TINJAUAN YURIDIS TENTANG PERANAN NEGARA TUAN RUMAH (HOST COUNTRY) DALAM MENGAWASI KEGIATAN PERUSAHAAN TRANSNASIONAL

SKRIPSI

Diajukan untuk Memenuhi Salah Satu Syarat Guna Memperoleh Gelar Sarjana Hukum Pada Fakultas Hukum Universitas Hasanuddin Makassar

Oleh :

ANDI INDAH PURNAMA LESTARI
B 111 99 135

FAKULTAS HUKUM
UNIVERSITAS HASANUDDIN
MAKASSAR
2006

TINJAUAN YURIDIS TENTANG PERANAN NEGARA TUAN RUMAH (HOST COUNTRY) DALAM MENGAWASI KEGIATAN PERUSAHAAN TRANSNASIONAL

SKRIPSI

Diajukan untuk Memenuhi Salah Satu Syarat Guna Memperoleh Gelar Sarjana Hukum Pada Fakultas Hukum Universitas Hasanuddin Makassar

Oleh:

ANDI INDAH PURNAMA LESTARI
B 111 99 135

FAKULTAS HUKUM
UNIVERSITAS HASANUDDIN
MAKASSAR
2006

PERSETUJUAN PEMBIMBING

Diterangkan bahwa skripsi dari:

N a m a	:	Andi Indah Purnama Lestari
Nomor Pokok	:	B 111 99 135
Fakultas	:	Hukum
Program Studi	:	Ilmu Hukum
Judul	:	Tinjauan Yuridis Tentang Peranan Negara Tuan Rumah (Host Country) Dalam Mengawasi Kegiatan Perusahaan Transnasional

Telah diperiksa dan disetujui oleh pembimbing untuk dapat mengikuti ujian skripsi pada Fakultas Hukum Universitas Hasanuddin

Makassar, November 2006

Disetujui Oleh :

Pembimbing I,	Pembimbing II,
(M. IDRIS BUYUNG, SH.)	(DR. JUAJIR SUMARDI, SH.,MH)
NIP. 130 535 958	NIP. 131 876 927

PERSETUJUAN MENEMPUH UJIAN SKRIPSI

Diterangkan bahwa skripsi mahasiswa :

Nama	: Andi Indah Purnama Lestari
No induk	: B 111 99 135
Bagian	: Hukum Internasional
Judul Skripsi	: Tinjauan Yuridis Tentang Peranan Negara Tuan Rumah *(Host Country)* Dalam Mengawasi Kegiatan Perausahaan Transnasional

Memenuhi syarat untuk di ajukan dalam ujian skripsi sebagai ujian akhir program studi.

Makassar, November 2006

Pembimbing Pokok

Prof. Dr. H. Syamsul Bachri SH.MS.

NIP. 130936997

PENGESAHAN SKRIPSI

TINJAUAN YURIDIS TENTANG PERANAN NEGARA TUAN RUMAH (HOST COUNTRY) DALAM MENGAWASI KEGIATAN PERUSAHAAN TRANSNASIONAL

Disusun dan diajukan oleh :

ANDI INDAH PURNAMA LESTARI

B 111 99 135

Telah Dipertahankan Di Hadapan Panitia Ujian Skripsi yang di Bentuk Dalam Rangka Penyelesaian Studi Program Sarjana Program Kekhususan Hukum Internasional Program Studi Ilmu Hukum Fakultas Hukum Universitas Hasanuddin Pada Rabu, Tanggal 15 Novemberr 2006 Dan dinyatakan diterima

Panitia Ujian

Ketua,	Sekertaris,
DR. Alma Manuputty, S.H, M.H	**Iin Karitha Sakharina, S.H, M.A**
NIP : 130 345 979	NIP : 132 259 311

Dekan
Fakultas Hukum
Universitas Hasanuddin

Prof. DR. H. Syamsul Bachri, S.H, M.S
NIP : 130 936 997

ABSTRAK

Andi Indah Purnama Lestari, B 111 99 135, **Tinjauan Yuridis tentang Peranan Negara Tuan Rumah (Host Country) dalam Mengawasi Kegiatan Perusahaan Transnasional.** Pembimbing I Muh. Idris Buyung, S.H. dan Pembimbing II Dr. Juajir Sumardi, S.H.,M.H.

Pelanggaran yang menyebabkan kerugian bagi Negara Tuan Rumah oleh perusahaan transnasional begitu banyak terjadi. Namun, seringkali terkesan tidak banyak yang dapat dilakukan oleh Negara Tuan Rumah. Ini menimbulkan pertanyaan apa saja peranan Negara Tuan Rumah dalam mengawasi kegiatan perusahaan transnasional?, apa saja yang dapat dilakukan Negara Tuan Rumah jika terjadi pelanggaran tersebut?, dan bagaimana cara penyelesaian sengketa yang terjadi diantara keduanya?

Dari hasil penelitian penulis dalam skripsi ini dapat diketahui bahwa 1) Negara Tuan Rumah memiliki kewenangan penuh untuk mengawasi kegiatan perusahaan transnasional dengan menggunakan pendekatan pengaturan dan pendekatan administratif, 2) Negara Tuan Rumah dapat melakukan pengambilalihan nasionalisasi, ekspropriasi, creeping expropriasi, dan regulasi taking jika perusahaan transnasional melakukan pelanggaran tersebut. 3) Jika terjadi sengketa, maka harus diselesaikan oleh Pengadilan Negeri Negara Tuan Rumah, pejabat yang berwenang, dan cara damai yaitu arbitrase internasional, konsultasi, negosiasi, mediasi, konsiliasi dan pemberian pendapat ahli.

KATA PENGANTAR

Alhamdulillah puji syukur kehadiran Allah AWT atas rahmat, karunia dan hidayah-Nya sampai saat ini. Tanpa izin-Nya skrpsi ini tidak akan selesai dengan baik. Shalawat dan salam terkirim untuk tuntunan kita Nabi Muhammad SAW, keluarga, sahabat, tabi'in, tabi' tabi'in, serta seluruh umat-Nya yang senantiasa istiqomah.

Tak lupa penulis mengucapkan Jaza Kumullah Khaer (semoga Tuhan membalas dengan lebih baik) kepada :

1 Ayahanda Andi Syamsul Bachri (ALM) dan !bunda S.B Ningsih atas didikan, bimbingan, kasih sayang dan doa restunya yang ikhlas, I've never made you proud before, but I hope I do now. I love you.
2 Dekan FH-UH Prof. DR. Syamsul Bachri S.H,M.H, Prof. DR. Nurhayati Abbas, SH. MH selaku asisten creataker bidang kemahasiswaan, Prof. DR. Abdullah Marlang S.H.M.H selaku asisten caretaker
3 Bapak M. Idris Buyung S.H dan Bapak DR. Juajir Sumardi S.H, M.H. selaku Pembimbing I dan Pembimbing II, yang telah meluangkan banyak waktu dengan ikhlas untuk membantu dan membimbing penulis dalam menyelesaikan skripsi ini.
4 Spesial untuk Ibu DR. Alma Manuputty, S.H. M.H dan Ibu Inneke Lihawa S.H M.H atas bantuan luar biasa dan ikhlas.

5 Kakak-kakakku : A' Iwan, A' Iis, A' Ilham, A'Indan, A'Iman, K' Nindy, K' Ros, serta anak-anakku Oji, Farhan, Tenri, dan Nanda, untuk semua kasih sayang dan dukungan yang tak pernah henti, semoga Allah selalu menjaga dan melindungi kita, Amin.

6 Segenap dosen Fakultas Hukum UNHAS yang telah membagi ilmunya tanpa pamrih.

7 Keluarga Besar Andi Haedar S.H dan Opu Suki untuk semua bantuan moril dan kateri yang ikhlas.

8 Seluruh staf akademik dan karyawan/ti terutama Pak Usman, Pak Ramalang, dan Pak Djamal, untuk semua bantuan yang sangat berarti.

9 Saudara-saudariku : Mawar, Pittho, Puput, Fatma, Acchank, The Lis, Poppy, Ical, K' Novi, Ncus, Mbak Menuk Rosmiah, K' Yuni, Kamel, K' Ana dan K' Pati, untuk persaudaraan yang indah dan kisah yang mengiringi. Juga untuk keluarga kecil yang menyertai : K' Amran, Arif dan Calon Adiknya Arif, Ida dan Ahsan, Mas Budi dan Calon Keponakan, serta Herman, dan Calon Keponakan semoga silaturrahmi ini tetap terjaga.

10 Supremasi Hukum 99 : Maryam, Ros, Nana, Birkah, Ranti, Lusy, Endah, Eva Donna, Ridhayani, Susi, Phieng, Rita, Tracy, Amie, Bayu, Hamdi, Almarhum Viktor, dan semua yang tida dapat di sebut satu persatu untuk doanya.

11 Anak KKN-PH Angkatan IV : di Kantor Keungan.

12 Ahwat MPM : Fitri (00), maudy, tika, Ima fatimah Djufri, Arni, Eva, Fitri (01), Tri, Riska, Icha, Ana, Emi, Misra, Sukma, dan semua yang tidak disebut satu persatu.

13 K'Fadli, K'Wawan, K'Amir, K'Roni, K'Aci, K'Miyan, K'Cindy, K'Oda, K'Tomy, K'Dian, K'Cika, K'Asih, K'Beto, K'Oceng, Viko, dan anggota Gojukai lainnya.

14 Anak-anak 837 – 838 : K'naldi, K'Ipang, K'Saprud, K'Man, K'Uchenk, K'Ashar, K' Allink, K'Hendra, Supra, Cumank, Cuank, K'Bahri, Feri, Heri Besar, Heri Kecil, Ruslan, Wana, Rini (alm), K'Janah, K'Riswanti, Nurfah, dan semua anggota lain. Viva Charisma coccos nucivera.

Penulis sadar bahwa skripsi ini jauh dari sempurna, namun penulis berharap skripsi ini dapat menjadi inspirasi bagi mahasiswa lain yang ingin menyusun skripsi khususnya yang berhubungan dengan Hukum Ekonomi Internasional.

Makassar, November 2006

Penulis

DAFTAR ISI

BAB I

PENDAHULUAN

A. Latar Belakang Masalah

Pembangunan merupakan hal yang mutlak dilakukan oleh semua Negara. Bagi Negara maju yang memiliki modal, teknologi dan pengetahuan yang tinggi, tentu saja pembangunan bukanlah sesuatu yang sulit. Namun bagi Negara-negara dunia ketiga dengan kemampuan terbatas, pembangunan merupakan sesuatu yang amat berat. Sumber-sumber dalam Negeri tidak cukup untuk membiayai pembangunan tersebut. Untuk itulah mereka membutuhkan bantuan dari sumber luar Negeri yang salah satunya adalah melalui perusahaan transnasional.[1]

Kehadiran perusahaan transnasional sebagai penanam modal asing sungguh merupakan angin segar bagi *host country*[2] . Bagi Negara maju, kehadiran perusahaan transnasional berarti kesempatan untuk mengembangkan usaha-usaha mereka. Dan bagi Negara-negara berkembang, kehadiran perusahaan transnasional berarti kesempatan untuk membangun Negara mereka. Kemampuannya untuk menyediakan modal, memasok teknologi, dan memberikan pengetahuan yang luas dan bersifat

---

[1] Perusahaan transnasional merupakan istilah yang digunakan oleh *United Nations Commission on Transnational Corporation (UNCTC)* dalam *The Draft United Nation Code of Conduct on Transnational Corporation.* Dalam tulisan ini, penulis menggunakan istilah tersebut.

[2] *Host Country* adalah Negara dimana perusahaan transnasional melakukan kegiatannya, selanjutnya penulis akan menggunakan istilah Negara tuan rumah.

khusus tentang teknik-teknik produksi, pasar dan kerjasama internasional mengenai produksi dan penjualan yang merupakan unsur-unsur terpenting yang diperlukan dalam menjalankan perusahaan[3] berpengaruh besar bagi perkembangan ekonomi Negara-negara berkembang tersebut.

Di sisi lain, perusahaan transnasional bukannya tidak menerima apapun sebagai imbalan atas jasanya menyediakan modal, teknologi, dan pengetahuan tersebut. Tentu saja ia mendapatkan keuntungan yang tidak sedikit dari kegiatan yang dilakukannya di Negara tuan rumah. Jadi, hubungan antara perusahaan transnasional dengan Negara tuan rumah seyogyanya adalah hubungan yang bersifat mutualisme, artinya dapat menguntungkan kedua belah pihak (Negara asal dan Negara tempat beroperasinya perusahaan transnasional).[4]

Kelebihan yang dimiliki perusahaan transnasional dapat mendongkrak kemajuan ekonomi Negara dunia ketiga merupakan fenomena yang tidak dapat dibantah. Perusahaan transnasional terlihat selalu tampil prima dalam setiap kegiatan yang dilakukannya di Negara tuan rumah. Namun seiring perkembangan peranan perusahaan transnasional bagi Negara tuan rumah, maka pengkajian tentang perusahaan transnasional tidak lagi sebatas dari segi ekonomi saja, tetapi juga dari segi politik, hukum, dan sosial.

---

[3] Pieter Kuinn, Perusahaan Transnasional,Jakarta:Gramedia,1987, Hal 3.
[4] Juajir Sumardi, Aspek-aspek Hukum *Franchise* dan Perusahaan Transnasional, Bandung : PT Citra Aditya Bakti,1995,hal 81.

Pengkajian perusahaan transnasional sebagai subyek hukum ekonomi internasional secara serius dimulai setelah Perang Dunia II[5]. Hal ini dilakukan mengingat adanya potensi untuk timbulnya permasalahan hukum dalam hubungan antara perusahaan transnasional dengan Negara tuan rumah, seperti masalah wanprestasi serta masalah penyelesaian sengketa yang terjadi diantara keduanya.

Salah satu tujuan hukum adalah kepastian hukum[6]. Ini penting untuk melindungi kepentingan para pihak, terutama negara tuan rumah sebagai pihak yang biasanya berada pada posisi yang lemah. George Akpan, E.S.Q[7] dalam suatu tulisannya menyatakan bahwa :

> " *foreign investment can also adversely affect the host state. Thus, foreign investment can disqourage local interpreneurship, which may not have the capacity to complete with the foreign investors. This apart, foreign investment may harm the citizens of the host state, for instance, foreign investment may cause environtmental devastation of the house state or lead to abuse of human rights of the host citizens*".

Dari pendapat tersebut terlihat jelas bahwa perusahaan transnasional mempunyai potensi untuk menimbulkan kerugian bagi Negara tuan rumah, baik terhadap perusahaan-perusahaan lokal, maupun masyarakat Negara tersebut dengan menyebabkan kerusakan lingkungan ataupun pelanggaran HAM.

---

[5] Sunaryati Hartono, Hukum Ekonomi Pembangunan Indonesia, Bandung : Bina Cipta, 1988, hal 64.
[6] Tujuan hukum ada 3,yaitu : keadilan, kemanfaatan, dan kepastian hukum.
[7] George Akpan,E.S.Q, *Host State Regulation of foreign Investment and Indirect Expropriation In International Law*, Jurnal Hukum Internasional ,vol 2, no 2, thn 2003, hal 119.

