LEGAL STATUS OF TRANSNATIONAL CORPORATIONS IN INTERNATIONAL LAW

ABSTRACT

The idea of international law if analyzed within the doctrinaire limits of the classical approach, the very proposition of attributing international legal personality to transnational corporations as non-State actors will seem to be an unfounded premise engendering ambiguity and confusion. But if we turn our focus on the international socio-economic and political events, it will be perhaps imprudent to ignore the changing realities where there is an implicit acquiescence of transnational corporations emerging as economic powerhouses,securing commendable stations in the international space. At such a juncture of international reality, various scholars have tried to vindicate the appropriateness, or otherwise, of conferment of international legal personality to the transnational corporations which has created a furorowing to their amorphous legal status rooted in inadequate municipal laws. In this paper, my attempt will be to analyze the normative frameworks serving as potent justificationsof legal personality to transnational corporations, in the perspective of standing ideologies of both first world and third world countries. This paper intends to bring out how the fact and process of globalization, is in effect and substance, has historically been nothing more than a euphemism quite tactfully couching the dark and invidious facets of imperialism, neo-colonialism and self-aggrandizement.

Keywords: International Law, Legal Status, State, Transnational Corporation.

INTRODUCTION

Any attempt to define ‘international law’ from the classical perspective will no doubt mean law regulating the relations between nations (States). Such law essentially holds the consensus of the States representing and constituting the international community. In other words, nation States are the primary subjects of international law though there has been a gradual understanding and increasing acceptance of the fact that in the context of the evolving dynamics of international relations and politics, attributing enhanced importance to the various non-State actors like the ‘transnational corporations’ (hereinafter sometimes referred to as TNCs) is both imperative and pragmatic. The very expression ‘non-State actors’, in the context of the subjects of international

law, is pretty assumptive of an implicit ordering or ranking of such expression (which intends to encapsulate within its embrace a host of bodies like multinational corporations, TNCs, International Non-Governmental Organizations and the like) and the rank accorded to 'non-State actors' is one of inferiority compared to 'States' as the subject of international law.[1] Moreover, 'non-State actors' is a compendious term which signifies a host of organized and unorganized entities sweeping the globe. Every such body has its signature formulation of laws, rules and regulations and it is this uniqueness and specialty of such organizations, having regard to their respective aims, objects and purposes, which militates against the terminological crudeness or oversimplification with regard to the expression 'non-State actors'. One such entity which will be my subject of discussion in this paper is the Transnational Corporations.

THE LEGAL STATUS OF TRANSNATIONAL CORPORATIONS: A LEGACY OF DISPUTATIONS

The very idea of the legal status of the transnational corporations has been quite problematic since the initiation of discussions and deliberations on the ethical, normative and practical justifications for imputation of such legality to these corporations, primarily owing to the divided opinion of scholars based on the imminent threat as an aftermath of such attribution of legality on one hand and the desire of the adherents of another school of thought to downplay the purist ideation of 'State sovereignty' in order to accommodate the transnational entities into the realm of international law. Some scholars treat the growing economic clout of the TNCs as a threat to the sovereignty and equality of States[2] while others are curious to construct a scheme which will be quick to break down the artificial regimentation of territorial sovereignty and absorb the TNCs into its folds since they think that from the practical standpoint, the best way to proceed towards a developing world mechanism is not to discount for the factor of huge economic power of the TNCs, which if deliberately left unheeded will give innovative ways and means to the TNCs to have their voices heard in the international forums and this can have serious political undertones in the international relations of various nations of the globe.

