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Aliyev Amir Ibrahim oglu,
Doctor of Law, Professor
e-mail: amir.aliyev@gmail.com
ORCID ID 0000-0003-2702-0063;
Chiragli Mammad Anar oglu,
Doctoral student (PhD candidate),
the Department of International Law,
Faculty of Law,
Baku State University
e-mail: chiraglimammad@gmail.com
ORCID ID 0000-0001-6774-298X

ON THE ISSUES OF INTERNATIONAL LEGAL PERSONALITY OF TRANSNATIONAL CORPORATIONS

The article examines the issues of international legal personality of transnational or multinational corporations. The author refers to the opinion of a number of scientists, as well as international organizations specializing in the study of this area, to determine the possible prospects for the transformation of TNCs into a subject of international law. At the same time, the practice of international tribunals and courts, especially the International Court of Justice, was mentioned. The analysis of the theoretical essence of the subjects of international law is given. In addition, an analysis of the activities of TNCs as an active participant in international relations was carried out. The author gave various practical examples of regulating the activities of TNCs at the universal, bilateral and national levels. The author investigated the international legal personality of transnational companies and its relationship with the regulation of their activities by international legal norms. The difficulties associated with bringing these participants in international economic relations to international legal responsibility are noted. The article provides a number of arguments in favor of the fact that such differentiation at the present stage of development of international law seems impossible for objective legal reasons. In this context, the analysis of international legal personality, which refers to the ability to accept international rights and obligations, was given in connection with the need for theoretical approval of the thesis. The author substantiates the complexity of regulating the activities of such subjects within the framework of international law due to their lack of international legal personality. In addition, the article examines the legal definition of TNC, the author refers to the opinion of researchers in this area, as well as specialized international organizations. The article examines the forms of economic activity of TNCs and their impact on the economies of various states, including states that receive investments, as well as the complexity of the legal regulation of their

activities caused by such participation. Various areas of law that are affected by the activities of multinational corporations have been studied.

Key words: *law, international law, transnational corporations, international legal personality, subject of international law, globalization.*

А. І. Алієв, М. А. Чирагли. Про питання міжнародної правосуб'єктності транснаціональних корпорацій

У статті досліджуються питання міжнародної правосуб'єктності транснаціональних або багатонаціональних корпорацій. Автори посилаються на думку ряду вчених, а також співробітників міжнародних організацій, що спеціалізуються на вивченні даної області, для визначення можливих перспектив перетворення ТНК в суб'єкт міжнародного права. При цьому використовується практика міжнародних трибуналів і судів, особливо Міжнародного Суду ООН. Проведено аналіз теоретичних аспектів сутності суб'єктів міжнародного права. Крім того, було проведено аналіз діяльності ТНК як активного учасника міжнародних відносин. Автори привели різні практичні приклади регулювання діяльності ТНК на універсальному, двосторонньому і національному рівнях. Автори досліджували міжнародну правосуб'єктність транснаціональних компаній і її зв'язок з регулюванням їх діяльності міжнародними правовими нормами. Відзначено труднощі, пов'язані із залученням цих учасників міжнародних економічних відносин до міжнародно-правової відповідальності. У статті наводиться ряд аргументів на користь того, що така диференціація на сучасному етапі розвитку міжнародного права видається неможливою з об'єктивних юридичних причин. У цьому контексті аналіз міжнародної правосуб'єктності, який відноситься до здатності приймати міжнародні права і нести обов'язки, був розглянутий в зв'язку з необхідністю теоретичного осмислення проблеми. Автори обґрунтовують складність регулювання діяльності таких суб'єктів в рамках міжнародного права через відсутність у них міжнародної правосуб'єктності. Крім того, в статті досліджується правове визначення ТНК, автори посилаються на думку дослідників в цій області, а також спеціалізованих міжнародних організацій. У статті були вивчені форми господарської діяльності ТНК і їх впливу на економіки різних держав, включаючи держави, які беруть інвестиції, а також повязані з цим труднощі правового регулювання їх діяльності. Були вивчені різні галузі права, що стосуються діяльності багатонаціональних корпорацій.

Ключові слова: *право, міжнародне право, транснаціональні корпорації, міжнародна правосуб'єктність, суб'єкт міжнародного права, глобалізація.*

Introduction. The twentieth century marked the beginning of the general globalization process of the entire world economy. These processes have received an impetus in Europe since the middle of the last century. Economic integration turned into political integration and changed the situation on the European continent for many years. Today, the processes of economic globalization are taking place all over the world. Directly states, as well as their individuals and legal entities, international organizations of various public interests actively cooperate with each other in certain areas of economic activity.