Sebagai contoh adalah yang dialami oleh Indonesia. P.T Kelian Equatorial Mining di Kalimantan Tengah melakukan beberapa kasus pelanggaran seperti yang dilansir oleh Komnas HAM[8], yaitu pelecehan seksual dan kekerasan terhadap perempuan; kasus penangkapan demonstran pada desember 1992; kasus kematian Edward Tarung ; kasus pengusiran pangrebo; pembakaran rumah, penghalauan, perusakan alat dulang, penangkapan, dan penganiayaan serta kasus Daniel Paras, tuntutan atas kematian Ny. Repat; tuntutan atas PHK dan cacat akibat kecelakaan kerja, dan tuntutan atas tuduhan pencurian tembaga.

Hukum sebagai *a tool of social control*[9] menjalankan fungsinya untuk menetapkan tingkah laku mana yang dianggap penyimpangan terhadap aturan hukum, dan apa sanksi atau tindakan yang dilakukan oleh hukum jika terjadi penyimpangan tersebut. Hal ini dilakukan untuk mencapai tujuannya yaitu kepastian hukum. Maka perlu dibentuk suatu kerangka hukum dan kelembagaan yang mengikat perusahaan transnasional.

Tidak jelasnya kerangka hukum dan kelembagaan yang mengikat perusahaan transnasional menimbulkan beberapa dampak negatif bagi negara tuan rumah. antara lain[10]:

---

[8] www.google.com

[9] Fungsi hukum ada 4.yaitu:
1. sebagai *a tool of social control*
2. sebagai *a tool of social engineering*
3. sebagai symbol. dan
4. sebagai alat politik.

[10] www.google.com

1. perusahaan hanya bertanggung jawab secara hukum terhadap pemegang sahamnya (Share Holder), bukan kepada masyarakat tempat dimana dia beroperasi (Stake Holder) ;
2. Kekuatan transnasional meningkat karena mereka melakukan konsoliasi kekuatandan pengaruh, sembari memberi jarak antara perusahaan denganmsayarakat dimana dia beroperasi ;
3. perusahaan semakin banyak mengambil alih industri dan jasa yang sebelumnya dijalankan oleh negara, tanpa memikirkan kepentingan publik dan tanggung jawab yang harus di tanggung oleh pemerintah ;
4. Skala dampak negatif perusahaan semakin meningkat dan dampak negatif tersebut harus ditanggung masyarakat dimana perusahaan tersebut beroperasi, sementara sebagian besar besar keuntungan dinikmati oleh pemilik saham perusahaan ;
5. masyarakat kesulitan menggugat malpraktik dan atau menuntut ganti rugi kepada perusahaan transnasional, karena tidak ada hukum internasional yang mengatur mengenai *accountability* (tanggung gugat) dan *liability* perusahaan;
6. Adanya kecenderungan untuk menghilangkan atau mengendurkan berbagai halangan non tarif (*non tariff barries)*

B. Rumusan Masalah

Bertitik tolak pada latar belakang yang telah diuraikan di atas, maka penulis memberikan batasan masalah, sebagai berikut :

1. Bagaimankah peranan negara tuan rumah dalam pengawasan atas kegiatan perusahaan transnasional ?
2. Sejauhmana peranan negara tuan rumah dapat melakukan tindakan atas pelanggaran yang dilakukan oleh perusahaan transnasional ?
3. Bagaimana cara penyelesaian sengketa yang terjadi antara perusahaan transnasional dengan negara tuan rumah ?

C. Tujuan dan manfaat penulisan

Tujuan penulisan skripsi adalah untuk :

1. Mengetahui apa saja peranan negara tuan rumah dalam mengawasi kegiatan perusahaan transnasional.
2. Mengetahui apa saja peranan negara tuan rumah dalam mengambil tindakan atas pelanggaran yang dilakukan oleh perusahaan transnasional.
3. Mengetahui bagaimana cara menyelesaikan sengketa yang terjadi antara perusahaan transnasional dan negara tuan rumah.

Adapun manfaat penulisan skripsi ini adalah diharapkan dapat dijadikan sebagai salah satu sumber informasi dalam bidang hukum, khususnya hukum ekonomi internasional tentang perusahaan transnasional.

BAB II

TINJAUAN PUSTAKA

A. Pengertian *Host Country*

Ada beberapa istilah yang digunakan oleh para sarjana untuk menyebut negara Tuan Rumah, misalnya *George S. Akpan*[1] menggunakan istilah *Host State*. Istilah ini digunakan juga oleh Perserikatan Bangsa-Bangsa (PBB) dalam *Charter of Economic Rights and Duties of States (CERDS)*. *Stakeholder* dan istilah *host country* yang digunakan dalam draft *United Nations Code of Conduct on Transnational Corporation* oleh PBB.

Mengenai pengertian *Host Country* sendiri sudah jelas dilakukan dikemukakan dalam draft *United Nations Code of Conduct on Transnational Corporation* pada Pasal 1 huruf d yang berbunyi :

"*...The term host country means a country in which an entity other than the parent entity is located*".

Dengan demikian, *Host Country* berarti Negara tempat perusahaan transnasional berlokasi selain Negara asalnya. Sedangkan istilah *Stakeholder* (pemangku kepentingan) mempunyai pengertian yang lebih spesifik, yaitu dalam hal tanggung gugat.

---

[1] *George S. Akpan, ESQ, Host State Regulationof Foreign Investment and Indirect Expropriation in International Law*, Jurnal hukum internasional Vol. 2 No.2 tahun 2003 hal. 119

B. Status Hukum *Host Country*

Negara dalam hukum internasional merupakan subyek hukum yang terpenting *(par excellence)* dibanding dengan subyek-subyek hukum internasional lainnya. Sesuatu baru dikatakan Negara jika telah memenuhi syarat-syarat sebagai berikut :

1. memiliki penduduk,
2. memiliki wilayah tertentu,
3. memiliki pemerintahan, dan
4. memiliki kemampuan untuk mengadakan hubungan dengan negara lain.

Dalam hukum ekonomi internasional, Negara pun merupakan subyek hukum yang terpenting. Negara dalam konteks hukum ekonomi internasional, khususnya dalam kaitannya dengan perusahaan transnasional dibagi atas dua, yaitu *host country* (negara tuan rumah) dan *home country (*negara asal).

C. Hak dan Kewajiban *Host Country*

Subyek hukum adalah pemangku hak dan kewajiban. Negara adalah subyek hukum. Oleh karena Itu, negara memiliki hak dan kewajiban. Namun dalam praktek yang terjadi, hak-hak ini seringkali dilanggar oleh pihak lain, baik oleh negara lain ataupun oleh perusahaan transnasional. Untuk itu, penulis merasa perlu untuk membahas mengenai hak dan kewajiban Negara tuan rumah dalam kaitannya dengan kegiatan perusahaan transnasional.

Dalam hukum ekonomi internasional, hak dan kewajiban tersebut diatur dalam *Charter of Economic Rights and Duties of States (CERDS)*, *draft United Nations Code of Conduct on Transnational Corporation (TNC)*, dan *Declaration of New Economic Order (Declaration of NEO)*. Berikut adalah aturan hukum internasional yang mengatur tentang hak dan kewajiban *Host Country*.

1. Hak *host country*
   a. hak berdaulat untuk mengatur, mengawasi, dan melaksanakan kegiatan administrasi
      - *CERDS* Pasal 1, 2a, 2b, 2c, dan 7
      - *Draft United Nations Code of Conduct on TNC* Pasal 6, 7, 8, 15, 16, 17, 18, 19, 47 dan 49.
      - *Declaration of NEO* Pasal 4a, 4e, dan 4g.
   b. Dekolonisasi
      - *CERDS* Pasal 16
      - *Draft United Nations Code of Conduct on TNC* Pasal 13 dan 14.
      - *Declaration of NEO* Pasal 1
   c. Hak atas perlindungan konsumen
      - *Draft United Nations Code of Conduct on TNC* Pasal 37, 38, 39, dan 40.

d. Hak untuk melindungi lingkungan hidup

- *Draft United Nation Code of Conduct on TNC* Pasal 41, 42, dan 43.

e. Hak atas transparansi

- *Draft United Nations Code of Conduct on TNC* Pasal 44, 45, dan 46.

f. Nasionalisasi

- *CERDS* pasal 2 dan 2c.
- *Draft United Nations Code of Conduct on TNC* Pasal 54.
- *Declaration of NEO* Pasal 4 (e)

g. Bebas dari praktik korupsi

- *Draft United Nations Code of Conduct on TNC* Pasal 20

2. Kewajiban *Host Country*

a. Nondiskriminasi

- *CERDS* Pasal 2a
- *Draft united Nations Code of Conduct on TNC* Pasal 48

b. Membayar ganti rugi atas nasionalisasi, ekspropriasi, dan eksploitasi

- *CERDS* Pasal 2c dan 16 (1)
- *Draft United Nations Code of Conduct on TNC* Pasal 54

c. Kewajiban umum untuk memajukan pembangunan dan kerjasama ekonomi

- *CERDS* Pasal 7

d. Dekolonisasi

- *CERDS* Pasal 16

D. Pengertian Perusahaan Transnasional

Dalam perkembangannya, istilah perusahaan transnasional mengalami banyak perubahan. Seperti *Berthold Goldman* (1963) yang menggunakan istilah *International Companies; Robin dan Stobaugh* (1973) menggunakan istilah *Multinational Enterprise; Francoise Rigaux* (1990) menggunakan istilah *Transnational Group of Corporation;* sedangkan *Paul H. Becker* (1976) dan *Peter Fischer* (1985) menggunakan istilah *Transnational Enterprise.*[2]

Istilah yang umum diperdebatkan adalah antara istilah multinasional dan transnasional. Istilah yang digunakan oleh suatu kelompok ahli yang terdiri dari 20 (dua puluh) orang (*"Group of Eminent Persons"*) yang dibentuk oleh Badan Ekonomi dan Sosial PBB (*UN ECOSOC)* pada tahun 1973, telah menyarankan kepada PBB untuk mengganti kata multinasional menjadi

[2] Huala Adolf, Hukum Ekonomi Internasional, Suatu Pengantar, Jakarta ; PT. Raja Grafindo Persada, hal. 56.

transnasional, usulan ini diterima dan sejak tahun 1974, istilah multinasional menjadi hilang dari peredaran dalam literatur PBB[3].

Rigaux menjelaskan bahwa kata multinasional memberikan makna yang keliru karena kata tersebut seolah-olah menunjukkan perusahaan tersebut memiliki status nasionalitas di beberapa Negara, sedangkan kata transnasional lebih tepat karena mengacu pada suatu bentuk otonomi pada suatu perusahaan yang berbeda pada beberapa negara[4]. Dan pada penulisan skripsi ini, penulis menggunakan istilah tersebut.

Mengenai pengertian perusahaan transnasional sendiri sangat sulit untuk membuatnya menjadi baku. Hal ini disebabkan oleh pengertian perusahaan transnasional merupakan pengertian dalam ilmu ekonomi yang tidak dikenal dalam bidang hukum[5] . Selain itu, pendekatan yang digunakan oleh para sarjana dalam upaya pembuatan definisi mengenai perusahaan transnasional berbeda-beda, yaitu[6]:

1. Pendekatan Kuantitatif, yakni dengan melihat Perusahaan transnasional ini dari sudut besarnya pengaruh yang ditimbulkannya terhadap suatu Negara,
2. Pendekatan Operasional, menyatakan bahwa suatu perusahaan transnasional adalah suatu lembaga yang melaksanakan

[3] *ibid*
[4] *ibid*
[5] Sunaryati Hartono, Hukum Pembangunan Ekonomi Indonesia, Bandung;Binacipta,1982, hal 35.
[6] Huala Adolf, *op.cit.*,hal 58-60.

kegiatannya dari kantor pusatnya di satu atau lebih Negara penerima modal (*Host State*),

3. Pendekatan Struktural, menekankan pada kekhususan dari keadaan yang timbul dari suatu Negara penerima, manakala suatu perusahaan yang didirikan berdasarkan hukum nasional negara penerima modal memenuhi instruksi dari perusahaan induknya yang sering kali bertentangan dengan kepentingan atau bahkan hukum Negara penerima.

Begitu banyak definisi yang dikemukakan oleh para sarjana untuk menggambarkan perusahaan transnasional. Mereka menggunakan pendekatan yang berbeda satu sama lain. Sehingga definisi perusahaan transnasional begitu beragam. Namun, seyogyanya kita menyikapi perbedaan itu secara bijak dengan memandangnya sebagai suatu kekayaan intelektual.

Kalangan ahli ekonomi *OECD* mengemukakan definisi perusahaan transnasional yang menyatakan :

> " *MNE usually comprise of companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of other or in particular, to share know ledge and resources with the others.*[7]

[7] Sumantoro, *Kegiatan Perusahaan Multinasional.* Jakarta : Gramedia, 1987. hal. 35

Dari definisi di atas dapat kita lihat adanya pengaruh yang berarti dari salah satu atau beberapa elemen kepada yang lainnya dalam suatu kumpulan persekutuan atau kesatuan lain. Hal senada juga dapat kita temui pada definisi tentang perusahaan transnasional yang dikemukakan oleh Prof. Perl Mutter yang menyatakan[8]:

"Sekelompok perusahaan yang mempunyai kendali operasi langsung di berbagai negara yang berbeda yang mempunyai kecenderungan dan mengarah pada pandangan global akan penguasaan secara geosentris

J. Panglaykim[9] mengatakan bahwa perusahaan transnasional adalah suatu jenis perusahaan yang terdiri dari bermacam-macam kelompok perusahaan yang bekerja dan di dirikan di berbagai Negara, tetapi semuanya diawasi oleh suatu pusat perusahaan. Definisi tersebut menekankan pada pelaksanaan kegiatan perusahaan di beberapa Negara dengan pengawasan dari perusahaan induknya. Penekanan tersebut juga terdapat dalam literatur lain mengenai ekonomi internasional yang menyatakan [10] :

> " ... perusahaan yang kegiatan bisnisnya bersifat internasional dan lokasi produksinya terletak di beberapa negara. Dalam hal ini, cabang di luar negeri tidak hanya dimiliki oleh perusahaan induk, tetapi operasi atau kegiatan cabang tersebut juga dikontrol dan diawasi perusáhaan induk."

---

[8] Juajir Sumardi, *Aspek-aspek hukum Franchise dan perusahaan transnasional*, Bandung : PT Citra Aditya Bakti, 1995, hal 86.

