

## **REGULATING MULTINATIONAL CORPORATIONS UNDER GLOBAL ADMINISTRATIVE LAW: PERSPECTIVES AND THE WAY FORWARD**

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### **Abstract**

Multinational Corporations (MNCs)<sup>1</sup> and Global Administrative Law (GAL) are essentially both products of a single overarching phenomenon of globalization that has fundamentally changed the very nature of social, political, economic and administrative interactions between societies, communities and countries. While MNCs represent the fusion of economic boundaries between states, GAL though still somewhat fluid as a concept essentially envisages transcending state administrative law boundaries and putting in place some sort of a meta-state administrative structure of global governance. The present article focuses on the various nuances of regulating transnational corporations through a GAL framework and the challenges it entails.

- I. Introduction**
- II. Rationale for subjecting MNCs to a GAL Framework**
- III. GAL and Theoretical Approaches to MNC Regulation**
- IV. Institutional arrangements for MNC Regulation**
- V. The Way Forward**
- VI. Conclusion**

### **I. Introduction**

MULTINATIONAL CORPORATIONS (MNCs) and Global Administrative Law (GAL) are both products of a single overarching phenomenon of globalization that has fundamentally changed the very nature of social, political, economic and administrative interactions between societies, communities and countries. While MNCs represent the fusion of economic boundaries between states, GAL though still fluid as a concept essentially envisages transcending classical state administrative law boundaries and putting in place some sort of a meta-state administrative structure of global governance. In essence GAL can be understood as comprising the legal rules,

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<sup>1</sup> For the purposes of this paper, the terms multinational corporations, transnational corporations, MNCs, TNCs and multinational enterprises, will be used alternatively.

principles, and institutional norms applicable to processes of ‘administration’ undertaken in ways that implicate more than purely intra-state structures of legal and political authority.<sup>2</sup>

Last few decades have seen the emergence and intense proliferation of multinational corporations as economic entities and global actors whose operations and activities have transcended not just geographical but also legal and jurisdictional boundaries of nation states. MNCs today have become virtual behemoths employing large workforces worldwide and accounting for a considerable proportion of the world GDP. With the increasing diversification of state functions, states’ inability to perform all functions on their own and the consequent necessity to delegate to external agencies has seen a number of MNCs expanding their outreach to cover even those sectors which have been traditionally managed by the state.<sup>3</sup> For these reasons they have come to wield considerable economic and social power and their activities are capable of impacting the lives of a large number of people directly and indirectly. This is further accentuated by their outreach in unexplored and unsaturated areas in search of markets, client bases, workforce, favorable work environment *etc.* that has led many multinationals that were conventionally present in developed countries of the world to far flung corners of the globe including developing and least developed countries. This interaction while bringing revenue, employment and other fringe benefits to the host countries and societies has also brought tensions created by exploitative practices, environmental degradation, corruption, hegemonistic control and the like.

MNCs have indeed brought about changes in people’s lives in multiple ways as acknowledged by a number of international organizations, WTO included.<sup>4</sup> They have brought about technological advancements, introduced new cultures and engendered economic prosperity among other things.

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<sup>2</sup> Definition by Kingsbury and Donaldson in Max Planck Encyclopedia of Public International Law, available at: <https://www.ijl.org/publications/global-administrative-law/> (last visited on June 25, 2020).

<sup>3</sup> See John M. Kline, “MNCs and Surrogate Sovereignty” 13 *Brown J’ of World Affairs* 122-133 (2006), available at: <https://www.jstor.org/stable/24590648> (last visited May 29, 2020).

MNCs may also assume the role of a ‘surrogate sovereign’ and carry out public services in local communities (again mostly in poorer countries) by taking over from the government. This model would require the entire local economy of an area to be dominated by a single employer, by virtue of which he gains control over the locality’s political and social life as well. Kline presents the example of Chevron’s oil project in Papua New Guinea where they built a 66 mile mountain highway. Unfortunately, this facilitated theft and poaching thus leading to Chevron being asked to police the highway as well.

<sup>4</sup> United Nations Conference on Trade and Development, “World Investment Report, 1, Transnational Corporations, Agricultural Production and Development, overview, xxi (2009)”, available at: [www.unctad.org/en/docs/wir2009\\_en.pdf](http://www.unctad.org/en/docs/wir2009_en.pdf) (last visited May 26, 2020).

On the flip side however, their activities have also resulted in deleterious effects causing harm to local communities and environment. This harm has come in various forms which ultimately impinge on human rights. This has led to calls for establishing some kind of framework to regulate these entities.

