa’s Truth and Reconciliation Commission found out that corporations had been “willing collaborators” with the apartheid regime since the early 1960s. It claimed that certain

223 1st Principle of UN Global Compact, 2000

224 2nd Principle of UN Global Compact, 2000

corporations had had a “direct interest in maintaining the status quo”²²⁵.

Thus, TNCs might not be directly involved in breaching human rights principles, but contribute to it. The importance of this problem was raised by several non-governmental organizations. In particular, according to the Amnesty International, TNCs should establish procedures to ensure that the company staff are never complicit in human rights abuses, as well as enable discussion with the authorities at local, provincial and national levels of specific cases of human rights violations²²⁶.

The concept of such complicity is complex and the UN Global Compact distinguishes three types of it:

1. direct complicity (when a company provides goods or services that it knows will be used to carry out the abuse);
2. beneficial complicity (when a company benefits from human rights abuses even if it did not positively assist or cause them);
3. silent complicity (when the company is silent or inactive in the face of systematic or continuous human rights abuse), which is the most controversial type of complicity and is least likely to result in legal liability²²⁷.

The International Council on Human Rights has the list of four situations when a company is complicit in human rights violations:

1. when the company actively assists, directly or indirectly, in human rights violations committed by others;
2. when the company is in a formal partnership with a government and could reasonably

225 All cases are from: UN Global Compact and the Office of the High Commissioner of Human Rights (2004). *Embedding Human Rights into Business Practice*. p. 20. Available at <http://www.ohchr.org/Documents/Publications/Embeddingen.pdf> [accessed March 21, 2015]

226 Amnesty International (1998). *Human Rights Principles For Companies*. AI Index: ACT 70/01/98, p. 9. Available at <file:///home/likewise-open/aleph/0214001577/Downloads/act700011998en.pdf> [accessed March 22, 2015]

227 2nd Principle of UN Global Compact, 2000

foresee, or subsequently obtains knowledge that the government is likely to commit abuses in carrying out the agreement;

3. when the company benefits from opportunities or environment created by human rights violations even if it does not positively assist or cause the perpetrator to commit the violations;

4. when the company is silent or inactive in the face of human rights violations²²⁸.

It is evident that the International Council on Human Rights distinguishes the human abuse performed by government in favor of agreement concluded with TNCs. In this regard, it is necessary to point out that even in the absence of any agreement the human violations that include TNCs' complicity are usually performed by governments.

For instance, Indonesian military force is believed to have forced labor in favor of Nike's plants²²⁹. In Sudan, according to the Human Rights Watch, the government's military campaign in the oil producing regions was specifically designed to clear the civilian population out of the area to facilitate oil production. In fact, the military means used by government army against civilians were aimed at deliberate, forcible displacement, without notice or compensation, of many civilians from the southern oil regions in Western Upper Nile/Unity State during several periods since the discovery of oil. In this case, the TNCs which are engaged in producing oil in these regions clearly benefited from grave and systematic abuses performed by the state²³⁰. In another report of Human Rights Watch it is declared that Ecuadorian legislation does neither prohibit nor regulate child labor in banana sector. The

228 Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies. Versoix: International Council on Human Rights Policy, 2002. p. 161

229 Nike workers claim military paid to intimidate them. ABC News. Web January 15, 2013. The source describes labor forced by military personnel. Available at <http://www.abc.net.au/news/2013-01-15/nike-accused-of-using-military-to-intimidate-factory-workers/4465058> [all accessed September 10, 2015]

230 Human Rights Watch (2003). Sudan, Oil, and Human Rights. United States of America. ISBN: 1564322912. Available at <http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf> [accessed October 21, 2015]

Ecuadorian law also does not protect interests of workers' associations and fails to deter employers from retaliating against workers for organizing. These legislation gaps let TNCs exploit children on banana plantations with poor working conditions, prevent workers from organizing and be not accused of violating domestic law²³¹.

These cases might be the result of illegal actions taken by TNCs (bribery, for example) in order to “encourage” government of host state to create favorable conditions. Governments have enough of legislative and actual power to violate human rights.

Therefore, it seems reasonable if the UN Global Compact's second principle would concentrate more on business complicity in human rights violations made by governments. This could be done by distinguishing another particular type of complicity (like the International Council on Human Rights did). In current version the types of complicity in human rights violations presented by UN Global Compact are too broad.

Besides this, the second principle contains the “silent complicity” which seem to be unnecessary. In fact, the non-governmental organization Human Rights Watch argues that the company be complicit in human rights abuse in following cases:

1. when corporations benefit from the failure of government to enforce human rights standards.

2. when corporations are involved in systematic violations of rights and the state, aware of such violations, and fail to meet its obligations under international human rights law; this constitutes human rights abuse by state omission and corporate commission.

3. when a corporation facilitates or participates in government human rights violations. Facilitation includes the company's provision of material or financial support for governmental forces which then commit human rights violations²³².

231 Human Rights Watch (2002). Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations. United States of America. Library of Congress. Available at <http://www.hrw.org/legacy/reports/2002/ecuador/2002ecuador.pdf> [accessed October 21, 2015]

232 Human Rights Watch (2003). Sudan, Oil, and Human Rights. United States of America.

The list does not include “silent complicity”. Such approach seems to be most reasonable because it is necessary to remember that TNCs are the actors of the economy sector. They might be accused of complicity in human rights breach when such breach is profitable for them, or they indirectly participate in it. In this case, the appropriate counteractions should be taken. However, if there is not possible economic benefit for TNCs from the human rights violations, it is obvious that there are not complicit in such violations. Simply because there is no motivation for that.

TNCs are not a regulative body. They do not have to control the compliance with human rights principles in every host state where they operate. They perform activities in different countries in order to obtain profit. Considering them “complicit” in case they are silent or inactive when others violate human rights is not fair. Therefore, it seems that “silent complicity” is excess in the UN Global Compact.

Next four principles of the UN Global Compact are dedicated to labor issues. In particular, it is recommended that businesses shall uphold the freedom of association and the effective recognition of the right to collective bargaining, uphold the elimination of all forms of forced and compulsory labor, uphold the effective abolition of child labor, uphold the elimination of discrimination in respect of employment and occupation. This area is very closely connected to first two principles as long as all labor discrimination is to deal with human rights.

The problems that first six principles of UN Global Compact are dedicated to are “traditional” problems that arise out of TNC's activities.

The next three principles deal with problems that were given attention quite recently. These are environmental issues.

The question of the environment protection has become most popular in the XXI century

ISBN: 1564322912. p. 520. Available at <http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf> [accessed October 21, 2015]

as a result of the TNCs' pursuit of financial gain at the expense of the natural environment which took place in the second part of the XX century. Severe damage to environment was caused by activities of TNCs, such as copper mining in Papua New Guinea, forestry in Indonesia, pesticides in Mexico, industrial pollution in Brazil²³³.

According to the seventh principle of the UN Global Compact, businesses should support a precautionary approach to environmental challenges in order to take early actions rather than remedy the damage²³⁴. The eighth principle encourages businesses to undertake initiatives to promote greater environmental responsibility as such approach would lead to needing fewer raw material inputs and lower costs²³⁵. The ninth principle states that the development and diffusion of environmentally friendly technologies shall be encouraged by businesses²³⁶.

The last principle of the UN Global Compact deals with anti-corruption²³⁷. It was added in 2004 only after the UN Treaty on anti-corruption was adopted in 2003²³⁸. The corruption problem is usually associated with the activities of TNCs in developing countries. The question is quite serious as the corruption and non-business relationships with government usually let corporations escape from punishment for human rights, labor, environment violations. Thus, the introduction of this principle seems to be logical.

The Global Compact created a new tendency in the international regulation of business. It admits significant role that is played by TNCs and encourages them to contribute to the world development through complying with certain principles. The goal of the Global

233 Pearson, Charles. *Multinational World, environment and the Third World*. Durham, NC: Duke University Press, 1987. p. 3.

234 7th Principle of UN Global Compact, 2000

235 8th Principle of UN Global Compact, 2000

236 9th Principle of UN Global Compact, 2000

237 10th Principle of UN Global Compact, 2000

238 Lim, Alwyn and Tsutsui. Keyoteru (2012). *Globalization and Commitment in Corporate Social Responsibility: cross-national analysis of institutional and political-economy effects*. *American Sociological Review* 77(1), p. 71

Compact is to show TNCs the possible advantages that implementing of principles may bring to them, to motivate them to proper behavior instead of forcing them. The international society most probably realized that preceding international regulative instruments due to many reasons did not succeed a lot in search for effective enforcement mechanisms. Therefore, the UN Global Compact does not have section or chapter dedicated to implementation²³⁹.

Compliance with the UN Global Compact is dependent solely on the consent of the participating TNCs. From a legal point of view, the consent of any TNC to apply these principles could be withdrawn at any time, which definitely reduces the efficiency of principles. Such consent can not impose any rights and obligations upon TNCs under international law, as long as TNCs, as indicated above, do not currently have international legal personality.

3.3. Concluding remarks

The absence of a single type of regulation, which might efficiently coordinate TNCs' activities, resulted in the genesis of the system. This system includes 4 types of regulation of different levels: self-regulation, national, regional, international regulation. The self-regulation (corporate social responsibility) has a positive impact on TNCs' behavior. It is proved by a growing number of TNCs, which issue on the voluntary basis codes of conduct, rules, declarations, standards and statements dealing with human rights protection, workplace conditions, etc. The idea behind this type of regulation is that compliance with certain principles is not based solely on the possibility of using mandatory measures in case of violations. Compliance with principles can be based on social factors. Modern TNCs need competitive advantages on the market. Such advantages could be achieved, for example, through ethical business conduct, which would provide broad social support for their activities

239 The OECD Guidelines for Multinational enterprises and the Draft UN Code of conduct on transnational corporations do have provisions dedicated to implementation issues

in different countries. However, the main disadvantage of corporate social responsibility is that it may be used by TNCs as merely a tool to protect the reputation and the general image without revealing and solving real problems.

In this regard, corporate social accountability, which is a mix of two types of regulation (self-regulation with elements of national regulation) is more effective. It suggests that the self-regulation has to be influenced by pressure exerted at the national level through adoption of certain binding acts, which directly or indirectly force TNCs to comply with ethical business conduct and social norms. However, this type of regulation is limited to national boundaries, and its efficiency is, therefore, reduced. From this standpoint, the international standards of regulation have to be more efficient.

