INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 4 AND ISSUE 2 OF 2024

INSTITUTE OF LEGAL EDUCATION

INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN - 2583-2344

(Free and Open Access Journal)

Journal's Home Page – https://ijlr.iledu.in/

Journal's Editorial Page - https://ijlr.iledu.in/editorial-board/

Volume 4 and Issue 2 of 2024 (Access Full Issue on - https://ijlr.iledu.in/volume-4-and-issue-2-of-2024/)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 4 AND ISSUE 2 OF 2024

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

EXAMINING THE IMPACT OF MULTI-NATIONAL CORPORATIONS ON INTERNATIONAL LAW

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BEST CITATION - VANSH CHADHA & CHERRY SINGHAL, EXAMINING THE IMPACT OF MULTI-NATIONAL CORPORATIONS ON INTERNATIONAL LAW, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 4 (2) OF 2024, PG. 1423-1431, APIS – 3920 – 0001 & ISSN - 2583-2344

ABSTRACT

The subject of Multi-National Corporations (MNCs) within the framework of international law has become increasingly significant in today's globalised world. Multinational corporations are major global economic players, with their economic influence extending worldwide. This economic power can grant them significant leverage over the governments of the countries in which they operate, as the income generated by these corporations often plays a crucial role in those countries' economies. Additionally, the actions of multinational corporations can impact a country's legal framework and potentially lead to violations of international law, which may be observed by multiple countries. The influence of multinational corporations can have both positive and negative effects on the host state.

In cases where multinational corporations have a negative impact that results in a breach of either national or international law, the responsible party must face penalties. The entity held accountable for its actions, with associated rights and obligations, is referred to as a legal subject. In the realm of international law, when violations occur, the entity at fault is designated as a subject of international law. These violations may arise from conflicts between legal subjects and can involve various legal subjects.

Multinational corporations are considered subjects of international law and thus also have a significant impact on international law. In such instances, multinational corporations can both violate international law and take legal action in response, which is related to other subjects of international law. This is especially prominent in the financial sector, where multinational corporations often enter into agreements, particularly those related to financial matters.

Keywords: *Multi-National Corporations, International Law, Legal Personality, Human Rights.*

INTRODUCTION

Over the past four decades, there has been a significant increase in globalised business activities. Currently, it is estimated that approximately 100,000 multinational corporations (MNCs) are responsible for around 25% of the world's gross domestic product (GDP), with a turnover that surpasses the public budgets of many countries.[9] The private sector now possesses substantial economic and social influence, expanding into sectors traditionally managed by governments, such as infrastructure, housing, healthcare, and even organizing elections.

While MNCs can contribute to the economic and technological progress of societies, they also have the potential to infringe upon human rights, harm the environment, or even engage in unlawful activities. National laws often struggle to create a consistent regulatory framework for MNCs due to the global fragmentation of their operations, decentralized network structures,

[9] John Mikler, 'Global Companies as Actors in Global Policy and Governance,' in John Mikler (ed), The Handbook of Global Companies (Wiley-Blackwell 2013) 1, 4 ff.

and the flexibility to relocate activities and profits. Moreover, economically weaker nations may depend on MNC investments and, as a result, may be hesitant to implement and enforce stringent human rights and environmental standards to attract foreign investors.[10]

Recognizing the limitations of domestic legislation in effectively regulating MNCs, attention has turned towards international law. This shift is characterized by two main dynamics. First, in acknowledgment of the positive impacts of international business, endeavours have been made to provide companies with a stable operating environment by granting them rights under international investment and human rights law. Second, in response to numerous reports of MNCs being involved in human rights violations, severe environmental harm, and criminal activities, various initiatives have sought to hold these companies accountable under international human rights, environmental, and criminal law.

INTERNATIONAL LEGAL PERSONALITY

The central debate in international law regarding multinational corporations (MNCs) centres around the question of whether they can be considered subjects of international law. In other words, this debate seeks to determine whether MNCs can have international rights and duties and if they can assert these rights by making international claims.[11]

Traditionally, international law was seen as governing interactions solely between sovereign states. However, with the emergence of international organizations and international human rights law, the scope of entities considered subjects of international law has gradually expanded. Legal positivists argue that states, as the primary subjects of international law[12], have the authority to elevate non-state actors to the status of international law subjects by conferring rights and obligations upon them. Non-state actors, therefore, derive their status as international law subjects from the recognition and endorsement of states.