However, the fact that MNCs operate across multiple national jurisdictions, have complex organizational structures involving multiple hierarchies of corporate governance as well as other issues to be elaborated subsequently in this write up often renders the task of regulating them extremely difficult. Furthermore, conventionally private entities including transnational corporations essentially being non-state actors are not considered to be holding human rights obligations despite a burgeoning academic debate around this issue and growing recognition that they are participants in the international law with capacity to bear some rights and duties. This creates additional difficulties in directly imputing human right violations on them.<sup>5</sup>

In this backdrop GAL can serve as an important regulatory instrument and can provide legal interventions necessary to hold MNCs accountable. The underlying logic is that GAL draws its very basis from being able to provide solutions to issues of global governance that arise due to the interoperability of entities in multiple jurisdictions.<sup>6</sup>

## II. Rationale for subjecting MNCs to a GAL Framework

The justifications for adopting a GAL approach to regulate MNCs stem from the intrinsic nature of their organizational structure and operations and hence their inherent suitability for being subjected to a GAL framework. This will be clear from an analysis of the definition of MNCs given by the Economic and Social Council (ECOSOC) commission on Transnational Corporations<sup>7</sup>

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<sup>5</sup>John Gerard Ruggie“Business and Human Rights: The Evolving International Agenda”, 101 *American J of Intl Law* 8254 (2007), available at: <https://www.jstor.org/stable/40006320> (last visited June 30, 2020). See also, Anogika Souresh, “MNCs and Human Rights: An Ongoing Struggle”, available at: <http://cilj.co.uk/2016/05/12/mncs-human-rights-ongoing-struggle/> (last visited June 28, 2020).

<sup>6</sup>Nico Krish and Benedict Kingsbury, “Introduction: Global Governance and Global Administrative Law in the International Legal Order”, available at: <http://ejil.org/pdfs/17/1/64.pdf> (last visited June 30, 2020).

<sup>7</sup>Melik Özden, “Transnational Corporations and Human Rights” (CETIM, Geneva, 2005), available at: <https://www.cetim.ch/wp-content/uploads/Transnational-corporation-and-human-rights.pdf>, (last visited May 17, 2020).

Enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activities of these entities, which operate under a system of decision making permitting coherent policies and a common strategy through one or more decision-making centers, 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.

This somewhat complicated definition reflects the complex nature of the legal status of multinational corporations and the consequent difficulties in subjecting them to any particular form of national regulation (judicial or administrative jurisdictions). Mathias Koenig-Archibugi in this context observes:<sup>8</sup>

“The problem of moral and legal constraints upon the behavior of multinational corporations, given that they are effectively "stateless" actors, is one of several urgent global socioeconomic problems that emerged during the late twentieth century...”

This fluidity of legal status in turn provides the justification for a Global Administrative Regime to step in. While the multinationals are legal entities and also holders of a corporate personality, given the nature of their business domestic legislations often find themselves inadequately situated to regulate them.<sup>9</sup>

The parent-subsidiary mode of organization that most transnational corporations follow often obfuscates their accountability and makes it indeterminate. For example, if a subsidiary violates a right it is often not clear whether the parent country can be made vicariously accountable for it. This is because often subsidiary companies operate as separate legal entities allowing the parent enterprise to screen themselves from liability.<sup>10</sup> Piercing the corporate veil presents another

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<sup>8</sup> See, Mathias Koenig- “Archibugi, Transnational Corporations and Public Accountability”, *available at*: [https://infogalactic.com/info/Multinational\\_corporation](https://infogalactic.com/info/Multinational_corporation).(Last visited on May 22,2020).

<sup>9</sup> Jan Wouters, “Multinational Corporations in International Law”, *available at*: [https://www.researchgate.net/publication/272241501\\_Multinational\\_Corporations\\_in\\_International\\_Law](https://www.researchgate.net/publication/272241501_Multinational_Corporations_in_International_Law) (last visited June 26, 2020).

<sup>10</sup> See, Morgan, “Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?”, *available at*: [https://www.academia.edu/20063461/Vicarious\\_Liability\\_for\\_Group\\_Companies\\_The\\_Final\\_Frontier\\_of\\_Vicarious\\_Liability](https://www.academia.edu/20063461/Vicarious_Liability_for_Group_Companies_The_Final_Frontier_of_Vicarious_Liability) (last visited June 26, 2020).

difficulty since it lends itself to a rather subjective interpretation. On the whole this has led to an established presumption in corporate law that parent organizations are not held liable for the act of subsidiaries.<sup>11</sup>

In this backdrop it becomes necessary to look for alternative regulatory mechanisms for MNCs so that an effective accountability regime could be established. The rationale for a GAL to step in gains strength in this context.

Another justification that adds further weight to the need for MNC regulation is the role of the international financial institutions particularly the trio of IMF, World Bank and WTO. The policies laid out by these institutions are heavily geared towards trade and commerce and therefore have always undervalued social responsibilities of MNCs and neglected the human rights dimensions of trade.<sup>12</sup> These policies are moreover often imposed on financially vulnerable economies by arm twisting or as a quid pro quo for financial assistance, many times states even become willing partners.