[9] *ibid*

[10] Panji Anoraga, *Ekonomi Perusahaan Multi Nasional dan Penanaman Modal Asing*. Jakarta: Pustaka Jaya. Hal 45

Selain itu, *The United Nations Commission on International Trade Law (UNCITRAL)* juga memberikan definisi mengenai perusahaan transnasional, sebagai berikut [11] :

> " *The term Multinational Enterprise is used in a broad sense and includes enterprises which through branches, subsidiaries of affiliates or other establishment engage in substantial commercial or other economic activities in state (Host state) other than the state or states in which decision making and/or control is centered (The home state).*"

Definisi tersebut jelas menekankan adanya kenyataan dimana perusahaan induk tidak hanya memiliki kekuasaan untuk mengendalikan, tetapi juga kekuasaan untuk memutuskan. Bahkan di dalam kamus ekonomi dikemukakan kemungkinan adanya konflik kepentingan di antara negara tuan rumah dengan perusahaan transnasional dalam definisi yang selengkapnya menyatakan [12] :

> " Sebuah perusahaan yang wilayah operasionalnya meliputi sejumlah Negara dan memiliki fasilitas produksi dan servis di luar negaranya sendiri. Perusahaan transnasional tersebut mengambil keputusan pokoknya dalam suatu konteks global tadi dengan Negara-negara dimana perusahaan tersebut bekerja. Pertumbuhan perusahaan-perusahaan multinasional yang cepat serta kemungkinan bahwa dapat timbulnya konflik-konflik antara kepentingan perusahaan multinasional dengan kepentingan Negara individual dimana mereka beroperasi telah menimbulkan macam-macam perdebatan antara para ahli ekonomi pada tahun-tahun belakangan ini sehingga disebut *International Enterprise.*"

---

[11] Huala Adolf. Op.cit., hal. 60
[12] Panji Anorga, op.cit. hal 1

Kemudian PBB dalam *Draft United Nations Code of Conduct on TC* memberikan definisi yang lebih luas agar dapat mewakili definisi-definisi sebelumnya, yaitu :

1. *The term " Transnational Corporation " as used this code means an enterprise, comprising entities in two or more countries regardless of the legall form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies anf a common strategy trough one or more decision-making centers, in which the entities are so linked, by ownership or otherwise that one or more of them maybe able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with other.*

2. *The term "Transnational Corporation" as used in this code means enterprise wheter of public, privat or mixed ownership comprising entities in two or more countries and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them maybe able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with other.*

E. Status Hukum Perusahaan Transnasional

Perdebatan dalam mendudukan *International Company* atau perusahaan transnasional dalam hukum internasional publik merupakan isu yang menarik dan mengandung kontroversi. Hal ini dikuatkan oleh pendapat *D. Kokkini-Iartridou* berikut ini[13] :

[13] Ade Maman Suharman, Aspek Hukum dalam Ekonomi Global, Bogor: Ghalia Indonesia,2005, hal 73

" The present century has seen a growing tendency to admit that individual and -companies have some degree of international personality, but the whole subject is extremly controversial ... but the personality is ussuaily seen as something limited much more than the legal personality of international organizations, individu, and companies may have various right under special treaties, for instance. But it has never been suggested that they can imitate states by acquiring territory, appointing ambassadors, or declaring war.

Pengertian di atas secara garis besar, bahwa individu dan perusahaan (internasional) memiliki personalitas sebagai subyek hukum internasional. Personalitas perusahaan internasional ini sifatnya lebih terbatas daripada organisasi internasional, mereka memiliki bermacam-macam hak di bawah perjanjian internasional, namun mereka tidak akan dapat meniru negara atau berkapasitas seperti negara untuk memperoleh territorial, menugaskan duta besar atau menyatakan perang..

Terdapat 2 ajaran dalam menentukan nasionalitas suatu perusahaan transnasional, yaitu[14] :

1. Ajaran Inkorporasi

   Ajaran ini memandang negara tempat didirikannya perusahaan itu merupakan nasionalitas perusahaan tersebut.

2. Ajaran *Siege real*

   Negara tempat dipusatkannya kebijakan umum perusahaan tersebut dibuat (*headquarter)* merupakan nasionalitas perusahaan tersebut

Sebagai perbandingan dan pelengkap kedua ajaran tersebut, pakar hukum Belanda, *Molenggraaff,* menyatakan bahwa perusahaan tersebut tidak mengenal nasionalitas atau kebangsaan. Namun, apabila terpaksa

[14] *Ibid.,hlm 74.*

harus menunjukkan kebangsaannya misalnya dalam melaksanakan Pasal 128, dan 872 RV, maka yang menentukan kebangsaan suatu perusahaan adalah siapa yang berkuasa pada perusahaan tersebut yaitu pemegang saham dan direksi perusahaan tersebut[15]

Nasionalitas perusahaan harus ditunjukkan karena dalam melaksanakan pasal-pasal tersebut terdapat perbedaan hak dan kewajiban antara warga negara dan orang asing dalam hal mengajukan gugatan, di mana dalam pasal 128 RV diatur bahwa orang asing atas permintaan lawannya memberikan jaminan terlebih dahulu mengenai pembayaran biaya, kerugian atau bunga yang mungkin dapat dikenakan padanya. Dan dalam pasal 872 RV diatur bahwa warga negara jika dapat menunjukkan bahwa ia miskin atau tidak mampu membayar biaya perkara, maka ia dapat diizinkan oleh hakim yang akan atau sedang memeriksa perkaranya untuk berperkara secara cuma-cuma atau dengan biaya dengan tarif yang dikurangi, sedangkan orang asing tidak dimungkinkan diizinkan berperkara dengan cuma-cuma kecuali dengan suatu perjanjian yang tegas mengenai hal itu.

Sementara itu, *Pollack van der Hayden* dan *Van der Griten* mengajukan teori teritorialitas (*teritorialiteits principe)* yaitu kebangsaan suatu perusahaan ditentukan atas dasar dua hal :

1. menurut Undang-undang dimana perusahaan itu didirikan
2. di wilayah mana perusahaan itu berdomisili secara tetap[16]

Philip Jessup menegaskan, dalam prakteknya hukum *common law* menganut ajaran bahwa tempat perusahaan tersebut didirikan sebagai penentu nasionalitas perusahaan. Sedangkan dalam sistem *civil law* dianut

[15] *ibid*
[16] *Ibid hal.75*

sebaliknya yaitu penentu nasionalitas perusahaan berdasarkan *Siege real*. Namun, apabila menelaah ketentuan *EEC Convention on the Mutual Recognition of Companies and Legal Persons*, tanggal 20 Februari 1968. Konvensi ini mengisyaratkan adanya suatu *Genuine link* dan *Registered office* dengan komunitas Negara penandatangan. Negara di Eropa yang menganut *civil law*, seperti Belanda dan Swiss tidak menganut ajaran *Siege real*, tetapi menganut ajaran inkorporasi yang dituangkan dalam *Uitvoeringswet* tanggal 25 Juli 1959. Sedangkan hukum Swiss yang mengatur masalah ini dituangkan dalam Pasal 152 Undang-undang Federal dalam bidang hukum perdata internasional.[17]

Pasal tersebut mengatur tentang penentuan nasionalitas suatu perusahaan asing di negaranya, dimana penentuan itu berdasarkan prinsip inkorporasi yaitu negara tempat didirikannya perusahaan itu merupakan nasionalitasnya, jadi Swiss menentukan bahwa perusahaan asing di negaranya merupakan subyek hukum nasionalnya.

Code on Conduct on International Corporation sebagai salah satu sumber hukum internasional mengenai perusahaan internasional juga menganut ajaran inkorporasi tersebut. dalam pasal 55 *Code of Conduct on Transnasional Corporations* menegaskan bahwa perusahaan internasional merupakan subyek hukum negara tempatnya beroperasi.

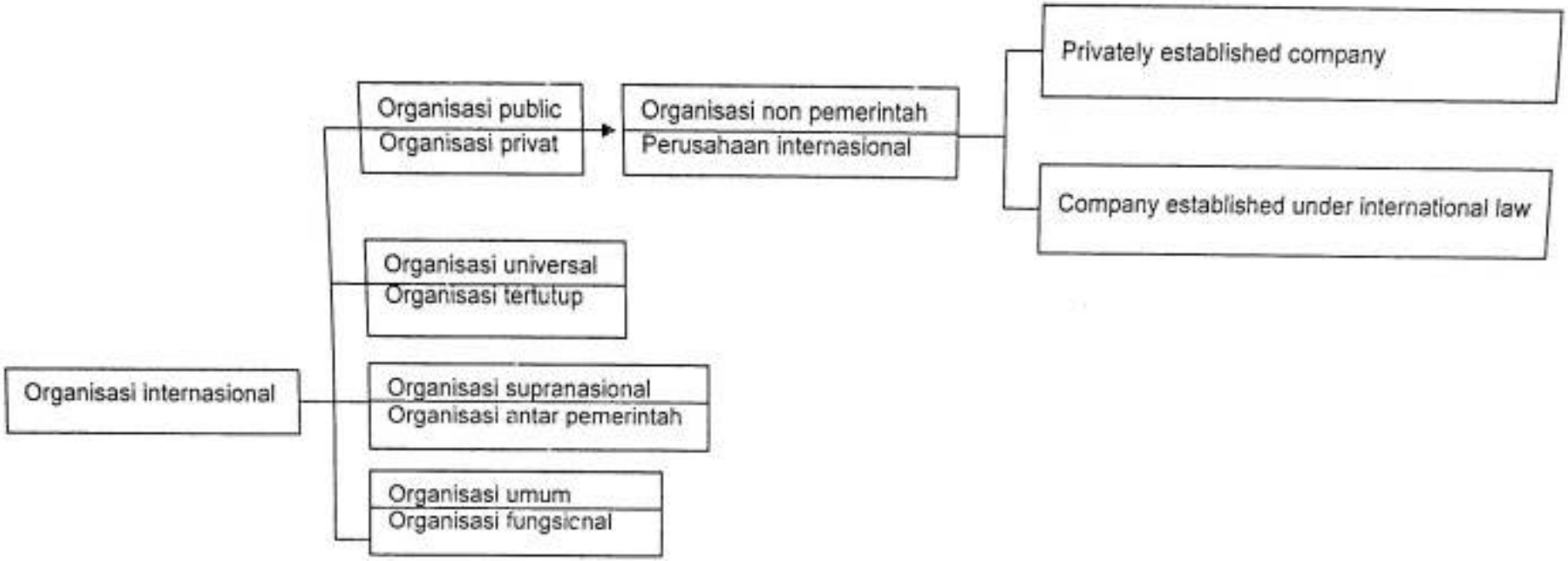
Setelah mengupas ajaran nasionalitas perusahaan transnasional dari segi perdata, visi lain dari segi hukum organisasi internasional akan semakin memperjelas posisi perusahaan transnasional. Menurut *Henry G. Schermer*, dalam mengklasifikasikan organisasi internasional dapat digambarkan dalam skema berikut ini [18]

---

[17] *ibid*
[18] *Ibid hal. 76*

Skema 1

Skema Organisasi Internasional



Berdasarkan bagan tersebut, perusahaan transnasional berada atau merupakan bagian dari organisasi privat internasional. Organisasi tersebut dapat berupa NGO, sebagai nirlaba dan perusahaan transnasional. Hal yang menarik adalah dikelompokkannya dua perusahaan transnasional, yaitu perusahaan transnasional yang bersifat perdata dan perusahaan transnasional yang didirikan berdasarkan hukum internasional.

BAB III

METODE PENELITIAN

A. Lokasi Penelitian

Penyusunan skripsi ini dilakukan melalui proses penelitian. Penelitian adalah suatu penelitian yang bersifat yuridis normatif. Oleh karena itu, penulis melakukan studi kepustakaan (library research) yang berlokasi di UPT perpustakan Universitas Hasanuddin, Perpustakaan Daerah Propinsi Sulawesi Selatan, serta melakukan penelitian melalui situs-situs internet guna melengkapi informasi yang diperlukan dalam penulisan skripsi ini.

B. Jenis dan Sumber Data

Jenis data yang dikumpulkan dalam penelitian ini adalah data sekunder, yaitu data yang diperoleh dari sejumlah literatur dan jurnal-jurnal serta konvensi-konvensi internasional yang sangat erat kaitannya dengan tema skripsi ini.

C. Teknik Pengumpulan Data

1. Studi Kepustakaan

   Studi kepustakaan merupakan teknik pengumpulan data yang dilakukan melalui sejumlah buku-buku literatur, jurnal, dan konvensi internasional.

2. *Browsing* situs-situs internet

   Teknik pengumpulan data jenis ini berkembang sejalan dengan perkembangan teknologi informasi yang semakin maju. Melalúi jaringan internet dapat diperoleh informasi terkini tentang tema skripsi ini.

D. Teknik Analisis Data

Data-data yang terkumpul, kemudian akan disusun dan dianalisis. Teknik analisis data yang digunakan dalam penelitian ini adalah dengan mendalami dan menginterpretasi data yang diperoleh, kemudian dideskripsikan secara terpadu dan sistematis menjadi sebuah karya tulis ilmiah berupa deskripsi.

BAB IV

HASIL DAN PEMBAHASAN

A. Peranan *Negara Tuan Rumah* dalam mengawasi kegiatan perusahaan transnasional

Di dalam *Declaration on the Establishment of a New International Economic Order* (1974) , dalam Pasal 4 (g) ditegaskan bahwa :

> " *The right to control transnational corporation in one of the fundamental principals of the new order; the new international economic order should be founded on full respect for the following principals : (g) regulation and supervision of the activities of transnational corporation by taking measures in the interest of the national economies of the countries where such transnational corporation operate on the basis of the full sovereignity of those country*".

Artikel ini berarti hak untuk mengontrol perusahaan transnasional merupakan prinsip yang fundamental dalam tata ekonomi dunia baru bahwa perusahaan transnasional harus menaati sepenuhnya prinsip berikut : peraturan, pengawasan terhadap perusahaan transnasional dengan mendasarkan pada kepentingan ekonomi nasional negara dimana perusahaan itu beroperasi atas dasar sebagai negara yang berdaulat.

Hal serupa juga diatur dalam *Charter of Economic Rights and Duties of State Preambule* (1974), Pasal 2 (b) yang menyatakan :

> " *Each state has the right : (b) to regulate and supervise activities of transnational corporation within its national jurisdiction and take measure to ensure that such activities comply with its laws, rules and*

regulations and conform with its economic and social policies. Transnational corporation shall not intervence in the internal affairs of a host state. Every state should, with full regard for its sovereign rights, co-operate with other states in the exercise of the right set forth in this subparagraph."

Berdasarkan ketentuan di atas, maka jelaslah bahwa setiap Negara memiliki hak : untuk mengatur dan mengawasi kegiatan perusahaan transnasional yang berada dalam wilayah kekuasaannya dan mengambil tindakan untuk mencegah kegiatan yang bertentangan dengan hukum, aturan, peraturan yang sesuai dengan kebijakan ekonomi dan sosialnya. Perusahaan transnasional tidak boleh mencampuri urusan dalam Negeri *Negara Tuan Rumah.* Dan semua negara harus menghormati hak berdaulat tersebut, dan bekerjasama dengan negara lain dalam melakukan hak yang telah diatur tersebut.

Secara lebih khusus, *The Draft United Nations Code of Conduct on Transnational Corporation* mengatur dalam Pasal 47, bahwa :

"State have right to regulate the entry and establishment of transnational corporation including determining the role that such corporations may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors."

Negara memiliki hak untuk mengatur masuknya dan pendirian perusahaan transnasional termasuk menetapkan aturan yang melonggarkan perusahaan dalam pembangunan ekonomi dan sosial, dan melarang atau membatasi luasnya kehadiran mereka pada sektor tertentu.

Dari ke tiga aturan di atas jelas bahwa negara tuan rumah memiliki hak untuk mengatur dan mengawasi kegiatan perusahaan transnasional yang berada dalam wilayah kekuasaannya.