Following these formal prerequisites, most international legal scholars argue that MNCs do not possess international legal personality. They contend that MNCs have not been granted specific rights or obligations under international law. While companies benefit from various international law provisions, they may not necessarily possess corresponding rights. Some international legal scholars, however, have recognized MNCs as international law subjects. They have taken a more practical approach, considering the significant involvement of MNCs in international law matters and the increasing privatization of international law, particularly in the fields of investment law and arbitration. One perspective even suggests a rebuttable presumption that MNCs are international law subjects unless states and international organizations expressly state otherwise in a legally binding manner. Some scholars have left the question open, sometimes emphasizing that there are no legal barriers to acknowledging MNCs as international law subjects.[13]

To move beyond the traditional subject/object distinction, which has led to extensive and often inconclusive debates about the precise categorization of entities, some legal scholars have proposed alternative approaches. These approaches emphasize the capacity of non-state actors to hold rights and obligations, thereby granting limited international legal personality to MNCs. Some scholars focus on the roles, duties, rights, and responsibilities of

[10] Gatto (n 3) 14; Nicolás Zambrana Tévar, 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' (2012) 4 Cuadernos de Derecho Transnacional 398, 400.

[11] Peter Malanczuk, Akehurst's Modern Introduction to International Law (7th edn, Routledge 1997) 104.

[12] Cassese (n 22) 103; Régis Bismuth, 'Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders' (2009/2010) 38 Denver Journal of International Law and Policy 203, 204.

[13] Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 Recueil des cours 112; Patrick Daillier, Mathias Forteau, and Alain Pellet, Droit international public (8th ed, LGDJ 2009) 714; Simon Chesterman, 'Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones' (2010/2011) 11 Chicago Journal of International Law 321, 327.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 4 AND ISSUE 2 OF 2024

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Published by

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MNCs, rather than being preoccupied with their formal categorization.

RIGHTS UNDER INTERNATIONAL LAW

Irrespective of the ongoing debate concerning their international legal status, it is now widely acknowledged that multinational corporations (MNCs) possess specific rights under international law, particularly in the domains of international human rights law and investment protection.[14]

A. INTERNATIONAL HUMAN RIGHTS LAW

One notable instance of international recognition of MNCs' rights under human rights law is evident in the jurisdiction of the European Court of Human Rights (ECtHR). Art. 34 of the European Convention on Human Rights (ECHR) extends the right to claim a violation of one's rights before the Court to "any person, non-governmental organization, or group of individuals," encompassing corporations within the category of "non-governmental organization." MNCs have taken advantage of this legal avenue and invoked various Convention rights, including those that do not inherently require an individual connection. These rights include procedural rights, freedom of expression, and the right to peaceful enjoyment of possessions.

Although only the latter explicitly mentions legal persons (Art. 1 of the First Protocol to the ECHR), the ECtHR has generously conferred corporate applicants with protection under various other Convention rights. These rights encompass due process guarantees, such as the right to a fair and public hearing, access to a court, equality of arms, and reasonable length of proceedings. Media companies have often utilized the Convention, asserting violations of the right to freedom of expression (Art. 10(1)), especially when the expression involves political elements and addresses contemporary societal issues.[15]

Moreover, the ECtHR has ruled in favour of corporate applicants in several cases, some of which were complex and sparked legal debates. These cases revolved around the protection of business premises as a form of "home," the protection of purely commercial speech under the right to freedom of expression, and the granting of monetary compensation for non-pecuniary damages (Art. 41 ECHR).

In the first case, *Société Colas Est SA and Others v France (2002)*, the ECtHR considered Art. 8(1) ECHR, which protects the right to respect for one's private and family life, home, and correspondence. The claimants argued that their business premises had been unlawfully raided without a court warrant, asserting a violation of their right to respect for their "home." Despite arguments against applying Art. 8(1) ECHR to company facilities, the ECtHR determined that evolving conditions required a dynamic interpretation of the provision, thus recognizing that companies could have rights under Article 8 in certain circumstances.