Transnational organizations are essentially economic entities that have a presence in two or more countries. However, even though their physical presence is in multiple jurisdictions the core strategy and policy formulations mostly take place at a particular center where they are headquartered at times without due regard to local regulations on environment, labour and the like. Furthermore, as stated earlier the operating mechanism of such organizations can take various forms. MNCs can work “*through a parent-subsidary system, through conglomerates or alliances having diverse activities can consolidate through mergers or acquisitions or can create financial holding companies*”.<sup>13</sup>

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<sup>11</sup> See, *United States v. BestFoods*, 524 U.S. 51 (1998), available at: <https://www.law.cornell.edu/supct/html/97-454.ZO.html> (last visited June 26, 2020).

“It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.”

<sup>12</sup>Sarah Joseph and David Kinley argue that the acceleration of the process of economic globalization under the auspices of such bodies as the WTO, the World Bank and the International Monetary Fund, has been prioritized at the expense of other goals, such as social welfare and human rights considerations. Certainly, international trade law essentially grants numerous rights to MNCs and very few enforceable duties, and few of any apparent significance in respect of human rights. See, Sarah Joseph and David Kinley, *Multinational corporations and human rights: questions about their relationship*, available at: <http://www.austlii.edu.au/au/journals/AltLawJl/2002/3.html> (last visited on June 25, 2020).

<sup>13</sup>*Supra* note 6 at 1.

TNCs are also uniquely situated in as much as the theory of limited liability applicable to corporations shields them from liability in the home state for violations on the part of subsidiaries in the host state.<sup>14</sup>

Besides, the problems of home state jurisdiction, corporate veil and separate legal entity status of the parent and subsidiary corporations, other issues such as state sovereignty and *Forum Non Conveniens*<sup>15</sup> further muddle the regulatory schematic.<sup>16</sup>

This multitude of operational and decisional mechanisms stated above create a legal and regulatory conundrum for the domestic jurisdictions and any single country finds it difficult to circumvent given the limitations of its sovereign power which loses force outside the national boundaries.

This fluid situation of overlapping national jurisdictions as well as the economic clout that such corporations can potentially use for subverting state laws allows them to wield considerable power. This also allows them to manipulate policies and strategies in their own favour. This is best reflected in a statement by Percy Barnevik president of the Swedish MNC Asea Brown Boveri (ABB):<sup>17</sup>

“I would define globalization by the freedom for my group to invest where it wants, for as long as it wants, to produce what it wants, supplying itself where it wants, and submitting to the least constraints possible regarding labor law and employee benefits...”

This heavily loaded definition carries a number of implicit underlying meanings and signifies how large corporations attempt to force an alternate definition of globalization in a way that

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<sup>14</sup> Home state is the country of incorporation of the MNC whereas the country in which the subsidiary is incorporated is referred to as the host state (the former typically being a developed and the latter a developing country).

<sup>15</sup> *Forum non conveniens* is a doctrine allowing a court with jurisdiction over a case to dismiss it because the convenience of the parties and the interest of justice would be better served if the case were brought in a court having proper jurisdiction in another venue. See also, *available at*: <https://www.merriam-webster.com/legal/forum%20non%20conveniensi> (last visited on June 20, 2020).

<sup>16</sup> See Marion Weschka, “Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?”, *available at*: [http://www.zaoerv.de/66\\_2006/66\\_2006\\_3\\_a\\_625\\_662.pdf](http://www.zaoerv.de/66_2006/66_2006_3_a_625_662.pdf) at p.630 (last visited June 20, 2020).

<sup>17</sup> Excerpt from, *available at*: <http://www.doonething.org/quotes/globalization-quotes.htm> (last visited May 24, 2020).

conforms to their vested interests and do not shy away from according minimal or no priority to human rights, labour and employee rights in particular.

Many times, the host countries also willingly or unwillingly succumb to these demands because MNCs are seen as agents of development and bring the much sought-after foreign investments. To lure them often becomes the priority of local governments and they are dis-incentivized to check irregularities or simply turn a blind eye.

To summarize, the transcendental nature of MNC operations and often unchecked power enjoyed by MNCs with sometimes open and often tacit support from the international custodians of trade spells the need for a counterweight that can be provided by an administrative mechanism operating at a global level.