Namun, dalam pelaksanaan pengawasan tersebut timbul masalah, dan menurut *Strecten,* masalahnya adalah[1] :

1. Walaupun kemampuan dan kekuatan politik untuk melakukan pengawasan tersebut ada, dipermasalahkan seberapa kemampuan dan kekuatan politik negara penerima modal tersebut dapat mengawasi perusahaan transnasional secara efektif (*The Problem of liability to control):*
2. Walaupun kekuatan politik dimiliki akan tetapi kemauan untuk melaksanakan pengawasan tersebut masih dipersoalkan *(the problem of the will to control) :*
3. Walaupun kemauan ada, yang jadi permasalahan adalah berkaitan dengan pengetahuan, keahlian dan kekuatan yang sifatnya non politik, sehingga masalahnya terlihat pada otonomi negara penerima modal tersebut dalam melakukan pengawasan (*the problem of autonomy of power).*

Permasalahan inilah yang kemudian menyebabkan cara pengawasan terhadap perusahaan transnasional oleh *Negara Tuan Rumah* berbeda-beda. Dalam praktek ditemui berbagai tingkat pengawasan yang dilaksanakan oleh

[1] Sumantoro, *Hukum Ekonomi,* Jakarta : UI-Press, 1986. Hal 204

Negara Tuan Rumah melalui " pendekatan pengaturan " dan " pendekatan administrative"[2].

Pendekatan pengaturan, *Rana Singh* mengemukakan pada umumnya berkenaan dengan[3] :

1. Aspek-aspek sosio ekonomis, seperti kesejahteraan buruh / pegawai termasuk ketentuan gaji minimum, perlindungan terhadap pemecatan buruh secara arbiter, jaminan buruh, peraturan tentang kesehatan dan keselamatan kerja, dan sebagainya,
2. Aspek-aspek produksi, seperti kapasitas produksi yang masih terbuka, lokasi pabrik, termasuk masalah insentif dan fasilitas yang diberikan untuk pengembangan daerah yang terbelakang atau untuk sektor industri tertentu yang diprioritaskan,
3. Aspek-aspek perpajakan dan perkreditan, termasuk fasilitas kredit atau pinjaman pada sumber-sumber dalam negeri,
4. Aspek-aspek distribusi seperti praktik-praktik pembatasan dalam pemasaran dan distribusi hasil-hasil produksi,
5. Aspek-aspek yang sifatnya eksteren yaitu yang berhubungan dengan persyaratan-persyaratan dalam pentransferan pembayaran untuk modal, barang-barang modal dan biaya teknologi.

---

[2] Sumantoro, *Kegiatan Perusahaan Multinasional*. Loc.cit
[3] Ibid

Singh juga mengamati bahwa sejak tahun-tahun terakhir ini pemerintah negara berkembang telah menerbitkan peraturan-peraturan khusus yang mengatur mengenai pengawasan, seperti[4] :

1. Pengalihan pemilikan secara menyeluruh atau sebagian atau yang diatur menurut jadwal waktu,
2. Pembatasan modal asing secara langsung dalam bidang-bidang tertentu dan mengarahkan penanaman modal tersebut pada suatu bidang yang lebih diprioritaskan,
3. Pengaturan mengenai penggunaan teknologi.

Pada bidang perdagangan yang berhubungan dengan kegiatan investasinya berkembang pada umumnya, menerapkan pengawasan modal yang tertuang dalam bentuk berbagai upaya penanaman modal dan persyaratan-persyaratan penanaman modal. Persyaratan-persyaratan demikian dikenal dengan istilah *TRIM's* atau *Trade-Related Investment Measures* terhadap perusahaan-perusahaan asing yang hendak menanamkan modalnya. Tujuan utama dari pengertian upaya-upaya atau persyaratan-persyaratan ini oleh negara penerima modal adalah untuk mengatur dan mengontrol aliran penanaman modal asing sedemikian rupa sehingga dapat memenuhi tujuan pembangunannya.[5]

---

[4] Ibid, hal. 147
[5] Haula Adolf. *Perjanjian Penanaman Modal dalam Hukum Perdagangan Internasional (WTO)*, Jakarta : PT. Raja Grafindo Persada, 2004. hal 9

Tujuan lain dari negara tuan rumah didalam menerapkan *TRIM's* ini adalah mencegah Penanaman Modal Asing (PMA) untuk membuat putusan-putusan atau kebijakan-kebijakan yang sifatnya lintas batas. Putusan atau kebijakan seperti ini biasanya dapat mempengaruhi kewajiban atau perekonomian negara sebagai suatu hak atau kewajiban setiap negara yang merdeka untuk mengatur perekonomiannya termasuk PMA didalamnya (guna mencegah dampak buruk dari PMA).[6]

Pada umumnya, persyaratan penanaman modal dapat digolongkan ke dalam 2 (dua) bentuk. Pertama, persyaratan masuk (*entry requirement)* dan kedua, persyaratan operasional (*operational requirement*). Kebijakan negara-negara menunjukkan bahwa pada umumnya negara-negara menerapkan kedua bentuk persyaratan tersebut sebagai syarat untuk masuknya modal asing ke negaranya. [7]

Pada tahap pertama, yaitu persyaratan masuk (*cntry requirement).* Biasanya badan penanaman modal dari negara penerima memeriksa apakah usulan atau proposal PMA sesuai atau cocok dengan tujuan pembangunan negaranya. Pertimbangan lainnya, apakah proposal tersebut memberikan keuntungan kepada negara penerima. Karena itu, setelah negara penerima memeriksa suatu proposal PMA beranggapan bahwa proposal tersebut tidak memenuhi syarat-syarat masuk atau persyaratan

[6] Ibid., hal 10
[7] Ibid., hal 12

kebijakan penanaman modal nasionalnya maka pemerintah tersebut dapat menolak permohonan penanaman modal.[8]

Sebaliknya, manakala pemerintah negara penerima beranggapan bahwa suatu usulan pemerintah memenuhi persyaratan untuk masuknya suatu penanaman modal, maka negara yang bersangkutan akan menetapkan persyaratan yang kedua, persyaratan dan operasionalisasi (*Operational requirement).* Ruang lingkup persyaratan-persyaratan ini cukup luas, tergantung kepada tujuan atau kebijakan masing-masing Negara.[9]

Namun demikian, persyaratan pelaksanaan yang paling umum adalah persyaratan menggunakan kandungan lokal (*local content requirement),* persyaratan perdagangan yang berimbang (*trade balancing requirement),* persyaratan ekspor (*Export performance requirement),* pembatasan impor (*Limitation in Import),* persyaratan mata uang asing dan pengiriman mata uang asing (*Foreign exchange and remittance requirement),* persyaratan modal minimum (*Minimum local equity requirement,* persyaratan alih teknologi (*technology transfer requirement,* dan persyaratan lisensi produk (*Product licensing requirement).*[10]

Pendekatan administrative dalam bentuk[11] :

1. Pengawasan impor,
2. Pengawasan lalu lintas pembayaran luar Negeri,

[8] Ibid
[9] Ibid., hal 13
[10] Ibid
[11] Sumantoro, op.cit hal 149

3. Pembatasan penggunaan tenaga kerja asing,
4. Penegasan untuk mengintegrasikan dengan usaha lokal menurut tingkat yang ditetapkan,
5. Pengawasan atas harga-harga produksi penting.

Kewenangan negara tuan rumah untuk mengatur masuknya PMA hanya tunduk pada perjanjian-perjanjian internasional (di bidang PMA) yang ditanda tangani oleh negara yang bersangkutan. Pengakuan atas hak ini sangat penting untuk negara-negara, khususnya negara sedang berkembang. Hak-hak tersebut diperlukan untuk mengatur dan mengawasi masuknya PMA ke dalam wilayahnya.[12]

B. Peranan *Negara Tuan Rumah* dalam mengambil tindakan atas pelanggaran yang dilakukan oleh perusahaan transnasional

George Ball mengajukan suatu pandangan bahwa perusahaan transnasional sebagai badan hukum asing yang melakukan usaha di luar negeri, maka harus tunduk pada peraturan hukum negara penerima modal, dengan menyatakan bahwa :

> " *Corporation citizen does business outside the country of its nationality by sufferance of the local state, the host government, if a corporate citizen affronts, the host it can like a human guest, be expelled and like an inniceeper who in pounds the guest laundry, the host government make convince scale whatever in moveable property the guest company lives behind the process euphemistically described as nationalization, expropriation or more recently. A gradually increasing participation. There is no doubt that the host government*

[12] Haula Adolf. Op.cit, hal 15

has the power to tax, regulate, expropriate and expel any company that does business within its bordess, it is because the host government has control power.[13]

Jadi menurut *George Ball*, jika perusahaan transnasional ternyata kedapatan melanggar ketentuan dari negara penerima modal, maka seperti halnya tamu, maka jika tidak sopan dapat diusir keluar. Dan pemerintah negara penerima modal dapat penyita barang-barang tidak bergerak yang ditinggalkannya. Proses ini secara tidak langsung disebut sebagai nasionalisasi, expropriasi, atau peningkatan partisipasi lokal. Di sini dipertegas bahwa pemerintah Negara penerima modal memiliki kewenangan untuk melaksanakan fungsi pemerintah dan pemegang kedaulatan. Sehingga dapat memungut pajak, mengatur, mengawasi, mengambil alih, dan mengatur setiap perusahaan / perusahaan transnasional yang melakukan kegiatan yang melanggar hukum di wilayahnya.[14]

Hak Negara dalam mengambil tindakan ini diatur dalam *Declaration on the Establishment of a New International Economic order* dalam Pasal 4 (e), yang menyatakan :

"The new international economic order should be founded on full respect for the following principals : (e) full permanent sovereignty of every state over its natural resources and all economic activities. In order to save guard these resources each state is entitled to exercise effective control over them and there exploitation with means suitable to its own situation, including the right to nationalization of transfer of

[13] Ade Maman Suherman, *Aspek Hukum dalam Ekonomi Global*. Bogor : Ghalia Indonesia, hal 79

[14] Sumantoro, op.cit. hal 149

ownership to its nasional. This right being an expression of the full sovereignity o fthe state. No state maybe subjected to economic, political or any other type of cordion to prevent the free of full exercise of this inliability right."

Hal ini berarti tata ekonomi dunia baru harus berdasarkan pada penghargaan penuh terhadap prinsip berikut : (e) kedaulatan tetap yang penuh setiap Negara atas kekayaan alam dan segala aktifitas ekonominya. Untuk melindungi kekayaan ini, setiap Negara berhak untuk melakukan pengendalian yang tetap padanya dan penggunaannya secara besar-besaran dengan cara yang sesuai dengan keadaan mereka termasuk hak untuk menasionalisasi pemindahan kepemilikan pada negaranya. Hak ini menjadi ungkapan kedaulatan penuh Negara. Tidak ada satu Negara pun yang boleh mempengaruhi secara ekonomi politik atau bentuk lain dari pengikatan untuk mencegah kebebasan dan penggunaan penuh hak yang tidak dapat diganggu gugat ini.

Kemudian dalam *Charter of Economic Right and Duties of State* Pasal 2 (C) mengatur bahwa :

"Each state has the right : (C) to nationalize, expropriate or transfer ownership of foreign property. In which case appropriate compensation should be paid by the state adapting such measures taking into account it's relevant laws and regulations and all circumstance that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunal, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means

Dengan memperhatikan ketentuan dalam pasal 2 (C) dari *Charter of Economic Right and Duties of State* di atas, maka jelaslah bahwa Setiap negara memiliki hak : untuk menasionalisasi, menyita, dan mengalihkan kepemilikan dari pemilik asing. Dalam hal pembayaran ganti rugi harus dibayar oleh negara berdasarkan aturan, dengan memperhatikan hubungannya dengan hukum dan aturan, dan hal yang dianggap berhubungan oleh negara. Dalam hal keragu-raguan atas pemberian ganti rugi menyebabkan perselisihan, maka harus diselesaikan berdasarkan hukum negara tuan rumah dan oleh pengadilannya. Kecuali ditentukan lain untuk semua negara yang bersangkutan bahwa jalan damai lain yang disukai berdasarkan persamaan kedaulatan negara-negara dan sesuai dengan prinsip kebebasan memilih.

Lebih lanjut hal in diatur dalam *Draft United Nations Code of Conduct on TNC* Pasal 54 yang berbunyi :

> *"In the exercise of its right to nationalize or expropriate totally or partially the assets of transnational corporation operating in its territory. The state adapting those measures should pay adequate compensation taking into account its own laws and regulations and all the circumstances which the state may deem relevant. When the questions of compensation gives rise to controversy or should there be a dispute.*
>
> *In the exercise of their sovereign, states have the right to nationalize or expropriate foreign owned property in their territory. Any such taking of property whether direct or indirect, consistent with international law, must be non-discriminatory, for a public purpose, in accordance with due process of law, and not be in violation of specific under takings to the contrary by contract or other agreement, and be accompanied by the payment of prompt, adequate and effective compensation such compensation should correspond to the full value of the property interests taken, on the basis of their fair market value, including going concern value, or where appropriate other*

internationally accepted methods of valuation, determined apart from any effects on value caused by the expropriatory measure or measures, or expectation of them – such compensation payment should be freely convertible and transferable, and should not be subject to any restrictive measures applicable to transfers of payment, in come or capital.

In the exercise of its sovereignty, a state has the right to nationalize of expropriate totally or partially the assets of transnational corporations in its territory , and appropriate compensation should be paid by the state adapting such measures, in accordance with its own laws and regulations and its international obligations.

Dari uraian di atas, dapat disimpulkan bahwa negara tuan rumah memiliki hak untuk menggunakan kedaulatannya dalam mengawasi dan mengambil tindakan atas pelanggaran yang dilakukan oleh TNC. Salah satunya adalah pengambilalihan perusahaan. Untuk memperjelas tentang pengambilalihan ini, maka penulis mensketsakannya dalam bentuk skema berikut ini (Skema 2).[15]

Skema 2
Pembagian Pengambilalihan

[15] Goerge. S. Akpan, *Host State Regulation of Foreign Investment and Indirect Expropriation in International Law*. Jurnal Hukum Internasional vol. 2 No. 2, 2003. hal 121

Dari bagan di atas dapat diketahui bahwa pengambilalihan terbagi atas 2 yaitu pengambilalihan secara langsung (*direct taking)* dan pengambilalihan secara tidak langsung (*indirect taking*). Di mana pengambilan secara langsung terdiri atas nasionalisasi dan ekspropriasi, sedangkan pengambilalihan secara tidak langsung terdiri atas regulatory takings dan creeping expropriation.

