Chapter – 3

Evolution of Regulatory Framework for Corporate Social Responsibility of Transnational Corporations relating to Right to Clean and Healthy Environment: International Scenario

‘There is no single code or standard, no panacea that will lead to corporate responsibility. Each company is different, with its own challenges, corporate culture, unique set of stakeholders and management systems. Corporate responsibility is a journey for which there is no single map but hundreds of guides. Codes and standards are maps that can be combined in new ways for different journeys.’

Scheme of Chapter

- The Frame
- The Focus
- The Objective

3.1 Introduction

3.2 International Initiatives

  3.2.1 United Nations’ Driven Initiatives
    3.2.1.1 United Nations Global Compact
    3.2.1.2 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003
    3.2.1.3 UN Guiding Principles on Business and Human Rights 2011

  3.2.2 Other International Organisations’ Driven Initiatives
    3.2.2.1 OECD Guidelines for Multinational Enterprises 2011
    3.2.2.2 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
    3.2.2.3 International Organization for Standardization
    3.2.2.4 World Business Council for Sustainable Development Recommendations on CSR
    3.2.2.5 ICC Business Charter for Sustainable Development
    3.2.2.6 Coalition for Environmentally Responsible Economies Principles
    3.2.2.7 Global Reporting Initiative Guidelines

---

3.2.8 Caux Round Table Principles for Responsible Business
3.2.9 AA 1000 Assurance Standard
3.2.10 Amnesty International Human Rights Guidelines for Companies

3.2.3 Individual Driven Initiative: Global Sullivan Principles of Corporate Social Responsibility

3.3 Regional Initiatives: European Union
3.4 Individual State Driven Initiatives: Indonesia and India
3.5 Salient Characteristics of the Emerging Regulatory Framework for CSR regarding TNCs
3.6 Chapter Conclusion
Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

The Frame

This chapter discusses the evolution of regulatory framework of CSR for corporations including TNCs in particular context of environmental protection at the international level. This evolution consists of key developments at the international, regional and domestic fronts.

The Focus

This chapter focuses on developing an understanding of the salient characteristics of regulatory framework of CSR regarding TNCs at the international level in the particular context of right to clean and healthy environment.

The Objective

The chapter explores the extent to which the evolutionary course of regulatory framework helps in fulfilling right to clean and healthy environment at the international level in particular context of TNCs.

3.1 Introduction

TNCs are global players whose activities transcend national frontiers. Being transferors of capital and technology across of the globe, they have emerged as dominant players influencing society. The environmental impacts of their operations accordingly have global dimensions although, they are more pronounced in the societies where such operations are undertaken. Accordingly, various stakeholders, interacting with TNCs or affected by their activities, have come to entertain heightened sense of CSR from them. Therefore, various initiatives have been taken at the international level by various organizations in order to develop regulatory framework of CSR for TNCs. Such initiatives may be classified into the following categories –

I. International Initiatives
II. Regional Initiatives
III. Initiatives by Individual States
3.2 International Initiatives

Evolutionary course of regulatory framework of CSR has been shaped by many actors at the international level. Such initiatives are variedly referred to as guidelines, compacts, codes, principles, commitments etc. Such initiatives may be further classified into the following four categories –

3.2.1 United Nations’ (UN) Driven Initiatives
3.2.2 Other International Organisations’ Driven Initiatives
3.2.3 Individual Driven Initiatives

3.2.1 United Nations’ (UN) Driven Initiatives

UN was created primarily to avoid third world war in future and to restore human dignity through fundamental human rights. No one could have anticipated at that point of time that in pursuit of its objectives, UN would ever concern itself with corporations in general and TNCs in particular. Over a period of time, its human rights agenda has come to include right to clean and healthy environment (as explained in the previous chapter). It has also realised that TNCs, in the course of their operations in different parts of the world, are alleged to be complicit in causing severe environmental damage yet their regulation through their home states has not proved to be very effective. Its first attempt to regulate TNCs through developing a binding code for them did not succeed and was given up in 1993. However, subsequently its human rights agenda has encouraged it into serious engagement with TNCs. Such engagement has given certain tangible outcomes which are discussed in detail hereinafter –

3.2.1.1 United Nations Global Compact (UNGC)

UNGC was first proposed by UN Secretary General Kofi Annan in World Economic Forum (WEF), in Davos, Switzerland in 1999. He called upon the business and UN to initiate a ‘global compact of shared values and principles, to give a human face to global market’. It was launched on 26 July 2000. It encouraged companies to

---

Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

embrace, support and enact, set of core values in areas of Human rights, Labour, Environment and anti-corruption and that too within their own sphere of influence.\(^4\) It refers to these principles as enjoying universal consensus and being derived from – UDHR, ILO’s Declaration on Fundamental principles and Rights at work; Rio Declaration on Environment and Development; and United Nations Convention against Corruption.\(^5\) Of all the business entities, sphere of influence of TNCs is widest due to the sheer scale of their operations spanning across the globe. As originally drafted, UNGC consisted of nine principles which related to Human rights, Labour, Environment. Tenth Principle was adopted in 2004 in the form of anti-corruption.

Due to the use of generic term ‘business’, UNGC is applicable to all kinds of businesses including TNCs which will invariably constitute its substantial component in terms of their scale of operations and magnitude of their impact on human rights and environment. Principle 7, 8 and 9 of UNGC relate to environment and are derived from Rio Declaration on Environment and Development. According to Principle 8, TNCs should promote greater environmental responsibility through undertaking initiatives for this purpose. Under Principle 7, TNCs should support precautionary approach towards environmental challenge. TNCs should encourage development and diffusion of environmentally friendly technologies under Principle 9. Therefore, although courts in USA refused to recognize principles contained in Rio Declaration as unenforceable under ATCA (as discussed in detail in previous chapter), UN has integrated these principles as integral part of UNGC agenda. UNGC office in partnership with Duke University and others developed next generation Environmental Stewardship Strategy to enable companies to develop truly holistic and comprehensive strategy.\(^6\) UNGC adopted two environmental issues namely – climate change and water sustainability. Under these environmental principles, three initiatives have been taken namely – caring for Climate, CEO water mandate and Food and Agriculture Business Principles.\(^7\)

---


\(^5\) ibid.


Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

Procedure under UNGC

Mckinsey & Company prepared an Evaluation Report in 2004 and recommended introduction of Integrity Measures, first version whereof was finalized in consultation with Office of Legal Affairs (OLA) in 2005. Integrity Measures were aimed at strengthening participants’ accountability particularly in three areas namely - misuse of name and logo of Global Compact; companies’ failure in submitting Communication of Progress (COPs); procedures to deal with allegations of systematic and egregious abuses of principles of UNGC by companies.

Para 4 of the Integrity Measures provides the procedure to be followed under UNGC. Whenever allegations of systematic and egregious abuses of UNGC’s principles by companies are received in writing by the UNGC office, it will undertake prima facie screening for frivolous allegations. If found frivolous, UNGC office will be informed and no further action will be taken. However, in case the allegations are not found frivolous, it will forward the same to the participating company with a request either to submit written comments directly to party which has raised the matter and a copy thereof to the UNGC. The participant company will also be requested to inform UNGC office of any actions taken by it to address subject matter of allegation. UNGC office is empowered to take the following measures –

a) Encourage resolution through its good office;

b) Require relevant country network or regional UNGC network or other UNGC participant organization to assist in resolution;

c) Refer the matter to one or more of the UN entities for advice, assistance or action;

d) Refer the matter to UNGC Board in order to benefit from the expertise and recommendation of its business members.


9 ibid.