In the case of *Autronic AG v Switzerland (1990)*, the ECtHR held that "corporate speech," defined as communication to incite the public to purchase a particular product, falls under the purview of Art. 10(1) ECHR, even without specifying the reason and purpose of the expression. This judgment was based on the belief that hindering a purely commercial reception of a television program amounted to an interference with the right to freedom of expression.

The third case, *Comingersoll SA v Portugal (2001)*, involved corporate applicants seeking monetary compensation for non-pecuniary damages under Art. 41 ECHR after successfully arguing that the duration of a civil lawsuit before Portuguese courts violated Art. 6(1) ECHR. The ECtHR ruled in favour of the applicant, stating that companies could indeed suffer non-pecuniary damage, such as harm to their reputation, uncertainty in decision-making, and disruption in management.

[14] Wouters and Chanet (n 7) 342 ff; Clapham (n 14) 82; Gatto (n 3) 61; Alvarez (n 38) 31; Pentikäinen (n 37) 148.

[15] VGT Verein Gegen Tierfabriken v Switzerland ECHR 2001-VI 243; see also Sunday Times v The United Kingdom (n 50).

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It's essential to note that while the ECtHR has extended some provisions of the Convention to corporate applicants that were traditionally seen as applicable only to individuals, this approach is sometimes offset by a more lenient standard of review, particularly in commercial matters. This approach ensures that the review remains within the limits of justifiability and proportionality concerning measures taken on the national level.

In conclusion, companies receive a distinctive level of protection under the jurisdiction of the ECtHR, which has pioneered the application of human rights to corporate applicants. Outside the realm of the ECHR, international human rights protection for companies is less extensive. The UN Human Rights Committee, overseeing the International Covenant on Civil and Political Rights (ICCPR), has recognized that legal entities may enjoy certain rights under the Covenant, but only individuals can formally claim rights violations before the committee. The American Convention on Human Rights explicitly grants human rights protection to human beings, and companies can bring petitions before the Inter-American Commission on Human Rights only on behalf of natural persons.[16]

B. INTERNATIONAL INVESTMENT LAW

International investment law provides multinational corporations (MNCs) with the most robust rights, which are established through various means, including customary international law, bilateral and multilateral investment treaties, and agreements between MNCs and host states. These rules are primarily designed to protect foreign direct investment.

Customary International Law sets forth criteria for lawful expropriation, stipulating that it must be undertaken in the public interest, without arbitrariness, and without discrimination based on nationality, accompanied by the payment of compensation. However, disputes have arisen, particularly between developed and developing countries, regarding the payment of compensation, especially in the context of the developed countries' efforts to establish a New International Economic Order. Developed countries generally support the Hull formula, which mandates prompt, adequate, and effective compensation.

In the late 1950s, the first Bilateral Investment Treaties (BITs) were established to promote and safeguard foreign direct investment. Presently, approximately 3,000 BITs are in force, and while there is no uniform standard, a typical BIT addresses various aspects, including personal and temporal applicability, the definition of investment, the treatment of foreign investment, expropriation, currency transfer, and dispute settlement. Many BITs also include "umbrella clauses," which obligate the contracting parties to honour any other commitments they may have made concerning the investment of a national or a company from the other party, thereby elevating the investor's contractual obligation to an international legal obligation.[17]

Contracting parties commit to observing specific standards with respect to foreign investors, including the principles of fair and equitable treatment, full protection and security, and non-discrimination. Non-discrimination implies that foreign investors should not face unfavourable treatment, compared to nationals of the host state (national treatment) or investors from third countries (most-favoured nation treatment). However, BITs may include exceptions for members of economic, tariff, or monetary unions, common markets, or free trade areas, as well as exceptions related to certain sensitive economic sectors.

A key innovation in BITs is their provisions on dispute settlement, which provide investors with the option to bring claims directly against the host state. This mechanism serves as a potent enforcement tool and contributes to the

[16] Inter-American Commission on Human Rights, Rules of Procedure (2009) art 23; see also Julian Ku, 'The Limits of Corporate Rights Under International Law' (2012) 12 Chicago Journal of International Law 729 (750) with a reference to the Inter-American Commission on Human Rights' decision in Tabacalera Boquerón SA v Paraguay, OEA/Ser.L/V/II.98, Doc 6.