Nasionalisasi adalah pengambilalihan hak milik dan pengendalian dari sebuah perusahaan milik swasta oleh negara, definisi ini dikemukakan oleh J. Donner dalam sebuah tulisannya[16]. Di dalam melakukan nasionalisasi, negara menggunakan atau mengancam menggunakan kekuasaannya untuk mendapatkan property, meskipun kompensasi yang diberikan mungkin cepat dan adil, namun ancaman paksaan dapat mengurangi nilai dari properti tersebut.[17]

Ekspropriasi adalah perbuatan memindahkan pengawasan dari pemilik pada bagian properti[18]. Dalam konteks ini eskpropriasi dilakukan oleh pemerintah negara tuan rumah[19]. Alasan untuk mengekspropriasi bervariasi, tergantung dari negaranya. Misalnya, pemilik perusahaan yang diekspropriasi sedikit atau tidak memperhatikan pernyataan negara tuan rumah bahwa royalty yang diberikan terlalu kecil sehubungan dengan kekayaan yang

[16] www. Canadianencyclopedia.ca/index.cfm? PgNm – TCE & Params – A1 ARTA0005639
[17] ibid
[18] www.en.wikipedia.org/wiki/expropriation
[19] www.barleby.com/89/18/expropriation.hml

diambil darinya. Keluhan politik beberapa negara tuan rumah mungkin berhubungan dengan perlakuan pada bangsanya sebagai pekerja dari perusahaan tersebut.[20]

Perbedaan yang mendasar diantara keduanya adalah obyek yang diambil alih. Jika nasionalisasi mengambil alih hak milik dan pengawasan, maka ekspropriasi hanya mengambil alih pengawasannya saja.

Di dalam hukum internasional, setiap pengambilalihan harus disertai dengan pemberian kompensasi. Hal ini sudah jelas dalam pengambilalihan secara langsung (direct takings), namun masalah yang timbul kemudian jika yang terjadi adalah ketika pemerintah negara tuan rumah membuat peraturan-peraturan yang bertujuan untuk melindungi lingkungan dan hak warga negaranya justru terkesan membatasi atau menghalangi perkembangan investasi yang dapat menimbulkan kerugian bagi investor, yang kemudian peraturan itu disebut regulatory takings.

Namun Pengadilan Internasional kesulitan untuk menentukan mana peraturan yang harus diberikan kompensasi dan mana yang tidak harus. Dalam hal ini, hukum internasional cenderung mengadopsi faktor-faktor yang mirip dengan faktor-faktor yang diadopsi di Amerika Serikat dan yurisdiksi

[20] www.gn.ikipedia.org,op.cit.

lainnya untuk menandakan kapan suatu peraturan dapat dikompensasi. Faktor-faktor tersebut yaitu[21] :

1. Besarnya Pengaruh Peraturan Pemerintah terhadap Properti Asing

   Faktor ini mempertimbangkan apakah tindakan pemerintah berlangsung terlalu jauh dan menetapkan intervensi yang besar pada penggunaan dan kenyamanan properti. Untuk mengukur seberapa besar campur tangan pemerintah dalam penggunaan dan kenyamanan properti agar dapat ditetapkan sebagai pengambilalihan tidak bisa hanya dilihat dari halangan atau pembatasan yang ditimbulkannya, tetapi jangka waktu yang lama dalam penerapannya.

2. Besarnya Pengaruh Ekonomis

   Faktor ini mempertimbangkan apakah tindakan pemerintah terbukti telah menghalangi pemilik atas hak properti mereka dan tidak mengindahkan hak tersebut untuk menetapkan tindakan tersebut membatasi hak-hak pemilik untuk menggunakan dan mengatur properti mereka kemudian dianggap setara dengan pengambilalihan.

3. Pengetahuan Investor tentang Peraturan Pemerintah

   Faktor ini mempertimbangkan apakah peraturan pemerintah negara tuan rumah untuk melindungi lingkungan dan hak asasi warga negaranya menyebabkan kerugian bagi para investor dan bersifat

[21] Goerge. S Akpan. *Host State Regulation of Foreign Investment and Indirect expropriation in International Law.* Jurnal Hukum International Vol 2 No.2,2002. hal 121

diskriminasi. Jika tidak, maka tidak ada alasan bagi investor untuk menuntut kompensasi meskipun ia tidak mengetahui sebelumnya mengenai peraturan tersebut karena ia memasuki negara tersebut dengan suka rela, namun jika iya, maka investor asing dapat meminta ganti rugi.

Di beberapa negara, masalah tentang *regulatory takings* ini telah dimuat dalam perjanjian multilateral (*multilateral agreement on investment* atau MAI) dan bilateral (*bilateral investment treaties* atau BITs). Diantaranya The North American Free Trade Agreement (NAFTA) pada pasal 1110[22], yang berbunyi :

> "*No party may directly or indirectly nationalize or expropriate an investment of an investor of other party in its territory or take a measure tantamount to nationalization or expropriation of such on investment……*"

Kata tantamount di atas mengisyaratkan adanya peraturan yang dibuat dan menimbulkan pengaruh setara dengan nasionalisasi atau ekspropriasi. Hal yang serupa juga diatur dalam BITs yang dibuat oleh Amerika Pasal III yang berbunyi :[23] :

> "*Investment shall not be expropriated or nationalized either directly or indirectly trough measures that amount to expropriation…..*"

BITs yang dibuat oleh Inggris pasal 5 yang berbunyi :[24]

> "Measures *having effect equivalent to nationalization….*"

[22] Ibid. hal 122
[23] Ibid.
[24] Ibid.

BITs yang dibuat oleh Belanda Pasal 6 yang berbunyi[25] :

"*any measures depriving directly or indirectly.....of their investment*"

BITs yang dibuat oleh Jerman Pasal 4 (2), yang berbunyi [26]

"Shall not be expropriated, nationalized or subjected to any measure the effect of which shall tantamount to expropriation or nationalization...."

Istilah lain yang muncul dalam pembahasan ini adalah *creeping expropriation*. *Creeping expropriation* meliputi tindakan atau aturan yang memiliki akibat yang senilai dengan pengambilalihan secara langsung. *Creeping expropriation* melalui pajak haruslah memenuhi syarat dimana peraturan pajak secara tidak langsung mempunyai pengaruh yang senilai dengan pengambilalihan secara langsung.

Perbedaan mendasar dari *regulatory takings* dengan *creeping expropriaton* adalah sifat keduanya. *Regulatory takings* bersifat nyata dalam artian dampak yang ditimbulkannya langsung dapat dirasakan begitu peraturan tersebut dikeluarkan, sedangkan *creeping expropriation* bersifat abstrak dalam artian dampak yang dirasakan secara perlahan-lahan dan semakin lama semakin bertambah.

[25] Ibid.
[26] ibid

Pengambilalihan suatu perusahaan asing adalah suatu pelanggaran hukum. Namun demikian dalam hal-hal tertentu tindakan ini dapat pula sah apabila dipenuhinya syarat-syarat berikut :

a. Tidak dilaksanakannya hak-hak pemilikan perusahaan oleh negara yang bersangkutan[27].

Pada tahun 1961, Harvard Draft menyimpulkan bahwa campur tangan yang tidak sah terhadap penggunaan, atau pemilikan suatu barang adalah dibenarkan asalkan bahwa si pemilik tidak dapat menggunakan, menikmati atau mengelola harta miliknya dalam jangka waktu yang wajar setelah campur tangan itu terjadi. Selengkapnya pernyataan Harvard Draft tersebut berbunyi sebagai berikut:

> "...any such unreasonable interference with these, enjoyment or disposed of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference"[28]

Dalam praktek, hal tersebut di atas tampak pada pernyataan pemerintah Inggris dalam menanggapi tindakan pemerintah Indonesia mengambil alih perusahaan-perusahaan dan perkebunannya. Pemerintah Inggris mengirim suatu pernyataan kepada pemerintah Indonesia tanggal 20 Juli 1965, yang menyatakan pengakuan tentang pengambilalihan tersebut karena pengusaha-pengusaha Inggris

[27]Huala Adolf, Aspek-Aspek Negara dalam Hukum Internasional, log.cit.
[28]Ibid,hal, 194

sendiri tidak mampu menjalankan atau menikmati hak-hak pemilikan perusahaan atau perkebunannya.

b. Untuk Kepentingan Umum (*Public Purposes*)

Pengambilalihan perusahaan tersebut dilakukan untuk kepentingan umum. Pengadilan (*The World Court*) dalam kasus *The Certain German Interests in Polish Upper Silesia*, menyatakan bahwa "exspropriasi untuk kepentingan umum..." diperbolehkan menuntut hak internasional *"Lex propriation for reasons of public utility..." was permissible in international law)*. Tentang ketentuan aturan sampai seberapa jauh ukuran kepentingan umum dalam pengambilalihan perusahaan-perusahaan asing masih belum ada kesepakatan diantara para sarjana[29].

c. Ganti Rugi yang Pantas (*Appropriate Compensation*)

Di dalam *The Draft United Nation Code of Conduct on Transnational Corporation* pasal 24 dinyatakan bahwa pengambilalihan baik secara langsung maupun tidak langsung....dan diikuti dengan pembayaran yang cepat, memadai, dan efektif....(*...any such taking of property whether direct or indirect,....and be accompanied by the paymeni of prompt, adequate and effective compensation....).*

[29]Ibid., hal, 195

"*... a state should give a fair compensation for the nationalized business. It not be prompt, adequate and effective compensation as it claimed by the western governments. If the state fail to give fair compensation. It incurs international liability in respect of foreign business.*[33]

Diantara sarjana-sarjana hukum Barat sendiri ada pula yang membela pendirian pandangan negara-negara berkembang dalam hal pembayaran ganti rugi sebagai akibat pengambilalihan. Sebagai contoh, Prof. Isi Foighel berpendirian bahwa dalam hal terjadi pengambilalihan secara besar-besaran dalam rangka perombakan struktur ekonomi sosial secara menyeluruh dari negara-negara bekas dijajah, maka tidak dapat diberikan ganti rugi yang sifatnya "prompt", adequate and effective", tetapi cukuplah diberikan ganti rugi sejumlah "*lump sump*" yang kemudian oleh pemerintah dari para warga negara korban pengambilalihan bersangkutan, akan dibagi-bagikan kepada mereka.[34]

Menurut Schwarzenberger, kompensasi (ganti rugi) dapat berupa *monetary compensation* (ganti rugi dalam bentuk sejumlah uang), atau berupa satisfaction, yaitu ganti rugi dalam bentuk, misalnya saja permintaan maaf yang biasanya dimintakan untuk

[33] Ibid.
[34] Ibid., hal. 198

kerugian-kerugian non material atau moral (kepribadian) suatu negara. *Monetary compensation* dapat terdiri dari [35]:

a. Penggantian biaya pada waktu keputusan pengadilan dikeluarkan, meskipun jumlah penggantian tersebut menjadi lebih besar dari nilai pada waktu perbuatan melawan hukum oleh negara lain terjadi.
b. Kerugian tak langsung (*indirect damages*). Sepanjang kerugian ini mempunyai kaitan langsung dengan tindakan tak sah tersebut.
c. Hilangnya keuntungan yang diharapkan, sepanjang keuntungan tersebut mungkin dalam situasi atau perkembangan yang normal.
d. Pembayaran terhadap kerugian atas bunga yang hilang karena adanya tindakan pelanggaran hukum.

Brownlie mendefinisikan *satisfaction* ini adalah setiap upaya yang dilakukan oleh si pelanggar, suatu kewajiban untuk mengganti kerugian menurut hukum kebiasaan atau suatu perjanjian yang dibuat oleh para pihak yang bersangkutan, yang bukan berupa *restoration* (pemulihan)atau kompensasi.[36]

d. Nondiskriminasi (*Non-discrimination*).

Penulis-penulis dan sarjana hukum internasional berpendapat bahwa non diskriminasi ini merupakan suatu prasyarat agar

[35] Ibid
[36] Ibid., hal 199

pengambilalihan sah. Pengadilan arbitrase dalam kasus the Lianco menyatakan bahwa suatu tindakan pengambilalihan yang diskriminatif adalah tak sah.[37]

C. Penyelesaian Sengketa antara Perusahaan Transnasional dengan Negara Tuan Rumah

Hukum internasional senantiasa menghendaki penyelesaian secara damai dalam setiap sengketa internasional. Secara umum pengaturan penyelesaian sengketa secara damai pertama kali lahir sejak diselenggarakannya The Hague Peace Conference (Konferensi Perdamaian Den Haag) tahun 1899 dan 1907 yang menghasilkan *the Convention on the Pacific Settlement of International Disputes* tahun 1907. Konvensi ini berkembang seiring disahkannya perjanjian-perjanjian internasional lain tentang penyelesaian sengketa internasional[38].

Seruan untuk menggunakan cara damai dalam menyelesaikan sengketa ini dituangkan oleh PBB sebagai badan yang bertujuan untuk memelihara perdamaian dan keamanan internasional ke dalam piagamnya pasal 2 ayat (3) yang berbunyi : *All members shall settle their international peace and security are not endangered.* Kata shall (harus) dalam kalimat di

[37] Ibid., hal 200
[38] Huala Adolf, Hukum Penyelesaian Sengketa Internasional, log.cit

atas merupakan salah satu kata kunci yang mewajibkan negara-negara untuk menempuh cara damai saja dalam menyelesaikan sengketanya[39]

Kewajiban menyelesaikan sengketa secara damai ini dijelaskan lebih lanjut oleh pasal 33 Piagam PBB. Lengkapnya pasal ini menyatakan :

> "The parties to any disputes, the continuance of which is likely to endager the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, equiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (para pihak dalam suatu persengketaan yang tampaknya sengketa tersebut akan membahayakan perdamaian dan keamanan internasional, harus pertama-tama mencari penyelesaian dengan cara negosiasi (perundingan), penyelidikan, mediasi, konsoliasi, arbitrase, pengadilan, menyerahkannya kepada organisasi-organisasi atau badan-badan regional atau cara-cara penyelesaian damai lainnya yang mereka pilih).[40]

Prinsip penyelesaian demikian diperkuat kembali dengan Resolusi Majelis Umum (MU) PBB No. 2625 (XXV) 1970 (24 Oktober 1970) mengenai General Assembly Declaration on Principles of International Law Concerning Charter of United Nations (Deklarasi MU mengenai prinsip-prinsip hukum international tentang hubungan-hubungan persahabatan dan kerjasama diantara negara-negara sesuai dengan piagam PBB) atau friendly relations declaration. Resolusi PBB tersebut antara lain menyatakan sebagai berikut:

> "States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry and mediation, conciliation and arbitration, judicial settlement, resort to regional agencies or arrangement or other peaceful means of their choice"[41]

---

[39] Ibid, hal 12
[40] Ibid., hal 13
[41] Ibid.

Resolusi MU PBB No. 2625/XXV diatas diperkuat kembali oleh resolusi MU No. 40/9 (8 November 1985) dan resolusi MU No. 44/21 (15 November 1989). Resolusi ini mendorong negara-negara untuk memajukan perdamaian dan keamanan serta kerja sama internasional dalam semua aspek sesuai dengan piagam PBB.[42]

Berdasarkan pasal 33 Piagam PBB dan Resolusi-resolusi tersebut. Pada pokoknya cara penyelesaian sengketa secara damai dibagi dalam 2 kelompok [43] :

a. Penyelesaian secara diplomatik, yaitu negosiasi, penyelidikan, mediasi dan konsiliasi, disamping cara-cara lainnya yang masih dimungkinkan dipilih atau diinginkan oleh para pihak.
b. Cara penyelesaian secara hukum, yaitu arbitrase dan pengadilan.

