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SYNOPSIS

TNCs and international law presents a complex and immense subject. This dissertation addresses the contentious issue of Transnational Corporations (TNC) and international law. TNCs target maximising profits and consequently violate regularly international law and regulations. However, law, international or national, focuses on a fair and ideal society through its rules. Consequently, the title of this dissertation is "***Transnational Corporations VERSUS International Law***". This provocative heading exposes the conflicting aims of both TNCs and international law.

Solving such tensions and accomplish better control of TNCs could be achieved through several important areas, that will be addressed. For example, the contemporary international framework regulating TNCs is an essential starting point. It is clear however, that TNCs, in their search for maximum profit, violate, circumvent or avoid such international laws, regulations and rules. The issue of avoidance is central to the debate. With this context considered, it is ultimately necessary to discover what lessons can be learnt so that affective progress can be attained in the future.

This dissertation has found out that international law often logged behind in regulating modern worldwide activities of TNCs. Furthermore, instead of legislating all areas of TNCs trade system, it is recommended that international law, through international organisations, might operate in a progressive and limited way in order to achieve successfully any laws, rules and regulations that try to supervise TNCs international performances.

As a result of this analysis, it identifies some of the structural concerns that the world economic system poses. This tension is clearly articulated in the following statement:

The rules of the world economy serve the interests of the multinational companies; they do not serve the interests of the vast majority of the people on this planet[1]

[1] Wallach Lori and Michelle Sforza: "World Trade Organization (WTO)" of "*The Progressive Magazine"* in the third world traveller website:
http://www.thirdworldtraveler.com/WTO_MAI/WTO.html

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Introduction

"Aujourd'hui, toutes entreprises, meme nos societes nationales, sont devenus en fait multinationales quant a leur financement, leurs marches, leur strategie et parfois leurs hommes. Ces societes d'un nouveau types n'ont vis-à-vis des Etats aucune visee aggressive, simplement elles les contournent et bientot les ignereront, penetrant leurs territoires, les federants a leur insu et les modelant a leur image sans visage : Universal company patri mea!"

"Today, all firms, even public firms, become Transnational Corporations according to their finance, their market, their strategy, and often by their human resources. These new types of companies do not have an aggressive target as regards the state, firstly, they circumvent and then they ignore them, penetrate their territory, federate against them in their image without face: Universal company patri mea!"[2]

The importance of Transnational Corporations (TNC) and the globalisation of production are now widely recognised. TNCs have become central actors of the world economic order; their impact on the economic, political and legal domain of developed and developing countries are both widespread and critical.[3]

Subsequently an international legal framework for Transnational Corporations ought to be put in place in order to regulate all activities of Foreign Direct Investment (FDI) in the world. Contrary to appearance, TNC and FDI are not synonymous words: FDI refers to the relevant process and TNC to the principal pertinent institution. A TNC or Multinational Corporation (MNC) is defined as an international, transnational corporation or enterprise with headquarters in one country but branch offices in a wide range of both developed and developing countries. Examples would include General Motors, Coca-Cola, Firestone, and Renault…[4]

[2] Fauroux Roger, 'Les comptes de la Politique', *Le Monde*, 9 June 1990, p. 2.
[3] Jones Geoffrey, *Transnational Corporations: a Historical Perspective*. The United Nations Library of Transnational Corporation: Volume 2, London, Routledge, 1994, p. 1.
[4] Todaro Michael P., *Economic Development*, 7th Edition. Reading, Massachusetts; Harlow: Addison-Wesley, 2000, p. 469.

The law governing TNCs consists of many kinds of national and international rules and principles of diverse forms and origins, differing in strength and degree of specificity. It is composed on customary international law, national laws and regulations, a multitude of international investment agreements (IIAs), and laws of international organisations, and other legal instruments. Moreover, there are also regional and plurilateral international arrangements that are increasingly important in matters of FDI. They help to create important patterns of expectations on a broader transnational level. At the multilateral level, there is no comprehensive tool for dealing with the subject, although there are a number of recent multilateral instruments of partial scope which deal with particular aspects of the FDI process.[5]

In order to achieve a deeper understanding, it is worth briefly relating the historical evolution of the law and TNC. For this, an examination is required on the transformation of the legal and policy frameworks from 1945 to the present.

In earlier times indirect foreign investment was far more important than direct investment. FDI acquired increasing importance in the twentieth century. During this period, they gradually came to possess the forms prevalent today. At the same time, there were significant changes in national and international policies on FDI.[6] These changes have had both causes and effects in the ongoing integration of the world

[5] United Nation Conference on Trade and Development: Note to correspondence No 7: '*Key Issues in the Emerging International Policy Framework for FDI*', Geneva, 18 February 2000, http://www.unctad.org/iia/Press/nc0007.htm. All website cited are printed out and included in the appendix.

[6] United Nation Conference on Trade and Development: Note to correspondence No 7: '*Key Issues in the Emerging International Policy Framework for FDI*', Geneva, 18 February 2000, http://www.unctad.org/iia/Press/nc0007.htm

economy and the changing role of FDI in that process. After the end of the Second World War, the prevailing government attitude toward FDI and policies in host countries was for State control over the economy. As a result, controls and restrictions were imposed on the entry and operations of foreign firms in many countries, and sometimes FDI were forbidden to invest in certain local industries for the benefit of domestic investors.[7] Therefore, the national government determined the specific terms under which investments were to be made, and ensured the participation of domestic firms in major industries. There was no international consensus on the pertinent legal norms. In the 1980s, a series of national and international developments reversed the original policy. This meant that there were real efforts to establish international rules regarding the TNCs investing in countries. Now, at the beginning of the twenty-first century, host countries are seeking to attract TNCs, by gradually reducing restrictions on its entry and operations and by offering strong guarantees. The tone and direction of international legal regulating has thus significantly changed.[8]

The consolidation of an emerging international framework of TNCs can be justified in four main objectives: First, this legal environment can ensure a reasonable degree of predictability, stability and transparency concerning the rules under which TNCs are to operate in and among individual states. Secondly, this kind of regulation protects the "accountability of TNCs to basic public concerns"[9]. Third, it provides a high degree of "compatibility and consistency"[10] between national measures

[7] Indirectly, the domestic investors refer to the host State of the TNC
[8]United Nation Conference on Trade and Development: Note to correspondence No 7: '*Key Issues in the Emerging International Policy Framework for FDI'*. Geneva, 18 February 2000, http://www.unctad.org/iia/Press/nc0007.htm
[9] United Nation Conference on Trade and Development: Note to correspondence No 7: '*Key Issues in the Emerging International Policy Framework for FDI'*. Geneva, 18 February 2000, http://www.unctad.org/iia/Press/nc0007.htm
[10] Fatouros A.A. *Transnational Corporations: the International Legal Framework*. The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p. 2.

and the system of economic regulation. This area must be regulated because of the growing globalisation of the world economy. Finally, this law will resolve "conflicts and disputes that may arise in the process of implementing national and international policies and measures".[11]

The above definition of TNCs and the law regulating them highlights the importance of creating or re-establishing a stricter legal framework for TNCs activities in the global economy. Without this, TNCs will continue to follow a business strategy of avoidance of international and national laws, and international and national jurisdictions. This has become such a necessary part of managing a TNC that every TNC now has a complete department or management consulting firm[12] to determine the strategy for escaping international laws. Therefore, it is clear how crucial it is to study, examine and describe the place of the law in the TNCs activities.

The topic of this dissertation is International Law ***VERSUS***[13] Transnational Corporation. This 'purposefully-antagonistic'[14] title contains several significant aspects that will be pointed out throughout the debate. This dissertation will provide an in-depth study of the law and regulations relating to the TNC's international operations. This study will analyse TNCs activities against regulations. However, the central question will be how TNCs could succeed to escape all national or international legislation in

[11] Fatouros A.A. *Transnational Corporations: the International Legal Framework*. The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p. 3.
[12] All the "Big 5" firm of consulting (Andersen, PricewaterhouseCoopers, Ernst and Young, Accenture, and Deloitte and Touche) advertise directly that their firm, in tax department, elaborate a tax and law avoidance strategy in order to maximise the profit of their clients: TNCs.
[13] Bennett, Douglas C. and Kenneth E. Sharpe. *Transnational Corporations versus the State: the Political Economy of the Mexican Auto Industry*. Princeton N.J.; Guildford: Princeton University Press, 1985. My title of the dissertation is inspired from this title of book.
[14] Bennett, Douglas C. and Kenneth E. Sharpe. *Transnational Corporations versus the State: the Political Economy of the Mexican Auto Industry*. Princeton N.J.; Guildford: Princeton University Press, 1985, p. 10.

order to achieve their first objective: profit.

Thus, this dissertation will be divided into four parts: First, it will analyse the emerging legal framework of TNC. Secondly, it will look at how these regulations are often violated by TNC. Thirdly, how the TNC try to avoid, escape, evade and circumvent international law, rules, regulations and jurisdictions. This section; the avoidance of law by the TNCs will form the heart of this dissertation. The last part will focus on what lessons could be learned from different attempts to regulate TNCs. In short, **(I)The international legal framework for TNC is (II)Violated and (III)Avoided by TNC,(IV) so what lesson could be learnt?"**

CHAPTER I - THE INTERNATIONAL LEGAL FRAMEWORK REGULATING THE TRANSNATIONAL CORPORATIONS

The first part of this chapter will analyse the historical evolution of the legal relationship between TNC and host countries. The second part will focus on the current type of international regulations on TNCs. The third will offer an overview of the organisations that are responsible for creating laws for TNCs.

A – The legal contractual evolution between host countries and TNCs.

