ГОСПОДАРСЬКЕ ПРАВО ТА ПРОЦЕС

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LEGAL DIMENSIONS OF INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY OF MULTINATIONAL ENTERPRISES

The article discovers the role of multinational companies in a global market and the way of influence on developing countries policies. Thus, a need of social regulation and a corporate social responsibility as its the first form is discussed. Finally, the analysis of corporate social responsibility legal character is presented.

Key words: multinational enterprises, regulation, soft law, corporate social responsibility, legal system, legal sources of CSR.

A widespread practice today is that many multinational enterprises have annual turnovers higher than that of the GDP of a significant number of less developed countries put together. At the same time, a global liberalization of trade, mounting external debt, and lack of financial capital in developing countries have forced their government to promulgate enticing foreign investment legislation, support corruption, and provide a lax control over the operations of MNEs. Since the addressees and bearers of human rights, labor, and environmental obligations under traditional treaty and customary international law have been states, MNEs have been able to hide behind the state "veil," asserting that globalized companies have no legal status, so they are not subject to a common legal system, and are not liable for damage they cause or risks they generate on a social level. Initiatives taken under the heading of social responsibility may be considered a response to the problem. It is, thus, possible to put forward the hypothesis that social responsibility is the first form of regulation applicable to globalized enterprises. Nowadays, an actual question remains a legal dimensions of corporate social responsibility and the models of its implementation, enforcement, and monitoring.

The main purpose of the work is to discover the need for international regulation of transnational companies, and to analyze a legal character of CSR.

A notion of corporate social responsibility is discovered in the works of many Ukrainian and foreign researchers. Evolution of the notion is revealed in the works of G. Akerlof, P. Drucker, L. Hrytsyna, S. Lytovchenko. The development of legal character of corporate social responsibility was studied by F. Kotler, F. Kolot, L. Petrashko, I. Bantekas, J. Ruggie.

National law is only applicable within individual countries and its effectiveness depends on the resources available to national organisations for monitoring application of the norms. Transnational companies take advantage of the diverse levels of protection they offer workers in dif-

ferent countries. The effectiveness of national law is also determined by the value placed by society on legal norms. In contrast, international law is agreed by states, with scrupulous respect for their sovereignty. The impact of international law on national legal systems depends on a formal commitment by each state and the real resources they are able and/or decide to devote to the practical implementation of these international commitments. States remain key players in international law whereas they have ceded their significant role in the globalized economy to transnational companies. There is a real paradigm shift between the legal world, with its borders and states, and the business world, where constraints and obstructions due to national borders have been removed to facilitate the free circulation of capital, goods, and services.

The need for regulation of transnational company appears as a result of their capacity to influence government policy and practice. The financial strength of most MNEs and the desire of developing countries to attract foreign investment give the former a significant advantage in investment negotiations with the host state. It means the MNE may impose favourable concessions regarding minimum wages, security measures, limitations in technology transfers, taxation, and others. The larger the investment is, the greater the economic dependence of the host state [1]. Similarly, the larger the democratic deficit of states' public governance, the more likely it is that corruption will be rife and pressure to sustain the particular investment status will be maintained. The company will likewise apply significant pressure to the home state in order to achieve the same results at an inter–governmental level, to win contracts, or to promote a political regime that will safeguard the interests of the subsidiary. On a more global level, it has been multinational enterprises that have persistently lobbied industrialized states toward trade liberalization through the lifting of tariffs and domestic subsidies.

Generally, there could be following characteristics of global business [2]: a) MNEs are necessary participants in the structure of international law, but that current "soft law" does not by itself constitute a sufficient platform by which to recognize international legal personality; b) MNEs substantially outstrip less developed countries in financial and technological terms, and as a result; c) they are able to influence the policy and practice of LDCs. Moreover, they operate across a range of national borders, their operations directly or indirectly affecting a multitude of stakeholders, including individuals and states, who are bearers of direct rights and duties under international law.

All these statements raise the thought that even with such enormous power of MNEs their activities should respond the common norms of social and ethical behaviours. If this is the case, social responsibility has a complex, ambiguous relationship with law, as it generates types of regulation in areas where legislation should exist or, in some cases, actually does. It deals with issues which are already covered by conventions, resolutions, or recommendations on an international level, or positive law on a national level. It, therefore, deliberately sets itself up in competition with international labour law and national legislation. Social responsibility forms the basis of new forms of self–regulation by companies, who produce their own resources or reference documents, based, to a great extent on social law sources. There may or may not be a relationship with the existing legal system and, if there is, it is really ambiguous, as it aims both at closeness to the rule of law and separateness from it, or even its marginalization. This ambiguity comes to a head when corporate social responsibility is the subject of a global framework agreement, signed by company management and trade union organizations.