However, the main disadvantage of international instruments regulating TNCs is their “soft law” nature. In order to avoid confusion, it is worth to notice, that according to M. Dixon, “soft law” describes two different phenomena in international law. Firstly, it describes the rules of international law that do not stipulate concrete rights or obligations for the legal persons to whom they are addressed. Such norms are binding, they are rules of law, but their content is flexible or vague. Secondly, “soft law” describes the values, guidelines, ideas, proposals, etc., which may develop into rules of international law in the future. In this case, it is not really a law, “soft” or otherwise, but is another name for principles “de lege ferenda”, i. e. principles that could become normative in the future²⁴⁰. Therefore, the international instruments (guidelines, recommendations, codes of conduct, principles, etc.), which have been analyzed in this chapter, are “de lege ferenda” (“lex ferenda”). They might become binding in the future, but currently they are not “law” in the strict sense of this word. They do make a certain contribution to achieving the expected behavior from TNCs. At the same time, it is obvious that increasing influence of TNCs requires “de lege ferenda” to evolve and change its status from “soft law” to real law in the near future. The fact that TNCs do not have international

240 Dixon, M. Textbook on international law. 7th ed. Oxford University Press, 2013. p. 52

legal personality and are not likely to obtain it is one of the most serious obstacles to such transformation. Therefore, it is possible to conclude that the international regulation of TNC's will remain completely voluntary and will be based solely on social support (UN Global Compact seems to prove this assumption). Therefore, States will have to use other instruments in order to coordinate the activities of TNCs. In the scope of the increasing regional integration processes, the regional instruments might become the most effective type of regulation.

CHAPTER IV

PERSPECTIVES OF TRANSNATIONAL CORPORATIONS WITHIN ACCELERATING REGIONAL ECONOMIC INTEGRATION PROCESSES

SUMMARY: 4.1. Regional economic integration tendency and its basic influence on transnational corporations. - 4.2. Andean Community customs union: first attempts to develop common regional investment policy. - 4.3. NAFTA and ACEAN: investment policy within free trade agreements. - 4.4. European Union and Eurasian Economic Union: transnational corporations' regulation within international organizations of regional integration. - 4.5.

Concluding remarks.

4.1. Regional economic integration tendency and its basic influence on transnational corporations

Earlier in this work it has been noticed that TNCs are an essential part of globalization, which is basically a process of international integration. However, it is necessary to say that the modern world is witnessing the amplification of another type of integration, namely, regional economic integration. This tendency was born in the middle of XX century as a reply to common economic interests and need for security of territorially close countries. Since that time the regional integration trend has kept strengthening²⁴¹.

241 In 1957 Belgium, Germany, France, Italy, Luxembourg, Netherlands signed the Treaty

In 1992, L. Thurow saw XXI century as a scene of the battle of three economic superpowers: the Europe, the USA, and Japan²⁴². However, it seems that XXI century will be most probably an area for competition between regional groupings. The European countries form the European Union, which is an example of the deepest level of regional integration nowadays. The USA for several years has been a part of the North American Free Trade Agreement (NAFTA) alongside with Canada and Mexico. Japan is a participating state in negotiations on the Regional Comprehensive Economic Partnership (RCEP), which seem to be concluded in 2016²⁴³. The Aims of RCEP include broader economic integration in the region, equitable economic development, and strengthening economic cooperation. It is also necessary establishing the European Economic Community in order to frame the economic cooperation. Data from <http://eur-lex.europa.eu>. In 1967 Indonesia, Malaysia, Philippines, Singapore and Thailand established the Association of Southeast Asian Nations (ASEAN) to accelerate economic growth and promote stability. Data from <http://asean.org>. In 1969 five South American countries (Bolivia, Colombia, Chile, Ecuador y Perú) created the alliance with the purposes of economic and social cooperation (nowadays called Andean Community of Nations). Data from <http://www.comunidadandina.org>. The Caribbean Community and Common Market (CARICOM) was established by Barbados, Jamaica, Guyana and Trinidad & Tobago in 1973. Data from <http://www.caricom.org>. In 1975 the Economic Community of West African States (ECOWAS) was established by west African countries with common economic purposes. Data from <http://www.ecowas.int>. In 1983 several Burundi, Rwanda and the then Zaire established the Economic Community of Central African States (ECCAS) with common economic goals. Data from <http://www.au.int>. In 1991 Argentina, Brazil, Paraguay, and Uruguay established Mercosur with a purpose of creating the common market. Data from <http://www.mercosur.int>. In 1994, the North American Free Trade Agreement (NAFTA) came into effect and created free trade zones for Canada, the United States, and Mexico. Data from <http://www.naftanow.org/>. In 2014 three former Soviet states created the Eurasian Economic Union, which purposes included the economic ones. This is the most recent regional integration process. Data from <http://www.eaeunion.org> [all accessed December 17, 2015]

242 Thurow, Lester C. *Head to Head: The Coming Economic Battle among Japan, Europe, and America*. New York: Morrow, 1992

243 On 22 November, 2015, the Heads of State/Government of the RCEP Participating Countries (the Member States of the ASEAN, Australia, China, India, Japan, Korea and New Zealand) reviewed the progress of negotiations for the RCEP and issued a Joint Statement on the RCEP Negotiations in order to further intensify the efforts for conclusion of the RCEP negotiations in 2016. Data from <http://www.asean.org/news/asean-statement-communiques> [accessed December 21, 2015]

to point out that the huge territory in the middle of the Eurasian continent shall not be omitted. The integration process of several Post-Soviet states took nearly 25 years and has been shaped into the Eurasian Economic Union in 2014²⁴⁴. This region might also have a significant influence in XXI century.

It is obvious that the world architecture will most probably be based on regional blocks' pillars in the future. Therefore, in the frame of this work, it is necessary to analyze the regulation of TNCs' activities on the regional level. First of all, it is needed to observe briefly what impact regional integration has on the development of TNCs from the economic standpoint. This would help to understand the status and perspectives of TNCs on the regional level.

The regional economic integration usually strengthens the stability of the economies of the participating countries. This makes them more attractive for foreign direct investment. A good example is the European Union regional integration. According to R. Baldwin and E. Seghezza, the EU membership induced investment-led growth for Ireland, Portugal, and Spain²⁴⁵. The EU membership as well raised the investment attractiveness of the Member States, which joined the Union in 2004.

Img. 2 Foreign direct investment inflows before and after EU membership (2004)²⁴⁶

244 The beginning of this regional integration process could be traced to the establishment of the Commonwealth of Independent States in 1991

245 Baldwin, R. and Seghezza, E. (1998). Regional Integration and Growth in Developing Nations. *Journal of Economic Integration*. DOI: <http://dx.doi.org/10.11130/jei.1998.13.3.367>. pp. 367–399

246 Based on data from:

UNCTAD (2003). *World Investment Report: FDI Policies for Development: National and International Perspectives*. New York and Geneva. pp. 250-252. Available at http://unctad.org/en/Docs/wir2003light_en.pdf;

UNCTAD (2006). *World investment report: FDI from Developing and Transition Economies: Implications for Development*. New York and Geneva. pp. 299-302. Available at http://unctad.org/en/Docs/wir2006_en.pdf [all accessed December 17, 2015]

Country	FDI inflows (millions of US dollars)				
	2001	2002	2003	2004	2005
Cyprus	652	297	891	1079	1166
Czech Republic	5639	9319	2101	4974	10991
Estonia	542	307	919	1049	2853
Hungary	2440	854	2137	4654	6699
Latvia	164	396	292	699	632
Lithuania	446	732	179	773	1009
Poland	5713	4119	4589	12873	7724

North American Free Trade Agreement (NAFTA) in 1994 replaced the Canada–United States Free Trade Agreement and included the territory of Mexico into free trade zone. This membership increased foreign direct investment inflows into Mexico significantly as well.

Img. 3 Foreign direct investment inflows in Mexico before and after NAFTA membership (1994)²⁴⁷

Year	1992	1993	1994	1995	1996	1997	1998	1999
FDI inflows (Millions of Dollars)	4393	4389	10 973	9 526	9 186	12 831	10 238	11 233

The impact of regional integration on foreign direct investment inflows could be traced even in particular spheres. Thus, Mercosur's membership increased the amount of foreign direct investment inflows into the automobile industry of Argentina significantly²⁴⁸.

Thereby, the historical background shows that regional economic integration contributes

²⁴⁷ Based on data from:

UNCTAD (1996). World Investment Report: Investment, Trade and International Policy Arrangements. New York and Geneva. p.229. Available at http://unctad.org/en/Docs/wir1996_en.pdf;

UNCTAD (2000). World Investment report: Cross-border Mergers and Acquisitions and Development. New York and Geneva. p. 285. Available at http://unctad.org/en/Docs/wir2000_en.pdf [all accessed January 13, 2016]

²⁴⁸ Özden, Çağlar, and Francisco J. Parodi. Customs Unions and Foreign Investment Theory and Evidence from Mercosur's Auto Industry. Santiago, Chile: Banco Central De Chile, 2004. p. 31

significantly to the rise of foreign direct investment inflows into the region. As it was noticed in the first chapter of this work foreign direct investment is an instrument for the expansion of TNCs' presence.

At the same time, regional integration contributes to creation and strengthening of corporations originating from the region. The key position here is the enlargement of the market due to the abolishment of trade and customs barriers. In the frame of the regional integration any large company with the significant amount of assets and turnover created within the territory of one of the members receives the possibility for easier enlargement within the territory of the region.

In the light of aforementioned facts we can see a direct causal relationship between regional economic integration and expansion of TNCs' presence in the region.

Therefore, there shall be certain room for regulation of TNCs on the regional level, which is more efficient than the national one. Within regional integration it is possible to establish the collective approach towards regulation of TNCs' certain activities, that would strengthen the practical influence of each member-state. Therefore, the aspects of regional regulation of TNCs' are worth to be analyzed.