In the early twentieth century, the legal doctrines relating to state contracts with foreigners was born. At this time Great Britain was the leading industrial and commercial power and the policy of "laissez-faire"[15] was pursued in all capital exporting countries. After the Second World War, Kuusi Juha observed that "the new development policies adopted by a great number of developing countries and the emergence of TNC as major participants in the world economy were likely to have significant implications for the legal doctrines relating to foreign investment".[16]

In response to the utilisation of the "laissez-faire" doctrine, different theories emerged to support the application of non-municipal law. Non-municipal law means, in effect, that the contract should be based on general principles of law recognised by

[15] The definition of "laissez-faire" is, in economics and politics, a doctrine that an economic system functions best when there is no interference by government. It is based on the belief that the natural economic order tends, when undisturbed by artificial stimulus or regulation, to secure the maximum well-being for the individual and therefore for the community as a whole. *Encyclopaedia*: The Columbia Encyclopaedia, Sixth Edition. 2001: http://www.bartleby.com/65/la/laissezf.html.
[16] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, pp. 10-27.

civilised nations on rules of transnational law or on public international law.[17] This was the theory. However, in practice it produced the opposite consequence. As a result, during the period between 1965 and 1977 the classical doctrine, in which state contracts with foreigners are governed by national legal system, seems to have regained support.[18]

1 –1960s

The rejection of non-municipal law is explained by the political and economic developments of the 1960s. In the early 1960s, there was an urgent need of FDI in developing countries and in newly independent countries. Many facilities were created in order to attract them; for example, legal guarantees, less taxes, and the freedom to use natural resources. However, in 1962, the United Nations Resolution on Permanent Sovereignty over Natural Resources[19] was adopted in order to achieve a fair and favourable balance and environment between foreign investment and the host countries. When this resolution was passed in the General Assembly, not one of the FDI receiving countries was against it because they were motivated to preserve their sovereignty and freedom of initiative in bargaining with TNCs over their natural resources.[20]

[17] Akehurst, Michael, *A modern introduction to international law*, 6th edition, London: Routledge, 1992, p. 15.
[18] Kuusi, Juha, *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*, Farnborough, Hants: Saxon House, 1979, pp. 27-35.
[19] United Nations: General Assembly resolution 1803 (XVII) of 14 December 1962 on 'Permanent Sovereignty over Natural Resources'. This Resolution means, "The leading capital exporting countries consistently claimed that certain legal principles had to be respected in order to maintain a favourable investment climate in the LDC*".* All legal text cited are printed out and included in the appendix.
[20] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, pp. 36-42.

In the middle of the 1960s it was observed that the governments of host countries and private corporations could be put on the same footing as contractual parties[21]. From the economic point of view this legal and therefore contractually binding relationship creates a mutually beneficial economic co-operation between developed and developing countries. However, scholars questioned whether this contract between private foreigners and the government of the host country could be governed by the new body of contract law. Thus, a new kind of international law and rules were created in order to favour the establishment of TNCs in less developed countries (LDC).

Consequently, at the end of the 1960s, there was an increasing and imposing number of TNCs settled in LDCs, under this favourable new law. Therefore, a growing number of LDCs claimed a new type of "neo imperialism facilitated by this investor-oriented TNC policy"[22] facilitated by internationalised contract. LDCs preferred the application of non-municipal law in contracts because it permitted them to preserve the interests of host countries.[23]

LDC's interest was mainly concentrated on their right to claim compensation for expropriation of properties. Webster's Dictionary defines expropriation as "the action of a foreign state in taking the property rights of an individual in the exercise of its sovereignty".[24] Most international laws allow expropriation with the limitation that

[21] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, p. 46.
[22] Barnet, Richard J., *Global Dreams: Imperial Corporations and the New World Order*, New York: Simon & Schuster, 1994, p. 363.
[23] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, pp. 59-72.
[24] Webster Dictionary: http://www.m-w.com/cgi-bin/dictionary

the expropriated company must be compensated. How this compensation is to be implemented is a controversial issue. The United States' view, which is parallel to the position of international law is that prompt, adequate, and effective compensation should be paid.[25] If compensation is to be paid, tribunals must apply a method of valuation to achieve a basic standard. In most cases the host country favours prompt, adequate, and effective compensation. With this guarantee, the TNC can be regarded as a real partner in the national economy.[26]

2 – 1970s

During the 1970s it was agreed by LDCs that TNCs, established in LDCs, needed a new economic and legal analysis and a revision of the development policies at national, regional, and international levels. Economists suggested that the TNCs had a real opportunity to improve economic and social growth of less developed countries. However, there was some real conflict between TNCs and host country aims. Indeed, the TNCs objective was profit, and the host government wanted to extract advantages from the establishment of TNC in order to develop their country.[27] In order to achieve the goal of development, it was seen as necessary to use international law with national law.

[25] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships.* Farnborough, Hants: Saxon House, 1979, pp. 75-94.
[26] Kevin Smith, and Prof. Palmiter, 'The law of compensation for expropriated companies and the valuation methods used to achieve that compensation' in *Law & Valuation Spring 2001*: http://www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm
[27] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, pp. 95-117.

Therefore, all host countries internationalised the contract with the TNC. Thus originally where the contract between the TNC and the host country was subject to national law, it was now subject to both international and national law. This meant that the TNC was still supervised by national jurisdiction, and as well as by international jurisdictions. This action became evident in the Charter on the Economic Rights and Duties of States in 1973-74. This change is called "internationalisation" of the contractual relations between states and TNCs.[28]

3 –1980s

From the 1980s to the present day, developing countries have wanted to improve the effectiveness of national control and regulation of TNCs in their countries. This involves the power of administrative institutions responsible for the negotiations with TNCs, the establishment of new procedures, and of course, the up-dating of laws relating to this aspect of economic life.[29] New company laws, labour laws, social security, fiscal law and monetary regulations have to be created. However, this seems to be an impossible task when the main hidden objective of the settlement of a TNC in LDC appears to be to avoid all rules in order to maximise profit. The TNC is an autonomous entity and by definition ignores national boundaries and operates globally.[30] Thus the international community has, for several years, been establishing a modern legal approach to all aspects of the activities of TNCs. In the period of globalisation, TNCs activities spread out across the world and this become increasingly

[28]Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, pp. 120-139.
[29] Kuusi, Juha. *The Host State and the Transnational Corporation: An Analysis of Legal Relationships*. Farnborough, Hants: Saxon House, 1979, pp. 143-151.
[30] Stonehouse George, Jim Hamill, David Campbell, and Tony Purdie, *Global and transnational business, strategy and management*, Chichester: Wiley, 2000, p.31.

difficult to regulate. Global problems require global solutions in regulating global organisations.[31]

B – The global approach of laws and regulations relating to TNC

There are several methods of regulating TNCs. However, the most effective method of regulating TNCs is done by the 'Codes of Conduct'. These are international codes of behaviour and rules of law to regulate the activities of TNCs. Codes have been drafted, interpreted, and applied through international organisations: the United Nations (UN), the Organisation for Economic Cooperation and Development (OECD), the European Community (EC), and the Andean Common Markets (ANCOM). These international organisations try to regulate the relationship between TNCs and LDCs. These efforts can be categorised in four main models: the Free Market model, The European Community model, the Multinational Consortium approach, and the Development Community approach.[32]

1 – The Free Market Model

In the Free Market model, the timing of regulation is *ex post facto*, meaning that laws and rules would be enforced after the establishment of TNCs in the host country.

[31] Stubbs, Richard and Geoffrey R.D. Underhill: *Political economy and the changing global order*, 2nd edition, Oxford University Press, 2000, pp. 297-299.
[32] Tharp Paul A., Jr., 'Transnational Enterprises and International Regulation: A Survey of Various Approaches in International Organisations'. *International Organisation,* Volume 30, Number 1. Winter, 1976, pp. 47-73.

For instance, this approach is an "arm's-length relationship".[33] Paul Tharp[34] defines this concept in reference to the relationship between governing authorities and TNC. In this model, necessary international regulation takes the form of increased exchange of data between governments and companies on matters of mutual concern. It includes government promulgated laws and procedural treaties, which provide "for reciprocity in national judicial processes".[35] The resolution of disputes between governments and multinationals may be conducted through standard diplomatic-legal techniques.[36]

In this model, TNC activities are free and not subject to restrictive laws. This approach seems good for two kinds of situation in international economics. The first case is where there is a group of countries roughly equivalent in economic level who are all members of an international organisation: for instance, the OECD. The second situation could be a specific international organisation (the UN), where all kinds of countries are grouped, and want to resolve a dispute between a TNC and their country. In this case, the procedural aspects of the Free Markets seem to be relevant in order to resolve the problem.[37]

2 - The European Community Model and the Development Community

[33] The definition of "arm's-length relationship" is more precious in Organisation for Economic Co-operation and Development (OECD), *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Paris, 2000, p. 9.
[34] Tharp Paul A., Jr. 'Transnational Enterprises and International Regulation: A Survey of Various Approaches in International Organisations'. *International Organisation,* Volume 30, Number 1. Winter, 1976, p. 49.
[35] Tharp Paul A., Jr. 'Transnational Enterprises and International Regulation: A Survey of Various Approaches in International Organisations'. *International Organisation,* Vol. 30, No. 1. (Winter, 1976), p. 50.
[36] This diplomatic-legal technique means actually conciliation and arbitration. If this latter is not agreed, then states went before the Court of Conciliation and Arbitration based in Geneva and part of Organisation of Security and Co-operation in Europe: http://www.osce.org/cca/
[37] Tharp Paul A., Jr. 'Transnational Enterprises and International Regulation: A Survey of Various Approaches in International Organisations.' *International Organisation,* Vol. 30, No. 1. (Winter, 1976), pp. 51-52.

Model

The European Community (EC) approach and the Development Community approach (ANCOM) contribute to a global model of regulation with political integration through centralised economic planning. These two models possess a different ideological position but in practice operate in the same way. For instance, in a basic capitalist environment, the EC use the preregulation meaning that E.U. laws would be implemented before the establishment of TNCs in the host country. The ANCOM, on the other hand, is completely against pre-regulation. The more legal restrictions that are in place, the more difficult it is to attract TNCs.[38]

3 – The Multinational Consortium Model

The Multinational Consortium approach is the most flexible and widely applicable of these four models. It can be used in any regional setting, in any group of geographically diverse states, for the production of any products. In this model, the TNC has the possibility of dealing with any kind of host government country. Because of its open nature, this model could be used with any of the other models.[39]

4 – Consequences of these approaches

[38]. Kindleberger C.P., 'European integration and the international corporation', in Robson Peter, *Transnational corporations and regional economic integration*, The United Nations Library of Transnational Corporation: Volume 9, London, Routledge, 1994, pp. 87-99.
[39] Tharp Paul A. Jr., 'Transnational Enterprises and International Regulation: A Survey of Various Approaches in International Organisations.' *International Organisation,* Volume 30, Number 1. Winter, 1976, pp. 54-55.