Corporate social responsibility is a way, where as a result of mounting public pressure, consumer awareness, and other forces, the MNE is forced to self-regulate in the sphere of human rights and the environment. The emergence of corporate influence in fields previously seen as sovereign prerogatives of the state – particularly the areas of soft law and human rights – has created a need for the main actors in international relations to get involved in CSR as an attempt to provide an ethical overall framework, and has forced many lawyers to venture out towards the very limits of law as they perceive it today. Most of the main international or regional institutions (the UN, particularly through the Global Compact launched by Kofi Annan, the European Union, the World Bank, the OECD and even the NGOs) have already put in place programmes entirely dedicated to creating and promoting an ethical code for and in partnership with businesses.

The scope of CSR could be summed up in the "triple bottom line" [1] theory ("people, planet, profit"): a business, no matter where it – directly or indirectly – carries out its activity, must

be judged according to three criteria: how it treats its employees, how its activity affects the environment, and how much profit it makes. There is no doubt that the largest multinationals – particularly those that are the most "suspect" environmentally or in labour law terms (oil companies, fast–food chains, etc.) – know that they are already under the constant and sometimes highly critical eye of civil society [3]. However, for companies not in the media spotlight, in other words the vast majority, the idea of imposing strict rules on themselves which go beyond the existing legal requirements is still highly unattractive in cost/benefit terms.

International legal instruments addressing MNE issues are channelled in two ways: a) through binding treaties in which state entities are the direct addressees of rights and obligations, but which directly affect and have a domestic impact upon MNE operations, and b) "soft law" that is directly addressed to MNEs. Examples of the former include the vast majority of International Labour Organization (ILO) conventions, industrial pollution–related treaties, and others, while examples of "soft law" include the OECD Guidelines, the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises, the Preamble to the 1948 Universal Declaration on Human Rights (UDHR), [4] and others.

Generally, there are four types of CSR sources. The responsibility accruing from each one of these is subject to both subjective and objective variables. These sources comprise public international instruments, NGO guidelines (some of which encompass a CSR evaluation system), individual business codes of conduct, and domestic legislation relating to CSR [5]. Each will be examined in turn.

Public international CSR instruments

The most influential public international CSR instruments are the OECD Guidelines, the UN Global Compact, and the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Unlike other "soft law" that is addressed by particular bodies of international organizations to their member states, the OECD Guidelines are recommendations addressed by governments to MNEs. Although, they are not legally binding on MNEs, OECD States have agreed to adhere to the Guidelines and encourage their companies to observe them wherever they operate. They contain recommendations on human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and taxation. Both the OECD Guidelines and the Global Compact are accompanied by so-called "follow-up" mechanisms [6]. This format is typical of such instruments, being a step below monitoring mechanisms. In addition, European Union recognizes the following regulative documents of corporate social responsibility:

– Integrated product policy (environmental issues);

– Eco-Management and Audit Scheme (voluntary environmental management instrument);

– ISO 26000 – Social Responsibility;

– United Nations "Protect, Respect and Remedy" Framework (guiding principles of business and human rights).

NGO guidelines on CSR

This is the most numerous group, that can be broken down into three categories: those that simply provide a set of CSR guidelines (most often entailing reporting standards), those that act as CSR indicator self-assessment mechanisms (self-performance standards), and those that are a combination of the two.

An example is the "Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance". The revised Benchmarks were issued in 1998 by the Interfaith Centre on Corporate Responsibility (ICCR) with input from related NGOs, labour groups, religious organizations, and corporations. They contain nearly sixty principles considered "fundamental to a responsible company's actions," including benchmarks to be used by external parties in order to assess the company's performance for the purposes of either SRI or other stakeholder involvement.

Finally, well-known principles of Sullivan (The Global Sullivan Principles of Corporate Social Responsibility) [7] pinpoint ways to increase active participation of companies in community development. The objectives of the Principles are to support economic, social and political justice by companies where they do business, to support human rights and to encourage equal opportunity at all levels of employment.

Corporate codes of conduct

Corporate codes of conduct are policy statements that outline the ethical standards of conduct to which a corporation adheres. This may take the form of a general policy statement or be inserted in the corporation's contracts with suppliers, buying agents, or contractors, in the sense that they must agree to abide by the company's ethical standards.

Corporate codes differ substantially from industry to industry and also from company to company. The codes in the OECD inventory address the whole gamut of economic, social, and environmental issues identified above as enshrined in the OECD Guidelines, and some go even further. The most common entries concern environmental and labour relations, followed by consumer protection and anti–corruption. The inventory suggests significant divergence in the scope of commitments, even with regard to well-defined issues such as child labour. Some codes pledge to protect any children found to be employed by the company or its suppliers, others mention specific ages or none at all, and others, while committed to eliminating child labor, point out that releasing the child from work will not alleviate the child's predicament.

