ҚАЗАҚСТАН РЕСПУБЛИКАСЫ БІЛІМ ЖӘНЕ ҒЫЛЫМ МИНИСТРЛІГІ
Л.Н. ГУМИЛЕВ АТЫНДАҒЫ ЕУРАЗИЯ ҰЛТТЫҚ УНИВЕРСИТЕТІ

ЕУРАЗИЯ ҰЛТТЫҚ УНИВЕРСИТЕТІ

ЖАС ҒАЛЫМДАР КЕҢЕСІ

Студенттер мен жас ғалымдардың «ҒЫЛЫМ ЖӘНЕ БІЛІМ - 2016» атты XI Халықаралық ғылыми конференциясының БАЯНДАМАЛАР ЖИНАҒЫ

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THE IMPACT OF FREE TRADE AGREEMENTS ON TRANSNATIONAL CORPORATIONS BY THE EXAMPLES OF NAFTA AND ACEAN

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In the frame of the modern global economy the activities of transnational corporations are heavily dependent on the investment policies, which get a new shape in the scope of continuing regionalism. Therefore, it is worth to start the analysis of the influence of the investment policy on transnational corporations from the "lightest" form of regional integration, namely free trade agreement. In this context, the most prominent free trade agreements are the North American Free Trade Agreement (NAFTA) and the Association of Southeast Asian Nations (ACEAN).

The whole Chapter 11 of NAFTA is dedicated to provisions regarding investment. Section A of the Chapter prescribes that each Member State shall accord to investors of another Member State and their investments treatment no less favorable than the one, which it accords to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The Section prohibits the Member States to impose certain requirements towards investors, such as requirement to export a given level or percentage of goods or services, or requirement to achieve a given level or percentage of domestic content. There are also provisions protecting investor's rights on questions, relating to senior management and boards of directors (no obligatory appointment of individuals of any particular nationality to senior management positions is permitted), transfers (all transfers relating to an investment shall be made freely and without delay), expropriation and compensation (there are strict exceptions when expropriation is possible under compensation) [1].

Provisions of NAFTA, which are related to investment, create very favorable conditions for the transnational corporations of the Member States. It seems that they mainly impose obligations upon the Member States making almost impossible future legislation change, which might affect investment negatively. The only provision of Section A, which seems to protect the Member States' rights for taking any measures against investors is art. 1114 ("Environmental Measures"). It states that a Member State has a right to adopt, maintain or enforce any measure to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The most important special feature of investment policy in the frame of NAFTA is contained in Section B of Chapter 11, which is called "Settlement of Disputes between a Party and an Investor of Another Party". It establishes a mechanism for the settlement of investment disputes between investor and a Member State before a tribunal. When investor supposes that the investment provisions of NAFTA (Section A of Chapter 11) were violated by certain Member State he may claim against such Member State both on his own behalf and on behalf of the enterprise. According to art. 1120 of NAFTA, the claim might be submitted under:

- the International Center for Settlement of Investment Disputes (ICSID) Convention if both the disputing Party and the Party of the investor are parties to the Convention; or
- the Additional Facility Rules of ICSID if either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- the UNCITRAL Arbitration Rules.

This range of choice is necessary as one of NAFTA Members, Mexico has never been and currently is not a party to ICSID rules. The final award of the tribunal is binding for disputing parties.

This regional investment dispute settlement mechanism is effectively used by investors of the NAFTA Member States: there are currently more than 60 disputes on different stages [2].

In 2004 two transnational corporations, namely Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, submitted a claim to arbitration against the United Mexican States arguing that amendments to tax legislation adopted by the United Mexican States breached Chapter 11 of NAFTA. In 2001 Mexican Congress amended its tax legislation imposing a 20 percent excise tax on soft drinks and syrups and the same tax on services used to transfer and distribute soft drinks and syrups. The transnational corporations alleged that the legislation amendments and resulting imposition of the tax had had a direct impact on their investment, causing substantial loss or damage in violation of the art. 1102, art. 1106, and art. 1110 of NAFTA. In its final award the Arbitral Tribunal found that the United Mexican States breached Article 1102 (National Treatment) and Article 1106 (Performance Requirements) with regard to the claimants' investment in Mexico and ordered the Member State to pay the damage to thetransnational corporations [3].

ASEAN was born on 8 August 1967. Since its foundation the Association has enlarged twice and nowadays includes ten countries, among which are Brunei, Cambodia, Indonesia, Laos (Lao PDR), Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam [4].

ASEAN is a crucial region of the global economy in terms of foreign direct investment. In 2014 ASEAN countries attracted 136 181 million (USD) foreign direct investment inflows out of 1 354 046 million (USD) of the world foreign direct investment flows in total. It is almost half of a European Union amount of foreign direct investment inflows in 2014 (280 124 million USD), while ASEAN includes just 10 countries [5, p. 236]. The most important sectors are manufacturing and trade. In 2014 foreign direct investment inflows into ASEAN were 22 215,4 million (USD) in manufacturing sector and 17 055,2 million (USD) in wholesale and retail trade [6].