These four models of TNC regulation have produced two types of codes: one between developing countries, and another between developed countries. Both have already entered into force: the Andean Common Market countries agreed in 1970 upon common regulations on foreign investment; and the OECD countries adopted in June 1976 a set of recommendations addressed to TNCs. These efforts open the way for new approaches in order to regulate TNCs more efficiently.

On the global level, the United Nations Commission on Transnational Corporation (UNCTC)[40] has been trying to complete general codes of conduct for TNCs. In addition, other organisations are working on new codes of conduct. Moreover, general organisations try to supervise and legally control TNC activities. These codes differ in their area of regulations, for instance the United Nations Conference on Trade and Development (UNCTAD)[41] has been preparing a code in the area of the "transfer of technology".[42]

C – Other means of supervising and regulating TNCs:

This debate, which is based on the description of the law and its relation with TNCs, would not be complete without a discussion on the main regulative international organisations.

1 – International Trade Organisation (ITO):

[40] This dissertation will explain in more details the consequences of UNCTC and UNCTAD in the fourth chapter.
[41] For more details about the work and objectives of United Nation Conference on Trade and Development, please see: http://www.unctad.org
[42] United Nations Conference on Trade and Development, *An International Code of Conduct on Transfer of Technology*, New York, United Nations, 1975.

It has been argued[43] that the problem of TNC regulation should be dealt with by a separate and exclusive international organisation. After the Second World War, this view became reality with the creation of the International Trade Organisation in order to promote and regulate international investment. The International Trade Organisation gave birth directly, indirectly, or in reaction, to several specified international organisations: the International Monetary Fund (IMF),[44] International Bank for Reconstruction and Development (World Bank),[45] General Agreement on Tariff and Trade (GATT) which became the World Trade Organisation (WTO),[46] United Nations Conference on Trade and Development (UNCTAD),[47] United Nations Committee on International Trade Law (UNCITRAL),[48] European Coal and Steel Community (ESCO), European Community (Common Market), European Free Trade Association (EFTA),[49] International Centre for the Settlement of Investment Disputes (ICSID), Organisation for Economic Cooperation and Development (OECD) etc.[50] Some are in the same geographical area, some have global objectives, and some have specific aims. Whatever the organisation, it has been created essentially in order to legalise all the activities of the TNC when they want to, or are settled in a host country.[51] For instance, UNCTAD's '10th World Investment Report' stated about the merger or an acquisition of TNCs in LDCs.[52]

[43] Seymour J. Rubin, practising attorney for the U.S. in international trade negotiation.
[44] The International Monetary Fund: http://www.imf.org
[45] The World Bank: http://www.worldbank.com
[46] The World Trade Organisation: http://www.wto.org
[47] The United Nations, Conference on Trade And Development: http://www.unctad.org
[48] The United Nations Committee on International Trade Law http://www.uncitral.org
[49] The European Free Trade Association http://www.efta.int
[50] The Organisation for Economic Cooperation and Development http://www.oecd.org
[51] Robson Peter, *Transnational corporations and regional economic integration*, The United Nations Library of Transnational Corporation: Volume 9, London, Routledge, 1994, pp 1-16.
[52] UNCTAD, *10th World Investment Report: Cross-border Mergers and Acquisitions and Development*, Geneva, 2000.

The International Trade Organisation no longer exists. Most of the economists argued that the ITO failed because it was too great an aim to codify the regulations of all international trade.[53] However, most international organisations in existence today grew out of the ITO.

2 – GATT/WTO

Rules become more complex as countries become progressively more interdependent in the global system. Contemporary with the development of the international economic relations, a specific branch of international law dealing exclusively with TNCs had to be created. International economic relations are increasingly formed by the World Trade Organisation (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT). These have provided the legal framework in which international interests in trade are managed and disputes are settled. Many bilateral[54] and multilateral agreements and regulatory norms exist outside the WTO framework, but the WTO provides an overarching set of rules in international economic affairs.[55]

[53] Robson Peter, *Transnational corporations and regional economic integration*, The United Nations Library of Transnational Corporation: Volume 9, London, Routledge, 1994, p. 37.
[54] Bilateral treaties has been outlined in Sauvant K.P. and V. Aranda, 'The International Legal Framework for Transnational Corporation', in Fatouros A.A. *Transnational Corporations: the International Legal Framework*. The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p.83 and p.94.
[55]Buhour, Chantal, *Le commerce international: du GATT à l'OMC*, Paris: Le Monde Editions, 1996, pp. 54-137.

GATT was focussed on reducing tariffs and trade barriers, and increasing trade benefits to all nations, but the majority opinion was that the real beneficiary was American TNCs.[56] Under the GATT, conferences were convened in order to evaluate and amend international trade regulations. Finally, in an agreement of 1995, GATT established its successor: the WTO, which has been given more power to resolve trade disputes. Since its formation, many cases have been "resolved" before the WTO. However, developing countries generally oppose the extra-liberal policy of the WTO, instead supporting the United Nations Conference on Trade and Development (UNCTAD), as part of the New International Economic Order (NIEO).[57]

The NIEO was demanded by LDCs because growing networks of international laws sought to free transnational capital through their main component; the TNC. The concerns of transnational capital have been met through the establishment of a Multilateral Investment Guarantee Agency (MIGA) and through concluding bilateral investment protection treaties (BITS) between the developed countries and LDCs. For example, in 1996, more than 1000 BITS had been concluded.[58] More recently, there has been the Agreement on Trade Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) adopted as a part of the GATT Final Act of the Uruguay Round of Trade Negotiations.[59]

[56] Buhour, Chantal, *Le commerce international: du GATT à l'OMC*, Paris: Le Monde Editions, 1996, p. 17.
[57] New International Economic Order was initiated by the Third-world countries that have declared that their terms of trade are persistently deteriorating vis-à-vis the industrial world. By "terms of trade," they mean prices of exports relative to prices of imports. They have asked for a New International Economic Order (NIEO), which would (among other things) protect their prices.
[58] World Bank source: http://www.worldbank.org/icsid/treaties/intro.htm
[59] The WTO's agreements are often called the 'Final Act of the 1986 -1994 Uruguay Round of trade negotiations'. A Summary of the Final Act of the Uruguay Round could be easily found on this website: http://www.wto.org/english/docs_e/legal_e/ursum_e.htm

If these texts are examined in conjunction with the World Bank Guidelines on Foreign Investment (1992) and the proposed OECD multilateral agreement on investment (MAI), it becomes clear that the agreements are directed towards removing all legal restriction on the entry, establishment and operations of TNCs in LDC. In other words although in appearance the laws created by international organisations are protecting the rights of LDCs, in reality these same laws have allowed TNCs to enjoy free access to LDCs.

This first chapter has described most of the specific and general approaches to organisations which try to regulate TNCs. It appears that efforts on the international level to formulate new rules with regard to foreign private investment has been accomplished. However, one of the objectives of this description of the international legal framework for TNCs was to show that the law has been unable to keep up with TNCs practices. In fact, TNCs always manage to find different and new ways to violate the international law and national law in order to make profit.

CHAPTER II – THE VIOLATION OF INTERNATIONA LAW, RULES AND REGULATIONS

The first chapter has described the international legal framework governing TNCs which is often violated. In fact, one of the most effective regulations was the codes of conduct, and even these rules are often violated with regard to labour employment by TNC.

A – Example of violation of codes of conduct by TNCs

In Thailand, many producers are paying major fines[60] for continued violation of codes of conduct. Yet, if the government of this host country tries to impose too many of the restrictions laid out by the codes of conduct, these companies use the threat of moving their production to lower labour-cost countries (China or Vietnam). So although the host country has some control over the actions of the TNC, it is very limited.

1 – Facts

An example of the employment condition in the production level of Bangkok Rubber Group[61] can be used to highlight the violation of codes of conduct. Bangkok

[60] The punishment for violation of codes of conduct could be in the order of $US 5000. See Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote. Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

[61] Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

Rubber Group believes that the transnational corporations have to follow the profit target whatever the cost in labour suffering. For instance, during the peak season, many of the TNCs orders are larger than the capacity of the producers. Thus, workers must do overtime, in some cases more than 80 working hours per week, to fill the order. Furthermore, in December 1997, workers of the Sena Manufacture[62] went on strike for two days because they did not want to work overtime anymore. The management forced them to work overtime by threatening to fire them if they refused. This is because Sena is the only rubber manufacturer for Reebok, Nike, Adidas, and Timberland. Thus the volume of orders often exceed the factory's capacity. The management of Reebok said simply: "we are a business and a business has to make a profit. For the manufacturers and the transnational corporations, business always comes before human rights." [63]

2 – Consequences

The majority of the violations of the codes of conduct relate to excessive working hours, but also underpayment, denial of the freedom of association, suppression of trade union organisations, and inadequate occupational health and safety standards. The way that the TNC labour codes of conducts is written and implemented is highly questionable. The codes of conduct claim that the workers have rights, such as freedom of association and collective bargaining. However, as in the case of workers

[62] Sena Manufacture is a part of the Bangkok Rubber Group, see Junya Yimprasert, Christopher Candland and Walden Bello. 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

[63] Managers were from both Reebok and the manufacturer. See Junya Yimprasert, Christopher Candland and Walden Bello 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

at Par Garment,[64] the workers have had their rights denied.[65]

Consequently, at the retail level, workers employed by the subcontractors are under-paid, forced to work long hours with no additional pay and no social welfare.[66] Therefore the TNC even violates the local labour law. Many of these subcontractors or sweatshops, in order to sell rapidly and on a massive scale, also employ children. TNCs, even with codes of conduct did not support or protect their workers at places such as Par Garment and Lian Thai.[67]

In conclusion, it is very difficult to pressurise the manufacturing companies to follow any codes of conduct because the manufacturer can always sell to someone else. The objective of the transnational corporations is still to find the cheapest price per item, not a manufacturer who gives fairest treatment and welfare to the workers. The transnational corporations do not want to increase their costs by pressuring the manufacturer into following codes of conduct. On the contrary, certain Transnational Corporations turn a 'blind eye' to labour abuses[68]. The politics of TNC have unfortunate consequences: the workers childrens' education suffer and their health deteriorates. The workers suffer while transnational corporations continue to gain more revenue and enjoy their prosperity. "The workers who make Reebok, Nike or Adidas shoes, which

[64] Company Profile: http://www.cleanclothes.org/companies/pargar.htm
[65] In order to posses a better understanding of the violations of the Right of Association at the Par Garment Factory, Thailand: http://www.web.net/~msn/3nike18.htm
[66] Sena Manufacture is a part of the Bangkok Rubber Group, see Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm
[67] See Par Garment and Lian Thai companies profile: http://www.cleanclothes.org/companies/nike00-09-15-1.htm
[68] Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

cost over $US 50 in retail outlets, never get the chance to wear them. On the other hand, the management at the corporate offices of Reebok and Nike are given newly released shoes free. Even if the poor workers could buy them, the workers would not wear these shoes for being accused by their employer of stealing them.[69] Business is about making profit and finding the cheapest cost of production for the highest profit, but when this profit is made at the expense of the worker welfare, health, and life, it is "morally criminal."[70]

B- Recommendation on the violation of codes of conduct by TNCs.