A pressing need for MNC regulation also draws strength from the fact that there are many examples worldwide wherein MNCs have manifestly abused their economic might and influence to disregard human rights as well as to circumvent or bypass domestic laws of the host state particularly if that state happens to be a weak one. Such violations include but are not limited to

- Damage to the environment;
- Forced labor including child labor
- Financial crimes
- Inhumane working conditions
- Perversion of government functions;
- Non-observance of the precautionary principle;<sup>18</sup>

Since the very nature of MNCs is such that they are all pervasive yet they cannot be pinned down to a specific location they often manage to escape from the democratic and judicial control of any particular country. As a result, any violations of human rights by these enterprises very often remain unresolved. The oft-quoted Bhopal gas leak disaster is a classic example of how parent

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<sup>18</sup> CETIM, *Supra* note 7 at 5.

entities try and often even manage to wriggle out of any accountability or liability by taking advantage of gaps in the legal framework or by deflecting responsibility towards subsidiaries.<sup>19</sup>

The above section has attempted to provide a rationale for MNC regulation while pointing at the inadequacies host countries may face. Transnational corporations, as economic agents are in theory subject to the law of a country, to the jurisdiction of its courts. The transnational group has not, as such, a distinct individual personality for each of the entities that constitute it, with the result that these entities can be held accountable for their acts only in a diffuse manner, thus exploiting the different interests of the various countries within which they operate. In order to evade their responsibilities, the TNCs take recourse to diverse abusive practices.<sup>20</sup> Because of these limitations of both home and host state jurisdictions effectively regulating the MNCs, as well as the inherently soft nature of the general international law around the topic. There has been an increasingly felt need to create a holistic framework for MNC regulation that can tide over these limitations. And that is where a GAL approach fits in.

### III. GAL and Theoretical Approaches to MNC Regulation

An international regulatory mechanism for MNCs has been a popular subject of academic discourse since a long time and more recently GAL has also started to figure even more prominently in this discourse due to its inherent suitability and adaptability to such forms of regulation.

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<sup>19</sup> In the Bhopal gas leak case Union Carbide (UCC), a US company managed with considerable success to evade direct responsibility by exploiting a loophole in the Foreign Exchange Regulation Act and by denying any responsibility for the acts of its Indian subsidiary.

See for more details, K. Subramanian, "Corporate Responsibility for Bhopal: How Union Carbide Exploited a Government Loophole", *available at*: <https://www.epw.in/journal/2015/3/reports-states-web-exclusives/corporate-responsibility-bhopal.html> (last visited June 30, 2020).

<sup>20</sup> *Supra* note 7 at 9-10.

Such practices include but are not limited to the transfer of activities prohibited in one country to another with less stringent regulations and/or the obtaining of the least constraining regulations possible by threatening government and workers with relocation to another country, relocation of very dangerous industries and other activities to places where they will not be subject to strict regulations well as relocation of their activities to countries with cheap labor and the least social security protection in order to reduce production costs and the use of front companies set up in such a way as to be deliberately complex.



GAL's suitability as the most relevant regulatory framework for MNCs can be understood by means of this explanation of the term GAL by Kingsbury.<sup>21</sup>

GAL can therefore be envisaged as providing a legal basis for a global or transnational administration which is itself multifaceted in nature and encompasses various kind of regulatory institutions and it is therefore not surprising that the Multinational Enterprises due to their intrinsic nature as jurisdictionally and politically spillover entities become natural subjects of GAL regulation. In addition, in the wake of economic globalization, the need for regulatory globalization frameworks has also been increasingly felt and GAL can adequately fill the existing regulatory void.

To articulate the need for MNC regulation under the GAL framework there have been attempts to develop theoretical underpinnings which could provide a legal basis for such regulations. They attempt to analyze and uncover the GAL mechanisms that are best suited and most effective for this purpose.

Kingsbury for instance<sup>22</sup> looks at GAL as a natural extension of the increase in the reach and forms of trans governmental regulation and administration designed to address the consequences of globalized interdependence and goes on to identify three main approaches towards of globalized administrative :<sup>23</sup>

- Administration by formal international organization
- Administration by hybrid intergovernmental–private arrangements.
- Administration by private institutions with regulatory functions.

Among these, formal inter-governmental organizations established by treaty or executive agreement are the main administrative actors as far as MNC regulations are concerned, even

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<sup>21</sup> Kingsbury says that GAL is applied to shared sets of norms and norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even where they are not obviously part of national (state) law or standard inter-state law. See Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23.

<sup>22</sup> Kingsbury, Krisch and Stewart, *The Emergence of Global Administrative law*, 68 *Law and Contemporary Problems* 15, 16, 15-61 (2005), available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp> (last visited January 19, 2020).

<sup>23</sup> *Ibid.*

though the other mechanisms mentioned above may also have some role to play in supplementing their efforts.

For example, the International Standards Organization (ISO) adopts a large number of standards (around 13000) that harmonize parameters related to processes and products and therefore help regulatory bodies across countries in formulating uniform basic standards to govern various sectors in which MNCs operate. ISO standards themselves have a great economic significance and are used by multiple agencies including the WTO in taking regulatory decisions.