The first prominent steps towards coordinated investment policy were taken in December 1987, when ASEAN countries signed the Agreement for the promotion and protection of investments. Later this Agreement was superseded by several documents and currently its successor is ASEAN Comprehensive Investment Agreement signed on February 26, 2009. The document aims to create a free and open investment regime in ASEAN for the purpose of economic integration [7]. Just like the Chapter 11 of NAFTA the ASEAN Comprehensive Investment Agreement requires from each contracting party (the ASEAN Member State) to provide investors of all other contracting parties and their investment with the treatment not less favorable than the one provided for own investors or for investors of other countries. In fact, the art. 5 (“National treatment”) and art. 6 (“Most-favored-nation treatment”) of the ASEAN Comprehensive Investment Agreement seem to be inspired a lot by the art. 1102 and 1103 of NAFTA respectively:

Art. 5 of ASEAN Comprehensive Investment Agreement: 1. Each Member State shall accord to investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Member State shall accord to investments of investors of any other Member State treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Art. 1102 of NAFTA: 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments...

Art. 6 of ASEAN Comprehensive Investment Agreement: 1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. 2. Each Member State shall accord to investments of investors of

another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments...

Art. 1103 of NAFTA: 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Besides this, the ASEAN Comprehensive Investment Agreement provides nationals or companies of the Member States with certain privileges that are very similar to those listed in NAFTA. For example, the Member State shall not require that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality, while it may require that a majority of the board of directors of a juridical person be of a particular nationality, or resident in the territory of the Member State, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment (art. 8 "Senior Management and Board of Directors"). This provision is almost identical to art. 1107 of NAFTA.

The ASEAN Comprehensive Investment Agreement ensures that each Member State shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory (similar to art. 1109 of NAFTA). The expropriation and compensation provisions (art. 14) are also very similar to NAFTA (art. 1110).

Section B of ASEAN Comprehensive Investment Agreement is dedicated to investment disputes between an investor and a Member State. The investment dispute settlement mechanism requires that the investor prior to submitting a claim goes through consultations. In case an investment dispute has not been resolved within 180 days, the investor might submit a claim to arbitration. Art. 33 of theASEAN Comprehensive Investment Agreement provides an investor with a choice to submit a claim:

- to the courts or administrative tribunals of the disputing Member State, if they have jurisdiction over claims; or
- under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, if both the disputing Member State and the Member State of investor are parties to the ICSID Convention; or
- under the ICSID Additional Facility Rules, if either of the disputing Member State or the Member State of investor is a party to the ICSID Convention; or
- under the UNCITRAL Arbitration Rules; or
- to the Regional Center for Arbitration at Kuala Lumpur; or
- any other regional center for arbitration in ASEAN; or
- if the disputing parties agree, to any other arbitration institution.

It is obvious that ASEAN learned the experience of NAFTA in the question of investment disputes' settlement and modified it. Thus, for example, art. 33 of the ASEAN Comprehensive Investment Agreement gives a much wider range of choice to a disputing investor than art. 1120 of NAFTA.

In conclusion it is worth to say that the North American Free Trade Agreement provides favorable and safe conditions for investors' of the Member States and protects their interests. Such position is not surprising as the main driving force of NAFTA is the USA, which alongside with Europe and Japan gave a birth to many powerful corporations that eventually became transnational corporations. However, there are no explicit rules governing third countries' investment in NAFTA. This part is not regulated at the regional level but remains a prerogative for the Member States. The continuing integration of NAFTA lets to suppose that the Member States might develop common

foreign investment policy which would affect transnational corporations originating out of NAFTA region in the future.

The ASEAN Comprehensive Investment Agreement, on its turn, is heavily inspired by the Chapter 11 of NAFTA. Its regional policy on investment falls into North American tendency and provides guarantees and favorable conditions to the international business represented by transnational corporations.

However, the ASEAN Comprehensive Investment Agreement in contrast to NAFTA has provisions relating to third countries' investment in ASEAN. For example, in accordance with the art. 24 and 25 of the ASEAN Comprehensive Investment AgreementMember States shall cooperate in order to increase and facilitate foreign investment into ASEAN through encouraging the growth and development of ASEAN small and medium enterprises and multinational enterprises, enhancing industrial complementation and production networks among multinational enterprises in ASEAN, creating the necessary environment for all forms of investments, streamlining and simplifying procedures for investment applications and approval, establishing one-stop investment centers, etc.

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ЭКОЛОГИЧЕСКАЯ БЕЗОПАСНОСТЬ — ОДИН ИЗ ПРИОРИТЕТОВ ГОСУДАРСТВЕННОЙ ПОЛИТИКИ РК

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Экологическая безопасность один из важных аспектов национальной безопасности Казахстана. Правовой основой обеспечения национальной безопасности, в том числе экологической безопасности как вида национальной безопасности, является закон «О национальной безопасности Республики Казахстан» от6 января 2012 года.

Ключевое понятие «экологическая безопасность», согласно данного документа есть «состояние защищенности жизненно важных интересов и прав человека и гражданина, общества и государства от угроз, возникающих в результате антропогенных и природных воздействий на окружающую среду» [1, С. 2.]. Одним из принципов национальной безопасности РК является «единство, взаимосвязь и сбалансированность всех видов национальной безопасности, оперативное изменение их приоритетности в зависимости от развития ситуации». В данном контексте экологическая безопасность РК возведена в ранг государственных приоритетов.