Penyelesaian sengketa internasional ini harus dilaksanakan berdasarkan prinsip-prinsip sebagai berikut[44] :

1. Prinsip itikad baik (*good faith*)
2. Prinsip larangan penggunaan kekerasan dalam penyelesaian sengketa
3. Prinsip kebebasan memilih cara-cara penyelesaian sengketa
4. Prinsip kebebasan memilih hukum yang akan diterapkan terhadap pokok sengketa
5. Prinsip kesepakatan para pihak yang bersengketa (konsensus)

---

[42] Ibid., hal 20
[43] Ibid.
[44] Ibidm, hal 22

6. Prinsip exhaustion of local remedies,
7. Prinsip-prinsip hukum international tentang kedaulatan, kemerdekaan, dan integritas.

Pada kenyataannya, hubungan antara Negara Tuan Rumah dengan TNC tidak selalu berjalan dengan harmonis. Sengketa diantara keduanya potensial terjadi antara lain karena masalah ganti rugi atas wanprestasi. Tentang hal ini hukum internasional mengaturnya dalam Charter Of Economic Rights and Duties of State pasal 2 (c) yang berbunyi :

> "...in any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals. Unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choise of means"

Dan Code of Conduct on TNC yang mengaturnya pada pasal 56 yang berbunyi :

> "*Disputes between a state and entity of a transnational corporation operating in its territory are subject to the jurisdiction of the courts and other competent authorities of that state unless amicably settled between the parties.*"

Disputes between a state and an entity of a TNC which are not amicably settled between the parties or resolved in accordance with previously agreed disputes settlement procedures, should be agreed means of settlement, such as arbitration.

Disputes between states and entities of TNC, which are not amicably settled between the parties, shall/should be submitted to component national

courts or authorities in conformity with the principle of paragraph 7, where the parties so agree such disputes may be reffered to other mutually acceptable dispute settlement procedures.

Dari kedua aturan di atas dapat diketahui bahwa jika terjadi sengketa antara Negara Tuan Rumah dengan TNC, maka penyelesaiannya dapat dilakukan dengan 3 cara, yaitu melalui pengadilan negara tuan rumah, pejabat yang berwenang dan jalan damai yaitu : konsultasi, negosiasi, mediasi, konsoliasi, pendapat para ahli, dan arbitrase.

BAB V

KESIMPULAN DAN SARAN

A. Kesimpulan

Dari bab hasil dan pembahasan tersebut, dapat disimpulkan bahwa:

1. Negara Tuan Rumah dapat mengawasi kegiatan perusahaan transnasional dengan berdasarkan prinsip kedaulatan penuh. Pengawasan ini dapat dilakukan dengan menggunakan pendekatan administratif dan pendekatan pengaturan. Seberapa efektif pengawasan ini tergantung pada kemampuan dan kekuatan politik, kemauan, dan pengetahuan/keahlian dan kekuatan yang bersifat non politik dari negara tuan rumah.
2. Jika perusahaan transnasional melakukan pelanggaran yang merugikan negara tuan rumah, maka negara tuan rumah dapat melakukan pengambilalihan yang terbagi atas pengambilalihan secara langsung yaitu nasionalisasi dan ekspropriasi, dan pengambilalihan secara tidak langsung yaitu *creeping expropriation* dan *regulatory taking*. Pengambilalihan ini harus diikuti dengan kompensasi, untuk tujuan umum, dan tanpa diskriminasi.
3. Penyelesaian sengketa diantara keduanya harus diselesaikan berdasarkan hukum nasional tuan rumah di Pengadilan negaranya, pejabat berwenangnya, atau cara-cara damai yaitu arbitrase,

konsultasi, negosiasi, mediasi, konsiliasi, dan pemberian pendapat ahli, jika tidak diperjanjikan terlebih dahulu, maka sengketa diselesaikan di pengadilan negeri, namun jika iya maka kewenangan pengadilan otomatis tidak ada dan sengketa diselesaikan sesuai dengan cara yang disepakati.

B. Saran

1. Untuk dapat mengawasi kegiatan perusahaan transnasional di negaranya, negara tuan rumah harus meningkatkan kemampuan dan kekuatan politik, kemauan, dan pengetahuan dan kekuatan yang sifatnya non politik dengan meningkatkan sumberdaya manusianya.
2. Negara tuan rumah seharusnya mengetahui apa saja hak dan kewajibannya dalam hal terjadinya pelanggaran oleh perusahaan transnasional, agar mereka dapat melakukan tindakan yang memang merupakan hak mereka tanpa menimbulkan masalah baru dengan para investor.
3. Negara tuan rumah harus peka dalam hal penyelesaian sengketa ini, mereka harus menyusun permasalahan tentang penyelesaian sengketa ini di dalam undang-undang nasional mereka atau pun pada setiap perjanjian investasi yang akan mereka buat dengan matang agar tidak menyulitkan hubungan mereka dengan para investor nantinya.

DAFTAR PUSTAKA

Ade Maman Suherman, 2005, *Aspek Hukum dalam Ekonomi Global*, Bogor : Ghalia Indonesia.

Akpan, George. S, 2003. *Host State Regulation of Foreign Investment*, Jurnal Hukum Internasional Vol. 2 No. 2

Bambang Sunggono, 1997. *Metodologi Penelitian Hukum*, Jakarta :PT. Rajagrafindo Persada.

Haula Adolf, 1997. *Hukum Ekonomi Internasional Suatu Pengantar.* Jakarta : PT. Raja Grafindo Persada.

_____, 2004. *Perjanjian Penanaman modal dalam Hukum Perdagangan Internasional (WTO)*, Jakarta : PT. Raja Grafindo Persada

_____, 2004. *Hukum Penyelesaian Sengketa Internasional.* Jakarta : Sinar Grafindo Persada.

_____, 2005. *Hukum Perdagangan Internasional*, Jakarta : PT. Raja Grafindo Persada

_____, 1991, *Aspek-aspek Negara dalam Hukum Internasional*, Jakarta: PT. Raja Grafindo Persada.

Juajir Sumardi, 1995, *Aspek-aspek Hukum Franchise dan Perusahaan Transnasional*, Bandung : PT. Citra Aditya Bakti.

Kuin, Pieter. 1987, *Perusahaan Transnasional*, Jakarta, Gramedia

Mochtar Kusumaatmaja, 1999. *Pengantar Hukum Internasional*, Bandung : Putra Bardin.

Panji Anoraga, 1995. *Ekonomi Perusahaan Multinasional dan Penanaman Modal Asing*. Jakarta : Pustaka Jaya

Sumantoro, 1986. *Hukum Ekonomi*, Jakarta : Penerbit Universitas Indonesia.

_____, 1987. *Kegiatan Perusahaan Multinasional.* Jakarta : PT. Gramedia.

Sunaryati Hartono. 1988. *Hukum Ekonomi Pembangunan Indonesia*, Bandung : Bina Cipta

The Draft United Nations Code of Conduct on Transnational Corporation.

Charter of Economic Rights and Duties of State

Declaration on the Establishment of A New International Economic Order.

DEPARTEMEN PENDIDIKAN NASIONAL
UNIVERSITAS HASANUDDIN
UPT PERPUSTAKAAN
JL. PERINTIS KEMERDEKAAN, KM.10, KAMPUS TAMALANREA
MAKASSAR 90245 TLP. (0411) 587027, FAX. (0411) 587027

Nomor : 871 J04.27.1/KM.11/200

Lampiran : -

Perihal : Surat Keterangan Penelitian

Yang bertanda tangan di bawa ini menerangkan bahwa

Nama : Andi Indah Lestari

Nomor Pokok : B 111 99 135

Jurusan : Hukum Internasional

Alamat : WPN Anga 1 3/5 Sungguminasa

Telah mengadakan penelitian di UPT Perpustakaan Universitas Hasanuddin guna mengumpulkan data-data yang berkaitan dengan skripsi yang berjudul :

TINJAUAN YURIDIS TENTANG PERANAN HOST COUNTRY DALAM MENGAWASI KEGIATAN TRANS NASIONAL

Demikian keterangan penelitian ini kami berikan kepada yang bersangkutan untuk digunakan seperlunya.

Makassar, 30 Juli 2005

Kepala,

u.b. Kasubag. Tata Usaha,

Dra. Hasni Husain, S.Sos.

NIP 130 913 692

CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES* UN GENERAL ASSEMBLY RESOLUTION 3281 (XXIX) 12 DECEMBER 1974

The General Assembly,

Recalling that the United Nations Conference on Trade and Development, in its resolution 45 (III) of 18 May 1972,[1] stressed the urgency to establish generally accepted norms to govern international economic relations systematically and recognized that it is not feasible to establish a just order and a stable world as long as a charter to protect the rights of all countries, and in particular the developing States, is not formulated,

Recalling further that in the same resolution it was decided to establish a Working Group of government representatives to draw up a draft Charter of Economic Rights and Duties of States, which the General Assembly, in its resolution 3037 (XXVII) of 19 December 1972, decided should be composed of forty Member States,

Nothing that, in its resolution 3082 (XXVIII) of 6 December 1973, it reaffirmed its conviction of the urgent need to establish or improve norms of universal application for the development of

---

*Reproduced from Proceedings of the United Nations General Assembly, Twenty-Ninth Session.

[1]*See Proceeding of the United Nations Conference on Trade and Development, Third Session, vol. 1, Report and Annexes* (United Nations publications, Sales No.: E.73.11.D.4), annex I.A.

...signed the Working Group on the Charter of Economic Rights and Duties of States to complete, as the first step in the codification and development of the matter, the elaboration of a final draft Charter of Economic Rights and Duties of States, to be considered and approved by the General Assembly at its twenty-ninth session.

Bearing in mind the spirit and terms of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing, respectively, the Declaration and the Programme of Action on the Establishment of a New International Economic Order, which underlined the vital importance of the Charter to be adopted by the General Assembly at its twenty-ninth session and stressed the fact that the Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries.

Having examined the report of the Working Group on the Charter of Economic Rights and Duties of States on its fourth session,[2] transmitted to the General Assembly by the Trade and Development Board at its fourteenth session.

Expressing its appreciation to the Working Group on the Charter of Economic Rights and Duties of States which, as a result of the task performed in its four sessions held between February 1973 and June 1974, assembled the elements required for the completion and adoption of the Charter of Economic Rights and Duties of States at the twenty-ninth session of the General Assembly, as previously recommended,

Adopts and solemnly proclaims the following charter:

---

[2]TD/B/AC. 12/4 and Corr.I.

...CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES PREAMBLE

The General Assembly,

Reaffirming the fundamental purposes of the United Nations, in particular the maintenance of international peace and security, the development of friendly relations among nations and the achievement of international co-operation in solving international problems in the economic and social fields,

Reaffirming further the need for strengthening international co-operation for development,

Declaring that it is a fundamental purpose of the present Charter to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems

Desirous of contributing to the creation of conditions for:

(a) The attainment of wider prosperity among all countries and of higher standards of living for all peoples,

(b) The promotion by the entire international community of the economic and social progress of all countries, especially developing countries,

(c) The encouragement of co-operation, on the basis of mutual advantage and equitable benefits for all peace-loving States which are willing to carry out the provisions of the present Charter, in the economic, trade, scientific and technical fields, regardless of political, economic or social systems,

(d) The overcoming of main obstacles in the way of the economic development of the developing countries,

(e) The acceleration of the economic growth of developing countries with a view to bridging the economic gap between developing and developed countries,

(f) The protection, preservation and enhancement of the environment,

Mindful of the need to establish and maintain a just and equitable economic and social order through:

(a) The achievement of more rational and equitable international economic relations and the encouragement of structural changes in the world economy,

(b) The creation of conditions which permit the further expansion of trade and intensification of economic co-operation among all nations,

(c) The strengthening of the economic independence of developing countries,

(d) The establishment and promotion of international economic relations, taking into account the agreed differences in development of the developing countries and their specific needs,

Determined to promote collective economic security for development, in particular of the developing countries, with strict respect for the sovereign equality of each State and through the cooperation of the entire international community,

Considering that genuine co-operation among States, based on joint consideration of and concerted action regarding international economic problems, is essential for fulfilling the international community's common desire to achieve a just and rational development of all parts of the world,

Stressing the importance of ensuring appropriate conditions for the conduct of normal economic relations among all States, irrespective of differences in social and economic systems, and for the full respect of the rights of all peoples, as well as strengthening instruments of international economic co-operation as a means for the consolidation of peace for the benefit of all,

Convinced of the need to develop a system of international economic relations on the basis of sovereign equality, mutual and equitable benefit and the close interrelationship of the interests of all States,

Reiterating that the responsibility for the development of every country rests primarily upon itself but that concomitant and effective international co-operation is an essential factor for the full achievement of its own development goals,

Firmly convinced of the urgent need to evolve a substantially improved system of international economic relations,

Solemnly adopts the present Charter of Economic Rights and Duties of States

CHAPTER I
FUNDAMENTALS OF INTERNATIONAL ECONOMIC RELATIONS

Economic as well as political and other relations among States shall be governed *inter alia*, by the following principles:

(a) Sovereignty, territorial integrity and political independence of States;

(b) Sovereign equality of all States;

(c) Non-aggression;

(d) Non-intervention;

(e) Mutual and equitable benefit;

(i) Peaceful coexistence;

(g) Equal rights and self-determination of peoples;

(h) Peaceful settlement of disputes;

(i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;

(j) Fulfilment in good faith of international obligations;

(k) Respect for human rights and fundamental freedoms;

(l) No attempt to seek hegemony and spheres of influence;
(m) Promotion of international social justice;
(n) International co-operation for development;
(o) Free access to and from the sea by land-locked countries within the framework of the above principles.

CHAPTER II
ECONOMIC RIGHTS AND DUTIES OF STATES

Article 1

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right:
   (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities No State shall be compelled to grant preferential treatment to foreign investment;
   (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State.

Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;
(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means

Article 3

In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others

Article 4

Every State has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social systems. No State shall be subjected to discrimination of any kind based solely on such differences. In the pursuit of international trade and other forms of economic co-operation, every State is free to choose the forms of organization of its foreign economic relations and to enter into bilateral and multilateral arrangements consistent with its inter-

national obligations and with the needs of international economic co-operation.

Article 5

All States have the right to associate in organizations of primary commodity producers in order to develop their national economics, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.

Article 6

It is the duty of States to contribute to the development of international trade of goods, particularly by means of arrangements and by the conclusion of long-term multilateral commodity agreements, where appropriate, and taking into account the interests of producers and consumers. All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account, in particular, the interests of developing countries.

Article 7

Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goal of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually

and collectively, to co-operate in eliminating obstacles that hinder such mobilisation and use.

Article 8

States should co-operate in facilitating more rational and equitable international economic relation and in encouraging structural changes in the context of a balanced world economy in harmony with the needs and interests of all countries, especially developing countries, and should take appropriate measures to this end.

Article 9

All States have the responsibility to co-operate in the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries.

Article 10

All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, *inter alia*, through the appropriate international organizations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom.

Article 11

All States should co-operate to strengthen and continuously improve the efficiency of international organizations in implementing measures to stimulate the general economic progress of all countries, particularly of developing countries, and therefore

should co-operate to adapt them, when appropriate, to the changing needs of international economic co-operation

Article 12

1. States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.
2. In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of the present Charter, its provisions shall also apply to those groupings in regard to such matters, consistent with the responsibilities of such States as members of such groupings Those States shall co-operate in the observance by the groupings of the provisions of this Charter.