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[1] Peter Willets, *Transnational Actors and International Organizations in Global Politics* (www.oup.com 2001) <http://fdslive.oup.com/www.oup.com/orc/resources/politics/intro/baylis5e/01student/revision/baylis5e_revision_ch01.pdf > accessed 25 August 2015

[2]Larry Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on The Responsibilities Of Transnational Corporations As A Harbinger Of Corporate Social Responsibility In International Law' (www.heinonline.com 2005-2006) <www.heinonline.com>accessed 25 August 2015

THE NEED FOR LEGAL STATUS FOR TNCs

The intricacy associated with the regulation of the TNCs has its genesis in the genre of such corporations, in their modus operandi and the globalized framework within which they operate.[3] The complex mode of operation of the TNCs in various parts of the globe makes it quite difficult to trace the principal body or the discrete entity which is to be held as the epicenter of international rights and obligations and it is this complexity that has always created confusion with regard to the apt positioning or incidence of legal rights and obligations under international law. Such volatility and serious want of definiteness with regard to the contours of operations has rendered the municipal laws largely ineffectual in tackling with the regulation of corporate behavior, its effect being attenuated by territorial constraints.[4] The highly sophisticated global network of the TNCs make it quite difficult for the municipal laws specific to individual nations to account for the legal violations made by such TNCs.

The TNCs are business behemoths having huge economic vigor and it is through the instrumentality of such power that they are trying to impact the geopolitics of certain regions with a view to destabilize the hostile governments opposing the growing cult of TNCs in favor of those supporting them. The unprecedented rise of TNCs, given the massive scale of operations coupled with ultramodern business techniques and expansionist stratagems, may be cited as the most potent of all factors creating an impressionable political impact.The main disputation with regard to granting legal recognition to the TNCs lies in the idea that even though TNCs are hugebusiness enterprises capable of affecting the socio-political terrain at national, regional and international planes, the status of TNCs under no circumstances can be equivalent to ‘States’ in terms of political might and influence.[5]

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[3]Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law' (www.heinonline.com 1983) <www.heinonline.com> accessed 25th August 2015

[4]According to Wellets, “Through the globalization of companies, the nature of the transnational companies has changed. Originally there was a clear demarcation with production occurring at the headquarters and secondary activities occurring in the subsidiary branches. A TNC such as IBM could be regarded as an American company with many foreign branches. Now the companies can be truly global, with the headquarters merely being a convenient site for strategic decision-making. Global communications are so efficient and sales can be so widely spread that production does not need to be located at the headquarters.” See n. 1, at p. 362-4

[5]Georg Schwarzenberger believes that no change in practical terms on key policy issues is manifest, despite the TNCs having greater influence. Nation-states control military and political power and hence dictate policy at the international arena. However, this postulate seems flawed and oversimplified.See n. 14, at p. 770-71.

Charney quite convincingly puts across an argument in favor of TNCs being accorded the international legal personality as it will be quite imprudent and over-simplistic on the part of the contemporary scholars to bypass the existential reality of TNCs which are capable of making deep inroads into the political psyche of various nations of the world by virtue of their economic might. One of the dominant arguments is that essentially, international law has both a history and deep rooted tradition of normative and moral or persuasive dimension which truly accounts for its non-binding nature and it is this intrinsic feature of this branch of law that creates a sufficient ground for automatic reliance on the municipal laws in order to regulate the TNCs or curb incidences of violations manifested in the form of non-compliance and anti-public avocations.[6]

The States continue to be the primary subjects of international law and hence, potent actors in the international space and therefore, granting international legal personality to non-State actors (such as transnational corporations) is squarely indicative of deliberate and studied subjugation of the authority of the States, the traditional players and this may result in the TNCs' escape from the stranglehold of the regulatory framework of municipal laws. Therefore, what is more pragmatic to consider at this point in time is not to remain obsessed with the theoretical and classical normative frameworks of sovereignty and State supremacy but to trace the implicit shortcomings and defects of the municipal legislations to effectively regulate the burgeoning power of the TNCs in the global scenario.[7] Such a scenario will invite several problems which will get entrenched with time and hence, the need of the hour is to act on this matter at a war footing with a view to bringing out some acceptable solution that will ensure gradual but steady attenuation of the discrepancy.