Apart from the processes of European integration, the establishment of the «New International Economic Order» also played an important role in this. The emergence of such a concept was due to decolonization and the emergence of new independent states, which necessitated the

introduction of new international legal mechanisms into international economic relations. The developing countries have put forward demands for the restructuring of the existing world economic system. The concept of the New International Economic Order (NIEO) expressed the demands of developing countries to establish a more equitable international economic order from their point of view, to abandon the policy of absolute liberalism in international trade relations, which is beneficial to the «rich North», but leads to an even greater lag behind it for the «poor South» [1, p. 915]. All these requirements were reflected in two universal documents adopted within the UN: in the Declaration on the Establishment of a New International Economic Order [14] and in the Charter of Economic Rights and Duties of States [15], which was included in the Program of Action for the Establishment of a New International Economic Order. In the same vein, the International Development Strategy for the Second United Nations Development Decade [16] was adopted even earlier.

Thus, the above processes served as an impetus for the creation of new mechanisms of a different nature in international economic relations. The NIEO concept contained some principles that became the basis of these mechanisms. Among these principles, the following can be distinguished: the principle of inalienable sovereignty of states over their wealth and resources, the principle of freedom to choose the forms of organizing foreign economic relations, the principle of non-discrimination, the principle of mutual benefit, most favored nation (MFN) regime, national treatment, and preferential treatment. These principles are contained in the above documents [1, p. 915–917].

Transnational corporations (TNCs) have become one of such mechanisms requiring their own international legal regulation. The phenomenon of transnational corporations has become widespread in today's international economic relations. However, it is worth noting that this economic substance was known to mankind long before the present era: back in the 17th century, East India companies of various powers conducted their active economic activities in various colonies and countries of the world: British (founded in 1600), Dutch (founded in 1602), Danish (founded in 1616), Portuguese (founded in 1628), French (founded in 1664). Industrialization began in Russian the second half of the 19th century. An important role in this was played by the entry of the city of Baku, which was rich in oil fields, into the Russian Empire. In order to increase the efficiency of oil production, the tsarist government decided to abolish the monopoly on oil production, and thus allowed private enterprises to enter the oil sector of the Russian Empire. The oil companies of the Nobel brothers and the Rothschild family, which can also be considered as early forms of TNCs, began their successful activities.

Core part. In the era of globalization of the world economy, the role of TNCs is growing even more. At the moment, transnational corporations are rightfully considered the leading subjects of international economic activity. Modern international economic relations between states are often formed taking into account the interests of certain transnational corporations, which indicates the increased role of the latter in world processes. The budgets of some transnational corporations can exceed the budgets of entire countries at times. Very often, the interests of TNCs do not coincide with the economic policies of a particular state or an international financial institution. Such cases lead to unlawful, including corruption, mechanisms of influence on the part of transnational corporations. This can lead to undesirable consequences for the world economy. In addition, TNCs sometimes allow themselves to interfere in the internal affairs of the state, in its foreign policy in order to exert their influence on the course of economic processes. After all, one of the reasons why transnational corporations currently do not have

legal personality in international law is that they were created solely to make a profit. Of course, developing countries, whose economies are almost entirely dependent on these corporations, have little to oppose this.

In the modern period, TNCs have already taken strong positions in the international arena, and, as can be seen from practice, not only in the economic sphere, but sometimes in the field of politics. In some cases, they can be used as leverage on economically less developed countries. In the able hands TNCs can turn into a dangerous weapon of manipulation of entire states by influencing their economies. It is for this reason that the need for a unified international legal regulation of the activities of TNCs seems important.

Today transnational corporations are rightfully considered the leading subjects of international economic activity. Modern international economic relations between states are often formed taking into account the interests of certain transnational corporations, which indicates the increased role of the latter in world processes. Studies of TNCs from the point of view of economics are quite extensive and allow learning about the history of the formation of this phenomenon, the prerequisites for their occurrence, areas of activity, as well as the definition of their characteristics as subjects of international economic activity. At the same time, there is a need for a legal study of this phenomenon within the framework of the international legal field.

To address the issues of a unified international legal regulation of the activities of TNCs, the most appropriate is the adoption of an appropriate international legal document within the framework of the UN bodies, as well as the adoption of relevant documents that do not contradict the universal act at regional levels. In this regard, it is worth referring to the universal and regional attempts to codify the norms for regulating the activities of TNCs and the definitions given in these documents.

To consider the issue of international legal personality of TNCs as a whole, first of all, it is worth turning to the concept of subjects of international law. The concept of a «subject of international law» was disclosed by the International Court of Justice in the Reparations case [19], in which the Court indicated «the ability to acquire international rights and obligations, as well as the ability to exercise one's rights by presenting international requirements» as a criterion.