Similarly, hybrid mechanisms such as the Codex Alimentarius Commission, which adopts standards on food safety both has significant participation of non-governmental actors as well as by government representatives and operates through a systematic decision-making process to provide adequate guidance and informational assistance when global policy regarding these domains is to be formulated.

Max Plank Encyclopedia of Public international law identifies some other examples of such bodies that supplement broader regulatory policy tasks as follows:<sup>24</sup>

- The International Financial Reporting Standards Foundation (formerly International Accounting Standards Committee Foundation), a private body, provides in its Constitution that the International Accounting Standards Board ('IASB'), will undertake the process of preparing standards and publish a discussion document for public comment thereby assisting in the formulation of uniform accounting standards
- Internet Corporation for Assigned Names and Numbers (ICANN), a hybrid public-private body, provides through its bylaws for a notice and comment procedure on policy actions. With respect to any policies that substantially affect the operation of the Internet or third parties, ICANN issues public notice of the proposed policy change and a reasonable opportunity for parties to comment on the adoption of the proposed policies. Where the policy action

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<sup>24</sup> Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e948> (last visited, May 25, 2020).

can potentially raise public policy concerns, the opinion of the relevant governmental advisory bodies of different states is also sought.

- The Basel Committee on Banking Supervision, a transnational network of banking regulators, drafts new capital adequacy accords, releasing consultative documents and inviting comments prior to finalizing Basel II and Basel III which are followed by many central banks and banking regulators across the world.
- The Council of the International Civil Aviation Organization (ICAO) permits specific nongovernment organizations in the aviation area to participate in its work, including the International Air Transport Association (IATA), the Airports Council International, the International Federation of Air Line Pilots' Associations, and the International Council of Aircraft Owner and Pilot Associations.

Overall, these bodies, associations and institutions help in developing institutional practices and lay down guidelines and standards which can then be considered by formal institutions for evolving effective mechanisms to regulate Multinational organizations operating in various domains.

Oyebode<sup>25</sup> too has attempted to examine certain approaches for an international regulation of MNCs. These approaches according to him could be specifically termed as

- De-concentration,
- Restructuring,
- Global Chartering and
- International regulation

He further goes on to point out that the first two of these approaches namely de-concentrating (which proposed universal nationalization *i.e.*, conversion of local subsidiaries of MNCs into State

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<sup>25</sup> See Akindele Oyebode, "International Regulation of the Multinational Corporation": A look at some recent proposals, *available at*: <https://cloudfront.escholarship.org/dist/prd/content/qt3nz79708/qt3nz79708.pdf?t=nrx7nz> (last visited, June 27, 2020).

owned enterprises) and Restructuring (which envisaged filing the boards of management of the affiliates by appointing local functionaries of the host state, as well as infusing local capital into the equity of the company) have both fallen out of favour due to their impracticality and are no longer considered suitable theoretical paradigms.

The third approach, global chartering, which envisages the formulation of an international company law and advocates the establishment by means of a treaty a supranational administrative body (Cosmocorp) consisting of representatives drawn from various countries to administer MNCs, as well as the last one *i.e.*, international regulation which envisages the establishment of an international regulatory agency to supervise the activities of MNCs therefore appear to be the only viable approaches. While these approaches are similar in some respects, the global chartering framework has been criticized as being too ambitious and also not being on firm practical footing due to the sheer scale on which it is sought to be implemented.

International Regulation also sometimes termed as regulatory globalization<sup>26</sup> thus seems to be the only viable alternative for MNC regulation. Analyzing the theoretical premises of both Kingsbury and Oyeboode it becomes amply clear that some kind of an Institutional framework that operates on an International scale has emerged as the only consensus as far as a theoretical approach to regulate MNCs are concerned. This has been explained in detail in the next section.

#### **IV. Institutional arrangements for MNC Regulation**

Before proceeding to understand the future course of MNC regulation through the GAL mechanisms, it is apt to look at how institutional arrangements of MNC regulations have evolved and how they are presently situated.

The first of such institutional mechanisms dates back to 1948. In the Havana Charter for an International Trade Organization (ITO)<sup>27</sup> under the aegis of the United Nations. The charter

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<sup>26</sup> Regulatory globalization is the process by which regulatory agencies extend their reach internationally. It can occur in several ways. For example, regulators can enter into agreements with corresponding regulators in other jurisdictions and agree to coordinate their efforts. Alternatively, regulators can form international regulatory institutions. For details see, Jonathan R. Macey, "Regulatory Globalization as a Response to Regulatory Competition", *available at*: [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2420&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2420&context=fss_papers) (last visited May 19, 2020).