The first step towards such an end is to accept the fact that TNCs have prominent existence in the globe and to acknowledge such existence is a true way of creating conducive atmosphere for accommodating or rather incorporating these non-State entities in the realm of international law and if that means holding such entities as capable of possessing legal rights and obligations, so be it. Any pedantic ideation based on philosophical abstractions would surely whet intellectual appetite but perhaps would not be tenable from the practical point of view. The sooner the

[6]KarstenNowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (www.heinonline.com 1998-1999) <www.heinonline.com> accessed 26th August 2015
[7]Fleur Johns, 'The Invisibility of Transnational Corporations: An analysis of International Law and Legal Theory' (www.heinonline.com 1993-1994) <www.heinonline.com> accessed 26th August 2015

existence of the TNCs as legally recognized bodies are accepted, the better it is as it will ease the process of identification of such entities for the purpose of activating regulatory mechanisms.

‘GLOBALIZATION’ OR ‘BACKDOOR COLONIZATION’ - AN INTRIGUING QUESTION IN THE CONTEXT OF THE ROLE OF TNCs

The emergence of the TNCs as an increasingly significant non-State actor has its inevitable base in the process of globalization which has manifested itself in the most obvious of forms post-1990. The breaking down of the artificial trade barriers and a concerted effort across the globe for the creation of a global village, a term often used to signify an interconnected web of business transactions by the dint of technological amenities, information and communication technology, is projected as an intention which is truly ennobling and which actually aims towards development of the developing economies (the third world economies) by the developed countries of the world (usually the first word economies).

Lot many justifications with due intellectual sophistication has been provided to substantiate the salutary effects of globalization as an economic reality. This is variously described as a new economic policy, policy of economic liberalization, globalization and competitiveness in the world market. But there is, in fact, nothing new about this process. It has been tried over the past three decades in several parts of the globe – both in industrial and in developing countries. According to the United Nations Commission for Trade and Development (UNCTAD),‘International production has become the central structural characteristic of the world economy.’ Stated differently, globalization leads to internationalization of trade, investment and production and democratization of developmental benefits. If this is so, the essence of international production should mean the development of all the countries and the equitable distribution of world trade in the process of developing countries gaining access to resources, technology and markets through this much claimed ‘globalization’.

Quite ironical to the avowed objects of globalization, experience reveals a diametrically opposite scenario where the interstices between the developed and the developing economies got more cavernous and entrenched leading to glaring disparities between the first world and the third world economies. This process of globalization, which more often than not smacks of

developmental paradigm, is interpreted by the third world scholars with all its paraphernalia as a model that is nothing more than a subterfuge of neo-imperialism.

The TNCs by virtue of globalization gradually started playing a decisive role in the domain of international politics and soon emerged as a dominant force capable enough to manipulate the configurative dynamics of the politics of interest and business through its steady access to the international policy making.[8] These events have opened the backdoor to neo-imperialism and neo-colonialism along with imposition of cultural norms upon the submissive nations by the dominant economies.

The scholars of the developing countries have looked into globalization as nothing more than an artifice, a ploy to reconfigure the object of imperialism in a way that is more acceptable and tenable to the world community which is shown to be grounded in some elusive philosophy or ideology to confer it the much needed legitimacy with a view to perpetuate their economic motives and business interests. To bolster the idea of projected legitimacy, efforts are shown to be made by the developed economies to create a comprehensive framework for regulating human rights violations by the transnational corporations based on the concept of optimum utilization of resources and benefits for all.[9]

IS ATTRIBUTION OF 'INTERNATIONAL LEGAL PERSONALITY' TO TNCs AN ADEQUATE REMEDY?

The moot point of disputation of the States disfavoring the idea of granting international legal personality to TNCs is that such attribution will bring the TNCs at par with the nation-States under international law and such an enhanced status or recognition so granted will more or less equate TNCs with States which runs counter to the fundamental premise of sovereign equality and supremacy of States that is kind of a theoretical groundwork on which stands the edifice of international legal regime.