Participating companies will be regarded as ‘non-communicating’, if they refuse to engage in dialogue within two months and will be identified as such on the website of UNGC so long as it does not commence dialogue. Having regard to the review of nature of complaint and the responses by the participating company, in case such continued listing of the participant company is regarded as detrimental to reputation and integrity of the UNGC itself, it can remove the name of such company from the list of participants. Once so removed, participating company will not be allowed to use UNGC name and logo. Upon taking appropriate actions to remedy the allegation, participating company may again be reinstated as “active” participant.

**Communication of Progress (COP)**

UNGC devised its Policy on Communication of Progress (COP) which was updated latest on 1 March 2013. As part of their annual disclosures under COP, companies are required to disclose to their stakeholders regarding their efforts towards implementing UNGC’s principles. Each COP must contain following elements – statement expressing continued support for UNGC; descriptions of practical actions taken by the company to implement UNGC’s principles in each of the issue areas including environment and measurement (both qualitative and quantitative) of outcomes. They should also submit brief self-assessment summarizing COP’s content. Participants must submit their first COP within one year of its date of joining. Subsequent submissions should be made yearly.

Depending upon meeting the requirements, companies are classified as –

a) **GC active participants**\(^\text{11}\) – They meet the minimum requirements.

b) **GC advanced participants**\(^\text{12}\) – Besides meeting all minimum requirements, they also meet additional advance criteria like implementing UNGC’s principles into strategies and operations; taking actions in support of broader UN Goals and issues; corporate sustainability governance and leadership. A one-time learner grace period of 12 month is given for those which submit

---


\(^{12}\) ibid.
COP while failing to meet minimum requirements for meeting the same.\textsuperscript{13} They will get UNGC’s extended support and assistance.

c) *Non-communicating participants*\textsuperscript{14} – They fail to submit COP within required deadlines.

d) *Expelled participants*\textsuperscript{15} – Upon non-submission of COP within one year from becoming non-communicating, they will be expelled from UNGC and their names will be listed on its website. Once expelled, such participants need to apply afresh to rejoin.\textsuperscript{16}

For avoiding duplication, companies should incorporate COP into corporate responsibility or sustainability report and/or integrated financial or sustainability report.\textsuperscript{17} If it does not publish such report, COP will be treated as stand-alone report.\textsuperscript{18} However, the entire process suffers from one crucial limitation - UNGC lacks any mechanism in order to assess the accuracy of such reports.\textsuperscript{19}

UNGC not being a compliance based initiative, the objective behind measures is to help participants in aligning their activities with UNGC principles. UNGC’s office does not concern itself with any legal claims against a participant. From legal point of view, this is another big limitation of UNGC.

UNGC developed Global Compact 100 consisting of a representative group of Global Compact companies selected on the basis of their implementation of UNGC principles and evidence of executive leadership commitment and consistent base-line profitability.\textsuperscript{20}

Although not addressed specifically to TNCs, UNGC may be seen as providing a mechanism for furthering the acceptance, adoption and implementation of its principles (including those concerning environment) by them. Since the nature of entire UNGC framework is admittedly voluntary, TNCs have a choice – be its participant so long as it suits their business interest. However, voluntary nature offers

\textsuperscript{13} ibid.
\textsuperscript{14} ibid 3.
\textsuperscript{15} ibid.
\textsuperscript{16} ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} ibid.
\textsuperscript{19} UNGC Strategy 2014-2016 (n 7) 23.
a distinct advantage in particular context of environment – if environmental concerns can be integrated with business interest, such integration becomes ever lasting. UNGC participant companies and other organizations established the Global Compact Network India (GCNI) in New Delhi as a non-profit entity on 24 November 2003.\textsuperscript{21} It was the first Local Network to be registered with full recognition.\textsuperscript{22} It figures presently among the top 10, out of more than 90 Local Networks in the world. It has also emerged as the largest corporate sustainability initiative in India and globally with a pan India membership of 230 leading business and non-business participants and 341 signatories.\textsuperscript{23}

**UNGC: Impact**

Although initiated by Kofi Annan, his successors as well as UN General Assembly have supported UNGC. In January 2008, for the first time UNGC delisted 394 companies from the list of participants for their failure to communicate their progress which they were required to do as part of integrity measures.\textsuperscript{24} After roughly six months, it delisted 630 more companies on 25 June 2008.\textsuperscript{25}

**2010 Review**

UNGC undertook review of a decade of its performance in 2010. The review took note of the fact that UNGC has emerged as world’s largest voluntary sustainability initiative comprising over 8,000 business participants and non-business stakeholders from 135 countries representing nearly every industry and sector as well as developed, emerging and developing economies.\textsuperscript{26} Recent initiatives to advance disclosures in areas particularly human rights, water and anti-corruption were taking this endeavour to next level.\textsuperscript{27} It also took note of what it preferred to call ‘rise of soft

\textsuperscript{21} It has pan-India membership base of 323 participants and acts as a vehicle for Indian companies—large, small or medium-sized—academic institutions and civil society organizations to work together to strengthen responsible business initiatives. See for details *Act Globally Engage Locally: India* <https://www.unglobalcompact.org/engage-locALLY/asia/india> accessed 7 February 2017.


\textsuperscript{25} ibid.

\textsuperscript{26} UNGC Annual Review (n 3) 7.

\textsuperscript{27} ibid.
power’ under which governments were playing vital role in promoting responsible business practices complementing regulatory measures instead of earlier approach of singularly focusing on regulation.  

Review showed that business participants continued with their efforts to implement policies and take tangible actions advancing UNGC principles despite global meltdown. Report revealed that 80% of companies having subsidiaries made at least moderate efforts and 30% of them required their subsidiaries to engage in responsible practices. Most significantly, Review also showed that like 2008, companies were implementing environment and labour better than human rights and anti-corruption in 2009 as well. Regarding principles relating to environment, review revealed that although largest companies significantly improved in impact assessment, risk assessment, technology assessment, and 3Rs (reduce, reuse, recycle) but companies with 5,000-50,000 employees were not impressive.

May 2009-April 2010 Review by JIU

Joint Inspection Unit (JIU) of UN conducted a review of the role and functioning of the UNGC for the period May 2009 to April 2010. Review focused on the work of New York-based Global Compact Office (GCO), 90 networks worldwide and five regional centres. It pointed out serious flaws in the working of UNGC and recommended that –

a) UN General Assembly should give clear mandate to UNGC which is lacking.

b) Although participation of companies in UNGC is better in comparison to other such initiatives like WBCSD and GRI but in order to make it more

---

28 ibid.
29 ibid 10.
30 ibid 15.
31 ibid 17.
32 ibid 46.
33 Fall and Zahran (n 8) 4.
34 ‘In 2009, 5,670 participants out of a total of 7450 participants registered in its database were business participants. (35% of business participants comprised large companies out of which 100 were ranked on Financial Times Global 500, and 60 were included in list of world’s largest 100 non-financial TNCs prepared by UNCTAD in its World Investment Report of 2009). Whereas Europe had largest region wise representation (43%), participation by North American companies is low (5%) apparently due to fear of litigation. At the national level, largest business participants came from France and Spain (around 10%). Interestingly 50% of top ten participants were from developing/emerging economies such as Argentina, Brazil, Colombia, China, Mexico and Singapore’. See for details ibid 9.
Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

