Submitted: 12/01/2025 - Accepted: 12/02/2025 - Published: 29/03/2025

Code of Conduct as a Source of International Legal Regulation for Transnational Corporations

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Abstract

This article discusses the possibility of adopting and using a code of conduct for transnational corporations as an international legal regulator of their activities. Author analyses the attempts of intergovernmental organizations (in particular the UN) aimed at adopting such a comprehensive act, as well as the reasons why they turned out to be untenable. Simultaneously, author assesses the effectiveness of existing international legal measures which focus the activities of transnational corporations.

Keywords: transnational corporations, code of conduct, corporative law, international law, globalisation, the United Nations.

Introduction

The history of transnational corporations goes back many centuries. A number of East India companies, formed at the beginning of the 17th century, can be considered the prototypes of modern TNCs. However, since then the process of formation and functioning of corporations has become much more complicated and acquired new characteristics. One of the most important stages in the development of TNCs is considered to be the middle of the 20th century. During this period, the role of foreign production units grew, which began to produce the same products that were previously produced in the "domestic" country for the corporation. Branches of TNCs are increasingly reoriented to serve local demand. The transfer of production was facilitated by the automation of operations, which made it possible to make more use of low-skilled and semi-literate personnel. The development of information communications made it possible not to lose control over processes remote from the centre. The transport infrastructure has made it economically feasible to split up and

locate individual technological processes in those countries where the factors of production are cheaper. The organizers of TNCs are increasingly becoming individual firms large enough to carry out independent foreign economic activity. It was in the 1960s that the term "transnational corporations" itself appeared (Slomski, 2022; Slomski, Dulski, Ilnicki 2022; Slomski, Staniewski, Ryziński, 2015).

In general, TNCs provide about 50% of world industrial production. TNCs account for more than 70% of world trade, and 40% of this trade takes place within TNCs, that is, they do not take place at market prices, but at so-called transfer prices, which are formed not under market pressure, but under the long-term policy of the parent corporation (Gilpin, 2018). Transnational corporations own very large budgets, exceeding the budgets of some countries. Of the 100 largest economies in the world, 52 are multinational corporations, the rest are states. They have a great influence in the regions, as they have extensive financial resources, public relations, political lobby. The combination of these factors allows us to conclude that transnational corporations are a powerful syncretic force, not only economic, but also political and social. In connection with this circumstance, the international community is faced with the task of regulating their activities, since the unlimited influence of TNCs on countries with cheap factors of production leads to catastrophic consequences, such as violation of human rights (especially economic and social), environmental degradation and suppression of these countries' state sovereignty (Deva, 2012).

Since 1993, UNCTAD has been monitoring and regulating the international activities of transnational corporations (in 1993, the United Nations Centre on Transnational Corporations, or UNCTC, passed under the auspices of UNCTAD - the United Nations Conference on Trade and Development, which is an agency of the UN General Assembly). According to researchers, the emergence of key sources of information on TNCs, including annual reports on world investment, is associated with the activities of this body (Kurek, 1981). It is noted that at the very beginning of the work of the UNCTC, the main goal of international cooperation in this area was to establish control over corporations; since the 1980s the focus of the Centre's work has shifted towards researching the positive results of the activities of TNCs, as well as attracting foreign direct investment and maximizing the benefits from them (Kurek, 1981). That is, the functions of UNCTAD do not come down only to limiting the forms and methods used by TNCs in their international activities, but are also of stimulative nature, directing cooperation between TNCs and state actors of international organizations in a constructive direction. That has led to evolution of the relationship between TNCs and host countries, so their dialogue has undergone a number of major changes, as a result of which a cooperative, mutually beneficial basis for equal and positive cooperation has been developed (Ruggie, 2003). The changes affected the strategies of both nation-states and the TNCs themselves: on the one hand, the strategies of TNC behavior changed from their excessive desire to obtain unilateral advantages in the host countries, which led already in the early 1970s to an aggravation of the "nation-corporation" conflict to the implementation of strategies for cooperation and joint

activities; on the other hand, the attitude of host countries towards TNCs has changed: from aggressive taxation and nationalization of direct investments and the practice of expropriating foreign assets to fierce international competition for attracting corporations to the country.

The doctrine of international law traditionally distinguishes three levels of legal regulation of the activities of transnational corporations: domestic legislation, bilateral and multilateral agreements (Muchlinski, 2007). At the first level, which also can be considered as a state level, the activities of foreign branches of TNCs are regulated by the national legislation of the host country, in whose jurisdiction they (branches) are located.