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[8]Larry Backer, 'From Moral Obligation To International Law: Disclosure Systems, Markets And The Regulation Of Multinational Corporations' (www.heinonline.com 2007-2008) <www.heinonline.com> accessed 27 August 2015

[9]DetlevVagts, *Making Transnational Law Work in the Global Economy* (Cambridge University Press 2010) 246 ISBN 978-0-521-19252-1

However, the researcher feels that adoption of the doctrine of State sovereignty amounts to denial of such legal rights attributed to TNCs.[10] The researcher through sustained efforts, to fathom the undeniable presence of the TNCs, has reached the conclusion that complete exclusion of TNCs from the entire scheme of things contemplated under the international law will result in more complex problems in the realm of international relations and politics and therefore,the safe and rather pragmatic way to deal with the growing impact of TNCs in international law is to confer upon them, if not a plenary framework of legal rights and obligations under the international law, definitely, qualified rights and obligations under the international law which will more than serve the dual purpose of bringing the TNCs within the fold of international law, and yet granting them qualified legal status and thus, maintaining the sanctity of the normative foundation of 'State supremacy' under international law and not bringing the TNCs, as entities, at par with the nation-States. Such an approach is basically quite convincing as it accommodates the theoretical foundation of the discipline on one hand and attempts to cure the growing complexities having regard to the practical implications of the rise of the TNCs in the globalized era on the other. Thus, there is identification of the TNCs and yet they are not granted a pedestal which may have all the probabilities of equating them to the nation-States which is in fact rendered possible by virtue of qualified imputation of legal status. Such an approach is the need of the time, which if not adopted will render effectual regulations of the actions of TNCs quite an uphill task. To quote Prof. Jenks:

"Every legal system, as it develops must grapple with the problem ofplacing an effective restraint upon power and insuring responsibility; thisis the essence of the whole concept of due process of law."[11]

It is such a qualified recognition that when granted to the corporations,they can be effectively brought under the umbrella of imposed regulations, and may be conferred rights and correlative duties after granting them 'international legal personality'. The phenomenon of globalization is so immense and impactful that any exhaustive survey of its genealogy is kind of arduous. Globalization emerged as a cult in the post-1990 when the ideas of liberalization and privatization nurtured and nourished by the growing emphasis on capitalism, individual choice

[10]Tania Voon, 'Multinational Enterprises and State Sovereignty under International Law' (www.heinonline.com 1999) <www.heinonline.com> accessed 27th August 2015
[11]H. Lauterpacht, at p. 79; accord in *France v. United States of America* [1952] I.C.J 176

and consumerism started gaining deep grounds. The post-1990 world, which conspicuously lacked the stability of the bipolar structure, its consequences could emerge with a greater thud. Globalization has both economic and political aspects and both these aspects consistently contest the classical state-centered structure of the Westphalian order. That is why, this time is typified as the 'age of non-state actors'.[12] At the elementary level, the following basic postulates need to be enforced:

1) The right to sue and be sued;
2) The ability to assert a right;
3) The acceptance of legal responsibility in a judicial forum.[13]

Accordingly, a 'minimal' personality model to the TNCs may be effected according to the extant corporate registration models used across the globe where domestic legislations mandate compulsory registration of businesses.[14] The process of registration brings with it some associated benefits incentivizing compliance to rules and regulations contemplated under such registration framework. The benefits that usually follow are the rights and responsibilities under such a regulatory structure. But, conferment of legal rights and responsibilities requires a certain degree of identification or bracketing of entities or bodies and it is here where the rub lies.

The apparent invisibility of the TNCs as entities, that have a sweeping influence across the globe with its tentacles binding the entire world through its international functioning, create a serious difficulty since such corporations are more conspicuous by their absence in international legal discourse, than by their presence. The theoretical, normative framework coupled with philosophical abstractions typifying the realm of traditional international law fail to accommodate the existential reality of the transnational corporations. But the socio-economic order as of now, in the context of present international politics and international relations, can no more ignore the TNCs and the resultant impact of their activities and therefore, the international order today challenges the theoretical strictures and poses an intuitive argument in favor of expansion of the contours of international legal process in order to include groups and

[12]Janne Elisabeth Nijman, *The Concept of International Legal Personality* (Cambridge University Press 2004) ISBN 90-6704-183-1
[13]See n. 10, at p. 247.
[14]See n. 8, at p. 604.

organizations whose participation is crucial to the upholding of the sanctity of international law which should subsume transnational corporations among such other kindred associations.[15]