Impactful, quality and quantity should be balanced by pegging participants composition by category and geographically.\(^{35}\)

c) Minimum criteria of selection for participation in Global Compact need to be established and accordingly followed in order to prevent companies from using UNGC for “bluewashing” benefits.\(^{36}\)

d) Instead of introducing new measures regarding non-reporting period for delisting and frequency of reporting, existing measures should be more effectively enforced.\(^{37}\)

e) Communicating participants used to be low (35% and 40% in 2002 and 2003 respectively). Gap was sought to be bridged by introducing COP policy guidelines in 2004 which came into force in 2005. They were further improved in 2006, 2008 and 2009. Environmental principles emerged as the ones most reported upon, by the companies. But quality of such reporting needs to be further strengthened through vetting by academics and peer reviews by local networks.\(^{38}\)

f) Independent assessment (presently lacking) should be included in the Annual review (published by GCO since 2007).\(^{39}\)

g) For ensuring adequate guidance and monitoring, UNGC Board should meet more frequently\(^{40}\) (presently biannual) and it should have representation of states who attend its meeting merely as observers\(^{41}\).

h) By stretching itself in newer fields like financial markets, conflict prevention, peace building, and partnerships towards achieving MDGs, GCO has lost focus.\(^{42}\)

UNGC vehemently disputed JIU’s conclusions. It also came out with strategy document for 2014-2016. The strategy document aimed at increasing participants from existing 8,000 to 13,000 by 2016 and ultimately to 20,000 participants by

\(^{35}\) ibid 12.
\(^{36}\) Other UN agencies like UNICEF have better screening processes. See for details ibid 14.
\(^{37}\) In this context, JIU noted that ‘According to JIU survey, 23% of respondents were not even aware of integrity measures; 46% felt the need for their more rigorous implementations. JIU could not obtain detailed figures on number and type of allegations received, handled and resolved or the number of companies delisted.’ See for details ibid 15.
\(^{38}\) ibid 17.
\(^{39}\) ibid 27.
\(^{40}\) ibid 16.
\(^{41}\) ibid 24.
\(^{42}\) ibid 28.
Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

2020\textsuperscript{43}, penetrate into under-represented areas like Africa\textsuperscript{44}, moving beyond the ten principles to cover other UN goals and issues\textsuperscript{45}, strengthening governance of local networks by raising 75\% of them to ‘formal status’.\textsuperscript{46} In order to increase participants’ base, it focused on tapping large multinationals and publicly traded companies (e.g. Dow Jones sustainability index; Fortune 500 and companies already engaged in sustainability).\textsuperscript{47} Also reducing the number of participants expelled from the UNGC (nearly 1000 every year) can help increase the participants’ base. It sought to enhance accountability and transparency to voluntary business efforts, through annual reporting requirements and removal (commit, act, report model).\textsuperscript{48}

2015 Review

UN Secretary-General Ban Ki-moon invited DNV GL Group as expert to comprehensively review and assess impact of UNGC since its inception. The review revealed that it is still a long way to go for sustainability to get deeply entrenched in ‘DNA of business globally’ but noted ‘clear signs of progress’.\textsuperscript{49} It is reflected from the following trend –

i) Business participants increased from 44 (representing 13 countries) in 2000 to more than 8,300 (representing 156 countries) in 2015.\textsuperscript{50} The year 2014 saw a total of 8378 participants of which 4747 comprised large companies.\textsuperscript{51} During July to December 2014, 729 companies joined UNGC from across the Globe.\textsuperscript{52}

ii) By the end of 2014, Business participants include 25\% of the Fortune Global 500 companies which constitute 32\% of total revenue of Fortune Global 500 corporations.\textsuperscript{53} 45\% of Financial Times 500 companies were UNGC participants.

\textsuperscript{43} UNGC Strategy 2014-2016 (n 7) 3.
\textsuperscript{44} ibid 4.
\textsuperscript{45} ibid.
\textsuperscript{46} ibid.
\textsuperscript{47} ibid 14.
\textsuperscript{48} ibid 10.
\textsuperscript{49} Impact (n 22) 10.
\textsuperscript{50} ibid 60.
\textsuperscript{53} Impact (n 22) 60.
iii) Europe continued to dominate as a region not only having highest number of participants (52%) but also countries represented. It continues to have most signatories (32 in 2000 to 5947 in 2015).

iv) Asia, Latin America & Caribbean and North America has also shown rise in the number of signatories. Africa has seen largest increase in the number of countries with UNGC participants (from 1 in 2000 to 32 in 2015) and Latin America has seen the largest increase in number of participants.

v) Participation of publicly listed companies is not very promising. Out of the total of 46,737 publicly listed companies in 2012, only 2% are UNGC signatories. Since 2012, the number of publicly listed companies in UNGC has increased from 935 to 1,101 in May 2015.

vi) Since 2008, 5,579 companies have been delisted. Besides, 798 companies have requested withdrawal. A total of 657 companies were expelled from UNGC for failure to communicate progress for consecutive two years while total 1,218 expulsions were done in 2015 of which 89% were SMEs.

vii) Despite gradual increase in the number of participants, it represents a marginal fraction of global economic activity.

viii) Percentage of global private sector workforce of UNGC business participants increased from 1.9% of 2005 to 3.7% in 2013.

ix) More than one third of companies stated that UNGC had a significant to essential influence on the work done in implementing the UNGC principles.

x) 46 companies were participating in LEAD of which 46% had more than 50,000 employees and 65% were publicly listed.

xi) Respondents having policies and practices in place relating to environment increased from 92% in 2008 to 96% in 2015.

---

54 ibid.
55 ibid.
56 ibid.
57 ibid.
58 ibid.
59 ibid.
60 UNGC Expels (n 52).
62 Impact (n 22) 61.
63 ibid.
64 ibid 65.
65 ibid 68.
66 ibid 69.
xii) Companies using risk assessment as a tool to implement the principles in the field of environment increased from 52% in 2008 to 56% in 2015.68

xiii) 251 tools and guidance resources were produced during 2000-2015 aimed at clarifying good corporate practice on a wide range of environmental, social and governance issues.69

xiv) UNGC launched specific issue engagement platforms namely – Caring for Climate (supported by over 400 companies)70, CEO Water Mandate and Women’s Empowerment Principles.71

xv) Large companies (more than 250 employees) applying policies and practices pertaining to environment to their suppliers increased from 59% in 2008 to 72% in 2015.72

xvi) Number of Communication on Progress Reports (COPs) submitted to UNGC increased from 646 in 2005 to 5,404 in 201473 (which further increased to 5,988 in 2015)74. 457 GC Advanced COPs were submitted while 614 GC Learner COPs were submitted.75 Number of Global Reporting Initiative reports also increased from 44 in 2000 to close to 4,500 in 2014.76 UNGC comprised world’s largest database of publicly available sustainability disclosures containing close to 28,000 COP reports.77

xvii) Both Global NGOs and local NGOs have seen enhanced participation in UNGC. Former increased from nil in 2002 to 487 in 2015 while latter from 5 in 2002 to 1,602 in 2015.78

UNGC has displayed the list of 1597 total non-communicating participants79 and 7130 expelled participants80.

67 ibid 75.
68 ibid.
69 ibid 76.
70 ibid 92.
71 ibid76.
72 ibid 87.
73 ibid 88.
74 CoP 2015 (n 61).
75 ibid.
76 Impact (n 22) 88.
77 ibid 89.
78 ibid 117.
Merits of UNGC

a) UNGC marked the beginning of a long journey of constructive engagement of UN with business entities including TNCs.

b) UNGC imports the principles from existing instruments and present them in the context of business entities and continue to further develop these principles.

c) Many TNCs have become participants in UNGC owing to its voluntary nature.