1 – The effectiveness of codes of conduct

TNCs main objective is profit, and the main objective of the law is social justice, pinpointing an inherent tension in the regulation of one by the other, and posing the question of how any combination of these two concepts can bring about a balanced solution. On the one hand, heads of TNCs claim that the law dealing with TNCs is very restrictive and does not allow them to achieve the profit target. On the other hand, Codes of Conduct; instruments of international law, are often stated in general and not adapted to the situation in the LDCs or to the activities of TNCs. So where is the "juste-milieu"[71] between the social and moral, and the maximizing of profit? Moreover, how can these

[69] Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

[70] Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

[71] "Juste-milieu" means some kind of happy or ideal medium, where both sides did an effort to make a common target.

codes be made more effective?

The effectiveness of codes depends on the management of TNCs. For example, the Bangkok Rubber Group employed workers at lower wages than the minimum fixed by the codes of conduct. However, a non-governmental organisation, the Union for Civil Liberty,[72] noticed this violation and publicly denounced it. In order to avoid damaging their image, Reebok, the mother-company of Bangkok Rubber Group, responded by cancelling its orders. In the health and safety area, many footwear factories have also improved with the application of corporate codes of conduct. For instance, NGOs press Reebok codes to improve the working environment, so the Ministry of Labour and Social Welfare officers can check their factory for excessive noise, light, and heat. Thus through public denunciation of violations, transnational corporations could be forced to change their policies.[73]

The "juste-milieu" can be achieved if the Transnational Corporation respond more to the requirements of the workers rights, but this is in direct conflict with the TNC, which wants to maximise profits and so decrease expenses. Yielding to the advent of labour rights is at a cost to TNCs. To realise the ideal of employee satisfaction, or at least protection of their basic human rights a TNC must have some moral consciousness.

[72] Union for Civil Liberty, North eastern Region 2: NGO working on Thailand. Main activity: human rights campaigns and social welfare. More information on this NGO see this website: http://www.signposts.uts.edu.au/contacts/Thailand/NGO/117.html

[73] Junya Yimprasert, Christopher Candland and Walden Bello, 'Can Corporate Codes of Conduct Promote Labour Standards? Evidence from the Thai Footwear and Apparel Industries', *The Centre for research on Multinational corporation*, 15 July 1999: http://www.somo.nl/monitoring/reports/thai-index.htm

2 – Potential solution

If an effort was made by all kinds of international organisations, it seems likely that change could be effected. For example, on 25 January 1984, one of the world's largest food corporations, Nestle, signed an unprecedented agreement with its non-governmental critics. In fact, Nestle signed up to the WHO/UNICEF[74] international Code of Marketing of Breast-milk Substitutes.[75] Yet, this seemed to have little effect on the company's policy. Consequently, the company was criticised and Nestle experienced a seven-year international consumer boycott of its products. This agreement provides the perfect example of what could be achieved if international organisations created a common code of conduct and stuck strictly to these regulations. The reaction against Nestle was the result of an interaction among inter-governmental organisations, international organisations, transnational corporations, national governments, workers, political activists, and consumer organisations.

Yet this kind of consensual action is rare; at least, some real efforts have been made on the international level to regulate Transnational Corporations. The first motivation for regulating TNCs was made by the UN Resolution passed in 1972 in ECOSOC. This Resolution recognised the importance of TNCs for the UN and recommended the formation of a group of eminent persons to study the issue and make

[74] WHO: World Health Organisation, UNICEF: United Nations of Children's Funds
[75] The WHO/UNICEF International Code: Resolution WHA37.30 (1984): The Thirty-seventh World Health Assembly recognizing that the implementation of the International Code of Marketing of Breastmilk Substitutes is one of the important actions required in order to promote healthy infant and young child feeding: http://www.babymilkaction.org/regs/res3730.html

recommendations. This group laid the groundwork for subsequent UN actions on TNCs. In 1974, this group made many codes, some of which have been adopted, although others still have not been implemented by companies because they could result in grave losses to the companies' profits.[76] Many TNCs wield a great deal of power in their national governments due to the contributions they make to the UN. If the General Assembly adopted these codes, they would run the risk of forfeiting these funds.[77]

At the moment the TNCs, the host government and international organisations recognise the laws of UN bodies. It is to be hoped that the codes of conduct would contribute to the creation of a new body of rules relating to the legal relationship between TNCs and LDCs. And these new laws should be able to settle a favourable investment climate for TNCs and a reasonable return to the host country.[78]

With regard to the role of TNCs in the development of LDCs, perhaps the Codes of Conduct could facilitate the establishment of TNCs in host countries. The political bodies, and political forces in the international community could then supervise this adjustment. Currently though, the TNCs interest remains the achievement of profit, and they have no need to accept imposed regulation if they choose and therefore can avoid it.

[76] In 2000, nine United Nations' Principles for multinational and transnational corporations recognizes various forms of human rights, labor/worker rights, and environmental codes, currently. United Nation's Global Compact: http://www.codesofconduct.org/governmental.htm
And in 2001, the United Nation's Global recognizes approximately 215 available codes: http://unglobalcompact.org/un/gc/unweb.nsf/content/ilostudy.htm#codes
[77] Sikkink Kathryn: 'Codes of conduct for transnational corporations: the case of the WHO/UNICEF code', in *International Organisation*: Volume 40, Number 4, pp. 815-818.
[78] Werner J. Fld, *Multinational Corporations and U.N. Politics: The Quest for Codes of Conducts*, New York: Pergamon, 1980, p. 18.

CHAPTER III – THE AVOIDANCE OF THE INTERNATIONAL LAW, RULES AND REGULATIONS

The international legal framework for TNCs is ineffective because TNCs have been violating and avoiding the regulations.

The primary debate of this dissertation concerns international law versus Transnational Corporations, or in other words, how TNCs evade international regulations. The first chapter of this discussion has focussed on the description of the existing legal environment of TNCs. As stated above, the law has been found to be incompetent in controlling and creating a fair trading system in the global market. This is the case in spite of the willingness of international organisations and the worldwide community to curb this ineffective practise.

Many different kinds of rules and regulations have been created although only some have been successful, for instance Codes of Conducts,[79] some "moral" rules controlled by the inter-governmental organisations.[80]

TNCs try to evade these rules and regulations in order to achieve their main target of maximising profits. The first part of this chapter seeks to shed light on how

[79] Historically, the first Code of conduct adopted was the "Code of Liberalisation of Capital", in 1961 and settled by OECD. Another successful code was the "International Code of Marketing of Breast-milk Substitutes" adopted in 1981 by the WHO, which has been analysed in number 2, section B, second chapter of this dissertation. However, the most important codes of conduct, initiated by UNCTAD about the Transfer of technology, is still under negotiation since 1976. Sources: Table 1: 'Main International Instruments dealing with Transnational Corporation in 1991'. UNCTAD, *Transnational Corporation in World Development: Trends and Prospects*. United Nations publication, Sales No. E. 90 II.A.7.

[80] One of the "moral" rules could be recognised in the "Declaration of Fundamental Principals and Rights at Works" where the abolition of Child Labour is forbidden, for instance. International Labour Organisation: http://www.ilo.org/public/english/standards/decl/declaration/index.htm

these TNCs evade the rules and regulations as a means of undermining their competition. The second part will analyse the main business areas in which TNCs try to evade national laws and international jurisdictions.[81]

A – How a TNC tries to avoid international law, rules and regulations

In this part the main defects of international law, rules and regulations that attempt to regulate TNC activities will be discussed. Secondly, it will reach the focal point of this dissertation, which is how TNCs avoid international law, rules and regulations.

1 – Defects of laws and regulations

The worldwide activities of TNCs pose a new challenge to international law. The fact that TNCs succeed in avoiding these laws, rules and regulations means that the body of law that tries to govern TNC activities contains several serious defects. Four major defects are easily identifiable. Firstly, the fact that these rules and regulations are spread across a range of regulating bodies means that they can only be applied in a fragmented manner.[82] Secondly, the law has failed to keep pace with developments on the international landscape**.** "It has failed to adapt itself to the kinds of problems that make the world of commerce today. International actors have learned to undermine

[81] Vagts D.F. 'The Multinational Enterprise: A New Challenge for Transnational Law', in *Transnational corporations and national law* edited by Seymour J. Rubin and Don Wallace, The United Nations Library of Transnational Corporation: Volume 19, London, Routledge, 1994, p. 24.
[82] For instance, ILO imposes a minimum time of work in all TNCs in the world, this rule is inefficiency because it is not specified the category of TNCs. Often, this rule is implemented only in few TNCs. Therefore, it is defect and easy to avoid by TNCs.

such laws by playing with past points of legality."[83] Furthermore, even if constrained by these laws, the TNCs frequently introduce new legal[84] issues as a way of prolonging or avoiding prosecution.[85] Thirdly, since these cases of TNC problems are so rare and so unique, there is a lack of the regularity and experience needed for the growth of a credible body of law.[86] Finally, due to the complexities which are inherent in the area of international law, it is very difficult to bring about a legal action against such rule-breaking TNCs, because law and economics[87] in the international realm have traditionally been considered as separates spheres.[88]

2 – How TNC avoid international law, rules and regulations?