[17] Prosper Weil, 'Problèmes relatifs aux contrats passés entre un État et un particulier' (1969) 128 Recueil des Cours 95, 130 ff.

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effective protection of investments.[18] Typically, investors can choose between pursuing remedies in a domestic court of the host state or through arbitration, either under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or through the International Centre for Settlement of Investment Disputes (ICSID).

Criticism has been directed at BITs for potentially limiting the regulatory freedom of host countries, which could hinder legislation aimed at protecting human rights or the environment. More recent BITs have incorporated exception clauses to address these concerns and account for the public interest. Additional initiatives have sought to provide policy guidance for sustainable development, such as the UNCTAD Investment Policy Framework for Sustainable Development and the IISD Model International Agreement on Investment for Sustainable Development, which aim to strike a balance between the obligations of the host state, the home state, and the investor.[19]

Several multilateral instruments also contain similar provisions on investment protection, including agreements like the North American Free Trade Agreement (NAFTA) and the 1994 Energy Charter Treaty. However, efforts to draft a Multilateral Agreement on Investment (MAI) by the OECD between 1995 and 1998, intended to replace numerous BITs, faced strong opposition from NGOs and developing countries, a lack of support from the business world, and disagreements among negotiating parties, ultimately leading to the project's abandonment. A subsequent initiative under the World Trade Organization (WTO) in 2004 also failed due to concerns from developing nations regarding undue restrictions on their regulatory freedom.

[18] Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' (2009) 3 Human Rights & International Legal Discourse 301.

[19] Christoph Schreuer, 'Investments, International Protection' in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP 2011).

OBLIGATIONS UNDER INTERNATIONAL LAW

Since the 1970s, various initiatives have been launched to address what is perceived as a "governance gap" and to exert control over the influence of multinational corporations (MNCs) by holding them accountable through binding obligations under international law. However, the success of these initiatives has been modest. The prevailing perspective asserts that MNCs do not bear direct obligations under international law. Nevertheless, there is an increasing body of non-binding "soft law" that regulates their behaviour.

A. INTERNATIONAL HUMAN RIGHTS LAW

Multinational corporations (MNCs) have a direct impact on human rights in the communities they operate in. This impact can take various forms, such as employing children or forced labor, operating on indigenous lands without their consent, using discriminatory hiring practices, or causing environmental damage that jeopardizes people's health and lives. MNCs can also indirectly harm human rights by incentivizing governments to violate these rights for business interests or by supporting regimes engaged in human rights abuses by providing infrastructure, financial support, or international legitimacy.

Under current international human rights law, the primary responsibility for upholding and protecting human rights against abuses by private actors like MNCs falls on states. States have enacted domestic laws to regulate the behaviour of companies operating within their borders, but they have not imposed direct and binding human rights obligations on MNCs under international law.

The Universal Declaration of Human Rights (UDHR) suggests that every segment of society, which might include MNCs, should promote respect for human rights through education. However, this statement is only in the preamble and not legally binding. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic,

Social and Cultural Rights (ICESCR) also do not impose direct obligations on private enterprises.

The lack of direct binding obligations for MNCs under international human rights law has been criticized. This criticism is based on concerns about a 'protection gap,' where the safeguarding of human rights relies solely on states. This gap exists due to differences in the recognition of human rights across jurisdictions and variations in enforcement, which depend on the strength of a country's legal system and its reliance on foreign investment. Critics also point to a 'governance gap,' resulting from the significant power of MNCs to harm human rights and the inability of domestic legislatures to effectively address these issues. Some legal scholars also criticize the one-sided nature of international human rights law, which grants MNCs significant rights and benefits without holding them accountable for abuses. Additionally, there are concerns about legal uncertainty for companies that are held to human rights standards they are not legally bound by, leading to increased costs and damage to their reputation.