Demerits of UNGC

a) UNGC principles are drafted in a very general language bringing an element of inherent vagueness.\(^{81}\) This is particularly so in case of the principles dealing with environment which requires more clarity for their implementation. In fact, they fail to provide much guidance to TNCs regarding what they should and should not do, leaving them free to interpret them according to their own economic advantage. Therefore, TNCs may flout them with impunity. Environmental activists have termed UNGC as ‘greenwash’ instrument.\(^ {82}\) They see it as a ploy adopted by the TNCs to thwart any plans of adopting any binding obligations during Johannesburg Summit.\(^ {83}\) Even the commentary provided to the principles (which is a welcome step) does not take the understanding of the principles very far and is having limited utility.

b) Despite being backed by Rio Declaration (having overwhelming consensus in its favour), UNGC could only go as far as being merely a voluntary initiative. One wonders what other backing was needed to provide a mandatory framework. A voluntary framework for regulation of TNCs with respect to environmental harm caused by them hardly inspires confidence regarding its efficacy amongst the people.

c) UNGC has rekindled a lot of hope for the future in the minds of various stakeholders regarding future effectiveness of the initiative in enhancing accountability of TNCs regarding environmental harm. However, UNGC office miserably lacks the capacity (financial or otherwise) to supervise


\(^{82}\) See Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press 2012) 89.

\(^{83}\) ibid 90.
compliance with even a voluntary framework of this nature. This is more so when such environmental harm may be caused and/or victims thereof may live in remote parts of the world. Existence of so much fanfare alongside such incapacity, will further threaten the trust in voluntary measures of such kind.

d) In absence of any mechanism of independent monitoring of UNGC, the whole exercise may be reduced to mere formality.\(^84\) So although TNCs will compete with each other in claiming themselves to be ecologically most green and clean of all, but the real picture will be craftily disguised.

### 3.2.1.2 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003 (UN Norms)

After abandoning of Code of Conduct on Transnational Corporations in 1993, drafting of UN Norms was the first initiative of the UN which exclusively focused on TNCs and their violation of human rights. Drafting began with constitution of Session Working Group in the Sub-Commission on the Promotion and Protection of Human Rights\(^85\) to examine activities of TNCs in 1998 for a three year period. Sub-Commission unanimously adopted UN Norms in August 2003. UN Human Rights Commission first considered the UN Norms on 20 April 2004.

UN Norms represent most comprehensive framework detailing human rights obligations of TNCs and their implementation procedure. UN supplemented them with a commentary in order to further elaborate their meaning.\(^86\) UN Norms have taken note of existence of OECD Guidelines as well as UNGC.\(^87\) The title of the UN Norms lay emphasis on three aspects. Firstly, they are norms prescribing responsibilities instead of accountability. Secondly, these norms are not only aimed

---

\(^84\) See Deva (n 81) 99.

\(^85\) United Nations Sub-Commission on the Promotion and Protection of Human Rights (the main subsidiary body of the former Commission on Human Rights) was established in 1947 with 12 members by ECOSOC as the 'Sub Commission on Prevention of Discrimination and Protection of Minorities'. Its name was changed in 1999. Its membership consists of 26 independent experts elected on the basis of equitable geographical distribution and they act in personal capacity. See About the Sub-Commission: &lt;http://www.ohchr.org/EN/HRBodies/SC/Pages/SubCommission.aspx&gt; accessed 10 February 2017.


\(^87\) See Preamble ibid.
against TNCs but also other business enterprises. Thirdly, the responsibilities are imposed on TNCs and other business enterprises regarding human rights.

Although UN Norms did not define the term ‘norms’, however it has purposively defined four terms i.e. ‘transnational corporations’, ‘other business enterprises’, ‘stakeholders’ and ‘human rights’ giving them broadest possible meaning. According to Paragraph 20 of the UN Norms, the term ‘transnational corporation’ means an economic entity which operate in more than one country or a cluster thereof which operate in two or more countries. Its legal form or whether in home or host country (i.e. country of their activity) or whether taken individually or collectively is immaterial to this definition. The application of UN norms is widened by the inclusion of the term ‘other business enterprise’ which is defined by Paragraph 21 as ‘any business entity’ but specifically mentions ‘TNCs, contractor, subcontractor, supplier, licensee or distributor, corporate, partnership or other legal form used to establish business entity and the nature of ownership thereof’. It is immaterial for the purpose of this definition whether the nature of their activities is international or domestic. In fact, the applicability of UN norms is presumed if business enterprise has any relation with TNC and impact of its activities is not entirely local or they involve violations of right to security. The objective is clearly to cover supply chains of TNCs within the ambit and scope of the UN norms, irrespective of their nature. The definition is inclusive extending scope to include other business enterprises having direct or indirect relationship with TNCs.

The term ‘stakeholder’ is defined in Paragraph 22 in inclusive sense. It is based on the stakeholder theory of a corporation. This definition is a welcome one which extends it to stakeholders as comprising both direct and indirect stakeholders. It includes stockholders, other owners, workers and any individual or group that is affected by activities of TNCs and other business enterprises. UN Norms emphasise that the term should be interpreted functionally in the light of their objectives. When so interpreted, the term is extended to include even indirect stakeholders such as consumer groups, customers, neighbouring communities, indigenous peoples and communities, non-governmental organizations, suppliers, trade associations and even governments provided their interests are or will be substantially affected by the activities of TNCs and other business enterprises.
The terms ‘human rights’ and ‘international human rights’ are also defined under Paragraph 23 in inclusive sense. It builds on the commendable work done by the UN in the field of human rights. The term includes civil, cultural, economic, political and social rights not only as mentioned in International Bill of Human Rights but also in other human rights treaties. Further, it includes the rights recognized by international humanitarian law, international refugee law, international labour law and other relevant instruments adopted within UN system.

The intent behind defining these terms so broadly in order to delineate the scope of UN Norms is crystal clear i.e. to ensure that UN Norms should be made applicable to all probable situations of violations of human rights by TNCs.

According to the Preamble of UN Norms, although States have primary responsibility for promoting, respecting, protecting, securing the fulfillment of human rights but at the same time TNCs and other business enterprises, being societal organs, are responsible for promoting and securing human rights enumerated in UDHR. Norms emphasize upon making efforts in order to increase awareness and respect about them.\(^88\)

Paragraph A (1) contains general obligations. It provides that states have the primarily responsibility towards promoting, respecting and protecting human rights which are recognized in international as well as national law. As part of their primary responsibility they shall ensure that TNCs and other business enterprises respect human rights. However, at the same time responsibility is also cast on TNCs and other business enterprises to promote, respect and protect such human rights (including the rights and interests of indigenous peoples and other vulnerable groups) within the spheres of their activity and influence. The phrase ‘sphere of activity’ appears in UNGC as well. Norms have not defined the phrase ‘sphere of activity or influence’. The addition of the word ‘influence’ indicates that even if human rights violations are at the periphery of its area of activity, responsibility will be apportioned where the TNC has some degree of influence.\(^89\) According to the commentary, Paragraph A (1) expresses the primary approach and the rest of the UN Norms are to be read in its light. The obligations imposed under the UN Norms on the TNCs and other business

\(^{88}\) ibid.

enterprises are applicable to their activities undertaken in home country or in their
territory or in any country in which business is engaged in activities. Commentary
further mentions the responsibility on the part of TNCs and other business enterprises
to use due diligence in ensuring that their activities do not contribute to human rights
abuses and they do not benefit directly or indirectly from such human rights abuses
which they are aware or ought to have been aware. They are also required to refrain
from activities undermining rule of law as well as governmental and other efforts to
promote and ensure respect for human rights. They shall use their influence to help
promote and ensure respect for human rights. They shall assess human rights impact
of their principle as well as major proposed activities in order to avoid their
complicity in human rights abuses. States shall not use UN norms as an excuse for
their inaction through enforcement of existing laws.