E.R. Latty in his two articles[89] explained how TNCs avoid laws and regulation. Actually, Latty enumerates in large details the ways in which TNCs evade national and international rules as well as national and international jurisdiction.[90]

[83] Vagts D.F. 'The Multinational Enterprise: A New Challenge for Transnational Law', in *Transnational corporations and national law* edited by Seymour J. Rubin and Don Wallace, The United Nations Library of Transnational Corporation: Volume 19, London, Routledge, 1994, p. 24.
[84] In order to avoid laws, TNCs introduce news legal issues such as the law of Internet that is currently inefficiency.
[85] TNCs lawyers provide a proposition rather less true of tax law than other branches.
[86] One of the unique areas of TNCs activities, which have been not really regulated, is the merger and acquisitions of TNCs.
[87] However, law and economy have been recently successful to merge in the area of regulation, for instance, in the creation of WTO.
[88] Vagts D.F. 'The Multinational Enterprise: A New Challenge for Transnational Law', in *Transnational corporations and national law* edited by Seymour J. Rubin and Don Wallace, The United Nations Library of Transnational Corporation: Volume 19, London, Routledge, 1994, p. 24.
[89] E.R. Laty: 'The Yale Law Journal', 65 (1955), selections from pages 137-143 and 166-173, and 'Pseudo-foreign Corporations' in *Transnational corporations and national law* edited by Seymour J. Rubin and Don Wallace, The United Nations Library of Transnational Corporation: Volume 19, London, Routledge, 1994, p. 80.
[90] E.R. Latty listed 11 ways of law avoidance, however, it will be taken only few of these ways of avoidance that are dealing with the subject of our research.

He argued in his first point that when TNCs want to escape "undesirable" features of local corporation law, they simply move their activities to another country that does not have such stringent laws.[91] As a second point, local corporation law should not be enforced in "one big go"[92] because the volume involved makes it easier for TNCs to dodge general and ambiguous rules and laws. Thirdly, Latty describes a typical case of avoidance in which a local law reflecting a strong national public policy was ignored by a TNC, which in turn tried to impose its home rules and laws on the host country. The TNCs indulge in such practices under the pretext that their way of conducting business will benefit both the local population and the TNCs concerned. However, this is a convenient excuse for producing more profit. Finally, it is interesting to note that the concept of the "social seat"[93] allows TNCs to avoid laws and regulations, owing to the fact that TNCs are able to change their social seats in the event of legal action taken by a fellow TNC. In order to take legal action against a TNC it is necessary to name their "social seat", which becomes virtually impossible if it can move country at short notice. That is why some laws require the exact "social seat" of the TNC before they invest.[94]

The gist of what Latty is saying compels the conclusion that in order to achieve

[91] That is why; host countries reduced all restrictive laws and regulations despite the local benefice in order to attract TNCs in their country.
[92] This refers to the fact that a large amount of national law should not be applied at the same time.
[93] European law requires designation of the social seat somewhere in the documents relating to the corporate organisation or statutory publication. Social seat is translating in English frequently by the "principal office" or "principal place of business" or "registered office" or "head office". Social seat is regulated in France, in Law of July 21, 1867, article 56 (under Code de Commerce, article 64); in Italy, in Codice Civile article 2328 (1942); in Spain, in Law of July 17, 1951 (Ley de Regiment Juridoco de las sociedades Anonimas) article 11 (domicilio social) Boletin Oficial, August 6, 1951.
[94] E.R. Laty: 'The Yale Law Journal', 65 (1955), selections from pages 137-143 and 166-173, and 'Pseudo-foreign Corporations' in *Transnational corporations and national law* edited by Seymour J. Rubin and Don Wallace, The United Nations Library of Transnational Corporation: Volume 19, London, Routledge, 1994, p. 81.

better control of TNCs they should be wholly incorporated into local enterprise and thus become subject to one national law. In other words, if a TNC is merged with a local firm, it will be subject to the local firm laws and therefore much better supervised by the host government.

This offers a general view point of law avoidance. For a more concrete understanding of how TNCs avoid the law, a detailed account of several business areas where TNCs try to evade laws is given below.

B – The main areas of law avoidance

This section will examine different legal areas where TNCs evade laws and regulations, such as tax or antitrust laws.

From the outset, there is a conflict between the objectives of TNCs whose primary motive is capital expansion, and those of states that rely on international law as their source of 'righteousness'.[95] TNCs strive to obtain the lowest possible costs of production, coupled with increased sales to achieve maximum profit.

On the other hand, the host state, through international law, seeks a beneficial return from the TNC. This is usually in the form of increased exports, thus contributing

[95] According to international law society, international law aimed to find the 'righteousness' in the society where this international law is applied. The reason if using this word because it is more appropriate in our context. This word demonstrated only the fact that the law, national or international, focused on the just, equal and freedom society where every individual could enjoy any basic rights such as the human rights.

to the gross national product of the national economy.[96]

The establishment of a TNC in a LDC is subject to traditional international law of territorial sovereignty,[97] that is to say, the law of a country. The LDC is free to allow or prohibit the entry and establishment of a TNC in their territory.

Moreover, the state regulates each TNC according to its national law. The TNC has a choice: it must either accept national law or elaborate another strategy: the avoidance of this national law. Often, it is the latter that prevails due to the cost-saving benefits to the TNC.

This part of the dissertation will not go into the topics of expropriation of natural resources and exploitation of labour due to the vastness of their content[98]. However, the areas of corporate taxation and antitrust will be focussed upon[99]. In all these sectors, the TNC can frequently avoid regulations by manoeuvring between national jurisdictions and international law.[100]

[96] Goldberg P.M. and C.P. Kindleberger. 'Toward A GATT for Investment: A Proposal for Supervision of the International Corporation', in Fatouros A.A., "*Transnational Corporations: the International Legal Framework"*, The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p.42.

[97] For a brief outline on 'The Fundamental Traditional International Law of Territorial Sovereignty', see Akehurst, Michael, *A modern introduction to international law*. 6th ed. London : Routledge, 1992. For a detailed analysis see: Vernon, 'Multinational Enterprise and National Sovereignty', 45 Harvard Bus. Rev., Mars-April. 1967.

[98] For a deep understanding on this topic, see McKern Bruce. *Transnational corporations and the exploitation of natural resources,* The United Nations library on transnational corporations. Volume 10. London:Routledge, 1993.

[99] This study excludes the analysis of 'Balance of Payment Controls, Exports Controls, securities Regulation'. However, this book provides a detailed analysis on these subjects: Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation,* The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994.

[100] Goldberg P.M. and C.P. Kindleberger. 'Toward A GATT for Investment: A Proposal for Supervision of the International Corporation', in Fatouros A.A. "*Transnational Corporations: the*

1 – Taxation

A special characteristic of TNCs is the integration of their operations on a worldwide scale. Such large corporations must be rendered taxable not only by their home countries, but also by the host country in which they operate.[101]

In the area of taxation, the TNC has two options: it is either the "underlap" or the "overlap" choice for the TNC.[102] In the "underlap" case the TNC avoids taxation whereas in the "overlap" case it cannot. In order to use the "underlap" case, the TNC must structure its operations to avoid substantial taxation. In the "overlap" case, the TNC cannot avoid being taxed on the same earnings by more than one jurisdiction. The first situation is evidently beneficial for the TNC.[103] However, successive governments

International Legal Framework", The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p. 43.

[101] *Transnational corporations: confronting the issues a symposium of essays*, compiled and edited at the invitation of the Industrial and Economic Affairs Committee of the General Synod Board for Social Responsibility and the Division of Community Affairs of the British Council of Churches. London: CIO, 1983, pp. 44-50.

[102] "Underlap" and "Overlap" were created by Goldberg P.M. and C.P. Kindleberger. "Overlap" means that a TNC dodges the law, and "Underlap" expresses that a TNC follow regulations. Goldberg P.M. and C.P. Kindleberger. Toward A GATT for Investment: A Proposal for Supervision of the International Corporation, in Fatouros A.A. *Transnational Corporations: the International Legal Framework*, The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994. pp. 43-44

[103] Goldberg P.M. and C.P. Kindleberger. 'Toward A GATT for Investment: A Proposal for Supervision of the International Corporation', in Fatouros A.A., *Transnational Corporations: the International Legal Framework,* The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p. 45.

in both home and host countries have gone to great lengths in vain to create a fairer world system of taxation.[104]

- *How taxes can be avoided.*

While host and home countries work out a universal tax system, tax evasion is still occurring by TNCs holding capital in several places. For instance, a large amount of taxable "income" finds its way into many well-known "tax havens" such as the Grand Cayman Islands or Monaco. Tax havens have different categories, the simplest being the "no-tax tax-haven". A no-tax tax-haven is a country (or jurisdiction) that has no income, capital gain, or wealth taxes of any sort and in which there are facilities and legislation under which it can incorporate and/or form corporations, foundations, and trusts.[105] This type of tax haven is a pure tax haven. The countries that fulfil this definition include: Anguilla, the Bahamas, Bahrain and the Cook Islands. This tax haven is the most straightforward example of tax avoidance. Subsequently the avoidance of tax law can be recognised easily.[106] The sole purpose of these foreign accounts is tax avoidance. "These malign tactics aim to create a complicated financial

[104] One of the attempt from host country and home country in order to create an agreement on tax, was the 'United Nations, International Tax Agreements'. The OECD completed in 1963 a draft uniform law for bilateral tax treties. One of its chief objectives was the standardisation of terminology. Because of the magnitude of the problem involved in renegotiation of all the existing tax treating, little attention has been paid to it. Some of its definitional concept, however, have been incorporated into treaties executed since its publication. OECD, Draft Double Convention on Taxes on Income and Capital, Paris, 1963.

[105] Gallo Roger, 'Definition of Tax Havens' in The Atlas Offshore, 2000, http://www.atlasofoffshore.com/offshoreinvesting/taxhavens1.htm#tax%20haven

[106] Gallo Roger, 'Definition of Tax Havens' in The Atlas Offshore, 2000, http://www.atlasofoffshore.com/offshoreinvesting/taxhavens1.htm#tax%20haven

web in order to hide real TNC earnings".[107] This is especially the case when the host country wants to pursue TNCs that are guilty of such practices. This can prove to be extremely difficult in the light of the fluidity of such capital. Alternatively, when a TNC is under tax control by an international organisation or any international tax institution, these tactics allow TNCs to slip away between national and international regulations.[108]

On occasions, TNCs are confronted by double taxation i.e. both in the host country and the home country. To counteract this, a number of bilateral treaties were agreed upon, stating that it need only be paid in one of the countries. One compilation prepared by the OECD indicates that 200 bilateral investment treaties had been signed by January 1981. By 1991, Germany had signed the highest number of bilateral investment treaties, in total 75.[109]

In addition to this "legal"[110] evasion of taxation, tax specialists often cooperate with each other on an international basis with the intention of forming an inter-governmental law[111] for collecting taxes and for exchanging information. In spite of this, these efforts have been thwarted by TNCs corrupting the local tax administrators in the host country.