<sup>27</sup> See Ch. V (arts 46-54) of the Havana Charter for an International Trade Organization (ITO), *available at*: <https://docs.wto.org/gattdocs/q/GG/SEC/53-41.PDF> (last visited May 19, 2020).

expressed its resolve to prevent restrictive trade practices such as exclusion from markets, discrimination, abuse of patent rights *etc.* The ITO devised a complaint procedure which provided that in case any standards prescribed under the charter are violated they are brought to the notice of the member states which are then requested to take necessary measures to remedy the situation. Also among the earliest attempts to regulate MNCs under the auspices of the United Nations was the establishment of a Group of Eminent persons (The Group) in 1973. As the name suggests the group consisted of eminent persons taken from a wide range professional backgrounds, government ministers, university professors, experts and businessmen chosen in their individual capacities but nevertheless representing the world's major areas. The goal was to create a “*focal point*” *within the United Nations to develop the “institutions needed for a new international economic order”*.<sup>28</sup>

The group was entrusted with the task of advising on the matters pertaining to Transnational Corporations (TNCs) and their impact on the developmental process. In view of the growing importance of such companies in the world economy, particularly in developing countries, as a source of foreign direct investment (FDI), trade and technology transfer among other things the group recommended that a permanent program and centre be established to study TNCs and related policy issues. The group also recommended the creation of a commission on transnational corporations, to which the centre was to report, so as to serve the needs of the United Nations in this area through information gathering, research and policy analysis, technical assistance and consensus-building. The United Nations Centre on Transnational Corporations (UNCTC) began its work in 1974. In 1993, the Program was transferred to the United Nations Conference on Trade and Development (UNCTAD).

In 1976, the Organization for Economic Cooperation and Development (OECD) adopted non-binding Guidelines for Multinational enterprises<sup>29</sup> working within the OECD region and have been subsequently revised the latest being 2011. These guidelines are essentially in the nature of recommendations for responsible business conduct in a globalized context and are mainly focused on issues of corporate governance and also address employment, industrial relations, environmental, and consumer issues, science and technology *etc.* With respect to human rights as

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<sup>28</sup> The UN and Transnational Corporations: From Code of Conduct to Global Compact, *available at*: [https://unctad.org/en/docs/diaeiia200910a4\\_en.pdf](https://unctad.org/en/docs/diaeiia200910a4_en.pdf) (last visited, May 17, 2020).

<sup>29</sup> *Available at*: <http://www.oecd.org/daf/inv/mne/48004323.pdf> (last visited May 9, 2020).

well there is an exhortation to the MNCs to respect the human rights of those affected by their activities. As per these guidelines each OECD member must establish National Contact Points (NCPs) which have been made responsible implementing the guidelines within their countries as well as handling complaints against the MNCs and also coordinating with governmental structures and other organizations like trade unions, employee unions and NGOs.

Likewise, OECD investment committees are responsible for overseeing the implementation of OECD guidelines and ensure proper coordination and consultation with senior officials in trade, and important government functionaries. Other mechanisms to implement OECD guidelines include setting up of advisory committees on important aspects.

At the international level the most representative institutional arrangement is the ILO Tripartite Declarations of Principles Concerning Multinational Enterprises and Social Policy.<sup>30</sup> The objective of the Declaration has been stated below:<sup>31</sup>

“The aim of this Declaration is to encourage the positive contribution which multinational enterprises can make to economic and social progress and the realization of decent work for all; and to minimize and resolve the difficulties to which their various operations may give rise.

This aim will be furthered by appropriate laws and policies, measures and actions adopted by the governments, including in the fields of labour administration and public labour inspection, and by cooperation among the governments and the employers’ and workers’ organizations of all countries.”

A compliance monitoring mechanism was also envisaged in these declarations as well as a system of submitting periodic reports was built in by creating a permanent commission for monitoring the declaration

Another recent and significant step in this direction has been the UN Global Compact which aims at encouraging the MNCs to adopt business practices which are both sustainable and socially responsible. The global compact works under the aegis of the UN with the objective of promoting

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<sup>30</sup>Available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) (last visited May 18, 2020).

<sup>31</sup>*Id.* at 9.

responsible business practices among the global business community. It also serves as a forum for exchange of ideas by facilitating communications between governments, companies and labour organizations. The compact works closely with global companies with the object of promoting activities that apart from promoting responsible business practices also contribute to Sustainable Development Goals (SDGs). The Global Compact rests on 10 principles that are based on four pivots of human rights, labour and environment as well as anti-corruption<sup>32</sup>

These initiatives as discussed above do represent formal or informal institutional efforts to bring a consensus regarding MNC responsible conduct by bringing all stakeholders together and providing a facilitative forum for monitoring, reviewing and taking cognizance of complaints etc.

However, all of them suffer from the basic drawback that they are voluntary and non-binding in their character and have therefore a persuasive effect at best. They are not strictly speaking regulatory administrative instruments and suffer from limitations such as non-compliance of guidelines by the MNCs, non-reporting by the state parties of the measures taken to implement their guidelines etc. Besides they also have weak enforcement and complaint redressal structures.