In the modern world, there are plenty of regional economic associations, which could not be analyzed in full. Therefore, only most prominent examples will be analyzed in this chapter. It is obvious that regional groupings have different levels of integration. Therefore, following classification established by WTO²⁴⁹ it is worth to analyze the *free trade agreements*

249 The WTO divides regional trade agreements into three types: 1) a free trade agreement; 2) a customs union; 3) an economic integration agreement. The classification basically implies that regional economic integration has several levels and next level always includes higher degree of economic liberalization than the previous one. The regional trade agreements information system of WTO is available at <https://rtais.wto.org> [accessed January 10, 2016]. The detailed definitions of a free trade agreement and a customs union could be found in Paragraph 8(a) and paragraph 8 (b) of Article XXIV of GATT 1994, a detailed characteristics of an economic integration agreement might be found in Article V of GATS.

(North American Free Trade Agreement (NAFTA) and Association of South-East Asian Nations (ASEAN), which are world's prominent recipients of foreign direct investment), *customs union* (the Andean Community, which was first to promulgate foreign investment code), and *international organizations of regional economic integration* as most developed form of regional cooperation (the European Union and the Eurasian Economic Union).

4.2. Andean Community customs union: first attempts to develop common regional investment policy

The first attempts for regional regulation of foreign investment were undertaken by the Andean Community. In 1970, the Commission of the Cartagena Agreement adopted the Decision No. 24 on Common regime of treatment of foreign capital and trademarks, patents, licenses, and royalties. The document contained quite strict principles for activities of foreign investors, including TNCs. The approach of Andean Community towards foreign direct investment was rather alert at that time. For example, art. 2 of the Decision 24 required a foreign investor desiring to invest in a Member State to submit an application to the competent national authority, which should then assess and approve it, if it met the development priorities of the receiving country. The Decision 24 even excluded foreign direct investment from certain sectors, such as drinking-water, drainage, electric power, public lighting, health, sanitation, telephone and postal and telecommunication services, insurance, commercial banking or other financial institutions (art. 41 and art. 42). Moreover, the art 43 of the Decision 24 prescribed no foreign investment in an undertaking concerned with domestic transport, advertising, commercial broadcasting, television, newspapers, magazines, or the marketing of any kind of product within the country. It also required foreign undertaking already operating in these sectors to convert itself into a national undertaking, i.e. to offer for sale to national investors at least eighty per cent of its shares within three years from the entry of the Decision 24 into

force²⁵⁰. The Decision 24 aimed at developing domestic industry of the Member Countries.

However, times changed and the common tendency of the world economy and obvious advantages of investment inflows made Andean Community reconsider its approach towards foreign direct investment. Since its adoption, the Decision 24 experienced several amendments until it was replaced first by the Decision 220, and later, in 1991, by the Decision 291 of the Commission of the Cartagena Agreement. The Decision 291 made the regional environment much more favorable for TNCs comparing to the previous decisions. Thus, according to the Decision 291, foreign investors should have the same rights and obligations as those to which national investors are subject, except as provided for in the national legislation of each Member State. The strict control of foreign investment admission, which included application, was replaced by the procedure of foreign investment registration performed by the competent national agency in freely convertible currency²⁵¹.

In 1991, right after the adoption of the Decision 291 the Commission of the Cartagena Agreement adopted the Decision 292 on Uniform Code on Andean Multinational Enterprises. Through this document, Andean Community decided to stimulate the association of national investors in the Member Countries for working on projects of shared interest and multinational scope. The Uniform Code's scope of application covers the Andean Multinational Enterprises (AME), which is the company fulfilling several requirements. The most important features of the AME are following: principal domicile of such company shall be in the territory of one of the Member Countries, it must be constituted as a corporation in accordance with the procedures contemplated in the corresponding national legislation and it shall add to its name

250 Andean foreign investment code. (1972). Andean foreign investment code. *International Legal Materials*, 11(1). Art. 41, 42, 43 of the Decision 24 of the Commission of the Cartagena Agreement: Common Regime of treatment of foreign capital and of trademarks, patents, licenses, and royalties. p. 126–146. Available at <http://www.jstor.org/stable/20690848> [accessed January 26, 2015].

251 Decision 291 of the Commission of the Cartagena Agreement: Common Code for treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties (1991). Chapter II. Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2915> [accessed January 26, 2015].

the words “Andean Multinational Enterprise” or the letters “AME” [in Spanish “Empresa Multinacional Andina” or “EMA”]. Its capital must be represented by nominal shares of equal value that confer on the shareholders equal rights and impose equal obligations, and it must have contributions of property from national investors from two or more Member Countries that together are greater than sixty percent of the capital of the company, etc.²⁵²

The Uniform Code prescribes the special treatment for the AME, such as treatment not less favorable than that established for national companies, free circulation of capital contributions to the AME and their branches in the subregion, participation in economic sectors reserved for national companies, right to open branches in other Member Countries, investors' right to transfer abroad in freely convertible currency all of the net verified earnings, elimination of double taxation, eligibility for export incentives under the same conditions contemplated for national companies, facilitation of contracting of personnel with subregional origin, etc.²⁵³

It is obvious that alongside with the recognition of the importance of TNCs in the global economy and change in the investment policy the Andean Community aims to stimulate the creation of TNCs within the region in order to strengthen the national economies, industries and positions of the Member States at the international level.

4.3. NAFTA and ACEAN: investment policy within free trade agreements

252 Andean Group: Commission decision 292 — uniform code on Andean multinational enterprises. (1991). Andean Group: Commission Decision 292 — Uniform Code On Andean Multinational Enterprises. *International Legal Materials*, 30(5). Art. 1. of the Decision 292 of the Commission. p. 1295–1302. Available at <http://www.jstor.org/stable/20693612> [accessed January 27, 2016]

253 Andean Group: Commission Decision 292 — uniform code on Andean multinational enterprises. (1991). Andean Group: Commission Decision 292 — Uniform Code On Andean Multinational Enterprises. *International Legal Materials*, 30(5). Art. 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21 of the Decision 292 of the Commission. p. 1295–1302. Available at <http://www.jstor.org/stable/20693612> [accessed January 27, 2016]

North American Free Trade Agreement

The whole Chapter 11 of the North American Free Trade Agreement is dedicated to provisions regarding investment. Section A of the Chapter prescribes that each Member State shall accord to investors of another Member State and their investments treatment no less favorable than the one, which it accords to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The Section prohibits the Member States to impose certain requirements towards investors, such as requirement to export a given level or percentage of goods or services, or requirement to achieve a given level or percentage of domestic content. There are also provisions protecting investor's rights on questions, relating to senior management and boards of directors (no obligatory appointment of individuals of any particular nationality to senior management positions is permitted), transfers (all transfers relating to an investment shall be made freely and without delay), expropriation and compensation (there are strict exceptions when expropriation is possible under compensation)²⁵⁴.

Provisions of NAFTA, which are related to investment, create very favorable conditions for TNCs of the Member States. It seems that they mainly impose obligations upon the Member States making almost impossible future legislation change, which might affect investment negatively. The only provision of Section A, which seems to protect the Member States' rights for taking any measures against investors is art. 1114 (“Environmental Measures”). It states that a Member State has a right to adopt, maintain or enforce any measure to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The most important special feature of investment policy in the frame of NAFTA is contained in Section B of Chapter 11, which is called “Settlement of Disputes between a Party

²⁵⁴ Full text is available at www.nafta-sec-alena.org [accessed January 12, 2016]

and an Investor of Another Party”. It establishes a mechanism for the settlement of investment disputes between investor and a Member State before a tribunal. When investor supposes that the investment provisions of NAFTA (Section A of Chapter 11) were violated by certain Member State he may claim against such Member State both on his own behalf and on behalf of the enterprise. According to art. 1120 of NAFTA, the claim might be submitted under:

- the International Center for Settlement of Investment Disputes (ICSID) Convention if both the disputing Party and the Party of the investor are parties to the Convention; or
- the Additional Facility Rules of ICSID if either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- the UNCITRAL Arbitration Rules.

This range of choice is necessary as one of NAFTA Members, Mexico has never been and currently is not a party to ICSID rules. The final award of the tribunal is binding for disputing parties.

This regional investment dispute settlement mechanism is effectively used by investors of the NAFTA Member States²⁵⁵. In 2004 two TNCs, namely Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, submitted a claim to arbitration against the United Mexican States arguing that amendments to tax legislation adopted by the United Mexican States breached Chapter 11 of NAFTA. In 2001 Mexican Congress amended its tax legislation imposing a 20 percent excise tax on soft drinks and syrups and the same tax on services used to transfer and distribute soft drinks and syrups. The TNCs alleged that the legislation amendments and resulting imposition of the tax had had a direct impact on their investment, causing substantial loss or damage in violation of the art. 1102, art. 1106, and art. 1110 of NAFTA. In its final award the Arbitral Tribunal found that the United Mexican States breached Article 1102 (National Treatment) and Article 1106 (Performance Requirements)

²⁵⁵ There are more than 60 disputes on different stages according to www.naftaclaims.com [accessed January 12, 2016]

with regard to the claimants' investment in Mexico and ordered the Member State to pay the damage to the TNCs²⁵⁶.

It is obvious that the North American Free Trade Agreement provides favorable and safe conditions for investors' of the Member States and protects their interests. Such position is not surprising as the main driving force of NAFTA is the USA, which alongside with Europe and Japan gave a birth to many powerful corporations that eventually became TNCs. However, there are no explicit rules governing third countries' investment in NAFTA. This part is not regulated at the regional level but remains a prerogative for the Member States. The continuing integration of NAFTA lets to suppose that the Member States might develop common foreign investment policy which would affect TNCs originating out of NAFTA region in the future.

ASEAN free trade agreement

The Association of Southeast Asian Nations (ASEAN) was born on 8 August 1967. Since its foundation the Association has enlarged twice and nowadays includes ten countries, among which are Brunei, Cambodia, Indonesia, Laos (Lao PDR), Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam²⁵⁷.