The second regulation level of the TNCs' international activities is constructed of bilateral investment agreements that are concluded between interested states. Moreover, quite a lot of these agreements between international organisations, states and TNCs have already been signed. At the same time, in the scientific literature, international treaties of this kind are given an assessment that is clearly ambiguous. In these treaties, there is a clear trend towards the unification of the norms contained in them, which is confirmed by the presence of many agreements containing often similar, although not identical, norms (Ratner, 2001). UN experts also note the application of the principle of international custom in relations between states, intergovernmental organizations and TNCs, the transfer of this international legal practice to the sphere, in fact, public-private partnerships, perceiving this as a positive phenomenon that significantly expands the practice of nation-states and, to a large extent measures to promote international cooperation. At the same time, there are also controversial points in this form of transnational corporations' regulation: for example, the least developed countries that need an influx of investments enter into such agreements directly with TNCs, thereby providing broad benefits for foreign capital (Donaldson, 1996). Thus, the inequality of the parties is actually fixed and the stability of international economic relations is undermined. However, the conclusion of bilateral agreements between TNCs and the home country or host country is a common way to regulate the international activities of TNCs.

The third level of regulation are multilateral international treaties, which, depending on the number of participants, are divided into universal, regional and subregional treaties. The growing role of the transnational sector in the world economy results in attempts to conclude specifically multilateral international agreements; some of them, concerning multilateral investment guarantees, the expansion of intellectual property rights, the opening of the service sector to mutual funds, the abolition of national discriminatory measures against foreign companies, serve the interests of TNCs. At the same time, nation-states are increasing their collective efforts to conclude multilateral agreements designed to protect them from certain types of TNC activities and to promote a clearer formulation of mutual obligations (Knudsen, 2011). That is, this process is mutual. Universal regulation of the TNCs' activities is undertaken under the auspices of the UN based on the recommendations of specially

created bodies – Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises[1] as well as United Nations Centre on Transnational Corporations (Hamdani, Ruffing, 2015). At this intergovernmental level, attempts are being made to adopt universal acts aimed at regulating the activities of transnational corporations. Instruments of this kind of regulation include normative acts, such as the Code of Conduct for TNCs developed in 1975, the provisions of which prohibit the use of discriminatory measures against a partner, establish the obligations of TNCs to promote the development of the scientific and technical potential of the host country, provide reports on their activities, comply with the requirements of financial and tax nature. However, this code remained a draft, since it was not adopted at the official level.

Sometimes attempts to regulate the activities of TNCs are made not by intergovernmental organizations, but by individual actors. An example of such an attempt to develop a code of conduct for corporations is an initiative taken in 1977 by Leon Sullivan, an anti-apartheid campaigner and General Motors Board Member. At that time, General Motors was one of the largest corporations in the United States. General Motors also happened to be the largest black employer in South Africa, a country that pursued a harsh program of state-sanctioned racial segregation and discrimination that targeted black people first. The Sullivan Principles, introduced in 1977 with one addition in 1984, consisted of seven requirements that a corporation had to accept and operate on their basis. In general, the principles called for equal treatment of employees regardless of their race both in and out of the workplace, in direct conflict with South Africa's official policy of racial segregation and inequality. So, Sullivan provided the following principles (as cited in Larson, 2020):

1. Non-segregation of the races in all eating, comfort, and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs.
5. Increasing the number of blacks and other nonwhites in management and supervisory positions.
6. Improving the quality of life for blacks and other nonwhites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities.

[1] For details see: Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. (2014). Retrieved from https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc (01.12.2022).

7. Working to eliminate laws and customs that impede social, economic, and political justice (added in 1984).

Thus, initially Sullivan's principles were aimed directly at solving the problems of racial discrimination in multinational corporations. Until the end of the apartheid era in South Africa, these principles were formally adopted by more than 125 American corporations operating in South Africa. Of those companies that have formally adopted these principles, at least 100 have completely abandoned their activities in South Africa. However, the formation of principles for TNCs did not stop there. In 1999, more than 20 years after the adoption of the original Sullivan Principles and six years after the end of apartheid, Leon Sullivan and UN Secretary-General Kofi Annan jointly promulgated the new Global Sullivan Principles. The overarching objective of these principles, according to Leon Sullivan, is "to support economic, social and political justice by companies where they do business," including respect for human rights and equal work opportunities for all peoples (Alexis, 2010).