Besides general obligations, UN norms specifically cover environmental protection
and human rights along with other rights namely - right to equal opportunity and non-
discriminatory treatment; right to security of persons; rights of workers; national
sovereignty and consumer protection. In the context of environmental protection,
Paragraph 14 mandates that TNCs and other business enterprises shall carry out their
activities not only in accordance with national laws, regulations, administrative
practices and policies relating to preservation of environment of countries of their
operation but also relevant international agreements, principles, objectives,
responsibilities and standards relating to environment as well as to human rights,
public health and safety, bioethics and precautionary principles. It is interesting to
note that while compliance with international framework needs to be relating to not
only environment but also with those relating to public health and safety, bioethics,
but compliance with national regulatory framework needs only be with the one
relating to preservation of environment. They shall generally conduct their activities
towards wider goal of sustainable development. Although precautionary principle
finds specific mention but there is no mention of other recognized principles regarded
as integral part of the right to clean and healthy environment. However, Commentary
to Paragraph 14 broadens its scope by clarifying its meaning in terms of right to clean
and healthy environment. Commentary further mentions prevention principle as well
as principle of inter-generational equity while at the same time it reiterates wider goal
of sustainable development as well as precautionary principle. According to the
Commentary, TNCs shall be responsible for environmental and human health impact of all their activities including any products or services introduced by them. Commentary also includes impact assessment by TNCs and other business enterprises of their activities on environment, particularly the hazardous and toxic substances. Such impact assessments shall focus on certain groups such as children, older persons, indigenous peoples and communities and/or women. According to the Commentary, they shall ensure timely availability of such reports in order that they are accessible to UNEP, ILO and other interested international bodies including the host state as well as the other groups. TNCs shall adopt best management practices and technologies to reduce the risk of accidents and environmental damage. They shall share technology and report of anticipated or actual release of hazardous and toxic substances.

General provisions for implementation of the UN Norms contained in Paragraph 18 has particular significance in context of the right to clean and healthy environment. It requires TNCs and other business enterprises to provide reparation for their failures in complying with the UN Norms. Such reparation shall not only be prompt and effective but also adequate. They shall provide reparation to such persons, entities and communities which are adversely affected by their failure in compliance. National courts and/or international tribunals shall apply UN Norms pursuant to national and international law in connection with determining damages regarding criminal sanctions as well as in all other respects.

TNCs and other business enterprises are required under Paragraph 15 to periodically report their implementation of UN Norms as an initial step. They shall incorporate UN Norms in their contracts or other arrangements and dealings so as to ensure respect for them as well as their implementation. According to the Commentary on Paragraph 15, TNCs and other business enterprises shall do business only with those that follow UN Norms. They shall inform everyone who may be affected by conditions caused by them which might endanger health, safety or environment. Furthermore, they shall strive to improve their implementation of UN Norms on continuing basis.

UN Norms require periodically monitoring and verification of their application (in a transparent and independent manner considering inputs from stakeholders) under Paragraph 16 by the UN and other international as well as national mechanisms.
regarding impact of their activities on human rights. According to the Commentary on Paragraph 16, NGOs are encouraged to make UN Norms as the parameter to monitor TNCs and other business enterprises. TNCs and other business enterprises are required to ensure that claims of their violations of UN Norms shall be received, recorded and independently investigated or call upon other proper authorities. They shall actively monitor the status of investigations of such claims and ensure their full resolution and prevent their recurrences. They are also required to ensure such monitoring by their contractors, subcontractors, suppliers licensees, distributors to the extent possible. The results shall be made available to stakeholders to the same extent as annual report. Such assessments shall include plans of action or reparation methods and redress in case of inadequate compliance with UN Norms. They are required to study human rights impact before any major initiative or project, subject to the availability of their resources and capabilities.

States are required to establish and reinforce necessary legal and administrative framework under Paragraph 17 for ensuring that the UN Norms are implemented by TNCs and other business enterprises. Commentary to paragraph 17 refers to measures like ombudspersons, national human rights commission or other national human rights mechanisms for this purpose. TNCs and other business enterprises are required under Paragraph 19 to pursue a course of conduct that is most protective of human rights, be it in the form of international or State law or in industry or business practices.

**Merits of UN Norms**

a) Many experts have criticized the inclusion of environmental damage in an international instrument on human rights by artificially stretching definition of human rights and ‘one size fits all’ approach. However, the criticism seems to be misplaced – firstly, TNCs have been alleged to be involved in violation of the right to clean and healthy environment in number of cases across the world and therefore, its exclusion from the UN Norms would have rendered UN Norms grossly incomplete. In this sense, inclusion of right to clean and healthy environment in the UN Norms is a welcome and encouraging step.

---

90 ibid 472.
91 ibid 464.
Secondly, this right is implicitly included in right to health under Article 12 of ICESCR and its violation would lead to violation of other expressly recognized human rights like right to food, health, shelter etc. It should be seen as express recognition that many human rights cannot be fully enjoyed by an individual in the absence of right to clean and healthy environment. Thirdly, Vienna Declaration has recognized way back in 1993 that all human rights are ‘universal, indivisible, interdependent and interrelated’.93

b) UN Norms adopted non-conventional approach from ‘should’ to ‘shall’. This change was unprecedented implying binding nature of obligations created thereby and distinguishing them from other voluntary initiatives. They imposed positive obligations on companies under which companies were not only required to refrain but proactively use their influence over others to ensure adherence with the norms.95

c) Another important contribution of UN Norms was inclusion of ‘other business enterprises’ thereby broadening the ambit thereof. Norms imposed direct obligations on TNCs in ensuring that their business partners comply with them. Such inclusion was long overdue in the particular context of right to clean and healthy environment since in many cases subsidiaries effectively controlled by TNCs were alleged to be involved in environmental pollution and degradation. In this sense, UN Norms were far closer to the ways TNCs organise and structure their business on the global landscape.

d) UN Norms recognise the relationship between environment and human rights. Further, the fact that obligations regarding environment are elaborated as part of responsibilities of TNCs and other business enterprises with regard to human rights, is an implicit recognition of right to clean and healthy environment as an integral part of human rights.

e) UN Norms marked a distinct shift from existing indirect mode of implementation confining responsibility for human rights enforcement exclusively on States.96
f) UN Norms should be distinguished from all other efforts since they aim to further human rights agenda rather than the agenda of foreign capital/business case of CSR. International Bill of Rights was never drafted having corporations (or for that matter TNCs) in mind. Listing corporate human rights obligations in terms of human rights was a remarkable service rendered by the UN Norms to the cause of right to clean and healthy environment as well as human rights vis-à-vis TNCs.

**Demerits of UN Norms**

a) Business associations sternly objected to the binding nature of the UN Norms. In fact, International Chamber of Commerce (ICC) and International Organisations of Employers (IOE) submitted a joint statement which *inter alia* pointed out that UN Norms – will shift the responsibilities from government to companies; goes far beyond issues of basic human rights; fail to distinguish between non-binding and binding international human rights obligations and convert even the former into latter; render most of the companies non-compliant with existing national laws; company, instead of courts, should decide if its contractor is in compliance with the norms; and will deter companies from investing in developing countries depriving such countries of opportunities for improving human rights situation through their investment.  

They put enormous pressure on the governments (US, UK and Australia in particular) in opposing binding nature of the UN Norms. On the other hand, NGOs, members of the academia and human rights advocates opposed such disapproval. Succumbing to intense pressure exerted by TNCs themselves, through their business associations and their respective governments, Human Rights Commission at its 60th Session unanimously decided that the UN norms have no legal standing and asked the Sub-Commission not to monitor its functioning.  