The first prominent steps towards coordinated investment policy were taken in December 1987, when ASEAN countries signed the Agreement for the promotion and protection of investments. Later this Agreement was superseded by several documents and currently its successor is ASEAN Comprehensive Investment Agreement (ACIA) signed on February 26, 2009. The document aims to create a free and open investment regime in ASEAN for the purpose of economic integration²⁵⁸. Just like the Chapter 11 of NAFTA the ACIA

256 Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5. Final award. Available at <http://www.naftaclaims.com/disputes/mexico/ADM/Tate/ADM-TateLyle-Mexico-Award.pdf> [accessed January 15, 2016]

257 On the website at asean.org [accessed January 15, 2016]

258 Full text is available at <http://agreement.asean.org/media/download/20140119035519.pdf> [accessed January 15, 2016]

requires from each contracting party (the ASEAN Member State) to provide investors of all other contracting parties and their investment with the treatment not less favorable than the one provided for own investors or for investors of other countries. In fact, the art. 5 (“National treatment”) and art. 6 (“Most-favored-nation treatment”) of the ACIA seem to be inspired a lot by the art. 1102 and 1103 of NAFTA respectively²⁵⁹.

Besides this, the ACIA provides nationals or companies of the Member States with certain privileges that are very similar to those listed in NAFTA. For example, the Member State shall not require that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality, while it may require that a majority of the board of directors of a juridical person be of a particular nationality, or resident in the territory of the Member State, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment (art. 8 “Senior Management and Board of Directors”). This provision is almost identical to art. 1107 of NAFTA.

The ACIA ensures that each Member State shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory (similar to art. 1109

259 Art. 5 of ASEAN Comprehensive Investment Agreement: 1. Each Member State shall accord to investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Member State shall accord to investments of investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Art. 1102 of NAFTA: 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments...

of NAFTA). The expropriation and compensation provisions (art. 14) are also very similar to NAFTA (art. 1110).

Section B of ACIA is dedicated to investment disputes between an investor and a Member State. The investment dispute settlement mechanism requires that the investor prior to submitting a claim goes through consultations. In case an investment dispute has not been resolved within 180 days, the investor might submit a claim to arbitration. Art. 33 of ACIA provides an investor with a choice to submit a claim:

- to the courts or administrative tribunals of the disputing Member State, if they have jurisdiction over claims; or

- under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, if both the disputing Member State and the Member State of investor are parties to the ICSID Convention; or

- under the ICSID Additional Facility Rules, if either of the disputing Member State or the Member State of investor is a party to the ICSID Convention; or

- under the UNCITRAL Arbitration Rules; or

- to the Regional Center for Arbitration at Kuala Lumpur; or

- any other regional center for arbitration in ASEAN; or

- if the disputing parties agree, to any other arbitration institution.

It is obvious that ASEAN learned the experience of NAFTA in the question of investment disputes' settlement and modified it. Thus, for example, art. 33 of ACIA gives a much wider range of choice to a disputing investor than art. 1120 of NAFTA.

In general, ACIA is heavily inspired by the Chapter 11 of NAFTA.

However, ACIA in contrast to NAFTA has provisions relating to third countries' investment in ASEAN. For example, in accordance with the art. 24 and 25 of the ACIA Member States shall cooperate in order to increase and facilitate foreign investment into ASEAN through encouraging the growth and development of ASEAN small and medium

enterprises and multinational enterprises, enhancing industrial complementation and production networks among multinational enterprises in ASEAN, creating the necessary environment for all forms of investments, streamlining and simplifying procedures for investment applications and approval, establishing one-stop investment centers, etc.

ASEAN is a crucial region of the global economy in terms of foreign direct investment²⁶⁰, especially in such sectors as manufacturing and trade²⁶¹. Therefore, its experience seems to be worth analyzing. Its regional policy on investment falls into North American tendency and provides guarantees and favorable conditions to the international business represented by TNCs.

4.4. European Union and Eurasian Economic Union: transnational corporations' regulation within international organizations of regional integration

European Union

The European Union is a unique international organization which provides not just economic, but also political integration. It was established in 1992 by the Treaty on the European Union (Maastricht Treaty).

In general, the investment policy coordinating the intra-EU investments is expressed in the “freedom of capital” concept. The art. 63 and 64 of the Treaty on the functioning of the European Union eliminate any restrictions on the movement of capital, involving direct investment, and payments between the EU Member States²⁶².

260 In 2014 ASEAN countries attracted 136 181 million (USD) foreign direct investment inflows out of 1 354 046 million (USD) of the world foreign direct investment flows in total. It is almost half of a European Union amount of foreign direct investment inflows in 2014 (280 124 million USD), while ASEAN includes just 10 countries. Data from: UNCTAD (2015). World Investment Report: Reforming international investment governance. New York and Geneva, p. 236

261 In 2014 foreign direct investment inflows into ASEAN were 22 215,4 million (USD) in manufacturing sector and 17 055,2 million (USD) in wholesale and retail trade. Data from aseanstats.asean.org [accessed January 16, 2016]

262 European Union. Consolidated version of the Treaty on the Functioning of the European

At the same time, the European Union is a prominent recipient and source of foreign direct investment, and consequently home and host region for many TNCs. Therefore, the investment deals with capital to/from third countries shall be regulated as well. There are plenty of bilateral investment treaties concluded between the EU Member States and third countries for this purpose. However, the EU moves towards common international investment policy, which means a conclusion of investment agreements on the EU level. In 2010, the European Commission made a Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions named “Towards a comprehensive European international investment policy”, which contained a strategy for the EU common international investment policy. The aim of this policy is to create favorable conditions for investors of third countries and at the same time for EU investors abroad, creating a “two-way street” relations with third partners. According to Communication, the bilateral investment treaties at the Member States' level have certain disadvantages, which do not allow to create such relationships. In particular, not all of such treaties have same high standards and most of them relate to the treatment of investors “post-entry” or “post-admission” without specific binding approach regarding the conditions of entry²⁶³.

The Communication resulted in Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between the Member States and third countries²⁶⁴. The Union. C 326/47, 26.10.2012.

263 European Union: European Commission. Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions towards a comprehensive European international investment policy. Brussels, 7.7.2010. COM(2010)343. Available at <http://trade.ec.europa.eu/> [accessed January 26, 2016]

264 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. Official Journal of the European Union. L 351/40, 20.12.2012. Available at <http://www.italaw.com>. List of the bilateral investment agreements between the EU Member

Regulation addresses the status of bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorized to amend or conclude bilateral investment agreements. The bilateral investment agreements signed before December 1, 2009, could be maintained in force, or enter into force until a bilateral investment agreement between the Union and the same third country enters into force. However, if the Commission finds out that one or more of the provisions of such bilateral investment agreement constitute a serious obstacle to the EU common international investment policy, the Commission and the Member State shall cooperate in order to identify the appropriate actions to resolve the matter (Chapter II). In order to amend or conclude new bilateral investment agreement a Member State has to be authorized. Thus, prior to negotiations with a third country in order to amend or conclude a bilateral investment agreement, a Member State shall notify the Commission of its intentions in writing. If such bilateral investment agreement would not constitute any obstacle to the development of the EU common international investment policy, the Commission shall authorize the Member State to open negotiations. Before signing a bilateral investment agreement, a Member State shall notify the Commission and transmit to it the text of an agreement (Chapter III). As for bilateral investment agreements concluded between 1 December 2009 and 9 January 2013 a Member State shall notify the Commission of such an agreement, and if it creates an obstacle for further common international investment policy, the Member State shall not take any further steps towards the conclusion of such an agreement, and shall withdraw or reverse those steps which have been taken (Chapter IV).

Thus, the EU tends to replace investment relationships between the particular Member States and third countries by common international investment policy in order to protect the interests of the European investors, to ensure equal treatment of foreign investors, and to create the high standards for all bilateral investment relations. Such approach does not exist in other

States and third countries is available at <http://eur-lex.europa.eu/> [all accessed January 20, 2016]

regional associations and is, therefore, unique.

The important aspect of the regulation of TNCs is investment disputes settlement. Generally in case of the intra-EU disputes, i.e. if the European investor's right are violated by the EU Members States, the claim of the investor shall be brought in front of the national court of that Member State. However, there is certain room for international arbitration in such cases. It is possible under bilateral investment treaties concluded between the EU Member States. At the same time, it is obvious that not all European investors can benefit from it because not all the Members States have such bilateral investment treaties between them, and standards of such treaties are different. Moreover, the international arbitration for European disputes will most probably no longer be available in a following couple of years because the European Commission believes there is no need for bilateral investment treaties between the Member States anymore and takes certain steps to encourage their termination. Thus, in June 2015, the European Commission has initiated infringement proceedings against five Member States requesting them to terminate the intra-EU bilateral investment treaties between them. Besides this, the Commission has initiated an administrative dialogue with the remaining 21 Member States on the termination of their intra-EU bilateral investment treaties (except Italy and Ireland, which have already terminated all their intra-EU bilateral investment treaties)²⁶⁵. Thereby, the general way to settle the intra-EU investment disputes is to negotiate or to file a claim in the national courts of an appropriate Member State. Such situation is not in favor of business and put TNCs in a vulnerable position. At the same time, it ensures interests of the Member States, protects common EU law, and guarantees equal conditions for all EU investors.

The investment disputes arising from breach of the EU investment agreements with third parties are usually settled through the investor-to-state dispute settlement mechanism which

²⁶⁵ More information is available in European Commission Press Release on the website at <http://europa.eu/> [accessed January 20, 2016]

depends on particular investment agreement rules. The complexity of the EU, which is a contracting party to several investment treaties, resulted in the adoption of Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party²⁶⁶. According to art. 3 of this Regulation, financial responsibility arising from a dispute initiated by the third country shall be borne:

1. by the EU when financial responsibility arises from treatment afforded by the institutions, bodies, offices or agencies of the Union,

2. by the Member State concerned when financial responsibility arises from treatment afforded by that Member State. However, the EU shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law.

Chapter III of the Regulation (“Conduct of disputes”) contains provisions governing the conduct of disputes concerning treatment afforded by the Union (Section I), and rules governing the conduct of disputes relating to the treatment afforded by a Member State (Section II). According to Section I, the EU shall act as a respondent where the dispute concerns treatment provided by the institutions, bodies, offices or agencies of the Union. In accordance with Section II, if a dispute arises from treatment fully or partially afforded by a Member State, as a general rule the Member State shall act a respondent. However, the Commission may decide by means of implementing acts, based on a full analysis and legal reasoning provided by the Member State, that the European Union is to act as the respondent. This is possible when the EU would bear all or, at least, part of the potential financial responsibility arising from the dispute or/and the dispute also concerns treatment afforded by

²⁶⁶ Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. Official Journal of the European Union. L 257/121, 28.08.2014

the institutions, bodies, offices or agencies of the EU. Besides this, the Commission may decide that the European Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case (art. 9). The Regulation is basically another pillar for the future common international investment policy of the EU.