As is known from theory of international law, the subjects of international law are states and international organizations. International law, first of all, regulates relations between states, which are considered to be primary subjects in the doctrine of international law, while international organizations that are created on the initiative of states are allocated to the category of secondary or derived subjects, since they are endowed with the ability to possess rights and obligations under international law at the will of the primary subjects - states.

In particular, the presence in the international legal field of such a subject as a TNC would cause an urgent need to create coercive mechanisms, which is not at all typical of modern international law. Transnational corporations are created directly by individuals (or, in some cases, legal entities) of a particular state. They have the status of legal entities and can bear rights and obligations in accordance with the domestic legislation of the state. It will be enough that their activities will be regulated within the framework of branches of international law, such as international economic law, as well as international law to protect and promote foreign investment. In addition, TNCs are subject to the study of such a branch of law as private international law (since they take part in civil law relations, and often act as a foreign element themselves).

It is noted that the use of the word «transnational» in the terminology mainly before «international» speaks of the desire to prevent the interests of these enterprises from being put above the interests of the state. The difference in the goals that the subjects of international law and TNCs pursue in their activities is also important. The main goal of creating a TNC is to generate profits on an international scale; other goals for TNCs are secondary.

Of course, TNCs are subjects of the national law of their state. But due to the peculiarities of their organizational structure and activities, they do not fall under the legal regulation of a particular state. This is due to the fact that states do not independently have the mechanisms that could regulate the entire multiplicity of TNC activities outside the state, and also for the reason that TNCs can often have greater economic power and financial strength than the states themselves. For example, if the state adopts such norms of domestic legislation that may affect the profits of TNCs, such an entity can quite successfully transfer its activities to subdivisions on the territory of other states, thus preventing negative consequences for itself. The activities of TNCs can give rise to certain problems that would not be able to cope with an individual state.

The above reasons determine the need for international legal regulation of the activities of TNCs. At the same time, the lack of international legal personality in these entities complicates this process. Various aspects of the activities of TNCs are regulated by a variety of international legal acts in this area – both bilateral and multilateral agreements. However, the legal regulation of the activities of TNCs as a special structure is currently carried out in rather scattered documents, which, moreover, are generally not legally binding. This means that the rights and obligations enshrined in such documents are not directly binding on TNCs.

With regard to the international legal personality of transnational corporations, Lukashuk rejects the possibility of such recognition for TNCs, motivating it as follows: «Transnational corporations are interested in creating a special right that would be formed by them and implemented with the help of a mechanism created by them. The activity of TNCs can and should be regulated through the interaction of international and national law» [3, 27]. Velyaminov believes that transnational corporations should be considered not as a subject, but as a subject of regulation by international law [4, p. 127].

As noted by D. K. Labin, the main goal that underlies TNCs is the desire to obtain the maximum savings in transaction costs in doing business by using the advantages of the division of labor at the international level and manipulating the disadvantages of markets in different countries [2, 48]. Transfer pricing is one of the methods used by TNCs to achieve their goals. Transfer pricing is the influence of non-market relations on the formation of the cost of products. Transnational corporations operate mainly in the most profitable sectors of the country's economy, which are usually controlled by the state with the help of natural monopolies. Usually, TNCs start their activities either through joint ventures or companies with foreign investment.

D. K. Labin agrees that transnational corporations lack proper international legal personality. However, at the same time, TNCs became active players in the world arena: under the influence of their activities, the doctrine of internationalization of investment contracts arose, the parties to which are a private investor and the state, as well as the theory of extending the action of such a principle as pacta sunt servanda [18, Article 26] to investment contracts; moreover, disputes arising from such contracts will be settled in international arbitration courts [2, 49–50].

Foreign doctrine, in particular American, is more inclined to recognize individuals and corporations as subjects of international law. For example, the American Institute of Law notes the following: «Although individuals and corporations enjoy some independent status

internationally, the basic relationship between individuals and international law still runs through the state» [9, 71].

Nevertheless, one cannot fail to recognize the role that transnational corporations play in the global economy. TNCs have linked world trade with international manufacturing [1]. They have enormous potential, realized through financial and human resources. Transnational corporations are capable of exerting a decisive influence not only on the market of a particular country, but also on the global market, shaping its development trends, as well as on the daily life of people. In the early 70s of the twentieth century, when the UN began to take decisive steps to comprehensively study transnational corporations as important participants in international relations, there were already about seven thousands of them around the world. The power of TNCs is indicated, in particular, by the following indicators: today they control approximately 2/3 of world trade; half of the world's industrial production is in their hands, TNCs provide colossal employment for the world population, providing jobs for about 10 % of all unemployed in agricultural production; most of the world's patents, licenses and know-how are controlled by transnational corporations [2]. By the beginning of the XXI century, their number reached to more than 60 thousand. The annual production cost of all transnational corporations in the world was in the order of 12 trillion US dollars, which is equal to about 40 % of the total world GDP [8]. Such impressive data is another reminder of the influence that large TNCs have.