Regulation of CSR through domestic legislation

With the exception of bribery and tax evasion, most matters pertinent to MNE operations outside the host state are not subject to extraterritorial legislation. Similarly, until recently, not all corporate action on home territory was subject to rigid regulation, such as corporate governance and investment funds. It was logical to assume that companies themselves were best suited to allocating salary levels, appointing appropriate board members, etc., as well as having the expertise and know how to invest accumulated funds for profit.

Now, from the de-regulation of corporate governance and investments as part of CSR broadly understood, local governments enter a new stage of global companies' regulation. Some states are now intending to encourage practices, using very different methods which nevertheless express a shared desire to educate and to bring about social innovation and a new link between public action and private initiatives. This can be seen, for instance, from legislation on social audits, social labels, ethical investment and socially responsible restructuring [8]. Nowadays many countries oblige companies to present non-financial reports of their activities. It is a common practice among European countries, the U.S., Japan and China.

Hence, multinational corporations have a momentous role to play in promoting sustainable development and alleviating global poverty. They not only possess the potential and resources, but the power to be persuasive and be heard. At the same time a significant influence of the companies on developing counties policies and global market require an intensive social control and regulation. A rapid growth in telecommunications, human rights activism, and increased consumer awareness led companies and corporate lawyers to contemplate the significance of stakeholders other than shareholders. Due to corporate social responsibility, companies are forced to re-evaluate their operational processes and managerial mechanisms. Although anti-competitive practices, bribery, and most forms of tax evasion or fraud are subjects to jurisdiction on the basis of extra-territorial legislation, the extent to which MNEs are bound to respect human rights, labour rights, and environmental protection in the host state is circumscribed by host state laws and MNE self-regulation. This self-regulation is reinforced by public international non-enforceable instruments, such as the OECD Guidelines for MNEs and the UN Global Compact, as well as NGO-based guidelines or reporting standards. Nowadays it is important to provide a satisfactory legal regime that allows for sufficient self-regulation that fosters business entrepreneurial spirit while legally obliging corporations to integrate particular human and labour rights, and environmental protection standards into their daily workings across the world.

References

1. Ruggie J. Business and human rights: the evolving international agenda / J. Ruggie // American Journal of International Law. – 2009. – No. 38. – p. 31-39.

2. Castro G. Governance, international law & corporate social responsibility / G. Castro, R. Clavet, I. Daugareilh. – 2008. – Geneva: International Labour Organization. – 207 p.

3. Muchlinski P. International Corporate Social Responsibility and International Law / P. Muchlinski // Indiana Journal of Global Legal Studies. – 2009. – No. 18 (2). – p. 14-37.

4. Petrashko L. Corporate social responsibility in Ukrainian business practice / L. Petrashko // International economic policy. – 2011. – No. 1–2. – C.115–141.

5. Bantekas I. Corporate social responsibility in international law / I. Bantekas // Boston University International Law Journal. – 2004. – No. 22. – p. 309-317.

6. OECD guidelines for multinational enterprises, 2011 edition: OECD Publishing. – 2011. – 93 p.

7. Ponomarev S.V. Corporate social responsibility in Europe: everything to know for a business going to the European markets / S.V. Ponomarev. – 2014. –Perm: EuroInfoCentre. – 40 p.

8. Calster G. The role of private international law in corporate social responsibility / G. Calster // Erasmus Law Review. – 2014. – No. 3 – p. 125–133.

У статті розглянуто роль транснаціональних компаній на світовому ринку та їх вплив на політичні процеси країн, що розвиваються. Дослідження визначає необхідність соціального регулювання діяльності компаній та, зокрема, акцентує увагу на корпоративній соціальній відповідальності підприємств. Особлива увага приділяється аналізу правових аспектів застосування корпоративної соціальної відповідальності.

Ключові слова: ТНК, регулювання, «м'яке право», корпоративна соціальна відповідальність, правова система, правові джерела КСВ.

В статье рассмотрена роль транснациональных компаний на мировом рынке и их влияние на политические процессы развивающихся стран. Исследование определяет необходимость социального регулирования деятельности компаний и, в частности, акцентирует внимание на корпоративной социальной ответственности предприятий. Особое внимание уделяется анализу правовых аспектов применения корпоративной социальной ответственности.

Ключевые слова: ТНК, регулирования, «мягкое право», корпоративная социальная ответственность, правовая система, правовые источники КСО.

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