Regarding investment disputes, it is necessary to notice that the European Commission has proposed in September 2015 a new system for resolving disputes between investors and states – the Investment Court System, which would replace investor-to-state dispute settlement mechanism. The system would be composed of a first instance Tribunal and an Appeal Tribunal, operating on similar principles to the WTO Appellate Body. The judges would be publicly appointed. The ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the basis of gender, race or religion, or nationality, expropriation without compensation, or denial of justice. Most probably the Transatlantic Trade and Investment Partnership would be the first one to use the Investment Court System²⁶⁷.

The European Union is the international organization which achieved the highest level of regional integration. This resulted in the creation of the European Union law, which is a very special kind of law²⁶⁸. It is a result of the Member States' voluntary restriction of sovereign rights, and is different from general international law. This idea was proved by the European Court of Justice in 1963: “The European Economic Community constitutes *a new legal order of international law* for the benefit of which the states have limited their sovereign

²⁶⁷ More information is available in European Commission Press Release. Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP). Both are available at <http://europa.eu/> [all accessed January 21, 2016]

²⁶⁸ The European Union law consists of primary (founding EU Treaties), secondary (unilateral acts and agreements) and supplementary law (international law and general principles of law). Detailed information might be available at <http://eur-lex.europa.eu> [accessed January 22, 2016]

rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of the Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community”²⁶⁹.

Due to the scope of this work the European Union secondary law is of a particular interest. It includes regulations, directives, decisions (recommendations and opinions do not have any binding force). According to art. 249 of the Consolidated Version of the Treaty establishing the European Community (or later - art. 288 of the Consolidated Version of the Treaty of the functioning of the European Union), regulation shall have a general application, it is binding in its entirety and directly applicable in all the Member States. A directive shall be binding as well, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed²⁷⁰.

The EU secondary law allows the Union to impose certain obligations upon the Member States in order to regulate TNCs' activities (directives) or even regulate TNCs' activities directly (regulations), forming a special company law of the European Union. This is very important, because the European Union is the only one regional association now, that not only protects interests of transnational business on regional level, but also imposes obligations upon TNCs. There are several legal documents, that are worth to be analyzed in this regard.

269 European Court of Justice. Judgment of 5 February, 1963. NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Case 26-62. ECLI identifier: ECLI:EU:C:1963:1. p. 2

270 European Union. Consolidated version of the Treaty on the Functioning of the European Union. C 326/47, 26.10.2012. Section 1, chapter 2, art. 288

One of the EU legislation documents that contributes prominently to TNCs' regulation is Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings²⁷¹.

It imposes upon the EU Member States an obligation to require certain types of undertakings²⁷² governed by its national law to draw up the annual financial statements and management reports. These certain types of companies include types mostly used by TNCs such as private companies limited by shares or by guarantee (ltd.) in United Kingdom, la società per azioni (S.p.a.) in Italy, die Aktiengesellschaft (AG) and die Gesellschaft mit beschränkter Haftung (GmbH) in Germany, la société anonyme (S.A.) in France, etc. (Annex I). The obligatory financial statements shall comprise, as a minimum, the balance sheet, the profit and loss account and the notes to the financial statements; the management report shall include a fair review of the development and performance of the undertaking's business and of its position, a description of the principal risks and uncertainties, which it faces and a corporate governance statement. This statement shall contain the corporate governance code to which the undertaking is subject, or the corporate governance code which the undertaking may have voluntarily decided to apply, and all relevant information about the corporate governance practices applied over and above the requirements of national law. If an undertaking departs from a corporate governance code, it shall provide the reasons for doing so (art. 20). This provision shows that the Directive is in basically a corporate social accountability instrument.

²⁷¹ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings. Official Journal of the European Union. L 182/19, 29.6.2013

²⁷² "Undertaking" in Community competition law covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed, which activity consists in offering goods and services on a given market. European Court of Justice (Grand Chamber). Judgment of 11 July, 2006. Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities. Case C-205/03 P

Besides this, the corporate government statement shall contain a description of the main features of the undertaking's internal control and risk management systems in relation to the financial reporting process, the composition and operation of the administrative, management and supervisory bodies and their committees. This ensures the transparency of an undertakings' activities.

Chapter 6 of the Directive (“Consolidated financial statements and reports”) is of a particular interest in terms of TNCs' regulation. According to this Chapter, a Member State shall require a parent undertaking governed by its national law to draw up consolidated financial statements and a consolidated management report. Parent undertaking in this case means that such undertaking:

- has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); or

- has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of a subsidiary undertaking and is at the same time a shareholder in or member of that undertaking; or

- has the right to exercise a dominant influence over a subsidiary undertaking of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association; or

- is a shareholder in or member of an undertaking, while 1. a majority of the members of the administrative, management or supervisory bodies of a subsidiary undertaking have been appointed solely as a result of the exercise of its voting rights; or 2. controls alone a majority of shareholders' or members' voting rights in that undertaking.

In addition to this, the Member States may require any undertaking governed by their national law to draw up consolidated financial statements and a consolidated management report, if that undertaking (a parent undertaking) has the power to exercise, or actually exercises, dominant influence or control over another undertaking (the subsidiary

undertaking); or that undertaking (a parent undertaking) and another undertaking (the subsidiary undertaking) are managed on a unified basis by the parent undertaking (art. 22). The exemption from this rule are small groups, and could be medium groups upon the decision of a Member State, under condition that they do not include any public-interest entity.

Thus, large and some medium TNCs, which parent companies are located in the EU, are obligated to draw up consolidated financial statements. Besides this they are obliged to draw up the consolidated management report, which shall indicate the number and nominal value or, in the absence of a nominal value, the accounting par value of all of the parent undertaking's shares held by that parent undertaking, by subsidiary undertakings of that parent undertaking or by a person acting in his own name but on behalf of any of those undertakings. The corporate governance statement shall refer to the main features of the internal controls and risk management systems for the undertakings included in the consolidation, taken as a whole (art. 29).

The consolidated financial statements shall show the assets, liabilities, financial positions, profits or losses of the undertakings included in a consolidation as if they were a single undertaking (art. 24). The consolidated management report shall provide an information required under Directive in a way, which facilitates the assessment of the position of the undertakings included in the consolidation taken as a whole (art. 29). Thus, the Directive helps to get a clear idea of a certain TNC as a unit and makes a significant contribution to TNCs' regulation on a regional level.

Next EU document, which seems to have an explicit impact on TNCs, is the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State. The directive was worked out in order to protect interests of shareholders and third parties which might have been affected by lack of coordination, in particular lack of disclosure of branches. It has provisions, concerning both branches of companies from the EU

Member States, and branches of companies from third countries. The compulsory disclosure includes among others the disclosure of accounting documents. The Member States may require third countries companies to draw up such documents in accordance with the EU legislation (art. 9)²⁷³. This Directive covers TNCs with branches, even those that originate from third countries.

Another interesting document is the Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, in particular its art. 41, according to which each public-interest entity shall have an audit committee. Public-interest entities include credit institutions, insurance undertakings, and other entities designed as public-interest entities by the Member States²⁷⁴. This Directive, therefore, affects the interests of TNCs, performing business in credit or insurance industries.

The EU legislative instrument which has had a significant impact on the acceleration of transnational activities is the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. It facilitated the cross-border merger between companies residing in different EU Member States. Such merger might be performed by 3 means: by acquisition, when one or more companies transfer all their assets and liabilities to another company in exchange for the issue of securities or shares and, if applicable, a cash payment; by formation of a new company, when two or more companies transfer all their assets and liabilities to a company that they form in exchange for the issue of securities or shares and, if applicable, a cash payment; by transfer, when a company transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

²⁷³ Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State. Official Journal of the European Union. L 395/36, 30.12.1989

²⁷⁴ Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts. Official Journal of the European Union. L 157/87, 09.06.2006

In general, the Directive allows to avoid complicated and expensive legal procedures and fastens the cross-border mergers, which are widely favored by many modern TNCs.

At the same time, the initiatives facilitating merger shall be implemented carefully. According to M. Porter, the uncontrolled mergers might be counterproductive, and the reduction of competition might lead to undermining of competitive advantage. Therefore, he argues, there is a necessity for strong antitrust policy²⁷⁵. This means that the limits of the mergers shall be established by legislation.

This approach is implemented in the EU competition policy. First legal act regulating concentration policy on the territory of the European Economic Community in order to ensure the competition in the common market was adopted almost 25 years ago in 1989. It was Council Regulation (EEC) No 4064/89. The Regulation dealt with concentrations of Community dimension, when two or more previously independent undertakings merged, or one or more persons already controlling at least one undertaking, or one or more undertakings acquired, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings. The Regulation prescribed the rules of notification about concentrations, suspension of concentrations, investigation procedures, fines etc.²⁷⁶

In 2004, the Regulation (EEC) No 4064/89 was recast by Council Regulation (EC) No 139/2004. This Regulation as well applies to all concentrations with a Community dimension. The Regulation due to its legal nature has binding effect directly on undertakings, it imposes certain obligations upon them (for example, to notify the Commission prior to concentration)

In Regulation No 139/2004 the definition of concentration with a Community dimension was expanded. Thus, the Community dimension now implies that:

²⁷⁵ Porter, Michael E. (1990). The competitive advantage of nations. Harvard Business Review. p. 89

²⁷⁶ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. Official Journal L 395, 30/12/1989 P. 0001 – 0012

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million, and

- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration that does not meet the aforementioned thresholds has a Community dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million, and

- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million,

- in each of at least three Member States included for the purpose of the aforementioned point, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million,

- and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State²⁷⁷.

Therefore, the competition law deals mainly with large mergers which can significantly affect the competition on the market. In this regard it is necessary to notice that the Regulation No 139/2004 has a very explicit reference to TNCs. According to its art. 5, the aggregate turnover of an undertaking concerned within the meaning of the Regulation shall be calculated by adding together the respective turnovers of the following:

²⁷⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Official Journal of the European Union. L 24/1, 29.1.2004

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly: (i) owns more than half the capital or business assets, or (ii) has the power to exercise more than half the voting rights, or (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or (iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

It is obvious that art. 5 of the Regulation takes into account economic interdependence between separate undertakings and, therefore, aims at addressing TNCs. In general, the main goal of the Regulation is to avoid harmful reduction of competition on the regional market. In case the expected merger might reduce competition without providing adequate remedies such merger would be prohibited.