The updated principles were less aimed at overcoming racial discrimination in the activities of transnational corporations, and more at involving TNCs in the process of promoting the international system of human rights and social justice for all. The principles were formulated as follows:

"As a company which endorses the Global Sullivan Principles we will respect the law, and as a responsible member of society we will apply these Principles with integrity consistent with the legitimate role of business. We will develop and implement company policies, procedures, training and internal reporting structures to ensure commitment to these principles throughout our organisation. We believe the application of these Principles will achieve greater tolerance and better understanding among peoples, and advance the culture of peace.

Accordingly, we will:

1. Express our support for universal human rights and, particularly, those of our employees, the communities within which we operate, and parties with whom we do business.
2. Promote equal opportunity for our employees at all levels of the company with respect to issues such as colour, race, gender, age, ethnicity or religious beliefs, and operate without unacceptable worker treatment such as the exploitation of children, physical punishment, female abuse, involuntary servitude, or other forms of abuse.
3. Respect our employees' voluntary freedom of association.
4. Compensate our employees to enable them to meet at least their basic needs and provide the opportunity to improve their skill and capability to raise their social and economic opportunities.

5. Provide a safe and healthy workplace; protect human health and the environment; and promote sustainable development.
6. Promote fair competition including respect for intellectual and other property rights, and not offer, pay or accept bribes.
7. Work with governments and communities in which we do business to improve the quality of life in those communities – their educational, cultural, economic and social well-being – and seek to provide training and opportunities for workers from disadvantaged backgrounds.
8. Promote the application of these principles by those with whom we do business.

We will be transparent in our implementation of these principles and provide information which demonstrates publicly our commitment to them" (Alexis, 2010).

The social and economic rights of workers remained the main sphere of regulation. Such an approach seems justified, since it is these rights that are subjected to the greatest infringement on the part of corporations. In the pursuit of cheap factors of production, child labor is widely used, citizens are involved in work with harmful working conditions without sufficient compensation, and the work shift is not standardized. This leads not only to a deterioration in the situation of individuals (employees of a transnational corporation), but also to a deterioration in the human rights situation in the state as such. At the same time, the states themselves prefer to "turn a blind eye" to such abuses and offenses, since TNCs are the largest taxpayers and provide employment to the population.

Another problem is the difficulty in holding transnational corporations accountable. Amnesty International, for example, opposed the activities of the oil trading company Trafigura[1]. In 2010, a Dutch court convicted Trafigura of supplying hazardous waste to Amsterdam, concealing its nature, and then exporting it to Côte d'Ivoire. As a result, 15 people died, more than 100 thousand sought medical help for various ailments. It is interesting to note that the Dutch prosecutor's office dealt only with those events that took place in the Netherlands. The fact that the prosecutor's office ignored the consequences of dumping this waste in Côte d'Ivoire shows how difficult it is to hold companies accountable for their activities abroad. Given this unbridled pursuit of profit, the human rights community has drawn attention to a number of aspects of human rights, such as the need to clarify the right to development, to further reaffirm economic, social and cultural rights, and to advance the principles of the United Nations.

These circumstances necessitate the adoption of a single international act that would act as a general regulator of the activities of transnational corporations. The

[1] For more details, see: Trafigura: a Toxic Journey. (2016). Retrieved from https://www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/ (05.08.2022).

International Development Strategy for the Third United Nations Development Decade (International Development Strategy, 1980, Article 70) provides that negotiations on a code of conduct for transnational corporations by the United Nations should be completed in 1981, and the code should be promptly adopted by all members of the international community soon thereafter and aimed at preventing - in order to their elimination - the negative effects of the activities of transnational corporations and to promote the positive contribution of transnational corporations to the development efforts of developing countries in accordance with the national development plans and priorities of these countries. The document also provided for the development and implementation of national policies that would allow governments to control and effectively regulate the operations of transnational corporations. In addition, the strategy drew attention to the necessity to control restrictive business practices that adversely affect international trade, especially the trade of developing countries and their economic development (International Development Strategy, 1980, Article 71).

The strategy under consideration was adopted in December 1980 and called for the establishment of a code of conduct for transnational corporations as early as next year, but no such code of conduct has yet been adopted. The draft act gave rise to many discussions in the international community. The main claims raised were (Sagafi-Nejad, Dunning, 2008):

- definitions of the nature of transnational corporations and related issues, for example, should companies with private capital be classified as TNCs, or should enterprises with public capital be added to them as well;
- harmonization of obligations and rights of transnational companies, ie. inclusion in the Code of both the rights and obligations for TNCs, guaranteeing companies compliance with the principles and rules of international economic law;
- interrelation between the Code and international law: there was no harmonization between international economic law and the regulations of conduct prescribed in the Code for TNCs.