Sub-Commission to draft such norms at the first place. Decision requested Office of the High Commissioner for Human Rights (OHCHR) to prepare a report on the scope as well as legal status of existing initiatives and standards (including UN norms) on the responsibility of TNCs and other related business enterprises regarding human rights in consultation with all relevant stakeholders including States, TNCs, employers’ and employees’ associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organizations. It reduced the legal significance of UN norms to mere voluntary measures which TNCs are free to comply with or not.

b) Human rights mentioned in UN Norms are indeed an “extensive formulation of corporate human rights obligations both in terms of breadth and depth”\textsuperscript{100}. Certain international treaties referred to in UN Norms have not been ratified by majority states. Mention of such treaties has helped in widening the scope for application of the Norms to various sorts of human rights. However, at the same time, from the perspectives of TNCs, it complicates the whole issue of determining what exactly are they required to comply with.

c) TNCs do business in various countries which are at different levels of socio-economic development across the globe. UN Norms fail to translate universality of human rights into precise standards (localisation of universality).\textsuperscript{101}

d) UN Norms failed to provide any credible enforcement mechanism for enforcement of human rights against TNCs at international level particularly in the light of the challenges posed by \textit{forum non conveniens} and separate legal personality.

e) After dilution of the UN Norms as described above, subsequent UN initiatives lost exclusive focus on TNCs. TNCs are in a dominant bargaining position in whatever business relationship they enter either with other local companies or even with the State. Companies working at domestic level will have hardly any incentive to adhere to voluntary approach of UN Norms. These companies may not even have any global business plans. They can only be incentivized through restructuring their relationship with TNCs.

\textsuperscript{99} ibid.
\textsuperscript{100} See Deva (n 81) 103.
\textsuperscript{101} See ibid.
f) In order to broaden the scope and ambit of UN Norms for their widest possible applicability, the definition of the terms ‘human rights’ and ‘international human rights’ actually complicates the whole matter by extending them through use of the clause ‘other relevant instruments adopted within UN system’. It will be very difficult to determine relevant instruments in this regard.

In the overall analysis, going by the kind of respect UN enjoys for its commendable work on human rights, UN Norms should be regarded as a missed opportunity in bringing accountability to TNCs particularly for the violation of right to clean and healthy environment and generally of human rights inflicted by them. But not all seems to be lost. Since the framework of the UN Norms is already available, it may be revived at any point of time in future as part of international human rights law to strengthen accountability of TNCs.

3.2.1.3 UN Guiding Principles on Business and Human Rights 2011

UN Norms imposed on companies same kind of duties under international law as are undertaken by States upon themselves. Therefore, they triggered a debate not only about their content but also about their impact. The debate led the Commission of Human Rights (CHR) to initiate a new process in 2005 by requesting the UN Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises initially for two years. Accordingly, Professor John Ruggie of Kennedy School of Government at Harvard University was appointed as Special Representative of the Secretary General (SRSG). Its work may be classified into three distinct phases –

   a) Phase – I (2005-2007) was marked by little shared knowledge on the part of stakeholders.


104 Ruggie (n 102) 3.
b) Phase – II (2007-2008) wherein SRSG concluded that existing public as well as private initiatives concerning business and human rights do not constitute a coherent or complementary system and have failed to move markets. According to SRSG, it was due to lack of authoritative focal point which SRSG later developed as Protect, Respect and Remedy Framework. The framework is hinged on three pillars – Firstly, State duty to protect against human rights abuses by third parties including business enterprises. Secondly, corporate responsibility to respect human rights. Thirdly, greater access to judicial and non-judicial remedies. These three pillars constitute ‘an interrelated and dynamic system of preventive and remedial measures’.

c) Phase – III (2009-2011) marked the beginning of operationalisation of the framework. Under this phase, SRSG was required to come out with practical recommendations for its implementation. These recommendations took the form of UN Guiding Principles.

UN Human Rights Council endorsed Guiding Principles drafted by SRSG on 16 June 2011 after extensive consultation with various stakeholders. Guiding Principles are classified into following three parts namely –

I. State Duty to Protect Human Rights

II. Corporate Responsibility to Respect Human Rights, and

III. Access to Remedy

Each part of the Guiding Principles is further classified into two sets of principles – foundational and operational. Each principle is followed by Commentary which further explains its meaning. Guiding Principles clarified at the outset that Guiding Principles are not creating new international law obligations. They merely explained effects of existing standards and practices for States and businesses. They ‘integrated them into a single, logically coherent and comprehensive template’. They identified shortfalls in existing regime and suggested improvement therein.

---

105 ibid.
106 ibid.
107 ibid 4.
108 ibid.
109 ibid.
110 ibid.
111 ibid.
112 ibid 5.
Therefore, Guiding Principles can make sense only when taken together, not in isolation. States and TNCs were required to collaborate in this endeavour.

I. State Duty to Protect Human Rights

This part consists of two foundational principles and six operational principles. Principle 1 put States under an obligation to protect human rights abuse within their territory/jurisdiction by third parties (including business enterprises) through effective policies, legislation, regulations and adjudication. According to the Commentary on Principle 1, obligations of States for human rights abuse of private actors arises under international human rights law not generally, but specifically in situation of such abuse being attributable to them or their failure in taking appropriate steps in preventing, investigating, punishing and redressing such abuse. For this purpose, they should consider full range of permissible preventive and remedial measures.

Principle 2 requires States to clearly lay down their expectations from business enterprises regarding respecting human rights throughout their operations. According to the Commentary on Principle 2, Home States should do it for their business enterprises abroad to save their own reputation through variety of measures like requiring parent companies to report on their global operations, direct extraterritorial legislations etc.

Principle 3 requires States’ to enforce laws; ensure that corporate law enable business respect for human rights instead of constraining it; effectively guide business enterprises regarding respecting human rights; encourage them to address their human rights impact. According to the Commentary on Principle 3, since corporate and securities law directly shape business behaviour, States should help develop clear understanding amongst the various stakeholders regarding their meaning and implications. Further, timely and transparent reporting can be a huge incentive in case of judicial or administrative proceedings against them. Their financial reporting should include even human rights impact as the same may be ‘material’ or ‘significant’ to their very economic performance.

Principle 4 requires States controlled or substantially supported business enterprises to undertake human rights due diligence. Principle 5 provides for adequate oversight on the part of the States regarding respecting human rights in their contracts with
Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

business enterprises or when they legislate for such business enterprises. According to the Commentary on Principle 5, States’ international human rights obligations are not relinquished by mere privatization. Principle 6 requires States to use their commercial transactions with business enterprises in promoting respect for human rights e.g. through contractual clauses. Principle 7 recognises heightened responsibility of Home States (through their assistance agencies, foreign and trade ministries, export finance institutions) regarding human rights in respect of their business enterprises operating in conflict ridden areas where host states will lack control. Principle 8 requires States to achieve policy coherence so as to avoid friction between their human rights obligations and the laws and policies developed by them for shaping business practices. According to Commentary on Principle 8, vertical policy coherence will consist of having requisite laws, policies and processes for implementing their international human rights law obligations whereas horizontal coherence will entail enabling departments and agencies (including the ones concerning corporate and securities regulation, investment, export credit and insurance, trade and labour) to act in a manner compatible with human rights obligations of their Government.