Transnational corporations can have both positive and negative impacts. Among the positive aspects, one can note the creation of new jobs, the promotion of economic growth in developing countries, research in the field of medicine, and the creation of high-quality products for human consumption. The negative influences, in addition to the above interference in the internal affairs and foreign policy of the state, the impact on economic processes in the world in their own interests, include the abuse of financial power, the exploitation of forced and child labor, violation of human rights, damage to the environment, corruption impact on government officials and international organizations to please the interests of the corporation, etc. For example, there are suspicions of the involvement of the oil-producing transnational corporation Royal Dutch Shell plc in the execution of nine citizens of Nigeria by the military junta, which was in power at that time. These citizens actively opposed environmental pollution in the conduct of their business activities by the company. In addition, activists demanded that some of the oil revenues be provided to the local indigenous population. Thus, there is also a violation of the rights of indigenous peoples, as another negative impact of transnational corporations. The activists were arrested and executed by the military junta, with which the TNK allegedly had active ties. These factors make it even more necessary and urgent to have a unified legal regulation of the activities of transnational corporations, whose main task is to make a profit abroad.

It should also be noted the impact that transnational corporations can have on jurisprudence. First of all, the emergence of such legal entities has become the reason for the emergence of various theories of their origin. It became necessary to determine the nationality of a legal entity. As noted by D. K. Labin, «the recognition by states of nationality of foreign or transnational corporations is necessary due to the lack of the latter of proper international legal personality» [2, 40]. In practice, there are several theories of determining the «nationality» of a legal entity: the theory of incorporation, based on the definition of the state of registration of a legal entity, regardless of where its main activity is conducted; the theory of the location of the governing body, which takes as a basis the location of the main governing body of a legal entity; the theory of the center of the main activity gives priority to the state on the territory of

which the legal entity conducts its main economic activity and where it receives the main profit for its operation; the theory of ownership and control determines the nationality of a legal entity by the citizenship of its participants. In some cases, a combination of the above theories is also possible for the most accurate determination of the nationality of a legal entity. For example, in the famous Barcelona Traction case, the International Court of Justice used the incorporation criterion in conjunction with the theory of the location of the governing body [13].

Thus, the emergence of transnational corporations has an impact on jurisprudence in general. Considering all the problems of recognizing the international legal personality of transnational corporations, the complexity of regulating their activities by the domestic legislation of states due to their economic activities in several countries at the same time, the lack of a single universal document on regulation, we can say that transnational corporations will serve as a basis for creating a common legal field.

Speaking about what can serve as the creation of such a field, N. S. Vereshchetin in his article «The General Legal Field of the Modern World» points to such a factor as «interdependence» [6]. He argues that in the process of world globalization, everything becomes interdependent, leading to the emergence of a «common legal field». It is in this field that the interaction of national and international legal systems, as well as national legal systems, takes place [5, 87]. N. S. Vereshchetin characterizes the «general legal field» not as a «super-system» that will stand at the head of the hierarchy of national and international legal systems. On the contrary, they retain their independence, and this legal field serves as a platform for their interaction. It is this approach that seems most appropriate for the international legal regulation of the activities of TNCs. This will help not only to create a unified mechanism of legal regulation of their activities, but also to adopt all the positive experience from the domestic legislation of various states and to abandon unsuccessful examples of regulation.

In addition to the «general legal field», such a concept as «global law» also appeared. Its author Shumilov speaks of the process of globalization as the main factor in the emergence of such a concept [7]. Through their activities, transnational corporations can also serve as a catalyst for the improvement and practical application of «global law». According to Shumilov, it is the «international economic system», of which TNCs are a part, that is most susceptible to the process of globalization in the modern era. This, in turn, leads to similar processes in law, since there is a need for a unified legal regulation of these processes. From this picture emerges such a new concept as «global law». It represents the strengthening of the relationship between national legal systems and international law. Shumilov includes two more phenomena in the «global law»: «supranational law» and «transnational law». He characterizes «supranational law» as regional integration and international organizations (that is, what can stand above the internal law of the state). In this context, the most applicable to the activities of transnational corporations is seen precisely the second element – «transnational law». It includes rules that, on the one hand, are not part of international law, and on the other hand, are not enshrined in the domestic legislation of states. However, these rules are used in various kinds of agreements and contracts, and their violation can be considered as bad faith and violation of obligations under the agreement. Shumilov believes, and one cannot but agree with this, that these very rules regulate precisely those relations that do not fall under the scope of regulation of either international or national law. At the same time, these rules are permissible and protected by national or international law (or both) and are an integral part of them. It is these rules in the aggregate that are meant as transnational law. As an example, Shumilov in his article cites the codification acts