The competent antitrust law is essential because the competitiveness of companies evolves in the atmosphere of competition. Cross-border mergers are efficient under the condition they are regulated at the supranational level.

In general, the regulation of TNCs within the European Union seems to be more effective in comparison to other regional alliances because it not only protects interests of the transnational business at the regional level (like NAFTA), but also imposes certain obligations upon TNCs directly (regulations) or indirectly (directives).

One of the most prominent steps in the development of the EU corporate legislation is the creation of the “Societas Europaea” (European company). The European company was

introduced by Council Regulation (EC) No 2157/2001 of 8 October 2001, which came into force in 2004²⁷⁸. This Regulation was born out of an idea that not only trade barriers has to be removed within the EU, but also, the forms of production have to be adapted to the Community dimension. For this purpose, it was necessary that companies which activities were not locally limited should have a possibility to carry out their activities on a Union scale.

The provisions of the Regulation allow the establishment and management of a company with a European dimension, which would be free from the obstacles arising from the disparity and the limited territorial application of national company law. The *Societas Europaea* (SE) shall have legal personality. Its capital shall be divided into shares (art. 1), be expressed in euro and be not less than EUR 120000 (art.4). The European company shall be regarded and treated in every Member State as a public limited-liability company formed in accordance with the law of the Member State, in which it has its registered office (art. 10). It may itself set up one or more subsidiaries in the form of European company (art. 3). Its registered office shall be located within the Community, in the same Member State as its head office (art.7).

The European company might be created in different ways (art. 2):

1. Merger (in order to establish the European company). Public limited-liability companies formed under the law of a Member State, with registered offices and head offices within the Community can form a European company through merger provided that at least two of them are governed by the law of different Member States.

2. Holding European company. Public and private limited-liability companies, formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding European company provided that each of at least two of them is governed by the law of a different Member State, or has for at least two years had a subsidiary company governed by the law of another Member State or a branch

²⁷⁸ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). Official Journal of the European Union. L 294/1, 10.11.2001

situated in another Member State.

3. Subsidiary European company. Legal bodies governed by public or private law (companies, enterprises or other legal bodies), formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary European company by subscribing for its shares, provided that each of at least two of them is governed by the law of a different Member State, or has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

4. Conversion. A public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into a European company if for at least two years it has had a subsidiary company governed by the law of another Member State.

The European company is to be governed by the Regulation and by the provisions of its statute, where it is expressly authorized by the Regulation. When certain matters are not regulated by the Regulation or partly regulated by it, the European company shall be governed by the provisions of laws adopted by the Member States in implementation of Community measures relating specifically to European companies, and by the provisions of the Member States' laws which would apply to a public limited-liability company formed in accordance with the law of the Member State in which the European company has its registered office, and by provisions of European company's statute, in the same way as for a public limited-liability company formed in accordance with the law of the Member State (art. 9).

The structure of the European company shall comprise a general meeting of shareholders and a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in its statute (art. 38). Members of company organs shall be appointed for a period laid down in the statute not exceeding six years (art. 46).

Even though the Regulation does not cover such areas as taxation, competition,

intellectual property or insolvency, and has some hindrances²⁷⁹, it also has prominent advantages. First of all, the Regulation allows the transfer of the registered office to another Member State (art. 8). Thereby, the European company is allowed to choose most favorable legislation through transferring registered office. This is a successful implementation of “home base” notion introduced by M. Porter²⁸⁰.

Besides this, the Regulation facilitates the cross-border mergers and lets large corporate groups (TNCs) simplify their business management and structure through obtaining a corporate form of a supranational nature. The Regulation, therefore, contributes significantly to the development of the European company law²⁸¹.

In general, the regional regulation of TNCs within the EU is more effective comparing to other regional associations. The European Union took several steps towards the establishment of the effective corporate law. First of all, the Union secondary law allows to cover business, operating on the territory of all the Member States, and, therefore, allows to protect interests of TNCs at the regional level and impose certain unified obligations upon them directly (regulations) or indirectly (directives). Secondly, the European Union develops a new business form of regional dimension, which receives equal treatment in all the Member States. Thirdly, the investment policy of the EU includes not only intra-EU investing regulation but also aims at creating common international investment policy.

279 Such hindrance is, for example, a difficult employment procedure established by Council Directive 2001/86/EC of 8 October 2001. It requires creation of a special negotiating body in order to achieve an agreement on arrangements for the involvement of the employees within the future European company prior to its creation. Official Journal of the European Union. L 294/22, 10.11.2001

280 Porter, Michael E. (1990). The competitive advantage of nations. Harvard Business Review. p. 73 – 91

281 Next prominent step in development of the EU common company law and transnational business could be the adoption of a Statute for a European Private Company (SPE), which would allow medium and even small enterprises to operate on the Community scale. The Proposal for a relevant Council Regulation was made on June, 25 2008. However, the decision has not yet been made. The updated information could be tracked on <http://www.europeanprivatecompany.eu/> [accessed January 25, 2016]

Eurasian Economic Union

Due to the fact that the Eurasian Economic Union is a relatively new regional formation and, therefore, has not yet been well studied, it seems worth to analyze in short the integration process that preceded to its establishment and the key features of this new organization of regional integration.

The Post-Soviet States took several attempts to build a stable regional economic community after the dissolution of the USSR. The idea of the Eurasian Economic Union as an organization of economic integration was first put forward by the President of the Republic of Kazakhstan Nursultan Nazarbayev in March 1994 during a speech at Moscow State University²⁸². At that time the only form of cooperation between the Post-Soviet States was the Commonwealth of Independent States (CIS), established in 1991. However, the CIS was not a successful attempt for building regional integration. It had a huge variety of aims and in reality did not have any significant influence on the economies of its Member States²⁸³. On 6th of January 1995, Belarus and Russia signed the Agreement on the Customs Union which would be a base for further regional integration. It was joined later by Kazakhstan (20th of January, 1995), and the Kyrgyz Republic (in 1999)²⁸⁴. These actions marked the intention of contracting parties to move towards closer integration through establishing customs union. However, the completion of its formation was postponed for an indefinite period of time. The difficult economic situation in contracting parties at that time most probably was a reason for that.

The new XXI century marked a new phase in the regional integration process. In 2000,

282 More information about the speech is available at <http://www.akorda.kz/> [accessed January 14, 2016]

283 Full text of the Agreement on the establishment of the Commonwealth of Independent States is available at <http://e-cis.info/> [accessed January 14, 2016]

284 Agreement on Customs Union between Russian Federation and Republic of Belarus of January 6, 1995, Agreement on Customs Union, signed by Russian Federation, Republic of Belarus, and Republic of Kazakhstan on January 20, 1995, and Agreement on Customs Union and Common economic space, signed by Russian Federation, Republic of Belarus, Republic of Kazakhstan, and Kyrgyz Republic on February 26, 1999, are available at <http://www.tsouz.ru/> [accessed January 14, 2016]

five countries (Russia, Kazakhstan, Belarus, Tajikistan, and Kyrgyzstan) made a decision to establish the Eurasian Economic Community (EAEC)²⁸⁵. It was an intermediate step, which aimed at the effective promotion of the customs union and common economic space formation process (art. 2 of Treaty on the establishment of the Eurasian Economic Community).

In October 2007, the formation of the Customs Union was successfully completed. The Treaty on establishing the Common Customs Territory and the formation of the Customs Union was signed by Russia, Belarus, and Kazakhstan²⁸⁶. The Customs Union became an entirely new form of integration within the Post-Soviet territory. In 2011, the Customs Code²⁸⁷ came into force within the entire territory of the Customs Union, the customs control at the borders between Russia, Kazakhstan and Belarus was abolished and moved to the outer contour of the boundaries of the members of the Customs Union. The first step to close regional economic integration was done. It provided the freedom of goods, one of four principles that are now guaranteed within the Eurasian Economic Union.

In 2010, Russia, Kazakhstan, and Belarus signed the Declaration on Eurasian economic integration in order to create the Single Economic Space²⁸⁸. This was the second important step towards close regional economic integration. The Single Economic Space aimed to provide remaining freedoms of services, labor and capital.

The final result of these integration “steps” was the Treaty on the Eurasian Economic Union which was signed in 2014, and came into force on January 1, 2015²⁸⁹. By now the

285 Treaty on the establishment of the Eurasian Economic Community is available at <https://docs.eaeunion.org> (in Russian), English version is available at <http://www.wipo.int/> [accessed January 14, 2016]

286 Treaty on establishing the Common Customs Territory and the formation of the Customs Union is available at <http://www.tsouz.ru/> [accessed January 16, 2016]

287 Customs Code of the Customs union (in Russian) and its unofficial translation into English are available at <http://www.tsouz.ru/> [accessed January 16, 2016]

288 Declaration on Eurasian economic integration is available at <http://kremlin.ru> [accessed January 24, 2016]

289 Treaty on The Eurasian Economic Union is available at <https://docs.eaeunion.org> (in

Treaty has been signed by five countries: Russian Federation, Kazakhstan, Belarus, Armenia, and Kyrgyzstan. The Eurasian Economic Union currently has reached the highest level of integration that ever existed in the region since the dissolution of the USSR. The Treaty provides not only four freedoms, listed above but also a coordinated policy of contracting parties in certain sectors of the economy. The Treaty consists of 118 articles divided into 4 parts. 33 Annexes also form the essential part of the Treaty.

It is worth to notice that the Eurasian Economic Union idea seems to be inspired to a certain extent by the European Union. This is not surprising because the European Union is the organization that reached the highest level of integration nowadays and its experience might be very useful for new regional groupings. In particular, the EAEU ensures four freedoms among its Member States: freedom of movement of goods, capital, services, and labor. It reminds of the EU “four freedoms”²⁹⁰. The EAEU supranational organs (Supreme Eurasian Economic Council; Eurasian Intergovernmental Council, Eurasian Economic Commission) are similar to those of the EU²⁹¹. However, the main difference between the EAEU and the EU is that there is no political integration in EAEU and there are no prerequisites for such integration. The EAEU is an organization of purely economic regional integration without any political extent.