Principle 9 is very crucial with regard to TNCs. It requires that the States should maintain adequate policy space in their pursuit of business related policy objectives either with their counterparts or with business enterprises. According to the Commentary, bilateral investment treaties, free-trade agreements or investment project contracts may create constraints in full implementation of new human rights legislations through binding international arbitration. States should maintain adequate policy and regulatory ability for protecting human rights through various clauses thereof.

Principle 10 requires the States, acting as members of multilateral institutions dealing with business related issues, to ensure that such institutions do not hamper ability of member states in meeting their duty to protect or business enterprises in respecting human rights.

II. Corporate Responsibility to Respect Human Rights

The part dealing with corporate responsibility to respect human rights contain five foundational principles and nine operational principles. It is interesting to note that although the part is titled as corporate responsibility but the term used in the
principles is ‘business enterprises’. Latter term is undoubtedly wider in scope and includes business entities other than corporations as well. Foundational principles require business enterprises to respect human rights. Respect includes avoiding infringing human rights and addressing their adverse human rights impacts. This responsibility has twin characteristics. Firstly, it exists beyond complying national laws and regulations meant for protecting human rights. Secondly, responsibility exists independently of abilities or willingness of States to fulfil their own human rights obligations. So, both States and business enterprises are give a distinct role in furthering human rights agenda. However, there is a significant difference between the two. Business enterprises are created to earn profits, structured accordingly and justify their existence so long as they continue to earn profits. On the other hand, States are created for welfare of people, structured accordingly and justify their existence so long as they continue to do welfare. This distinction has a direct bearing on the obligations that should be imposed on them and practical consequences thereof.

For the purpose of Guiding Principles, the term ‘Human rights’ mean ‘internationally recognized human rights’. Internationally recognized human rights are authoritatively contained in International Bill of Human Rights (comprising UDHR, ICCPR, ICESCR, eight ILO core conventions set out in Declaration on Fundamental Principles and Right at work). Business enterprises may have regard to additional standards like the ones relating to indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities, migrant workers. Although right to clean and healthy environment is not explicitly mentioned but has been interpreted to be included in their ambit and scope.

Business enterprises should avoid causing or contributing to adverse human rights impacts caused by their own activities. Even if they do not contribute to such impacts themselves, they should prevent or mitigate such impacts directly linked to

114 ibid.
115 ibid Commentary on Principle 11.
116 ibid.
117 ibid Principle 12.
118 ibid Commentary on Principle 12.
119 ibid.
120 ibid Principle 13.
their operations, products or services by their business relationships.\textsuperscript{121} Activities for this purpose include actions as well as omissions whereas business relationships include business partners, entities in value chain and any other non-State entity directly linked therewith.\textsuperscript{122}

Although the responsibility is applicable to all business enterprises irrespective of their size, sector, operational context, ownership and structure but the means adopted for this purpose are to be proportional to their capacity.\textsuperscript{123} Therefore, TNCs will have to own up greatest of responsibility and the means also need to be the most formal of all.

Business enterprises are required to prepare policy commitment; due diligence process and remediation processes regarding human rights.\textsuperscript{124} Every TNC therefore need to develop a specific policy elaborating details of their responsibility towards human rights. Further, this policy needs to translate itself in the form of due diligence processes and remediation processes regarding human rights. The operational principles require such policy to be approved at the most senior level; containing its expectation of personnel, business partners and other parties directly linked thereto.\textsuperscript{125} It should not only be communicated to all relevant parties internally as well as externally but also be made publicly available.\textsuperscript{126} It should be reflected in operational procedures.\textsuperscript{127} It is important to note that the term “statement” is used in generic sense giving considerable freedom to a TNC regarding the form to be adopted for this purpose.\textsuperscript{128} Experts are required to be involved in drafting such policy and the extent of their inputs depends on the complexity of business enterprise.\textsuperscript{129} Since TNCs adopt the most complex forms of business organization in our contemporary world, their policies are required to be the highly enriched by inputs of experts (both internal and external).

\begin{itemize}
\item \textsuperscript{121} ibid.
\item \textsuperscript{122} ibid Commentary on Principle 13.
\item \textsuperscript{123} ibid Commentary on Principle 14.
\item \textsuperscript{124} ibid Principle 15.
\item \textsuperscript{125} ibid Principle 16.
\item \textsuperscript{126} ibid.
\item \textsuperscript{127} ibid.
\item \textsuperscript{128} ibid Commentary on Principle 16.
\item \textsuperscript{129} ibid.
\end{itemize}
Human rights due diligence should cover adverse human rights impacts that a business enterprise may cause or contribute through its own activities or the ones directly linked to its operations, products or services; complexity whereof will vary according to its size, risks, nature and context of operations; be ongoing as risks may vary with time due to expansion or contraction of its operations.\(^\text{130}\) It may be included in enterprise risk management systems only if it goes beyond identifying and managing material risks.\(^\text{131}\) It should be initiated, as early as possible, as part of the process of developing new activity or relationship since it is possible to increase or mitigate human rights risks in the structuring contracts or it may be inherited through M&A.\(^\text{132}\) Such human rights due diligence will enable the business enterprises in defending itself in the court of law by taking every possible step to avoid its complicity.\(^\text{133}\)

Assessment of human rights risks is required to be done through meaningful consultation with potentially affected groups and other relevant stakeholders\(^\text{134}\) at regular intervals\(^\text{135}\). Such assessment may be clubbed with other assessments like environment and social impact assessment but not at the expense of any internationally recognized human rights.\(^\text{136}\) Business enterprises need to assimilate findings of such impact assessments in their functions and processes in such a manner that responsibility for addressing such impacts is fixed and effective responses are enabled through internal decision making, budget allocations and oversight processes.\(^\text{137}\) Appropriateness of action in this regard will be determined by the fact whether such adverse impacts are caused or contributed by the business enterprise concerned or directly linked to its activities by a business relationship or extent of its leverage.\(^\text{138}\) A business enterprise has leverage if it has ability to effect change in wrongful practices of an entity.\(^\text{139}\) If the business enterprise has leverage, the same must be exercised and if it lacks such leverage, it must explore ways to increase the---
same through capacity building, incentives etc. In case of no possibility of increasing leverage at all, business enterprise should discontinue its relationship, having regard to the potential adverse human rights impact of doing so. If such relationship cannot be discontinued, being essential for the business of the business enterprise, it should demonstrate its efforts towards mitigating such impact and should further be prepared to accept any consequences of continuing such relationship. TNCs usually have a dominant position in its relationships with other partners as well as even States in regard to environmental damage. Therefore, they will usually have maximum leverage in most of such situations.

Business enterprises should track effectiveness of their response through the means of both qualitative and quantitative indictors as well as feedback from both internal and external sources including affected stakeholders. It has peculiar significance from environmental perspective since the affected parties may be situated in the surrounding areas of the activities of TNCs and may otherwise be marginalized in their own society, enhancing their vulnerability.

Business enterprises should communicate their efforts aimed at redressal of adverse human rights impacts externally, particularly to the affected stakeholders in such form and frequency as is accessible as well as sufficient to evaluate its adequacy having regard to legitimate needs of commercial confidentiality. Such communication may be in the form of personal meetings, online dialogues, consultations with affected stakeholders and formal public reports.