Regional regulation of the international activities of transnational corporations is carried out within the framework of the EU, OECD (Organization for Economic Cooperation and Development), SELA (Latin American and the Caribbean Economic System) and a number of other organizations. So, in 1976, The OECD Guidelines for Multinational Enterprises[1], were adopted, concerning various aspects of the activities of TNCs (disclosure of information, competition, etc.); the principles for TNCs' activities regulation in the EU are formulated in the EEC Commission report (Multinational undertakings and Community Regulations, 1973). The position of the

[1] The text of the Guidelines is accessible through the OECD website: The OECD Guidelines for Multinational Enterprises. (1976). Retrieved from https://www.oecd.org/investment/mne/1903291.pdf, 01.12.2022.

Latin American countries on the problem under consideration was expressed in the principles formulated at the nineteenth session of the UN Economic Commission, which contained the requirements for TNCs in the territory of the host state. In this regard, it should be noted that the adopted documents made a positive contribution to the rapprochement of Latin American countries but did not have a practical impact on the activities of TNCs. Further development of rule-making in the field of regional regulation of TNCs took place in the process of developing and adopting two decisions by the countries participating in the Andean Community (Andean Common Market, which includes countries such as Colombia, Venezuela, Bolivia, Ecuador, Peru and Chile) - Decisions No. 220 "The Common Foreign Investment and Technology Licensing Code" (Preziosi, 1989) and Decision No. 46 "Multinational Enterprise Regime and Regulation of the Use of Subregional Capital", aimed at protecting the interests of regional states. Thus, Decision No. 46 created the legal basis for the creation by Latin American countries of their own multinational corporations, the main task of which was to promote regional integration and prevent non-regional players ("international capital") from entering the markets (Carcano, 1983).

Corruption is a particular danger in the international activities of TNCs. That is why the developing states within the framework of the UN initiated the creation of a special group of experts on TNCs to study their role in modern economic and political life; taking into account the report of a group of experts at the 57th session of ECOSOC in 1974, the UN Centre for Transnational Corporations was established, the UN Commission on Transnational Corporations, the Division of International Investment, Transnational Corporations and Technology of UNCTAD, the Commission on International Investment and Transnational Corporations of the Council for trade and development of UNCTAD, etc. These bodies were tasked with developing norms and rules of international legal regulation of the activities of transnational corporations, developing codes of conduct; development of uniform norms governing foreign investment; identifying the consequences of the interaction of foreign direct investment with the development of competition in their host countries. To a large extent, these tasks were completed, which formed an international legal system for regulating and controlling the activities of TNCs. Thus, UNCTAD constantly monitors the international activities of TNCs and annually publishes a report on the results of this activity – "World Investment Report"[1], which, among other things, assesses the pace and dynamics of the economic and political expansion of TNCs, as well as the results of their activities and the degree of influence of TNCs on world political processes.

In 1976, the OECD member countries adopted the Declaration and Decisions on International Investment and Multinational Enterprises, which defined the basic requirements for the foreign activities of TNCs: maximum consideration of the policies of the countries in which they operate, promotion of the socio-economic

[1] See the last published Report for 2022 on the UNCTAD website: World Investment Report. (2022). Retrieved from https://unctad.org/topic/investment/world-investment-report (01.12.2022).

development of the host countries, compliance with the national legislation, human rights, etc.; the updated version of this declaration - as amended in 2011 - contains more stringent environmental requirements for the activities of foreign affiliates of TNCs[1]. Today, the requirements imposed by TNCs on the part of states and intergovernmental organizations include the following positions (Schembera, 2018):

- unconditional respect for the sovereignty of the host countries and compliance with local laws, regulations and regulations;
- respect for human rights and fundamental freedoms;
- an unconditional ban on interference in the internal affairs of sovereign states through direct or indirect participation in political activities;
- respect for local traditions, customs and values;
- conformity of the actual activity in the host country with the goals and objectives publicly declared by TNCs;
- non-participation in corruption schemes.

All this seems quite reasonable, if not for one "but": there are no real legal mechanisms capable of forcing TNCs to comply with all these requirements under the threat of sanctions in international law; any developments in this area, especially in terms of sanctions mechanisms and procedures, are blocked by lobbyists of the TNCs.