of the International Chamber of Commerce on the interpretation of trade terms («Incoterms»). As you can see, transnational law, filling in the legal gaps, regulates those relations that are somewhere between international and domestic law. Thus, it is precisely such a regulation that is most acceptable for transnational corporations: they, too, as subjects, are somewhere between international and national law.

Conclusion. Among the world powers, the United States continues to maintain its dominant position in terms of the number of bases of the largest transnational corporations in the world, as well as in terms of the volume of capital export abroad in the form of foreign direct investment. It should be noted that these indicators only increase from year to year. Of course, such a turnover, which is ensured through the activities of large TNCs, will bring tremendous benefits not only to the companies themselves, but also to the state of their nationality - the United States (as already noted, many speak of US TNCs as a «second economy»). In addition, transnational corporations often play the role of political levers for the US government, which is achieved through economic pressure. For example, in Great Britain, US TNCs have taken such a strong position that, as the well-known leader of the Labor Party A. Benn puts it, «the British government is narrowing the ability to make decisions in many areas.» Such a statement may seem an exaggeration, but the fact that this mechanism still works in developing countries is undeniable.

An analysis of the essence of TNCs and attempts to regulate their activities leads to a fairly clear conclusion. Achieving the best conditions for conducting their activities with minimal violation of any principles of international law, or the prevention of unjustified interference of states in the sphere of jurisdiction of TNCs should be based on international legal documents that can be developed by the relevant mechanisms of international law and further supported with inalienable rights on the economic activity of TNCs and taking into account respect for the principles of sovereignty and non-interference in the internal affairs of states. This is their general obligation without current possibility of obtaining an international legal personality due to different factors mentioned in this research.

Solving these problems in a fair manner is the most important condition for stabilizing international economic relations and increasing confidence in investments made by TNCs from mainly developing countries.

The UN remains the leading force in the world community, capable of consolidating a unified approach to any sphere of its activity. It is also important that the occurrence of such situations allows one to widely investigate and interpret the activities of the UN structural divisions, as well as the institutions of certain regional associations in the relevant field, and to identify their shortcomings, gaps and contradictions.

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А. И. Алиев, М. А. Чыраглы. О вопросах международной правосубъектности транснациональных корпораций

В статье исследуются вопросы международной правосубъектности транснациональных или многонациональных корпораций. Авторы ссылаются на мнение ряда ученых, а также сотрудников международных организаций, специализирующихся на изучении данной области для определения возможных перспектив превращения ТНК в субъект международного права. При этом используется практика международных трибуналов и судов, особенно Международного Суда ООН. Проведен анализ теоретических аспектов сущности субъектов международного права. Кроме того, был проведен анализ деятельности ТНК как активного участника международных отношений. Авторы привели различные практические примеры регулирования деятельности ТНК на универсальном, двустороннем и национальном уровнях. Авторы исследовали международную правосубъектность транснациональных компаний и ее связь с регулированием их деятельности международными правовыми нормами. Отмечены трудности, связанные с привлечением этих участников международных экономических отношений к международно-правовой ответственности. В статье приводится ряд аргументов в пользу того, что такая дифференциация на современном этапе развития международного права представляется невозможной по объективным юридическим

причинам. В этом контексте анализ международной правосубъектности, который относится к способности принимать международные права и нести обязанности, был дан в связи с необходимостью теоретического осмысления проблемы. Авторы обосновывают сложность регулирования деятельности таких субъектов в рамках международного права из-за отсутствия у них международной правосубъектности. Кроме того, в статье исследуется правовое определение ТНК, авторы ссылаются на мнение исследователей в этой области, а также специализированных международных организаций. В статье были изучены формы хозяйственной деятельности ТНК и их влияния на экономику различных государств, включая государства, принимающие инвестиции, а также вызванные подобным участием сложности правового регулирования их деятельности. Были изучены различные области права, которые затрагиваются деятельностью многонациональных корпораций.

Ключевые слова: *право, международное право, транснациональные корпорации, международная правосубъектность, субъект международного права, глобализация.*

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