STRATAGEMS TO ENSURE COMPLIANCE OF TNCs TO THE REGULATORY FRAMEWORK

The idea of ensuring compliance of the transnational corporations to the regulations contemplated based on felt necessity is brilliant but will seldom serve the purpose unless backed by concrete procedures and methods requiring effective actions and assuring conformity. There is no denying of the fact that if accountability and responsibility of the TNCs are called for, these bodies need to be given legal recognition in order to bring them within the folds of international law. But there is a very legitimate dose of skepticism with regard to the fact that whether holding TNCs accountable will be a smooth affair at all due to the less binding nature of international law vis-a-vis municipal law. Such a problematic situation quite spontaneously invites some pragmatic solutions which can be adopted.

Various international forums, where issues concerning Deep Seabed Mining were tabled, are replete with instances of the TNCs influencing the political configurations representative of various nations for the simple reason that the TNCs were not treated as entities capable of voicing their own opinions or issues in such forums. Such bracketing of TNCs as non-participants was rooted in the classical normative foundation of international legal regime which essentially ignored the presence of TNCs in the international plane as international players unlike nation-States. But, new found pragmatism has kind of cured such a defect and has started increasingly to acknowledge the undeniable presence of TNCs. Such an approach is more suited to the present international context for reasons galore, the most prominent being the fact that TNCs which have now emerged as seats of economic clout, any strategy to ignore them will provide such entities with grounds to adopt convoluted means and devices to air their voices and this may in turn disrupt the traditional authority of the nation-States which always claim their supremacy as subjects of international law in relation to TNCs.

According to Charney, the idea of restricting TNC participation will not provide a suitable solution to the problem of compliance. On the contrary, the solution lies in enhancing the

[15]See n. 7, at p. 893

participation of the TNCs in the law making process which will provide a more democratic and inclusive platform as the desires and issues of the TNCs will also gain voice and relevance. Some scholars hold divergent views on the issue of granting legal recognition to the TNCs. Some of them are in agreement with Charney and are in favor of granting legal recognition to these entities. They also repent that had it not been for the State centric approach of classical international law, the TNCs perhaps would not have to wait so long for their legitimized presence.

A very popular opinion has recently gained ground that TNCs are the real seats of power in the globalized era and such an inclusionary strategy must be welcomed. Suchinclusion will give these entities the much needed voice as direct participants in the international deliberations and this will mitigate probabilities of implicit power struggles and corruption in the international political scene.[16] There is another group of scholars who are reluctant to accord such position to TNCs which will enable them to voice their claims directly as the basis of such claims are in majority of the cases devoid of equitable principles and primarily zero in on profit generation.

Such a grant of authority is feared will altogether subvert the efficacy and worth of principles that have hitherto played a dominant role in ensuring a just and stable legal order. There are instances where the TNCs have outright flouted the international labor standards giving utmost primacy to profiteering and resorting to self-aggrandizement practices.[17] Formal international responses to such questions have been slow in coming. In August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a pioneeringdocument in this regard, titled 'Norms on the Responsibilities of Transnational Corporations andOther Business Enterprises with Regard to Human Rights'.[18] The norms which attempt to structure and

[16]Charney reaches this conclusion basing his study on DetlevVagts' analysis on dealing with the problem of regulating TNCs. Vagts suggests that either an autonomous space be allowed to such Corporations outside statecontrol
enabling individual states to perform the regulatory functions in accordance with their municipal laws; or,
creating an international agency for the purpose of such monitoring, along the lines of the WTO; in alternative, to continue with the current system of checks and balances and pursue the same more vigorously. In the opinion of the researcher, the second solution may yet be found more suitable, as the municipal laws seldom can be Seen to have extra-territorial application, and in any case such the major issue of locating the country in which the corporation is based does not get addressed through the former method. The problem of continuing with the current system has been established already and needs no reiteration, and is hence discarded.See n. 11, at p. 772-4.
[17]Corporations like Nike, etc are openly flouting labor standards, See n. 1.
[18]Responsibilities of transnational corporations and other business enterprises with regard to human rights, Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, 13 August 2003.

codify the principles relating to the identification of the areas for affixing legal accountability of TNCs pertain to a great extent to a refiguring of established principles of public international law subjecting the TNCs to an effective international legal regime. But more or less, there has been a lot of controversy and suspicion with regard to the utility of 'soft laws' to control the TNC activities.