One of the first official evidence of the role of TNCs as participants in world politics was the UN Global Compact, developed in 2000 by UN Secretary General Kofi Annan. This treaty calls on transnational corporations to comply with certain standards of conduct in the international arena, is a kind of UN charter for corporations (Schembera, 2018). Although it is very difficult to measure the impact of companies in numbers, there are examples that are difficult to argue with: for example, BRICS is an organization that was created by states under the influence of the idea of Goldman Sachs. The Global Compact today is the largest platform for cooperation between the UN and TNCs on the protection of the rights of society, on the problems of corruption, environmental protection, and labor relations. The main goals pursued by the Global Compact are formulated in the so-called "Millennium Declaration" (U.N. Millennium Declaration, 2000) and in the ten principles contained in the text of the Treaty itself. At the same time, one of the main threats hindering global development and undermining the stability of the market, along with such factors as corruption and transnational crime, is recognized as administrative barriers on the part of national governments that prevent TNCs from their supranational activities. To facilitate the cooperation of national governments with vertically integrated corporations (most TNCs have just such a structure), the structure of the Global Compact is organized

[1] For more details, see: OECD Declaration and Decisions on International Investment and Multinational Enterprises. (1976). Retrieved from https://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm, 01.12.2022.

according to the network principle, and not hierarchically, which affects the analysis of its work.

In addition to the Global Compact, there are other documents regulating cooperation between TNCs and national governments at various levels: for example, in 2000, the Organization for Economic Cooperation and Development identified the Guidelines for Multinational Enterprises – a document that is a set of voluntary wishes that are declarative in nature and focused on increasing responsibility corporations[1]. The main principles of interaction between the state and corporations found their legal form in the Charter of Good Practice in using Public Private Dialogue for Private Sector Development (Charter of Good Practice, 2006), adopted in Paris with the assistance of the World Bank and the OECD Development Centre. Influenced by the pace of development of public-private partnerships, in an effort to quickly address these trends, former UN Secretary General Kofi Annan signed the Guidelines on a principle-based approach to the Cooperation between the United Nations and the business sector in 2000[2]. However, despite significant progress in rule-making activities, TNCs still remain an object that is largely not affected by the instruments of international regulation that exist today.

The intervention of TNCs in the foreign and domestic policies of nation-states is strictly prohibited both at the national and international levels, such regulations are explicitly spelled out in the Code of Conduct for TNCs and in the Global Compact. At the same time, the intervention of TNCs in these areas is still present, although not in a direct form: with the help of lobbying tools (both legal and illegal), political raiding, and also through participation in development of state decisions - on the basis of TNC-owned or associated “think tanks”.

In turn, nation states seek to put the international activities of TNCs under their control: in their opinion, TNCs that do not have sovereignty are located in the hierarchy of actors at significantly lower levels than classical nation-states, and should be considered not as a subject, but rather, as an object of state (or interstate) regulation. At the same time, it should be noted that the existing forms and methods of legal regulation of the international activities of modern transnational corporations cannot be recognized as effective and completely solving the problem of controllability of the political activities of TNCs. There is only one reason for this: the fact is that most of the measures taken by nation states and intergovernmental organizations come down to encouraging TNCs to conclude agreements and treaties with nation states, which are mainly declarative in nature and urge TNCs not to abuse political power and functions at their disposal. These treaties and agreements (such as the UN Global Compact or the Code of Conduct for TNCs) do not contain binding

[1] For details see: The OECD Guidelines for Multinational Enterprises. (1976). Retrieved from http://mneguidelines.oecd.org/guidelines/ (01.12.2022).
[2] See on the UN website: Guidelines on a principle-based approach to the Cooperation between the United Nations and the business sector. (2000). https://www.un.org/en/ethics/assets/pdfs/Guidelines-on-Cooperation-with-the-Business-Sector.pdf (01.12.2022).

rules - basically, the instructions contained in such international documents are predominantly advisory (in relation to TNCs) in nature, depend on goodwill TNC owners. In addition, these treaties and agreements do not contain sanctions for violation of the regulations contained in them and, as a result, there is no international mechanism for their application, which allows TNCs to ignore them.

Thus, it should be concluded that in modern international law the code of conduct for transnational corporations is regarded as an act of "soft law": following its provisions is a voluntary decision taken directly by TNCs. It seems that the transition of this form of regulation of corporations from the category of "soft law" to a generally binding one is difficult due to the large number of lobbyists of transnational corporations, represented not only at the level of state governments, but also at the international level. Economic circumstances are developing in such a way that today transnational corporations are ahead of many states in terms of their financial potential, which allows them to directly influence decisions made in the international arena. Consequently, they acquire the features of an independent subject of international law, because of which the issue of regulating their activities is particularly acute. The dictates of neo-corporatism must be stopped by the efforts of all members of the international community since the unlimited power of transnational corporations leads to the collapse of the existing system of human rights.

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