The OECD watch has aptly summarized these regulatory deficiencies as follows:<sup>33</sup>

“There is no conclusive evidence that the Guidelines have had a positive, comprehensive impact on multinational enterprises.... As a global mechanism to improve the operations of multinationals, the Guidelines are simply inadequate and deficient.”

However even though initiatives such as the OECD Guidelines and subsequently International Labour Organization's Tripartite Declaration of Principles concerning multinational enterprises and social policy and more recent UN Global compact were voluntary standards they can be construed as responses to accommodate the growing demand for more stringent international regulation of business. The prerogative was to monitor major areas of activities by the MNCs and its impact on environment, employment, trade as well as advising developing countries in their

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<sup>32</sup> The ten principles of Global Compact, *available at*: <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited May 28, 2020).

<sup>33</sup> *Available at*: <http://www.companydirectors.com.au/director-resource-centre/publications/company-director-magazine/2000-to-2009-back-editions/2007/december/oecd-guidelines> (last visited May 28, 2020).

interactions with large corporations, and drafting guidelines that govern the activities of multinational companies. On the whole these initiatives do signify a move towards formulating certain normative frameworks to regulate MNCs. A focus on human rights was perceptibly demonstrated when some of the activities by these enterprises did raise human rights questions.

### V. The Way Forward

A perusal of the various mechanisms for regulating MNCs makes it clear that neither the home nor the host state working in silos nor regulation by the host state or the home state alone is sufficient for an effective regulation of MNCs. What complicates the issue further is that international law including formal institutional arrangement without an enforceable implementation mechanism also lacks teeth and is therefore not able to address the regulatory dilemma adequately. In this context an effective regulation will have to be a judicious mix of a broad regional or global mechanism juxtaposed with and local level implementation mechanisms that have potency and can be enforced.

The solution could also lie in setting up a global regulatory mechanism that works in tandem with national mechanisms. This would overcome the inherent impediment of international law in terms of its inability to impose obligations directly on MNCs which are not strictly speaking subjects of international law. At the same time any global regulatory body must also follow procedural principles of GAL, along with making room for national regulatory bodies to retain local procedural safeguards. Ideally, the coordination between the global and national bodies must eventually lead to homogenization of administrative principles.

Creation of a dedicated international organization to deal specifically with MNC regulation can be one of the strategies that can prove to be useful. Creating an institutional framework however is not the most challenging task in this context. In the GAL-MNC interface a more daunting challenge is to provide certain legitimacy to these organizations which would facilitate acceptance and participation. Dubois and Nowlan<sup>34</sup> argue in this context that “*any regulatory body dealing with liability of TNCs with respect to their conduct affecting human rights in developing countries must not only follow the procedural principles of global administrative law but also develop substantive*

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<sup>34</sup> Pascale Hélène Dubois and Aileen Elizabeth Nowlan, Global administrative law and the legitimacy of sanctions regimes in international law, 36 *Yale J. Int'l L.* 15 (Fall 2010), available at: <http://www.yjil.org/docs/pub/o-36-dubois-nowlan-global-administrative-law-sanctions.pdf> at 16 (last visited June 28, 2020).



*norms with respect to attribution of liability. This would call for, at least to a limited extent, a synthesis of principles of principles from different national laws”.*

Any forum envisaged for such a purpose must therefore embed the GAL principles within its functional ambit so that the stakeholders can be convinced about its impartiality and legitimacy such as:

- Certainty of procedures
- A substantive and prescriptive orientation
- An *a priori* determination of liabilities of the stakeholders, state and the MNCs for example
- A credible and determinate dispute resolution mechanism
- Country or region-specific adaptations.
- Civil Society participation (NGOs and welfare associations)

Out of these principles mentioned above two stands out as the most important, first is the imperative to infuse the regulatory mechanism with substantive legal backing so as to be binding and effective in real terms particularly if there are any human rights implications involved

Secondly in order to incorporate a human rights perspective and address human rights violations of TNCs in developing countries, it is important to provide for the participation of local NGOs and civil society organizations who can represent the voices of the poor and the marginalized since there could be situations in which governments of developing or least developed countries might themselves be directly or indirectly abetting such violations.

In addition, in order to give real potency to the global regulatory framework, it is worthwhile to examine the possibility of a dispute resolution forum that not only conforms to the standards of administrative law but is also transparent, accountable, envisages the participation of all stakeholders such as TNCs, affected citizens and nongovernmental organizations, and is subject to review and appeal mechanisms.