[107] United States Treasury, 'Characteristics of Tax Havens', in Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation*. The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994, p. 671.
[108] United States Treasury, 'Characteristics of Tax Havens', in Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation*. The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994, pp. 67-75.

[109] Sauvant K.P. and V. Aranda, 'The International Legal Framework for Transnational Corporation', in Fatouros A.A. "*Transnational Corporations: the International Legal Framework"*, The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p.83 and p.94.
[110] This speech mark means that even in legal arena, TNC succeed to dodge law.
[111] See *Intertax: Intergovernmental Cooperation in Taxation*, 7 Harvard International Law Club Journal. No. 179, 1966.

Finally, the TNCs have found another way to evade tax. The most common way is in the system of transfer prices.[112] When a TNC decides to establish a plant in another country, it always chooses its investment site on a cost-profit basis. Therefore, many developing countries are forced to compete by lowering their labour and production costs in order to attract such investments. Consequently, taxes are reduced for TNCs.[113]

Transnational Corporations are supposed to pay taxes, but in order to achieve their target of maximized profit, TNCs may use a variety of means to lower their corporation taxes.[114]

Any given TNC must face a number of unavoidable expenditures such as research and development costs, labour costs, marketing costs etc. This can be best shown in a hypothetical example discussed by McIntyre R. S.:[115] A US TNC has $10 billion in total sales (half in the U.S. and half in Germany) and $8 billion in total expenses (again half and half). With $1 billion in actual U.S. profits and a 55% tax rate, the company should have to pay $550 million in income taxes to the United States government. However, suppose that for U.S. tax purposes, the company is able to treat 5/8th of its expenses (or $5 billion) as U.S. related. Mathematically, that leaves the TNC with zero U.S. taxable profit. This is a clear example of how TNCs behave when

[112] Plasschaert Sylvain described in detailed all the area of transfer prices and taxation in his book: *Transnational Corporations: Transfer Pricing and Taxation*. The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994

[113]Lall Sanjaya, 'Transfer Pricing and Developing Countries: Some Problems of Investigation', in Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation*. The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994, pp. 217-227.

[114] McIntyre Robert S., 'The Hidden Entitlements', *Citizen for Tax Justice*, May 1996, at http://www.ctj.org/hid_ent/part-2/part2-3.htm

[115] McIntyre Robert S., 'The Hidden Entitlements', *Citizen for Tax Justice*, May 1996, at http://www.ctj.org/hid_ent/part-2/part2-3.htm

confronted by taxation obligations.[116] Another example, but this time more concrete is the Intel Corporation which won a case in the Tax Court letting. This TNC dealt with millions of dollars in profits from selling U.S-made computer chips (as Japanese income for U.S. tax purposes) and therefore exempt from U.S. tax. This was in spite of a tax treaty between the U.S. and Japan requiring Japan to treat the profits as American. Therefore, exempt from Japanese tax as often happens, the profits became "nowhere income" and then were not taxable anywhere.[117]

Many TNCs avoid taxes by relocating business in LDC's, such as Puerto Rico. For instance, General Electrics tax earnings go to many electronics firms that have set up subsidiaries in Puerto Rico. They give the rights of their most valuable property to their Puerto Rican operations, and then argue that a very large share of their total profits is produced in Puerto Rico. Therefore it is eligible for the tax in Puerto Rico which is a great deal lower than that in the USA.[118]

One fast-growing tax avoidance method that had a very significant effect in lowering taxes is stock options. When stock options are used, TNCs can take a tax deduction for the difference between what employees pay for the stock and what it is worth. TNCs do not treat stock-option transactions as business expenses. It has been found[119] that 233 of the 250 companies lowered their taxes from stock options, by a

[116] Caves R., 'Taxation, MNEs' Behavior, and Economic Welfare' in Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation*. The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994, pp. 75-98.
[117] Nguyen T.D. Coo. and McIntyre Robert S, 'Corporate Income Taxes in the 1990s', *The Institute on Taxation and Economic*, October 2000, http://www.ctj.org/itep/corp00pr.htm or *www.itepnet.org*
[118] McIntyre Robert S., 'The Hidden Entitlements', *Citizen for Tax Justice*, May 1996, at http://www.ctj.org/hid_ent/part-2/part2-3.htm
[119] ITEP: The Institute on Taxation and Economic Policy: http://www.ctj.org/itep

total of $25.8 billion over the three years.[120] For instance, Microsoft was the leader in these transactions with $2.7 billion in stock-option tax benefits reflecting the fact that stock option tax benefit shares depends on how much a TNC stock has gone up in value**.** Thus the tax savings were especially large in high-tech industries whose market valuations zoomed during the three-year period.[121]

"The general public has a right to be concerned about how their taxes and services are affected by this resurgence in corporate tax avoidance," said McIntyre. "Companies that see their competitors paying much less in taxes than they do have a legitimate too. And anyone who worries about our economy's long-term growth has to wonder why the tax code is being used to favour some industries and some kinds of investments over others, rather than letting market forces decide."[122]

Following this claim, president Clinton pledged major international tax reforms in his 1992 campaign, but Congress rejected even restrained changes he proposed in 1993. The President's 1997 budget proposed $6.3 billion in international tax reforms over the 1997-2002 periods, while congressional tax plans called for about a quarter of that. One of the reasons for this rejection could be the fact that several congressmen are rich owners who deposit their money on "tax havens" or possess share options in these TNCs.[123]

[120] Caves R., 'Taxation, MNEs' Behavior, and Economic Welfare' in Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation*, The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994, pp. 75-98.
[121] McIntyre Robert S., 'The Hidden Entitlements', *Citizen for Tax Justice*, May 1996, at http://www.ctj.org/hid_ent/part-2/part2-3.htm
[122] McIntyre Robert S., 'The Hidden Entitlements', *Citizen for Tax Justice*, May 1996. http://www.ctj.org/hid_ent/part-2/part2-3.htm
[123] Nguyen T.D. Coo. and McIntyre Robert S, 'Corporate Income Taxes in the 1990s', *The Institute on Taxation and Economic*, October 2000, http://www.ctj.org/itep/corp00pr.htm or *www.itepnet.org*

- *Potential Solutions*

In order to find solutions for this tax avoidance, home and host countries have reached a compromise and supported the United States' proposition of regulation of tax[124]. This proposal was based on the article 31 of the Vienna Convention[125] for its interpretation and its implementation. Indeed, article 31 "requires states to interpret treaties in the light of their object and purpose". Tax treaties aim primarily at the avoidance of double taxation and the prevention of fiscal evasion but also have the objective of allocating tax revenues equitable between the two contracting states. The conclusion reached is that the interpretative process should aim to achieve two main objectives. These are to avoid taxing twice, and the prevention of fiscal evasion. This, it is claimed, could be achieved through the coordination of home and host administration.[126]

These provisions, originally set out in the Model Tax Convention[127] were supplemented in 1979 by guidelines for the practical application of the "arm's length principle"[128] in respect of different types of cross-border transactions within a TNC.

[124] Organisation for Economic Co-operation and Development (OECD), *Tax Aspects of Transfer Pricing within Multinational Enterprises, the United States Proposed Regulations*, Paris, 1993.
[125] Vienna Convention on the Law of Treaties: http://www.greenpeace.org/~intlaw/vien-tr.html
[126] Organisation for Economic Co-operation and Development, *Tax Aspects of Transfer Pricing within Multinational Enterprises, the United States Proposed Regulations*, Paris, 1993.
[127] Organisation for Economic Co-operation and Development, *Tax Aspects of Transfer Pricing within Multinational Enterprises, the United States Proposed Regulations*, Paris, 1993.
[128] Arm's length principale: The international standard that OECD member countries have agreed should be used for determining transfer prices for tax purposes. It set forth in Article 9 of thee OECD Model Tax Convention as follows: where "conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have not so accrued may be included in the profits of that enterprise and taxed accordingly". See also OECD, 'Methods of Ascertaining an Arm's Length Price' in Plasschaert Sylvain. *Transnational Corporations: Transfer Pricing and Taxation*, The United Nations Library of Transnational Corporation: Volume 14, London, Routledge, 1994.

The OECD 1979 Report, entitled "Transfer Pricing and Multinational Enterprises"[129] sets out the methods that OECD Member countries should use in applying the "arm's length principle". This proposition has been widely followed by member countries and in many countries as the basis for domestic legislation. These principles are also strongly endorsed by the business community and tax practitioners. However, other areas of business remain open to the avoidance of rules, such as antitrust.[130]

2 – Antitrust

The antitrust law prevents TNCs from reducing competition in a free market. In most countries, antitrust law[131] has been limited to the national regulation. Therefore, any antitrust act by a TNC in another country from its own is unregulated due to the absence of an "international antitrust" law. This legal point forms one of the principals of International law[132] who admit the concept of "adjudicative jurisdiction."[133] This concept is simply that a host country wishing to take legal action against a TNC is bound to do so before the TNC's home jurisdiction.