Various approaches have been proposed to hold MNCs accountable under international human rights law. Some argue that MNCs should bear direct liability for human rights abuses. Initiatives like the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights have been developed for this purpose. However, these initiatives have faced challenges due to concerns about diluting state responsibilities and the inapplicability of many human rights norms to private actors. Some have advocated for aiding and abetting liability for MNCs complicit in human rights violations, but questions about mens-rea and attribution remain unanswered.

In response to the resistance to imposing binding human rights obligations on MNCs, various non-binding 'soft law' instruments have been introduced to establish human rights standards for MNCs. These instruments are seen as a step in the right direction by some but criticized by others as inadequate for effectively protecting human rights and providing legal certainty for the private sector.

1. UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The UN Draft Norms aimed to create binding international human rights obligations for MNCs. However, they faced rejection by the United Nations Commission on Human Rights.

2. Guiding Principles on Business and Human Rights

After the failure of the UN Draft Norms, the Human Rights Council established the mandate of a Special Representative of the UN Secretary-General, John Ruggie, to identify and clarify existing standards and practices. Ruggie developed a framework known as the 'Protect, Respect, and Remedy Framework,' which led to the development of the Guiding Principles on Business and Human Rights. These principles were endorsed by the Human Rights Council in 2011.

3. Human Rights Council Resolution 26/9

Some countries, including Ecuador and South Africa, pushed for a legally binding human rights instrument for MNCs, leading to the establishment of an intergovernmental working group on this matter. The working group's mandate includes the development of a binding human rights instrument for MNCs.

4. OECD Guidelines for Multinational Enterprises

The OECD Guidelines provide non-binding recommendations for responsible business conduct for MNCs operating in participating countries. They include a chapter on human rights and require MNCs to respect human rights, avoid causing or contributing to human rights abuses, and establish responsible supply chain management.

5. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration is a non-binding instrument that recommends MNCs, governments, employers' organizations, and workers' organizations to observe principles related to employment, training, working conditions, and industrial relations on a voluntary basis.

6. Global Compact

The Global Compact is a voluntary initiative for businesses to commit to ten principles related to human rights, labour, the environment, and anti-corruption. However, it lacks monitoring and enforcement mechanisms.

7. Self-regulation

Many MNCs opt for voluntary self-regulation, including codes of conduct, transparency initiatives, and social labels. These initiatives often lack independent monitoring and are criticized for their lack of specificity.

8. Enforcement

At the national level, MNCs have been sued for human rights abuses before civil and criminal tribunals, resulting in legal consequences for them. The Alien Tort Statute (ATS) in the United States has been used to hold MNCs accountable for human rights violations, although recent legal developments have limited its scope and applicability. MNCs also face reputational and financial consequences for human rights abuses, as public opinion and shareholder pressure can impact their business.

B. INTERNATIONAL ENVIRONMENTAL LAW

Multilateral Environmental Agreements (MEAs) primarily target states and, at most, indirectly affect the regulation of multinational corporations (MNCs). A handful of specialized agreements establish civil liability rules for private actors, particularly those capable of causing severe environmental damage, such as oil spills or nuclear leaks. These agreements rely on domestic implementation and require contracting parties to create the necessary enforcement mechanisms.[20]

Instead of directly holding MNCs accountable, international law focuses on the responsibility of states where the corporations operate. This is seen in cases like the ***Barcelona Traction, Light and Power Company, Limited[21] (Belgium v. Spain)*** case before the International Court of Justice (ICJ). Here, the court held that Belgium could bring a claim against Spain for mistreatment of a Belgian-owned company operating in Spain.

Notable provisions related to sustainable development can be found in the non-binding OECD Guidelines and Agenda 21, last reaffirmed at the Rio conference. Compared to international human rights law, the practice of self-regulation by companies through codes of conduct or certification systems, such as eco-labels, is more developed. While the design of these systems varies significantly, many of them incorporate third- or second-party conformity assessments, and a few include dispute settlement or appeal mechanisms.[22]

C. INTERNATIONAL CRIMINAL LAW

International criminal law has historically lacked provisions for jurisdiction over legal entities. Even the first international criminal tribunal, the International Military Tribunal in Nuremberg, exclusively had jurisdiction over individuals. It famously declared, "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."