Such a dispute resolution mechanism has to be integrated with national level implementation mechanisms. A global level decision arrived at the dispute resolution structure will have to be effectuated against private parties through enforcement measures at the national level and therefore a system of coordination between courts and administrative agencies at the international and domestic levels must be established to avoid conflicts in this regard.

Alternate dispute resolution is one of the mechanisms which hold significant promise in supplementing other existing and proposed institutional mechanisms. The recently published Hague Rules on Business and Human Rights<sup>35</sup> contain provisions for the administration of arbitration for disputes arising from a human rights violation while carrying out business activities. These rules are premised upon UNCITRAL Arbitration Rules (2013) but they widen the scope of arbitral proceedings beyond commercial disputes and have been adapted to accommodate issues disputes pertaining to the impact of commercial activities on human rights.

Human Rights Arbitration can serve as a very useful instrument in dispute resolutions since the locus of human rights violations is often countries where municipal arrangements for justice administration and the court system in particular is either dysfunctional, ill-equipped, corrupt or susceptible to political manipulations. Given its inherent flexibility, mutual and collaborative dispute resolution mechanisms, human rights arbitration can also prove useful for countries with competent and impartial mainstream justice delivery systems through courts of law. Though still in a nascent stage, arbitration must be promoted for greater access to remedy for victims of human rights violations in consonance with Pillar III of the United Nations Guiding Principles on Business and Human Rights and to also provide an alternative forum to MNCs to take their case.

Self-regulation through voluntary initiatives and self-imposed codes of conducts also has considerable potential in supplementing the efforts of formal institutional mechanisms.<sup>36</sup> The variety of existing self-regulatory instruments is broad, comprising codes of conduct, transparency initiatives and social labels.<sup>37</sup> They can also plug the existing gaps in international law that arise either due to the absence of laws or lack of enforceability or both.<sup>38</sup> Besides, if adopted earnestly self-regulation can potentially take some burden off the formal regulatory mechanisms as well.

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<sup>35</sup>The Hague Rules were launched on Dec. 12, 2019 at the Peace Palace in The Hague. For more details see The Hague Rules on Business and Human Rights Arbitration, *available at*: [https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf) (last visited June 30, 2020).

<sup>36</sup>Rhys Jenkins, Corporate Codes of Conduct: Self-Regulation in a Global Economy. P 32, *available at*: <https://digitalcommons.ilr.cornell.edu/codes/10/> (last visited June 26, 2020).

<sup>37</sup> Jan Wouters and Anna-Luise Chané. “Multinational Corporations in International Law” at 20, *available at*: <https://www.researchgate.net/publication/272241501> (last visited June 26, 2020).

<sup>38</sup> See, Debra Cohen Maryanov “Sweatshop Liability: Corporate Codes of Conduct and The Governance of Labor Standards in The International Supply Chain”, *available at*:

Self-regulation of business can take various forms through adoption of various codes of conduct.<sup>39</sup> An inherent advantage self-regulation provides is that companies take it upon themselves to adhere to the codes of ethics and thus are self-motivated to follow them without necessarily having to be accountable to external regulatory compliance mechanisms. As stated earlier the UN Global compact is a credible initiative towards increasing reliance and can prove to be a suitable instrument for voluntary compliance to ethical and human rights standards by dovetailing elements of Business and Corporate Social Responsibility. The compact however would need to build stronger capacities for monitoring and enforcement through effective peer review and feedback mechanisms.

## VI. Conclusion

The global regulatory regime for multinationals has been constrained by gaps in the regulatory regimes and limitations of state specific domestic regulations which are inadequate to comprehensively deal with all aspects of MNC regulation. Hence it is considered appropriate to envisage appropriate global administrative law mechanisms which could operate in a wider ambit and with a larger mandate. This need has been further accentuated due to the expanding MNC outreach as well as the expansion of GAL both facilitated by globalization. From a voluntary self-regulated mechanism now, there is a need to go for a more institutional and enforceability-oriented framework. This can be achieved by creating either through creating regional level institutional frameworks or through a global network under the aegis of a supranational organization such as the UN. Another alternative is to strengthen the existing institutional mechanisms like the OECD or the ILO or any other representative organizations through evolving system of binding stipulations by means of a consensus-based approach involving all stakeholders such as MNCs, employees and member states as well as civil society organizations. Alternative dispute resolution especially arbitration with a dedicated and distinct human rights orientation can also prove to be an expedient mechanism for MNC regulation within a GAL framework.

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<https://pdfs.semanticscholar.org/69e9/c5841784c01e1d175f637b1859cf1d3aca67.pdf> at 401 (last visited June 29, 2020).

<sup>39</sup> Such voluntary codes of conduct come in a variety of forms such as internal codes adopted unilaterally, multi-stakeholder codes involving firms, company representatives, NGOs, model codes, intergovernmental codes agreed internationally *et al.* See for more details, Jenkins, *supra* note 39 at 8.