The EAEU brings grand economic promises. However, the fulfillment of them depends on the actions that will be undertaken by the leaders of the Member States. The main purpose is to increase the international competitiveness of the region. In this regard, the role of the large-scale business and especially TNCs shall not be underestimated.

It is worth to notice that TNCs, mainly ones originating from the USA and Western Europe, have played a significant role in the economies of the EAEU Member States. After the Russian), English version is available at http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf [accessed January 14, 2016]

290 European Union four freedoms which are: free movement of goods, capital, services and freedom of establishment

291 Reminiscent of the following EU organs: the European Council, the Council of the European Union, the European Commission respectively

dissolution of the Soviet Union, the transformation of the economy from centrally-planned one into the market economy required financial injections. Therefore, newly independent countries were interested in attracting foreign direct investment. In response, world TNCs were interested mainly in investing in countries rich with natural resources²⁹². Therefore, Kazakhstan and Russian Federation became most invested countries in the Post-Soviet area²⁹³. Nowadays these two countries form the EAEU alongside with Belarus, Kyrgyzstan and Armenia. It seems that the Eurasian Economic Union tends to become the biggest recipient of FDI within the Post-Soviet area, and, therefore, can become significant host region for foreign TNCs. At the same time, the enlargement of the market due to the regional integration brings new perspectives for national business of the Member States. Therefore, the EAEU has perspectives to give birth to new TNCs and increase the global competitiveness of the region.

The investment policy of the EAEU is an essential part in terms of TNCs' regulation. The Annex 16 of EAEU Treaty coordinates the intra-EAEU investment policy. The main

292 Foreign investment in Russia and Kazakhstan (most invested Post-Soviet countries) is mainly represented by world leading oil and gas TNCs (British Petroleum, ConocoPhillips, Chevron Texaco, Exxon Mobil, Eni group, and etc.). Foreign TNCs play important role in the gold mining of Kyrgyzstan (Canadian Centerra Gold Inc, European Orsu Metals Corporation)

293 Since 1995 Russian Federation has been at first place and Kazakhstan has been at second place in the hierarchy of inward foreign direct investment among Post-Soviet States. In 1995 the most invested countries in the region were: Russian Federation (2017 millions (USD)), Kazakhstan (280 millions (USD)), Azerbaijan (275 millions (USD)), Ukraine (267 millions (USD)), while inward foreign direct investment in remaining 11 Post-Soviet States accounted for just 807 millions (USD) in total. In 2014 the most invested countries in the region were: Russian Federation (20 958 millions (USD)), Kazakhstan (9 562 millions (USD)), Azerbaijan (4 430 millions (USD)), Turkmenistan (3 164 millions (USD)), Belarus (1 798 millions (USD)). Armenia and Kyrgyzstan received just 383 millions (USD) and 211 millions (USD) respectively. Based on data from:

UNCTAD (1997). World Investment Report: Transnational Corporations, market structure and competition policy. New York and Geneva. pp. 303-309. Available at http://unctad.org/en/docs/wir1997_en.pdf;

UNCTAD (2014). World investment report: Investing in the SDGs: an action plan. New York and Geneva. pp. 208-210. Available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf;

provisions of this Annex are worth to be analyzed. First of all, in accordance with the Annex each Member State shall ensure in its territory fair and equitable treatment to investments and to activities in connection with the investments made by investors of other Member States. This regime shall not be less favorable than the one granted by a Member State to investments and to activities in connection with investments made by national investors (national treatment) or by investors of third countries (most-favored-nation treatment). The choice between national treatment and most-favored-nation treatment shall be a prerogative of the investor. The EAEU investor shall be guaranteed (under the condition the investor fulfilled obligations of tax and other legislation of a recipient Member State): the right to use and dispose income obtained as a result of investment for any purpose not prohibited by the legislation of a recipient Member State; the right to freely exercise transfers of funds and payments related to investment to any country.

The Treaty also ensures that investors shall be entitled to compensation for damage caused to their investments by civil disorder, military actions, revolutions, rebellions, state of emergency or other similar circumstances on the territory of a recipient Member State. In such cases the Member State's investors shall be accorded by a recipient Member State treatment not less favorable than the one which is allocated to national investors or investors of a third country.

In accordance with the EAEU Treaty, investments of another Member State's investor can not be subjected by a recipient Member State to direct or indirect expropriation, nationalization and other measures equal to expropriation or nationalization, except when such measures are taken in the public interest in accordance with the legislation of a recipient Member State, are not discriminatory and are accompanied by payment of prompt and adequate compensation. The compensation shall correspond to the market value of the expropriated investments, estimated on the date preceding to actual expropriation or on the date when the expropriation became known. The compensation shall be paid without delay,

within the period prescribed by the legislation of a recipient Member State, but not later than three months from the date of expropriation. It shall be freely transferable abroad in a freely convertible currency. In case the payment of compensation is delayed the investor shall be paid interest, which shall be calculated at the rate of the national inter-bank market, but not below the rate of London Interbank Offered Rate, or in the manner determined by agreement between the investor and a recipient Member State.

The investment disputes arising within Eurasian Economic Union due to the breach of the Treaty shall be settled through negotiations. If the dispute can not be settled through negotiations within six months from the date of written notification of any of the parties it can be settled in the following ways (free choice of the investor):

- 1) the court of a recipient Member State, which has competent jurisdiction;
- 2) International commercial arbitration of the chamber of commerce of any country, agreed by the parties of the dispute;
- 3) the arbitral tribunal ad hoc, which shall be established and act in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), unless the parties agree otherwise;
- 4) the International Center for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). In this case the dispute: 1. is to be solved in accordance with the rules of the ICSID Convention when both the recipient Member State and the Member State of the investor are parties of the Convention; or 2. is to be solved in accordance with the rules of the ICSID Additional Facility Rules when one of the disputing parties is not participating in ICSID Convention.

Once the investor submitted a claim through one of the above mentioned ways he may not redirect the dispute to any other court or arbitration. His choice shall be final. Any arbitral award on the dispute shall be final and binding on the parties to the dispute.

The regulation of investment flows including third countries is a prerogative of each Member State. At the same time the EAEU has legal personality (art. 1 of the Treaty) and, therefore, can be a contracting party in international agreements²⁹⁴. This allows to suggest that the EAEU might become a party to international investment treaties in the future in order to work out common international investment policy. Such policy would help to follow common purposes of regional integration and most probably will improve stability and the general image of the Member States contributing to the rise of the FDI inflows. It would enhance the creation of common high standards in bilateral investment relations, the equal treatment of foreign investors, and the efficient and equal representation of the interests of the EAEU investors through creating two-way street relationships with third countries. Therefore, it seems reasonable to move the conclusion of bilateral investment treaties from the national level to the regional one.

In this regard, the experience of the EU in moving towards common international investment policy could be very useful. The Regulation (EU) No 912/2014 of the European Parliament and of the Council governing responsibility of the EU organs and the Member States in investor-to-state disputes arising out of investment treaties, to which the EU is a party is of a particular interest.

The regional regulation of TNCs' activities could not be performed within the EAEU as effectively as it is conducted in the EU due to different levels of integration. Besides this, the EAEU is relatively new organization of regional integration, and, therefore, the EAEU law has not yet been formed completely. In regard of TNCs' regulation, it seems worth to analyze the competition law of the EAEU. It establishes common competition rules in cross-border

294 In 2015 the EAEU for the first time became a part in international agreement. It happened when the Free Trade Agreement was signed between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part. However, provisions of the Free Trade Agreement regulating investment (Chapter 8) apply only between the Russian Federation and Viet Nam. Full text of the Agreement is available at <https://docs.eaeunion.org> [accessed January 15, 2016]

markets within the Union. The compliance with such rules is monitored on supranational level by the EAEU Commission.

The competition rules are contained in Annex 19 to the Treaty and they have explicit reference to TNCs. This reference is contained in “group of entities” notion, which definition could be found in “General Provisions” section of Annex 19. The “group of entities” means a group of individuals and/or legal entities corresponding to certain criteria. Thus, when a legal entity holds more than 50 percent of the total number of votes of voting shares (equities) in the authorized capital of another legal entity through participation in it or under the powers transferred by other parties including under written agreements, these legal entities are considered “group of entities” under the EAEU competition law. Another example: when a legal entity is entitled to issue mandatory instructions to another legal entity on the basis of constituent documents or a contract, these legal entities are considered “group of entities” as well under the EAEU competition law²⁹⁵.

The “group of entities” shall be regarded as a single market participant, and the competition provisions of the EAEU law, relating to market participants (legal entities) shall apply to a “group of entities” as if it was one market participant. Thereby, it is obvious that among other purposes the EAEU competition policy aims at regulation of TNCs.

According to art. 76 of the EAEU Treaty, any unfair competition shall be prohibited, including: 1) Spread of false, inaccurate or distorted information, which may cause damage to a market participant or damage its business reputation; 2) misleading as to the nature, method and place of manufacture, consumer properties, quality and quantity of goods or their manufacturers; 3) incorrect comparison by a market participant of goods manufactured or sold by the entity with goods manufactured or sold by other market participants.

Besides this the article prohibits any agreements between market participants of the

²⁹⁵ In fact, “group of entities” notion is broader than TNC, it includes family ties between parts of “group of entities”.

Member States if these participants are competitors operating in the same product market and such agreements may lead to: 1) setting or maintaining prices, discounts, allowances , extra charges; 2) increasing, decreasing or maintaining prices in tenders; 3) dividing the commodity market in the territorial principle, by the volume of sales or purchases of goods, by the range of products sold or composition of sellers or buyers (customers); 4) reduction in or cessation of the production of goods; 5) refusal to conclude agreements with certain sellers or buyers (customers).

The compliance with competition rules in cross-border markets shall be monitored by the EAEU Commission, which shall react to claims, which contain information on possible breach of the rules. In case of non-compliance with competition rules, the EAEU Commission shall imply fines upon violators. The competition on cross-border market is one of the first sectors, which is governed on the supranational level. The aim of such common competition policy is to ensure equal conditions for companies of all the Member States.

