

Lecture

**Transnational Corporations and the Protection of Human Rights and the Environment
and the Fight against Corruption: The Role of International Investment Law**

Questions to Prepare, Additional Readings Materials and Methodology

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Juan Ochoa, PhD, Postdoctoral Fellow at UiO, Faculty of Law

Methodology:

The class methodology will be interactive. Accordingly, it is expected that students read the reading materials and answer the questions listed here, before the class.

Questions to prepare:

1. How does Professor Muchlinski define the legal notion of corporation?
2. As you have studied, foreign investors have a number of rights under international investment law. Do foreign investors have legal duties under international law in the fields of human rights, the environment and the fight against corruption as well, according to current investment treaties and state-investor contracts? If they do not, what these instruments provide instead? Identify and critically analyze the reasons for the approach taken by most of these instruments. Take into account the definition of transnational corporation given below.
3. Could you identify some features of many current investment treaties and state-investor contracts which limit the ability of host States to introduce or enforce domestic regulations in the areas of human rights, the environment and the fight against corruption? How these can these be improved both at the negotiation and the post-agreement stages of these treaties and contracts?
4. Which are the alternatives for ensuring the protection of human rights and the environment by transnational corporations and their accountability when the host State is unable or unwilling to fulfil their duties in this respect and given the failure of int'l instruments to impose direct duties on TNCs? Identify various types of alternatives: hard law ones and softer ones.
5. Which is the nature of the OECD Guidelines for Multinational Enterprises? Why are they so influential? Which areas do they cover? Which 'responsibilities' they provide for transnational corporations regarding human rights? Which is the role of National Contact Points regarding complaints concerning alleged breaches of the Guidelines by a transnational corporation?
6. Which is the nature of the UN Guiding Principles on business and human Rights? Which are their main provisions? Which human rights body is charged with the promotion of the Guiding Principles?

Definition of transnational corporation:

Although there is no single agreed definition of TNC, some common elements can be identified. Peter Muchlinski describes well these elements. First, a TNC "operates its assets and controls their use across national borders." Second, it "organize[s] itself into divisions whose managerial reach crosses national frontiers, and through which the national identity of

the various operating companies in the group disappears, even though such identity continues on a formal level through the requirement of incorporation under the laws of the various states in which the MNE operates.” Third, it “trades across borders in factor inputs as well as finished products, and between affiliates of the group as well as with unconnected third parties.” Last, it uses its know-how in foreign markets without losing control over it by selling it only to affiliates. Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd ed., The Oxford International Law Library (Oxford ; New York: Oxford University Press, 2007), 7-8. Similarly, the UNCTAD defines transnational corporations as follows: “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. An equity capital stake of 10 per cent or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as a threshold for the control of assets (in some countries, an equity stake other than that of 10 per cent is still used. In the United Kingdom, for example, a stake of 20 per cent or more was a threshold until 1997.)” See <http://unctad.org/en/Pages/DIAE/Transnational-corporations-%28TNC%29.aspx>

Additional readings:

Peter Muchlinski, *Corporations in International Law in EPIL online*. Max Planck Encyclopedia of Public International Law, www.mpepil.com

Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (2011), *Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators*, 25 May 2011, UN Doc. A/HRC/17/31/Add.3, available at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>

OECD Guidelines for Multinational Enterprises, <http://www.oecd.org/daf/inv/mne/48004323.pdf>

OECD, "Oecd Guidelines for Multinational Enterprises: Responsible Business Conduct Matters "(OECD 2013), http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 21 March 2011, UN Doc. A/HRC/17/31, http://shiftproject.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf

Working Group on the issue of human rights and transnational corporations and other business enterprises, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>