Article 13

1. Every State has the right to benefit from the advences and developments in science and technology for the acceleration of its economic and social development.
2. All States should promote international scientific and technological co-operation and the transfer of technology, with proper regard for all legitimate interests including, *inter aria*, the rights and duties of holders, suppliers and recipients of technology. In particular, all Stales should facilitate the access

of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.

3. Accordingly, developed countries should co-operate with the developing countries in the establishment, strengthening and development of their scientific and technological infrastructures and their scientific research and technological activities so as to help to expand and transform the economies of developing countries.
4. All States should co-operate in research with a view to evolving further internationally accepted guidelines or regulations for the transfer of technology, taking fully into account the interests of developing countries.

Article 14

Every State has the duty to co-operate in promoting a steady and increasing expansion and liberalization of world trade and an improvement in the welfare and living standards of all peoples, in particular those of developing countries. Accordingly, all States should co-operate, *inter alia*, towards the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade and, to these ends, coordinated efforts shall be made to solve in an equitable way the trade problems of all countries, taking into account the specific trade problems of the developing countries. In this connexion, state shall take measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate

in the expansion to developing countries in the sharing of the advantages resulting from this expansion, through, in the largest possible measure, a substantial improvements in the conditions of access for the products of interest to the developing countries and, wherever appropriate, measures designed to attain stable, equitable and remunerative prices for primary products.

Article 15

All States have the duty to promote the achievement of general and complete disarmament under effective international control and to utilize the resources released by effective disarmament measures for the economic and social development of countries, allocating a substantial portion of such resources as additional means for the development needs of developing countries.

Article 16

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neocolonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.
2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.

Article 17

International co-operation for development is the shared goal and common duty of all States. Every State should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

Article 18

Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decision as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour.

Article 19

With a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and nondiscriminatory treat-

ment to developing countries in those fields of international economic co-operation where it may be feasible.

Article 20

Developing countries should, in their efforts to increase their overall trade, give due attention to the possibility of expanding their trade with socialist countries, by granting to these countries conditions for trade not inferior to those granted normally to the developed market economy countries.

Article 21

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

Article 22

1. All States should respond to the generally recognized or mutually agreed development needs and objectives of developing countries by promoting increases net flows of real resources to the developing countries from all sources, taking into account any obligations and commitments undertaken by the States concerned, in order to reinforce the efforts of developing countries to accelerate their economic and social development.
2. In this context, consistent with the aims and objectives mentioned above and taking into account any obligations and commitments undertaken in this regard, it should be their

endeavour to increase the net amount of financial flows from official sources to developing countries and to improve the terms and conditions thereof.

3. The flow of development assistance resources should include economic and technical assistance.

Article 23

To enhance the effective mobilization of their own resources, the developing countries should streng then their economic co-operation and expand their mutual trade so as to accelerate their economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation

Article 24

All States have the duty to conduct their mutual economic relations in a manner which takes into account the interests other countries. In particular, all States should avoid prejudicing the interests of developing countries.

Article 25

In furtherance of world economic development, the international community, especially its developed members, shall pay special attention the particular needs and problems of the least developed among the developing countries, of land-locked developing countries and also island developing countries, with a view to helping them to overcome their particular difficulties and thus contribute to their economic and social development.

All States have the duty to coexist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

Article 27

1. Every State has the right to enjoy fully the benefits of world invisible trade and to engage in the expansion of such trade
2. World invisible trade, based on efficiency and mutual and equitable benefit, furthering the expansion of the world economy, is the common goal of all States. The role of developing countries in world invisible trade should be enhanced and strengthened consistent with the above objectives, particular attention being paid to the special needs of developing countries.
3. All States should co-operate with developing countries in their endeavours to increase their capacity to earn foreign exchange from invisible transactions, in accordance with the potential and needs of each developing country and consistent with the objectives mentioned above.

Article 28

All States have the duty to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms

of trade for them, in a manner which is remunerative for producers and equitable for producers and consumers.

CHAPTER III
COMMON RESPONSIBILITIES TO WARDS THE INTERNATIONAL COMMUNITY

Article 29

The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon

Article 30

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States

tions in the field of the environment.

CHAPTER IV
FINAL PROVISIONS

Article 31

All States have the duty to contribute to the balanced expansion of the world economy, taking duly into account the close interrelationship between the well-being of the developed countries and the growth and development of the developing countries, and the fact that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts.

Article 32

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.

Article 33

1. Nothing in the present Charter shall be construed as impairing or derogating from the provisions of the Charter of the United Nations or actions take in pursuance thereof.
2. In their interpretation and application, the provisions of the present Charter are interrelated and each provision should be construed in the context of the other provisions.

Article 34

An item on the Charter of Economic Rights and Duties of States shall be included in the agenda of the General Assembly at its thirtieth session, and thereafter on the agenda of every fifth session. In this way a systematic and comprehensive consideration of the implementation of the Charter, covering both progress achieved and any improvements and additions which might become necessary, would be carried out and appropriate measures recommended. Such consideration should take into account the evolution of all the economic, social, legal and other factors related to the principles upon which the present Charter is based and on its purpose.

2315 th plenary meeting
12 December 1974

DRAFT UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

PREAMBLE AND OBJECTIVES* 1/

*The Working Group has not taken any final decision regarding the use and contents of headings and subheadings appearing in the text.

[1]No drafting was done on the Preamble and Objectives of the Code. However, the following text was drafted during the discussion on other parts of the Code and the decision was taken to place it in one of the substantive introductory parts of the Code:

"For the purposes of this Code, the principles set out in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, should apply in the field of employment, training, conditions of work and life and industrial relations."

DEFINITIONS AND SCOPE OF APPLICATION

1. (a) [The term "transnational corporation" as used this Code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.]

[The term "transnational corporation" as used in this Code means an enterprise whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.]

(b) The term "entities" in the Code refers both parent entities — that is, entities which are the main source of influence over others — and other entities, unless otherwise specified in the Code.

(c) The term "transnational corporation" in the Code refers to the enterprise as a whole or its various entities.

(d) The term "home country" means the country in which the parent entity is located. The term "host country" means a country in which an entity other than the parent entity is located.

"operations" refers to a home or host country in which an entity of a transnational corporation conducts operations.

2. *[The Code is universally applicable in, and to this end is open to adoption by, all States.]*

[The Code is universally applicable in (home and host countries of transnational corporations] [as defined in paragraph 1 (a)], and to this end is open to adoption by, all States [regardless of their political and economic systems and their level of development].]

[The Code is open to adoption by all States and is applicable in all States where an entity of a transnational corporation conducts operations.]

[The Code is universally applicable to all States regardless of their political and economic systems and their level of development.]

3. [This Code applies to all enterprises as defined in paragraph 1 (a) above.]

[To be placed in paragraph 1 (a).]

4. [The provisions of the Code addressed to transnational corporations reflect good practice for all enterprises. They are not intended to introduce differences of conduct between transnational corporations and domestic enterprises. Wherever the provisions are relevant to both, transnational corporations and domestic enterprises should be subject to the same expectations in regard to their conduct.]

[To be deleted]*

5. [Any reference this Code to States, countries or Governments also includes regional groupings of States, to the extent that the provisions of this Code relate to matters within these groupings' own competence, with respect to such competence.]

[To be deleted]

*On the grounds, *inter alia*, that the text within the first pair of brackets goes beyond the mandate of the Intergovernmental Working Group on a Code of Conduct.

A. *General and political*

Respect for national sovereignty and observance of domestic laws, regulations and administrative practices.

6. Transnational corporations should/shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its [full permanent sovereignty] [in accordance with international law] [in accordance with agreements reached by the countries concerned on a bilateral and multilateral basis] over its natural resources [wealth and economic activities] within its territory.

7. [Transnational corporations] [Entities of transnational corporations] [shall/should observe] [are subject to] the laws, regulations, [jurisdiction] and [administrative practices] [explicitly declared administrative practices] of the countries in which they operate. [Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate to the extent required by the national law of these countries.]

8. Transnational corporations should/shall respect the right of each State to regulate and monitor accordingly the activities of their entities operating within its territory.

Adherence to economic goals and development objectives, policies and priorities

9. Transnational corporations should/shall [endeavour to] carry on their activities in conformity with the [declared] [established] development policies, objectives and priorities [established by] the countries in which they operate. [Consistent with their financial, technological and managerial resources and capabilities] [Consistent with the nature, purpose and extent of their business operations] [entities of] transnational corporations should/shall [endeavour to] make a positive contribution towards the achievement of [established] [declared] economic development goals of the countries in which they operate at the national and, where appropriate, the regional level within the framework of regional integration programmes. Transnational corporations should/shall [be prepared to] engage in consultations and

they operate with governmental authorities in the countries in which they operate with a view to maximizing their contributions to the development process thereby establishing mutually beneficial relations with these countries.

10. Transnational corporations shall/should carry out their operations in conformity with relevant intergovernmental co-operative arrangements concluded by countries in which they operate.

Review and renegotiation of contracts

11. Contracts between Governments and transnational corporations should be negotiated and implemented in good faith. In such contracts, especially long-term ones, review or renegotiation clauses should normally be included.

In the absence of such clauses and where has been a fundamental change of the circumstances on which the contract or agreement was based, transnational corporations, acting in good faith, shall/should co-operate with Governments for the review or renegotiation of such contract or agreement.

Review or renegotiation of such contracts or agreements shall/should be subject to [the laws of the host country] [relevant national laws and international legal principles.]

Adherence to socio-cultural objectives and values

12. Transnational corporations should/shall respect the social and cultural objectives, values and traditions of the countries in which they operate. While economic and technological development is normally accompanied by social change, transnational corporations should/shall avoid practices, products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by Governments. For this purpose, transnational corporations should/shall respond positively to requests for consultations from Governments concerned.

Respect for human rights and fundamental freedoms

13. Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex,

religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatmend.

Non-collaboration by transnational corporations with racist minority régimes in southern Africa

14. In accordance with the efforts of the international community towards the elimination of *apartheid* in South Africa and its continued illegal occupation of Namibia,

[(a) Transnational corporations shall progressively reduce their business activities and make no further investment in South Africa and immediately cease all business activities in Namibia;

(b) Transnational corporations shall refrain from collaborating directly or indirectly with that régime especially with regard to its recist practices in South Africa and illegal occupation of Namibia to ensure the successful implementation of United Nations resolutions in relation to these two countries.]

[Transnational corporations operating in southern Africa

(a) Should respect the national laws and regulations adopted in pursuance of Security Council decisions concerning southern Africa;

(b) Should within the framework of their business activities engage in appropriate activities with a view to contributing to the elimination of racial discrimination practices under the system of *apartheid*.]

Non-interference in internal political affairs

15. Transnational corporations should/shall not interfere [illegally] in the internal [political] affairs of the countries in which they operate [by resorting to] [They should refrain from any] [subversive and other [illicit]] activities [aimed at] undermining the political and social systems in these countries.

16. Transnational corporations should/shall not engage in activities of a political nature which are not permitted by the laws and established policies and administrative practices of the countries in which they operate.

17. Transnational corporations should/shall not interfere in [any affairs concerning] intergovernmental relations [, which are the sole concern of Governments].

18. Transnational corporations shall/should not request Governments acting on their behalf to take the measures referred to in the second sentence of paragraph 65.

19. With respect to the exhaustion of local remedies, transnational corporations should/shall not request Governments to act on their behalf in any manner inconsistent with paragraph 65.

Abstention from corrupt practices

20. [Transnational corporations shall refrain, in their transactions, from the offering, promising or giving of any payment, gift or other advantage to or for the benefit of a public official as consideration for performing or refraining from the performance of his duties in connexion with those transactions.

Transnational corporations shall maintain accurate records of payments made by them, in connexion with their transactions, to any public official or intermediary. They shall make available these records to the competent authorities of the countries in which they operate, upon request, for investigations and proceedings concerning those payments.]

[For the purposes of this Code, the principles set out in the International Agreement on Illicit Payments adopted by the United Nations should apply in the area of abstention from corrupt practices.]*

B. *Economic, financial and social*

Ownership and control

21. Transnational corporations should/shall so allocate [endeavour so to allocate] their decision-making powers among their entities as to enable them to contribute to the economic and social development of the countries in which they operate.

*To be included in one of the substantive introductory parts of the Code.

22. To the extent permitted by national laws, policies and regulations of the country in which it operates, each entity of a transnational corporation [consistent with its legal status and obligations] should/shall co-operate with the other entities so as to enable each entity to meet effectively the requirements established by the laws, policies and regulations of the country in which it operates.

23. Transnational corporations shall/should co-operate with Governments and nationals of the countries in which they operate in the implementation of national objectives for local equity participation and for the effective exercise of control by local partners as determined by equity, contractual terms in non-equity arrangements or the laws of such countries.

24. Transnational corporations should/shall carry out their personnel policies in accordance with the national policies of each of the countries in which they operate which give priority to the employment and promotion of its [adequately qualified] nationals at all levels of management and direction of the affairs of each entity so as to enhance the effective participation of its nationals in the decision-making process.

25. Transnational corporations should/shall contribute to the managerial and technical training of nationals of the countries in which they operate and facilitate their employment at all levels of management of the entities and enterprises as a whole.

Balance of payments and financing

26. Transnational corporations should/shall carry on their operations in conformity with laws and regulations and with full regard to the [declared] policy objectives of the countries in which they operate, particularly developing countries, relating to balance of payments, financial transactions and other issues dealt with in the subsequent paragraphs of this section.

27. Transnational corporations should/shall respond positively to requests for consultation on their activities from the Governments of the countries in which they operate, with a view to contributing to the alleviation of pressing problems of balance of payments and finance of such countries.

government policies] [Consistent with the purpose, nature and extent of their operations] transnational corporations should/shall contribute to the promotion of exports and the diversification of exports [and imports] in the countries in which they operate and to an increased utilization of goods, services and other resources which are available in these countries.

29. Transnational corporations should/shall be responsive to requests by Governments of the countries in which they operate, particularly developing countries, concerning the phasing over a limited period of time of the repatriation of capital in case of disinvestment or remittances of accumulated profits, when the size and timing of such transfers would cause serious balance-of-payments difficulties for such countries.

30. Transnational corporations should/shall not, [contrary to prudent financial practices], engage in short-term financial operations or transfers (short-term financial transactions) or defer or advance foreign exchange payments, including intra-corporate payments, in a manner which would increase currency instability and thereby cause serious balance-of-payments difficulties for the countries concerned.

31. [In respect of their intra-corporate transactions,] transnational corporations should/shall not impose restrictions on their entities, [beyond generally accepted commercial practices] regarding the transfer of goods, services and funds which would cause serious balance-of-payments difficulties for the countries in which they operate.

32. When having recourse to the money and capital markets of the countries in which they operate, transnational corporations should/shall not [beyond generally accepted financial practices] engage in activities which would have a significant adverse impact on the working of local markets, particularly by restricting the availability of funds to other enterprises [than international corporations]. When issuing shares with the objective of increasing local equity participation in an entity operating in such a country, or engaging in long-term borrowing in the local market, transnational corporations shall/should consult with the Government of the country concerned upon its request on the effects of such transactions on the local money and capital markets.