[129] The transfer pricing guidelines in 'Tax and Multinationals' chapter of *OECD Tax Guidelines* discussed on 5-6 April 2001: http://www1.oecd.org/daf/fa/tr_price/transfer.htm#tp_guide
[130] Organisation for Economic Co-operation and Development, *Tax Aspects of Transfer Pricing within Multinational Enterprises, the United States Proposed Regulations*, Paris, 1993, pp. 2-3.
[131] Antitrust laws definition: Laws designed to preserve the free enterprise of the open market place by making illegal certain private conspiracies and combinations formed to minimize competition: http://www.buyersresource.com/Glossary/ANTITRUST_LAWS.html
[132] The principals of International Law are outlined in Akehurst, Michael, *A Modern Introduction to International Law*, 6th ed. London: Routledge, 1992.
[133] The adjudicative jurisdiction principle was settled in the Brussels and Lugano Convention. It provides the exclusiveness of jurisdiction and enforcement of judgment. This principle is applicable for civil and commercial matters. If the contractor faces legal actions, so the jurisdiction of country of performance is applicable. To put this in practical way, if Nigeria wants to sue an US TNC based on Nigeria, so this country must put the legal action before an US jurisdiction: http://www.ilpf.org/events/jurisdiction/presentations/lindbergpr/tsld003.htm

Contrary to this principle, each country wishes to preserve its sovereignty via legal jurisdiction in its own territory. Thus a conflict arises between the universality of one tax jurisdiction and national legal territory power. One example of the extra-territorial enforcement of antitrust decisions is that between a British firm; Imperial Chemical Industries Ltd (ICI), and the Commission of the European Economic Community (EEC). In July 1969 the EEC fined ICI and nine other firms for allegedly fixing prices in aniline dyestuffs.[134] Britain was at this time outside the EEC so ICI argued that they were not subject to EEC legislation and thus could not be guilty. The point was further brought home when the British government informed the EEC, via diplomatic note, that its attempts to fine a company based outside the EEC "exceed the limits fixed by the recognised principals of international law."[135]

In a comment on this case, the economist posed the following consideration:

"What the law says is obviously complex, and it is up to the courts of the law to decide the ICI case. In the meantime, governments must decide what they want the law to be in the future. Do they want it to encourage local subsidiaries to hide behind the legal immunity of parent companies? Or do they want to help anti-cartel agencies to discipline international firms? Clearly there is a danger of governments using cartel powers to help local business, but equally there is a danger, if parent companies are untouchable, that the countries with large business empires overseas, like the United States and Great Britain, will use immunity to further their interests. Britain indeed has tried too often to shelter under the excuse that subsidies are somehow not their masters' voices, Rhodesian sanctions being a case in point. It is to stop the see no evil."[136]

The ICI case demonstrates that it is impossible to punish a 'guilty' TNC which has many subsidies and subsequent immunity due to their involvement in different national legal sovereignties. It highlights the lack of law and jurisdiction required to

[134] International Quinine Cartel, 12 E.C.J.O. L192, 5 (1969). 2 CCH Comm. Mkt. Rep. 9313 (1970). See generally comment, Developments Cases 2 Law and Pol. International Bus. 259, 271-77 (1970).
[135] See *N.Y. Times*, November 28, 1969, at 63, col. 2.: www.nytimes.com
[136] See *The Economist*, November 29, 1969, at 83: www.economist.com

facilitate the pinning down of the real "mother" firm of several international subsidies.[137]

Due to the widespread national legal differences in policies, the international community has been trying to create an international antitrust regulation through inter-governmental organisations. After the Second World War, several international organisations[138] were created such as International Trade Organisation, and the U.N. In 1956, the US proposed that the U.N. Economic and Social Council (ECOSOC) establish an "ad hoc committee to prepare an international agreement to prevent restrictive international trade practices".[139] The debate on the regulation of the trust is still on. GATT and other organisations are still hard at work on this issue, but it has not resulted in practical effects.[140] This is simply because strong countries in which TNCs are resident have two faces: internationally they want a fair trust regulation controlled by an inter-governmental organisation, but nationally and for the profits of their TNCs, governments water down and delay all concrete legal propositions. [141]

[137]Goldberg P.M. and C.P. Kindleberger. 'Toward A GATT for Investment: A Proposal for Supervision of the International Corporation', in Fatouros A.A. *Transnational Corporations: the International Legal Framework*, The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994, p. 46.

[138] The main inter-governmental organisations has been described in number 1, Section C, of the first chapter, however we are going to enounce some of them in the antitrust field.

[139] UN ECOSOC, Report of the Ad Hoc Committee on Restrictive Business Practices- U.N. Doc. E./ 2380, 1953.

[140] GATT, Decision on the Seventeenth Session, December 5, 1960, GATT Document L/1397, at 17.

[141] Goldberg P.M. and C.P. Kindleberger. 'Toward A GATT for Investment: A Proposal for Supervision of the International Corporation', in Fatouros A.A. *Transnational Corporations: the International Legal Framework,* The United Nations Library of Transnational Corporation: Volume 20, London, Routledge, 1994. p. 48.

CHAPTER IV – WHAT LESSONS MAY BE LEARNT FROM THE INTERNATIONAL LAW, RULES AND REGULATIONS?

The international legal framework is being violated and avoided by the TNCs. So what can be learnt from this?

It seems that nothing has been learnt from the past lessons. As the first chapter suggested, national institutions have been trying to regulate the activities of transnational corporations for approximately half a century. However, this has not produced an efficient result although national governments at the international level through intergovernmental organizations[142] have achieved a degree of legislation to supervise the activities of TNCs.

This intergovernmental achievement gave birth to specific agreements about TNCs worldwide activities. This has been created the United Nations Code of Conduct on Transnational Corporations,[143] the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises,[144] the OECD Guidelines for Multinational Enterprises,[145] and the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business

[142] All these organisations and agreements have been described in details in the first chapter of this dissertation.
[143] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*, United Nations Publication, 1988.
[144] International Labour Office (ILO): *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Geneva, 1991.
http://www.ilo.org/public/english/standards/norm/sources/mne.htm
[145] Organisation for Economic Co-operation and Development (OECD). *The OECD Guidelines for International Enterprises, International Investment and Multinational Enterprises*, Paris, 1994. This Guidelines is attached in the appendix.

Practices[146].

The introduction and effects of these agreements provides us with important lessons for current and future efforts to regulate Transnational Corporation through international organisations. Several lessons are identifiable: the importance of considering the advantages and disadvantages of 'non-binding' agreements; carefully choosing the forum in which an agreement is negotiated; balancing the need for consensus; clearly defining an agreement's focus; and creating strong implementation and review mechanisms.[147] In order to ascertain whether these lessons have been learnt by international organisations, it is appropriate to look briefly at the main international organisations dealing with TNCs such as the UNCTC, the UNCTAD, the ILO, and the OECD.[148]

A – Lessons from United Nations Agencies dealing with TNCs

Two main agencies of the United Nations have tried to regulate TNCs activities at the international level: The United Nations Centre on Transnational Corporations (UNCTC) and the United Nations Conference on Trade & Development (UNCTAD).

[146]United Nations Conference on Trade & Development (UNCTAD): *The Set of Multilaterally Agreed Principles & Rules for the Control of Restrictive Business Practices*, United Nations, Geneva, 1981. http://www.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4a.htm

[147] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?' *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy. Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

[148] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?' *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy. Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

1 - The United Nations Centre on Transnational Corporations

In Codes of Conduct on Transnational Corporations, the United Nations Centre on Transnational Corporations (UNCTC) started negotiations to establish a voluntary Draft Code of Conduct on Transnational Corporations in 1972.[149] The objective of this Code of Conduct was to solidify a strong relationship between TNCs and national development goals. In order to achieve this goal, UNCTC settled rights and responsibilities of both TNCs and the host countries.

The following provision has been settled in the Draft of the Code of Conduct:

- Respect for national sovereignty and observance of domestic laws, regulations and administrative practices;[150]

- adherence to national economic goals and development objectives, policies and priorities;[151]

- review and re-negotiation of contracts or agreements between governments and transnational corporations;[152]

- an acknowledgement that states have the right to nationalise or expropriate the assets of a TNC operating in their territory, but that appropriate compensation is to be paid by the state concerned.[153]

[149] The Draft Code of Conduct on Transnational Corporations is attached in the appendix.
[150] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations,* United Nations Publication, February 1988. Chapter 1, A – General, Article 7, 8, 9.
[151] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations.* Chapter 1, A – General, Article 10, 11.
[152] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*. Chapter 1, A – General, Article 12(a), (b).
[153] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*. Chapter 3 B – Nationalisation and compensation, article 55.

Furthermore, in general terms, TNCs should respect human rights and fundamental freedom,[154] adhere to socio-cultural objectives and values,[155] abstain from corrupt practices,[156] and observe consumer and environmental protection objectives.[157] Despite such interesting recommendations, disagreements appeared in the negotiations.

The United States disagreed with this Draft of Codes on several points: Firstly, the US clashed on the legal type of relationship between TNCs and international law. This point has not been resolved yet. Secondly, America did not agree with the United Nations' role in administering the code. This point is also not yet resolved. Finally, the US opposed the possibility of host countries applying national incentives, thus preserving favourable conditions for TNCs at the expense of domestic companies. This area is still in negotiation.

In 1992, the UNCTC abandoned the Code and adjourned, but the UNCTAD renegotiated. Thus, some of the disagreements with the US could be resolved. It has been agreed that TNCs cannot invest in short-term financial operations that would lead to economic instability in host countries.[158] TNCs have been prohibited to interfere with host country politics. An agreement was settled on the prohibition of TNCs to lobby home country governments in order to influence host country politics in their favour.

[154] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*. A – General, Article 14.
[155] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*. A – General, Article 13.
[156] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*. A – General, Article 20 (a),(b).
[157] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations*. A – General, Articles 37-43.
[158] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?' *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy. Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

Finally, the most controversial issue of expropriation and compensation has been resolved. [159]

What lessons can be learned from the failure of the UNCTC proposition text on the Draft of Code of Conduct on Transnational Corporation? This shows that much of the treaty, which tried to deal with many issues, created uncertainty. The adoption of a voluntary base means that negotiations may not be successful. The abandoned areas of the UNCTC Code omitted many areas of agreement which could provide new regulations for future negotiations. For instance, a proper definition of a TNC is still under discussion. [160]

2 - The United Nations Conference on Trade and Development

The United Nations Conference on Trade and Development's (UNCTAD) Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("The Set") was created in December 1980 and has since been reviewed. The Set was created due to the "need to ensure that restrictive business practices do not impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries."[161]

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[159] United Nations Conference on Trade and Development, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, United Nations Publication New York, 1981 and also in *World Development: Trends and Prospects* (Executive Summary), United Nations, New York, 1988.
[160] Dunning, John H. *The theory of transnational corporations*, The United Nations Library of Transnational Corporation: Volume 1, London, Routledge, 1994, p. 26.
[161] United Nations Conference on Trade & Development (UNCTAD): *The Set of Multilaterally Agreed Principles & Rules for the Control of Restrictive Business Practices*, Part IV - Section A: Objectives. United Nations, Geneva, 1981. http://www.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4a.htm

In other words, the Set aimed to eliminate any disadvantages experienced by trade and development coming from increased anti-competitive behaviour of TNCs. It aimed to promote competition, controlled concentration of economic power, and to encourage innovation. The Set argued that more liberalisation will benefit developed countries. Within the last decade and in addition to the Set, UNCTAD has analysed the implications of international investment agreements for development, and has conceded implications of a Possible Multilateral Framework on Investment (PMFI).[162] Both the US and developing countries representatives in UNCTAD favour further work on a PMFI.[163]