Subsequent ad hoc international criminal tribunals established by the UN Security Council also did not possess jurisdiction over corporate entities. The 1998 Draft Statute of the International Criminal Court initially proposed jurisdiction over legal entities, excluding states,

[20] Miriam Mafessanti, 'Responsibility for Environmental Damage under International Law: Can MNCs Bear the Burden? … And How?' (2009-2010) 17 Buffalo Environmental Law Journal 87, 90.
[21] Belgium vs. Spain, 1962, https://www.icj-cij.org/case/50.
[22] See for an analysis of 400 eco-labels: Axel Marx, 'Varieties of legitimacy: a configurational institutional design analysis of eco-labels' (2013) 26 Innovation: The European Journal of Social Science Research 268.

when crimes were committed on behalf of or by their agencies or representatives. However, this approach was later abandoned for two main reasons. Firstly, many domestic legal systems do not recognize corporate criminal accountability, which would have complicated the application of the complementarity principle. Secondly, there were concerns that states might be perceived as hypocritical if they held every entity accountable except for themselves.

The extension of jurisdiction to legal entities was briefly considered during the 2010 Kampala Review Conference but received limited attention due to the strong focus on the crime of aggression.

It is worth noting that several domestic legal systems do recognize the criminal liability of legal entities. These include Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States.

Furthermore, certain international instruments do include provisions for the criminal liability of legal entities. Examples of such instruments are the European Convention on the Protection of the Environment through Criminal Law, the United Nations Convention against Corruption, the United Nations Convention on the Suppression of the Financing of Terrorism, and the United Nations Convention against Transnational Organized Crime. These conventions require state parties to establish the liability of legal entities for crimes defined in the respective instruments. However, liability is not limited to criminal liability alone, as Member States are typically allowed to adopt administrative or civil measures as alternatives.

CONTRIBUTION TO INTERNATIONAL LAW MAKING

While states primarily create international laws, multinational corporations (MNCs) have several ways to influence the law-making process. They can participate in the International Labour Organization (ILO) through a 'tripartism' mechanism, engage in international investment arbitration, use the World Trade Organization (WTO) dispute settlement process through WTO member states, and, most importantly, exert their influence on the legislative process by lobbying at national, European Union (EU), and international levels. They can also engage in dialogues and consultations. However, the influence of MNCs can be restricted by conflicting policy objectives of states or international organizations and by the activism of non-governmental organizations (NGOs).[23]

CONCLUSION

In this, it has been argued that multinational corporations (MNCs) can have both positive and negative impacts on society. On one hand, they can contribute to economic and technological development, improving living conditions and wealth. As a result, they deserve protection from excessive government interference and a stable, reliable business environment. On the other hand, MNCs can harm human rights, the environment, and even commit crimes that require accountability. Domestic measures often fall short in addressing these challenges. MNCs transcend national boundaries and can operate beyond the reach of national legislators who may be unwilling or unable to regulate them.

The turn to international law, however, has faced challenges. Prolonged debates about whether MNCs have legal status in international law have delayed discussions about their rights and obligations. This debate has revolved around waiting for states to grant rights and obligations to MNCs. Nevertheless, MNCs already enjoy substantial rights under international investment and human rights laws. They can seek protection for their assets in domestic courts, engage in arbitration, and file complaints about rights violations with bodies like the European Court of Human Rights (ECtHR). However, MNCs do not have legally

[23] Muchlinski, 'Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights' in Math Noortmann and Cedric Ryngaert (eds), Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers? (Ashgate 2010) 9, 13 ff.

binding obligations under international law, particularly in the realm of human rights, despite various initiatives attempting to establish both voluntary and mandatory instruments. At most, they have certain responsibilities not to harm human rights, but enforcement relies on government authorities.

Given the increasing power of MNCs and reports of their involvement in human rights violations and environmental damage, there are continued calls for stronger international obligations for MNCs. Yet, it is important to exercise caution since a narrow focus on MNCs should not distract from the primary responsibility of states. Many existing instruments can be leveraged with increased attention to achieve similar results. The 'Ruggie Framework' has initiated a development that calls for greater MNC responsibility without diminishing the primary role of states. Whether the new effort to create a legally binding human rights instrument can overcome existing political divisions or meet the same fate as previous attempts to move beyond voluntary guidelines remains to be seen.

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