33. In respect of their intra-corporate transactions, transnational corporations should/shall not use pricing policies that are not based on relevant market prices, or, in the absence of such prices, the arm's length principle, which have the effect of modifying the tax base on which their entities are assessed or of evading exchange control measures [or customs valuation regulations] [or which [contrary to national laws and regulations] adversely affect economic and social conditions] of the countries in which they operate.

Taxation

34. Transnational corporations should/shall not, contrary to the laws and regulations of the countries in which they operate, use their corporate structure and modes of operation, such as the use of intra-corporate pricing which is not based on the arm's length principle, or other means, to modify the tax base on which their entities are assessed.

Competition and restrictive business practices

35. [(a) Transnational corporations shall conform to the laws and regulations relating to restrictive business practices in the countries in which they operate and consult and co-operate with the competent authorities of those countries in charge of controlling restrictive business practices.

(b) Transnational corporations shall refrain from restrictive business practices adversely affecting international trade, particularly that of developing countries and the economic development of these countries.

(c) Transnational corporations in their intra-group transactions and in their dealings with other enterprises shall/should adhere to the relevant provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by the General Assembly in its resolution 35/63 of 5 December 1980, and in particular refrain from the practices listed in section D thereof containing principles and rules for enterprises including transnational corporations.]

[For the purposes of this Code, the relevant provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the

Assembly in its resolution 35/63 of 5 Desember 1980 shall/should apply in the field of restrictive business practices.]*

Transfer of technology

36. [Transnational corporations shall conform to the transfer of technology laws and regulations of the countries in which they operate. They shall co-operate with the competent authorities of those countries in assessing the impact of international transfer of technology in their economies and consult with them regarding the various technological options which might help those countries, particularly developing countries, to attain their economic and social development.

Transnational corporations in their transfer of technology transactions, including intra-corporate transactions, shall avoid practices which adversely affect the international flow of technology, or otherwise hinder the economic and technological development of countries, Particularly developing countries.

Transnational corporations shall contribute to the strengthening of the scientific and technological capacities of developing countries, in accordance with the science and technology policies and priorities of those countries. Transnational corporations shall undertake substantial research and development activities in developing countries and make full use of local resources and personnel in this process.]

[For the purposes of this Code the relevant provisions of the International Code of Conduct on the Transfer of Technology adopted by the General Assembly in its resolution ____ of _____ shall/should apply in the field of transfer of technology.]*

Consumer protection

37. Transnational corporations shall/should carry out their operations, in particular production and marketing, in accordance with national laws, regulations, administrative practices and policies concerning consumer protection of the countries in which they operate. Transnational corporations shall/should also perform their activities with due regard to relevant international standards,

*To be included in one of the substantive introductory part of the Code.

so that they do not cause injury to the health or endanger the safety of consumers or bring about variations in the quality of products in each market which would have detrimental effects on consumers.

38. Transnational corporations shall/should, in respect of the products and services which they produce or market or propose to produce or market in any country, supply to the competent authorities of that country on request or on a regular basis, as specified by these authorities, all relevant information concerning:

Characteristics of these products or services which may be injurious to the health and safety of consumers including experimental uses and related aspects;

Prohibitions, restrictions, warnings and other public regulatory measures imposed in other countries on grounds of health and safety protection on these products or services.

39. Transnational corporations shall/should disclose to the public in the countries in which they operate all appropriate information on the contents and, to the extent known, on possible hazardous effects of the products they produce or market in the countries concerned by means of proper labelling, informative and accurate advertising or other appropriate methods. Packaging of their products should be safe and the contents of the product should not be misrepresented.

40. Transnational corporations shall/should be responsive to requests from Government of the countries in which they operate and be prepared to co-operate with international organizations in their efforts to develop and promote national and international standards for the protection of the health and safety of consumers and to meet the basic needs of consumers.

Environmental protection

41. Transnational corporations shall/should carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations shall/should, in performing their activities, take steps to protect the environment and where damaged to [restore it to the

undertakings and apply adequate technologies for this purpose.

42. Transnational corporations shall/should in respect of the products, processes and services they have introduced or propose to introduce in any country, supply to the competent authorities of that country on request or on a ragular basis, as specified by these authorities, all relevant information concerning:

Characteristics of these products, processes and other activities including experimental uses and related aspects which may harm the environment and the measures and costs necessary to avoid or at least to mitigate their harmful effects;

Prohibitions, restrictions, warnings and other public regulatory measures imposed in other countries on grounds of protection of the environment on these products, processes and services.

43. Transnational corporations shall/should be responsive to requests from Governments of the countries in which they operate and be prepared where appropriate to co-operate with international organizations in their efforts to develop and promote national and international standards for the protection of the environment.

C. *Disclosure of information*

44. Transnational corporations should disclose to the public in the countries in which they operate, by appropriate means of communication, clear, full and comprehensible information on the structure, policies, activities and operations of the transnational corporation as a whole. The information should include financial as well as non-financial items and should be made available on a regular annual basis, normally within six months and in any case not later than 12 months from the end of the financial year of the corporation. In addition, during the financial year, transnational corporations should wherever appropriate make available a semi-annual summary of financial information.

The financial information to be disclosed annually should be provided where appropriate on a consolidated basis together with suitable explanatory notes and should include, *inter alia*, the following:

(1) A balance sheet;
(2) An income statement, including operating results and sales;

(3) A statement of allocation of net profits or net income;
(4) A statement of the sources and uses of funds;
(5) Significant new long-term capital investment;
(6) Research and development expenditure.

The non-financial information referred to in the first subparagraph should include, *inter alia:*

(1) The structure of the transnational corporations, showing the name and location of the parent company, its main entities, its percentage ownership, direct and indirect, in these entities, inlcuding shareholdings between them;

(2) The main activity of its entities;

(3) Employment information including average number of employees;

(4) Accounting policies used in compiling and consolidating the information published;

(5) Policies applied in respect of transfer pricing.

The information povided for the transnational corporation as a whole should as far as practicable be broken down:

By geographical area or country, as appropriate, with regard to the activities of its main entities, sales, operating results, significant new investments and number of employees;

By major line of business as regards sales and significant new investment.

The method of breakdown as well as details of information provided should/shall be determined by the nature, scale and interrelationships of the transnational corporation's operations, with due regard to their significance for the areas or countries concerned.

The extent, detail and frequency of the information provided should take into account the nature and size of the transnational corporation as a whole, the requirements of confidentiality and effects on the transnational corporation's competitive position as well as the cost involved in producing the information.

The information herein required should, as necessary, be in addition to information required by national laws, regulations and

... practices of the countries in which transnational corporations operate.

45. Transnational corporations should/shall supply to the competent authorities in each of the countries in which operate, upon request or on a regular basis as specified by those authorities, and in accordance with national legislation, all information required for legislative and administrative purpose relevant to the activities and policies of their entities in the country concerned.

Transnational corporations should/shall, to the extent permitted by the provisions of the relevant national laws, regulations, administrative practices and policies of the countries concerned, supply to competent authorities in the countries in which they operate information held in other countries needed to enable them to obtain as true and fair view of the operations of the transnational corporation concerned as a whole in so far as the information requested relates to the activities of the entities in the countries seeking such information.

The provisions of paragraph 51 concerning confidentiality shall apply to information supplied under the provisions of this paragraph.

46. With due regard to the relevant provisions of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and in accordance with national laws, regulations and practices in the field of labour relations, transnational corporations should/shall provide to trade unions or other representatives of employees in their entities in each of the countries in which they operate, by appropriate means of communication, the necessary information on the activities dealt with in this code to enable them to obtain a true and fair view of the performance of the local entity and, where appropriate, the corporation as a whole. Such information should/shall include, where provided for by national law and practices, *inter alia*, prospects or plans for future development having major economic and social effects on the employees concerned.

Procedures for consultation on matters of mutual concern should/shall be worked out by mutual agreement between entities of transnational corporations and trade unions or other

representatives of employees in accordance with national law and practice.

Information made available pursuant to the provisions of this paragraph should be subject to appropriate safeguards for confidentiality so that no damage is caused to the parties concerned.

TREATMENT OF TRANSNATIONAL CORPORATIONS

A. *General treatment of transnational corporations by the countries in which they operate*

47. States have the right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors.

48. Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law].

49. Consistent with [national constitutional systems and] national needs to [protect essential/national economic interests,] maintain public order and to protect national security, [and with due regard to provisions of agreements among countries, particularly developing countries,] entities of transnational corporations should be given by the countries in which they operate [the treatment] [treatment no less favourable than that] [appropriate treatment].* accorded to domestic enterprises under their laws, regulations and administrative practices [when the circumstances in which they operate are similar/identical] [in like situations]. [Transnational corporations should not claim preferential treatment or the incentives and concessions granted to domestic enterprises of the countries in which they operate.] [Such treatment should not necessarily include extension to entities of transnational corporations of incentives and concessions granted to domestic enterprises

*In this alternative, the sentence will end here.

50. [Endeavouring to assure the clarity and stability of national policies, laws, regulations and administrative practices is of acknowledged importance. Laws, regulations and other measures affecting transnational corporations should be publicly and readily available. Changes in them should be made with proper regard to the legitimate rights and interests of all concerned parties, including transnational corporations.]

[To be deleted]

51. Information furnished by transnational corporations to the authorities in each of the countries in which they operate containing [legitimate business secrets] [confidential business information] should be accorded reasonable safeguards normally applicable in the area in which the information is provided, particularly to protect its confidentiality.

52. [In order to achieve the purposes of paragraph 25 relating to managerial and technical training and employment of nationals of the countries in which transnational corporations operate, the transfer of those nationals between the entities of a transnational corporation should, where consistent with the laws and regulations of the countries concerned, be facilitated.]

[To be deleted)

53. [Transnational corporations should be able to transfer freely and without restriction all payments relating to their investments such as income from invested capital and the repatriation of this capital when this investment is terminated, and licensing and technical assistance fees and other royalties, without prejudice to the relevant provisions of the "Balance of payments and financing" section of this Code and, in particular, its paragraph 29.]

[To be deleted]

B. *Nationalization and compensation*

54. [In the exercise of its right to nationalize or expropriate totally or partially the assets of transnational corporation operating in its

**Some delegations preferred not to have a second sentence.

territory, the State adopting those measures should pay adequate compensation taking into account its own laws and regulations and all the circumstances which the State may deem relevant. When the question of compensation gives rise to controversy or should there be a dispute as to whether a nationalization or expropriation has taken place, it shall be settled under the domestic law of the nationalizing or expropriating State and by its tribunals.]

[In the exercise of their sovereignty, States have the right to nationalize or expropriate foreign-owned property in their territory. Any such taking of property whether direct or indirect, consistent with international law, must be non-discriminatory, for a public purpose, in accordance with due process of law, and not be in violation of specific undertakings to the contrary by contract or other agreement; and be accompanied by the payment of prompt, adequate and effective compensation. Such compensation should correspond to the full value of the property interests taken, on the basis of their fair market value, including going concern value, or where appropriate other internationally accepted methods of valuation, determined apart from any effects on value caused by the expropriatory measure or measures, or the expectation of them. Such compensation payments should be freely convertible and transferable, and should not be subject to any restrictive measures applicable to transfers of payments, income or capital.]

[In the exercise of its sovereignty, a State has the right to nationalize or expropriate totally or partially the assets of transnational corporations in its territory, and appropriate compensation should be paid by the State adopting such measures, in accordance with its own laws and regulations and all the circumstances which the state deems relevant. Relevant international obligations freely undertaken by the States concerned apply.]

Compensation [A State has the right to nationalize or expropriate the assets of transnational corporations in its territory against, in accordance with its own laws and regulations and its international obligations.]

C. *Jurisdiction*

55. [Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate.]

when agreed among the Governments concerned, to procedures for dealing with international legal claims. Such action should not in any event amount to the use of any type of coercive measures not consistent with the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

IMPLEMENTATION OF THE CODE OF CONDUCT

A. *Action at the national level*

66. In order to ensure and promote the implementation of the Code at the national level, States shall/should, *inter alia:*

(a) Publicize and disseminate the Code;

(b) Follow the implementation of the Code within their territories;

(c) Report to the United Nations Commission on Transnational Corporations on the action taken at the nation level to promote the Code and on the experience gained from its implementation;

(d) Take actions to reflect their support for the Code and take into account the objectives of the Code as reflected in its provisions when introducing, implementing and reviewing laws, regulations and administrative practices on matters dealt with in the Code.

B. *International institutional machinery*

67. The United Nations Commission on Transnational Corporations shall assume the functions of the international institutional machinery for the implementation of the Code. In this capacity, the Commission shall be open to the participation of all States having accepted the Code. [It may establish the subsidiary bodies and specific procedures it deems necessary for the effective discharge of its functions.] The United Nations Centre on Transnational Corporations shall act as the secretariat to the Commission.

68. The Commission shall act as the focal international body within the United Nations system for all matters related to the Code. It

[shall establish and maintain close contacts with other United Nations organizations and specialized agencies dealing with matters related to the Code and its implementation with a view to co-ordinating work related to the Code. When matters covered by international agreements or arrangements, specifically referred to in the Code, which have been worked out in other United Nations forums, arise, the Commission shall forward such matters to the competent bodies concerned with such agreements or arrangements.

69. The Commission shall have the following functions:

(a) To discuss at its annual sessions matters related to the Code. If agreed by the Governments engaged in consultations on specific issues related to the Code, the Commission shall facilitate such intergovernmental consultations to the extent possible. [Representatives of trade unions, business, consumer and other relevant groups may express their views on matters related to the Code throught the non-governmental organizations represented in the Commission.]

(b) Periodically to assess the implementation of the Code, such assessments being based on reports submitted by Governments and, as appropriate, on documentation from United Nations organizations and specialized agencies performing work relevant to the Code and non-governmental organizations represented in the Commission. The first assessment shall take place not earlier than two years and not later than three years after the adoption of the Code. The second assessment shall take place two years after the first one. The Commission shall determine whether a periodicity of two years is to be maintained or modified for subsequent assessments. The former of assessments shall be determined by the Commission.

[(c) To provide [, upon the request of a Government,] clarification of the provisions of the Code in the light of actual situations in which the applicability and implications of the Code have been the subject of intergovernmental consultations. In clarifying the provisions of the Code, the Commission shall not draw conclusions concerning the conduct of the parties involved in the situation which led to the request for clarification. The clarification is to be restricted to issues illustrated by such a

situation. The detailed procedures regarding clarification are to be determined by the Commission.]

[To be deleted.]

(d) To report annually to the General Assembly [through the Economic and Social Council] on its activities regarding the implementation of the Code.

(e) To facilitate intergovernmental arrangements or agreements on specific aspects relating to transnational corporations upon request of the Governments concerned.

70. The United Nations Centre on Transnational Corporations shall provide assistance relating to the implementation of the Code, *inter alia*, by collecting, analysing and disseminating information and conducting research and surveys, as required and specified by the Commission.

C. *Review procedure*

71. The Commission shall make recommendations to the General Assembly [through the Economic and Social Council] for the purpose of reviewing the Code. The first review shall take place not later than six years after the adoption of the Code. The General Assembly shall establish, as appropriate, the modalities for reviewing the Code.*

*Further discussion of this provision will take place after related issues, such as the mode of adoption and the legal nature of the Code, have been settled.