B - The International Labour Organisation

The International Labour Organisation's (ILO)[164] Tripartite Declaration was successfully adopted in November 1977. The Declaration's stated aim was to "encourage the positive contribution which TNCs can make to economic and social progress, and to minimise and resolve the difficulties to which their various operations may give rise."[165] The Declaration contained general principles intended to guide governments, employers' and workers' organisations and TNCs.[166] The Tripartite Declaration required companies to respect the sovereign rights of states, obey national laws and regulations, respect the Universal Declaration of Human Rights, and act in

[162] Chakravarthi Raghavan; *UNCTAD & Multilateral Framework on Investment; State of Play at WTO/UNCTAD on investment*; http://www.blowlands.com/~merijn89/nieuws/23-11-98.html
[163] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?', *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html
[164] International Labour Organisation: see also their website: http://www.ilo.org
[165] International Labour Office (ILO): *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Geneva, 1991: Article 2. This Declaration is attached in appendix.
[166] International Labour Office (ILO): *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Geneva, 1991: Article 4.

harmony with the development priorities and social aims of host countries.[167]

An important feature of this declaration was that it encouraged dialogue between TNC, home, and host country governments. Furthermore, it changed the behaviour of governments as well as that of TNC. The Declaration was successful because all parties agreed with its aims and objectives. It was used as a point of reference in other international agreements and declarations for instance in the OECD Guidelines.[168]

Nevertheless, the Declaration had some 'loop holes'. In particular, it did not require companies to create worker's unions, which was similarly not required by law in the host countries and thus the TNCs could avoid this kind of collaborative pressure or power of the workers. Further, the Declaration did not define a TNC, and nor was there any reference to environmental protection in the text. As a result, the impact of this agreement was limited, particularly in countries ruled by oppressive or other non-representative regimes.[169]

What lessons can be learned by the Tripartite Declaration? This Declaration demonstrated ways to reach consensus. It showed that an agreement with a clear defined scope was more likely successful, and that its success would be dependent on the consultation with all relevant parties engaged. The Declaration also showed that

[167] International Labour Office (ILO): *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Geneva, 1991: Article 8.
[168] Organisation for Economic Co-operation and Development (OECD). *The OECD Guidelines for International Enterprises, International Investment and Multinational Enterprises*, Paris, 1994.
[169] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?', *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

negotiation requiring consensus with the targets of regulations may result in a weak agreement. In addition, a voluntary agreement that deals with a limited range of issues will probably not fully address the behaviour of multinationals.[170]

C - The Organisation Economic and Commerce for Development

The OECD[171] Guidelines for Multinational Enterprises established guidelines to ensure that "Transnational Corporations operate in harmony with the policies of the countries in which they operate and to develop greater understanding between business, governments and labour".[172] The Guidelines stated general policy, information disclosure, competition, financing, taxation, employment and industrial relations, the environment, science and technology. When governments signed it, they agreed to free access to TNCs in their domestic market. These Guidelines were part of a larger and more comprehensive OECD Declaration on International Investment and Multinational Enterprises.[173]

The Guidelines took a moderate and voluntary approach in order to ensure that it was accepted by TNCs. The Guidelines encouraged companies to employ the same operating standards in home and host countries. Thus, the Guidelines were useful in practice. The Guidelines also aimed to build a strong institutional structure in order to

[170] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?', *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

[171] The OECD Guidelines for International Enterprises, International Investment and Multinational Enterprises is attached in appendix. See also: http://www.oecd.org

[172] Organisation for Economic Co-operation and Development (OECD). *Guidelines for International Enterprises, International Investment and Multinational Enterprises*, Paris, 1994. See preface.

[173] Organisation for Economic Co-operation and Development (OECD). *Guidelines for International Enterprises, International Investment and Multinational Enterprises*. See introduction.

form sections of the agreement into more legally effective instruments. Furthermore, they did not request clarification of companies' activities in the area which dealt with environmental issues, so it became clear that the Guidelines were business-friendly.[174]

What lessons could be learned from the OECD Guidelines? Clearly there are several lessons. The purpose needs to be clear. The guidelines should take into account the needs and wishes of stakeholders-business, trade unions, and civil society. A comprehensive institutional structure needs to be established and finally, a continuous review process is useful.[175]

D - Summary of lessons learned

All existing agreements or international organisations which aim to regulate the international activities of TNCs have so far proved weak. Any future attempts to regulate TNCs should encompass the following lessons:

In order to learn from the past it is worth noting the issue discussed in the first chapter concerning the historical relation between the regulation of investors and investments. In many cases TNCs, host and home countries and international organizations involved in the draft of a new text, should look back on the previous politics and text in order to build upon existing knowledge and experience.

[174] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?', *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

[175] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?', *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

The right forum, transparency and clarity are the keywords in the successful achievement of a treaty. The appropriate forum and transparency should produce practical and effective agreement although the presence of stakeholders could bring difficulties in reaching consensus. Indeed, stakeholders, who were involved in the drafting, often influenced the nature and effectiveness of agreements. Finally, the purpose and objectives of any agreement must be clear.[176]

Should agreements be voluntary or mandatory? The UNCTC Code[177], the ILO Declaration[178], the OECD Guidelines[179] and UNCTAD's "Set"[180] were all voluntary and were easily-negotiated. Mandatory agreements have been proved less effective because they cause delay to the introduction of strong and binding agreements. Therefore, the costs and benefits of voluntary and mandatory agreements must be carefully weighed. Otherwisenegotiations are still likely to fail or be only partially successful such as the Draft of Codes of UNCTC.[181]

Finally, the implementation and the review hold a crucial part in the achievement of an agreement. Therefore a comprehensive institutional structure, a

[176] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?', *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html
[177] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations,* United Nations Publication, February 1988.
[178] International Labour Office (ILO): *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Geneva, 1991.
[179] Organisation for Economic Co-operation and Development (OECD). *The OECD Guidelines for International Enterprises, International Investment and Multinational Enterprises*, Paris, 1994.
[180] United Nations Conference on Trade & Development (UNCTAD): *The Set of Multilaterally Agreed Principles & Rules for the Control of Restrictive Business Practices*. United Nations, Geneva, 1981.
[181] United Nations Centre on Transnational Corporations (UNCTC): *The United Nations Code of Conduct on Transnational Corporations,* United Nations Publication. February 1988. This section was detailed in the first section of this fourth chapter.

rigorous implementation and an effective monitoring system were essential. Without these the negotiation would fail. A continuous review process could also be useful both in terms of updating content and increasing profile.[182]

[182] Friends of the Earth-England, Wales, and Northern Ireland, 'A History of Attempts to Control the Activities of Transnational Corporations: What Lessons Can Be Learned?'. *Discussion Paper for Working Group II* in the Conference on Toward a Progressive International Economy, Washington, DC, November 1998. http://www.foe.org/progressive-economy/history.html

Conclusion

The aim of this dissertation was to draw attention to the crucial role international law and institutions have come to play in the contemporary international economic system. With capitalism entering the phase of globalisation, Transnational Corporations start to internationalise their activities across the whole world, especially in developing countries.

The time has arrived for the international community to efficiently regulate all TNC's worldwide activities. For a period of time in the seventies there was optimism that international laws could be transformed by a global coalition of Third World countries to meet their particular concerns. Negotiations were initiated to draft codes of conduct in order to regulate TNCs and the transfer of technology. Currently, attempts are being made to settle regulations dealing with TNCs in international organisations such as the IMF and the World Bank.

Meanwhile, these international rules and regulations have been constantly violated and frequently avoided by TNCs in order to achieve their first target: profit. For companies, it is time to elaborate a business strategy to avoid rules. This concept has become so ordinary that, over the last decade specialised firms such as the "Big 5"have begun offering tax and regulations avoidance strategy for multinational corporations. The morality of business, based on the development of the welfare society, has been left far behind the maximum profit target.

These changes reflect the domination of the Transnational Corporations in the advanced capitalist countries. Various laws, rules and regulations have been put in place in order to regulate TNC activities, but none have really succeeded in doing so. So what lessons can be learned from these attempts to regulate TNCs through international organisations? It has been suggested that laws regulating TNCs in the future should be clear, focussed and transparent, implementing and reviewing all aspects of TNC activities in the world.

However, if one lesson should be remembered from this dissertation, it is that from P.M. Goldberg and C.P. Kindleberger.[183] They propose a kind of GATT of TNC, which could be called GAIC (General Agreement for the International Corporation). Using this approach, the government agrees to the formation of a preparatory commission to draft in detail the few principals on which agreement is needed, and establish the limited international machinery it requires.[184] An international group of experts would work for a period of two years, their goal being the creation of an international agreement based on a limited set of universally accepted principals. Therefore for future successful negotiation law must be progressive and focussed. Hopefully this would, in turn, lead to an efficient law of Transnational Corporation to regulate the world trade system. However, the following quotes reveal the challenges ahead, the reality of the global free-market and the increasing power of the TNCs.

> "We are witnessing an unprecedented transfer of power from people and their governments to global institutions whose allegiance is to abstract free-market

[183] P.M. Goldberg and C.P. Kindleberger. 'Toward a GATT for Investment: A Proposal for supervision of the International Corporation' in *Transnational Corporation: the International Legal Framework* edited by A.A. Fatouros, London: Routledge, 1994, p. 59.
[184] P.M. Goldberg and C.P. Kindleberger. 'Toward a GATT for Investment: A Proposal for supervision of the International Corporation'. *In Transnational Corporation: the International Legal Framework'* edited by A.A. Fatouros, London: Routledge, 1994, p. 60.

principle, and whose favoured citizens are soulless corporate entities that have the power to shape and break nations."[185]

"What we have is not a market economy. It is a corporately planned and controlled economy."

"We have a world in which a handful of corporations, detached from any link to any place or community, have extended their power beyond the reach of most governments."

"The U.S. has a centrally-planned economy, in many ways more tightly controlled than any state-planned economy that we have seen."

"The political system ... [is] enormously expensive. The only way you can raise the money to win an election is by appealing to corporate interests, which then means you're in their debt and have to focus on their agendas."[186].

[185] Joel Bleifuss, 'Back To The Past' in *These Times magazine*, Chicago, September 2001.
[186] Korten David C., *When Corporations Rule the World*. London: Earth scan, 1995, see preface.

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