The most praiseworthy of efforts came from the United Nations Human Rights Council which adopted a resolution[19] for imposition of legal obligations upon States and TNCs alike aimed towards the protection of human rights and punishment in cases of digression. The document enshrines a truly noble mandate of ensuring that nation-States take suitable measures to safeguard against excesses done by TNCs by the aid of domestic legislations. A 'Working Group'[20] is created to give effect to such mandate so contemplated. But such resolution and the associated attempts are not without their own share of defects. Despite these shortcomings, there is no gainsaying the fact that this may yet be the most positive step taken by an international entity exclusively for the purpose of regulation of TNCs at the global plane.[21]

From the above discussion, it can be well ascertained that the researchers have taken a kind of ambivalent stance with regard to the imputation of legal personality to TNCs. On one hand, there is celebration of the supposed potency of such legal recognition of TNCs and on the other, there is a presumption that such legal personality to TNCs will in the long run destabilize the international legal order due to preponderance of profit motives and gradual withering away of the universal tenets of international law.

CONCLUSION

[19]Resolution A/HRC/17/31

[20]United Human Rights Council , 'Resolution A/HRC/17/4: Working Group on the issue of human rights and transnational corporations and other business enterprises' (http://www.ohchr.org 2014) <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> accessed 29th August 2015

[21]Menno T. Kamminga, 'Corporate Obligations under International Law', (www.google.co.in 2004-2005) <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2F198.170.85.29%2FKamminga-Corporate-Obligations-under-Intl-Law.doc&ei=xdNzU9eMB8XQrQeorICIAQ&usg=AFQjCNGN1M4maY1ZDbRWe5dXBCXvdqqmOQ&sig2=B_4-CWAIrV3ix8QKsWNMiw> accessed 29th August 2015. In the given circumstances, self-regulation seems the only alternative, since no effective remedy can be sought from the states in question. Kamminga denounces soft laws and self-regulation as equally ineffectual means of creating corporate legal obligations.

The existence of a somber ambiguity and a commendable degree of ambivalence render the very proposition of attribution of international legal personality to transnational corporations highly problematic. The growing economic power of these entities buttressed by business transactions and exchanges across the globe provide the most compelling evidence of the increasing importance and presence of these entities in the highly dynamic global business space.

An intriguing question has bothered the scholars since years – whether the TNCs will be legally recognized as a subject of international law and hence brought within the four walls of the international legal regime so as to render them capable of enjoying legal rights and obligations. Even though the very idea of holding the TNCs as subjects of international law was initially refuted by scholars of different genre due to the brazen attack to the rudimentary theories of State supremacy and State sovereignty on which the classical edifice of international law is believed to have been erected, subsequent scholars have to a large extent come to terms with the evolving circumstances and changing realities in the international sphere, whereby they have realized that ignoring TNCs and their activities will be suicidal as such activities are seen to have entrenched impact on the socio-political terrain.

However, effectuating the attribution of legal personality has its own share of unique problems, the most conspicuous of which perhaps is the setting of true and fair ways of determining the obligations of the TNCs which the municipal laws find increasingly difficult to address. The invisibility of the TNCs from the perspective of international law is the center of all arguments and counter-arguments revolving around the idea of legal personality of TNCs. Though granting of legal recognition to TNCs in the current scenario is somewhat felt imperative, it is convincingly posited that by such granting, the position of TNCs will never be elevated to that of nation-States. The status will be a limited one, the primary objective for such conferment being to efficaciously control such entities, where identification of those who fail to comply with the stipulations is booked for unwarranted digressions or violations. This, the researcher feels to be the most reliable solution to our present predicament, and needs to be doggedly pursued to contest the problem of non-recognition introduced by the classical canons of State supremacy and State sovereignty in order to accommodate the dynamics of the time and to move in tandem with the pulse of the age.