At the same time, the encouragement of competition between similar strong companies operating in one sector sometimes is unnecessary and disadvantageous, especially when it prevents strong companies from operating on the international scale. In order to avoid such competition, it seems reasonable to encourage the creation of TNCs of regional dimension, which might consolidate the resources of strong national companies. The accumulation of the resources of the companies operating in one sector will lead to a creation of a coordinated regional value chain, which will significantly increase the competitiveness of each participating company and will bring benefits to the economy of the Member States.

The formation of common energy markets²⁹⁶ will definitely contribute to the accelerations of corporate integration processes because the natural resources production is traditionally the strongest sector in the Member States. Therefore, it is necessary not to create

²⁹⁶ Common electricity market is planned to be formed in 2019, common oil and gas markets are planned to be formed in 2025

obstacles to potentially effective cross-border mergers.

The protection of competition on cross-border markets is reasonable, but the territory of the EAEU shall not be merely a place for competitive battles between companies from the Member States. Therefore, it is necessary to ensure cross-border mergers between companies domiciled in the different Member States on the supranational level. In this regard, the experience of the European Union in facilitating the cross-border mergers (Directive 2005/56/EC of the European Parliament and of the Council) might be very helpful.

At the same time, the initiatives facilitating cross-border mergers shall be implemented carefully. It is necessary not to lose sight of the effective antitrust law. This means that the limits of the mergers shall be established by legislation. It is necessary to encourage the corporate ambitions for global expansion, not the ambitions to dominate simply the regional and national markets through a cross-border merger.

The cross-border mergers shall be especially encouraged in the sectors, in which the Member States have a real potential to become a world leader (natural resources sectors). Therefore, creation of common energy markets is a good platform for the realization of this idea.

Besides this, the introduction of a new business form of the regional dimension (Eurasian company) is essential for the future creation of new TNCs within the EAEU²⁹⁷.

²⁹⁷ It is necessary to notice that in 1998 several countries of the Commonwealth of Independent States signed Convention on transnational corporations. However, this document is not effective due to several reasons. First of all, the scope of the Convention is very narrow, it includes only corporations registered under rules of the Convention. However, Convention does not have any explicit rules on registration, it merely has references to national legislations of contracting parties. At the same time national legislations of parties do not contain certain mechanism for creation of “transnational corporations”, prescribed by Convention. The only way for a corporation to fall into the scope of the Convention is to be created under intergovernmental treaty of contracting parties. However, such corporations are to be dissolved after hee termination of the relevant intergovernmental treaty (art. 13). This provision puts transnational corporations into vulnerable position making them dependent on political relations between the contracting parties. Moreover, the Convention does not contain guaranteed priveleges for “transnational corporations”, it just declares that contracting parties “might”

In this regard, the experience of the European Union in creating *Societas Europaea* (European companies) might be very useful. The EAEU might stimulate the creation of new “Eurasian companies”, which would be TNCs gathering resources and production facilities of two or more Member States. The main provisions of such corporations' regulation shall be determined on supranational level. The possible provisions might be:

- participation in the equity capital of the corporation of investors from two or more Member States;

- possibility to create the company through different means such as: merger (between companies from different Member States), establishment of a new corporation, conversion (for example, when national company of any Member State has branches/subsidiaries in other Member States and is willing to convert into new form of corporation).

- the corporation will be governed by legislation of the country, where it has registered office, at the same time it will have the possibility of moving registered office and, therefore, choosing the most favorable legislation. This provision seems to be most prominent in legislation, governing *Societas Europaea*, because it lets the European company to choose the legislation among the EU Member States through moving the registered office.

The government support, privileges and exemptions for Eurasian companies shall be also enshrined in law. The appropriate legislative background will ensure the corporate integration between national companies in traditionally strong sectors of the EAEU Member States.

undertake measures aimed at stimulating the establishment and activities of the such corporations under condition that these measures do not contradict the national legislation. Besides this, the Convention permits only one possible way for creation of “transnational corporation”, which is registration of new legal entity. At the same time such ways of creation as merger or conversion are not described in the Convention. Therefore, the Convention seems to be outdated due to mentioned reasons and due to the establishment of the EAEU. Full text of the Convention is available at <http://zakon2.rada.gov.ua> [accessed January 07, 2016]

The creation of TNCs of regional dimension²⁹⁸ has been a popular tendency so far. Therefore, its realization within the EAEU seems to be question of time.

The EAEU is a relatively new international organization. Therefore, certain steps in common investment policy and the regulation of TNCs are yet to be taken. If these steps are correct, the EAEU will become a favorable “home base” for transnational corporations, both through attracting foreign direct investment from third countries and through the stimulating development of transnational business within the region.

The experience of the EU might be very useful for EAEU in many aspects. First of all, as earlier mentioned, it may be helpful for the facilitation of the cross-border mergers and the creation of legal entities of regional dimension (by the example of *Societas Europaea*). Secondly, it may be useful for the improvement of the investment policy and the elimination of gaps, existing in this policy.

In general, the legislative initiatives shall not be underestimated. The economic progress is stipulated by dynamic legislation corresponding to the changing world situation. This concept has been proven by history²⁹⁹. Therefore, the timely development of regional company law will facilitate the expansion of the EAEU business on the global scale and contribute to the competitiveness of the region in general.

4.5. Concluding remarks

The XXI century marks the tendency for the restructuring of the world economic system. The globalization processes will continue, the competition on the global market will keep increasing, and the role of TNCs will keep growing. According to the theory, presented by M. Porter, in new economic system companies would be the main driving force for the national

298 The examples of such corporations are: Andean multinational enterprise, CARICOM Enterprise, *Societas Europaea* (the most successful model), etc.

299 The world's leading economic powers are those which were first to develop basic corporate law

competitiveness. He introduced the concept of “home base”, which means nation, that provides most favorable conditions for the company. This “home base” concept reflects the tendency for transnationalization of business, implying that in the new era any competitive company would become transnational and will search for best options to place its business while most competitive countries will be those that will provide the most favorable supportive conditions to TNCs for their development. The country will be successful when the conditions in it allow companies of certain segment to conduct best strategy³⁰⁰.

At the same time, it is necessary to remember that TNCs have to be regulated. Countries as representatives of human interests have to develop instruments to prevent violations, that might be performed by TNCs in their pursuit of profit. However, it is difficult to perform regulation of TNCs at the national level. The production chain of TNCs usually includes several countries. In this regard international regulation seems to be a solution. However, due to the absence of international legal personality TNCs cannot be addressed by international law. Therefore, international type of regulation is represented only by non-binding soft law, which is effective to the extent of establishing general vector in national legislation towards TNCs. The world disparity creates the main obstacle for such type of regulation: countries around the world are too different in their level of economic development and political regime. In this situation, the regulation of TNCs within regional associations seems to be most perspective. The late XX – the early XXI centuries have been marked by the accelerating regional economic integration processes. This tendency suggests that the world architecture will most probably be based on regional blocks' pillars in the near future. Regional associations combine countries with similar economic aims and political regimes, which significantly facilitates the regulation of TNCs. The deeper level of integration is, the more effective such regulation might be performed. Regional associations usually encourage investment flows and

300 Porter, Michael E. (1990). The competitive advantage of nations. Harvard Business Review. p. 73 – 91

create favorable business conditions within the covered territory. Besides this, many of them work on the creation of TNCs with the regional dimension. This may lead to the emergence of a new generation of TNCs, which will be regionally based. Therefore, current regional economic integration processes definitely mark a new period in the development of TNCs.

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Abstract

Transnational corporations have an acute effect on the development of the economy. Being a result of dynamic international integration processes, they have transformed from a consequence to the main accelerators and enablers of globalization within a short period of time. In the modern world, the economic progress and the global competitiveness of states depend heavily on the activities of transnational corporations.

On the other hand, the activities of transnational corporations shall be adequately regulated by nations, as representatives of human interests, in order to prevent violations, which might be performed by these business conglomerates in their pursuit of profit. Therefore, the study of transnational corporations from the legal standpoint is essential. At the same time, the law does not recognize a “unit” nature of a transnational corporation. The legal personality of a transnational corporation is basically reduced to the legal personalities of the entities comprising its structure. In this question, the economy is ahead of the law. There have been developed several theories, which tried to solve this discrepancy but due to many reasons they do not seem to have succeeded in it.

The ambiguous status of transnational corporations did not allow to develop a unified effective regulation and eventually resulted in the multilevel regulation system. In the frame of it, each level brings different instruments which are designed to fill the gaps in the legal regulation of transnational corporations by compensating for the shortcomings of other levels. It is worth to analyze the whole system in order to find out the perspectives of legal development in the field of transnational corporations' regulation. This question receives even more importance in the light of growing regional economic integration trends.

Abstract

Le società transnazionali hanno un forte impatto sullo sviluppo dell'economia. Essendo un risultato di processi dinamici di integrazione internazionale, si sono trasformate in breve tempo da conseguenza ad acceleratori principali e attori della globalizzazione. Nel mondo contemporaneo il progresso economico e la competitività degli Stati su scala globale dipendono fortemente dalle attività delle società transnazionali.

Tuttavia, le attività delle società transnazionali dovrebbero essere adeguatamente regolate dagli Stati, in quanto rappresentanti degli interessi dei loro cittadini, per prevenire violazioni che gli enti potrebbero commettere nella loro ricerca del profitto. Allo stesso tempo, la legge non riconosce lo stato di unicità alle società transnazionali. La persona giuridica di una società transnazionale è costituita dalle singole persone giuridiche, una per ognuna delle entità incluse in essa. Su questo, l'economia appare un passo avanti rispetto alla legge. Sono state formulate diverse teorie che hanno tentato di risolvere questa discrepanza, ma che, per ragioni diverse, non hanno avuto successo.

L'ambiguità della fattispecie delle società transnazionali non ha permesso lo sviluppo di una regolazione unica, arrivando così ad un sistema di regole differenziato su più livelli. In questo quadro legislativo, ogni livello porta con sé diversi strumenti atti a colmare i vuoti nella regolamentazione giuridica delle corpo società nazionali compensando i limiti di un altro livello. In questo senso, sarebbe opportuno analizzare l'intero sistema, in modo da formulare in campo giuridico una legislazione uniforme in materia di società transnazionali. Tale questione assume ancora più importanza se esaminata alla luce della tendenza crescente di integrazione regionale a livello economico.