In case business enterprises come to know of causing or contributing to adverse human rights impacts, they should cooperate in remediation through legitimate processes. This may happen despite using best policies and practices. Operational-level grievance mechanisms can be particularly effective in this regard. Such
causation or contribution amounting to crime will require cooperation with judicial authorities. 147

Business enterprises should comply with ´all applicable laws and respect international recognised human rights´. 148 This is an important principle since such laws will be laid down by the concerned State for territories within its jurisdiction. In environmental context, a business enterprise must comply in letter and spirit with all environmental laws. In case domestic laws are lacking in this regard, a business enterprise should respect internationally recognized human rights. 149 Business enterprises should treat any risk of causing or contributing to gross human rights abuses as a legal compliance issue. 150 Guiding Principles acquire significance in the light of extraterritorial civil claims of environmental nature. Rome Statute of ICC may be relevant in States providing for corporate criminal liability. 151 Individual liability may also be imposed on directors, officers and employees for their acts amounting to gross human rights abuses. 152 Such corporate criminal liability and individual liability may arise in the case of environmental damage. Business enterprises should prioritise redressal of actual and potential adverse human rights impacts having regard to their severity and remediability in case of delay. 153

III. Access to Remedy

This part consists of one foundational principle and six operational principles. According to Principle 25, States must ensure access to effective remedy through judicial, administrative, legislative or other means in case of human rights abuses occurring within their territory/jurisdiction. Commentary refers to wide range of options that may be explored for this purpose, namely - constitutional and statutory; criminal and civil; judicial and non-judicial; National Contact Points (NCPs); ombudsperson; government-run complaints offices. Principle 26 requires States to ensure effectiveness of domestic judicial mechanism in cases of human rights abuses by business enterprises. Commentary on Principle 26 provides that legal barriers (e.g. apportioning legal responsibility among members of corporate group; denial of justice

147 ibid.
148 ibid Principle 23 (a).
149 ibid Commentary on Principle 23 (b).
150 ibid Principle 23 (c).
151 ibid Commentary on Principle 23 (c).
152 ibid.
153 ibid Principle 24.
in the host states and inability to access courts in home states irrespective of merits of claim; exclusion of certain groups like indigenous peoples and migrants from legal protection of their human rights which is available to wider population) and procedural barriers (e.g. high litigation costs; non-access to legal representation owing to resource constraints or disincentives for lawyers in advising victims; non-availability of aggregation of claims like class actions or representative proceedings like Public Interest Litigation; inability of State Prosecutors to investigate involvement of business or individuals in human rights related crimes owing to lack of adequate resources or expertise or support) in accessing justice should be done away with. Bhopal gas leak tragedy unfortunately emerged as a classical example in India where victims suffered from such legal and procedural barriers which are discussed in detail in chapter-6. In addition to providing effective judicial mechanism for redressal of grievances, Principle 27 and Principle 28 requires States to provide effective State based non-judicial and non-State based non-judicial grievance mechanisms respectively. Commentary clarifies that while the former may be mediation based or adjudicative or any other culturally appropriate and rights-compatible mechanism or any combination thereof, the latter may include the ones administered by business enterprise itself or with stakeholders, by an industry association or a multi-stakeholder group or regional or international human rights bodies. In both the cases, such processes should be non-judicial, adjudicative but rights compatible. Commentary on Principle 27 envisaged crucial role of National Human Rights institutions. In order to ensure early and direct remediation for individuals and communities adversely affected by the human rights abuse, Principle 29 requires business enterprises to provide or participate in effective operational level grievance mechanisms.

Principle 30 and the Commentary thereon requires that industry, multi-stakeholder and other collaborative initiatives like codes of conduct, performance standards, global framework agreements etc. should ensure availability of effective grievance mechanism. Criteria of effectiveness of the above-mentioned State and non-State based non-judicial mechanisms are enumerated in Principle 31 and further elaborated in the Commentary thereon as being legitimate; accessible (language, literacy, costs, physical location, reprisal fears); predictable; equitable (victims lack access to information and expert resources owing to financial resources); transparent
(communicating progress of individual grievances and performance of mechanism to wider stakeholders through statistics, case studies etc. while at the same time maintaining confidentiality of dialogue as well as identity of parties involved); rights compatible (if outcomes have human rights implications they should be in tune with internationally recognized human rights, even if grievances are not presented in terms of human rights as is usually the case); source of continuous learning and based on engagement and dialogue. According to the Commentary on Principle 31, last criterion is specific to operational-level mechanisms administered by business enterprises. Commentary further clarifies that the term ‘grievance mechanism’ is used as a term of art.

Every corporation and State has to mould the principles to suit its requirements since with more than 80,000 corporations and 193 UN Member states, one size cannot fit all.154

**Merits of UN Guiding Principles**

a) The normative contribution of the UN Guiding Principles lies in elaboration of ‘implications of existing standards and practices’ both for the States and for the TNCs; their integration into ‘single, logically coherent and comprehensive template’; and identification of pitfalls in current regime and manner of its improvement.155

b) UN Guiding principles are squarely applicable to TNCs since they will easily fall within the scope of the term ‘business enterprises’. A glance at the principles and the commentary thereon, clearly indicate that TNCs constitute a very important focus of the UN Guiding Principles and are drafted in such a manner so as to cover complex business strategies adopted by them.

c) UN Guiding principles constitute the most comprehensive framework developed till date to address the problems posed by human rights abuse committed by TNCs across the world.

d) SRSG succeeded in building a broad consensus. Dilution of rigour of UN Norms which preceded the UN Guiding Principles brought in more receptivity

---

154 Ruggie (n 102) 5.
155 ibid.
from TNCs for the latter. In this sense UN Guiding Principles furthered the agenda of human rights vis-à-vis TNCs.

e) Developing countries are in competition with each other in their desire to increase foreign investment. States have withdrawn itself from many areas of economy hitherto reserved for it, leaving them open for private entities. TNCs have fulfilled the vacuum so created by such withdrawal. It may cause adverse environmental impact. India is no exception to this trend. Despite such withdrawal, such States continue to be duty bound to protect human rights under UN Guiding Principles. Categorical statement in this regard was much needed in order to avoid confusion regarding the accountability of the State.

f) Although the UN Guiding Principles deliberately avoid the language of rights, they focus on access to effective remedy. Emphasis on State and non-State based judicial and non-judicial mechanisms along with their effectiveness criteria particularly of rights compatibility, creates opportunities which may be tapped in the future for redressal of grievances against TNCs for violation of right to clean and healthy environment.

g) UN Guiding Principles dropped the term ‘sphere of influence’ adopted in the UN Norms and instead used the term ‘due diligence’. TNCs are more conversant with the latter since it is already an integral part of their business strategy. Commentary is indicative of the fact that such due diligence will be applicable in the sphere of influence of company.

Demerits of UN Guiding Principles

a) UN Guiding Principles made a marked shift in the approach adopted by UN Norms. Firstly, Guiding Principles substituted the term ‘duty’ with ‘responsibility’ indicating that their violations may not invite legal consequences. It reflects an erroneous understanding that all human rights responsibilities of corporations are without any legal consequences or are distinct from them. Secondly, ‘obligations of corporations mirrored duties

---

156 Framework has been used by individual Governments, business enterprises and associations, civil society and workers organization, national human rights institutions, investors OECD and IOS. Ruggie (n 102) para 7.
157 Deva (n 81) 109.
158 ibid.
159 ibid 108.
160 ibid 111.
of states’ \(^\text{161}\) under the UN Norms whereas UN Guiding Principles adopted only the duty to protect human rights with reference to states and duty to respect human rights with reference to corporations resulting in adverse consequences. \(^\text{162}\) By following this division, it “ignored the crucial link between States’ duty to ‘protect’ human rights and corporate responsibility to ‘respect’ human rights.” \(^\text{163}\) It is not possible for States to enforce human rights obligations against corporations when they merely have a responsibility (not duty) to respect human rights. \(^\text{164}\) Thirdly, it has resulted in a marked shift of focus from human rights obligations of corporations to that of States. \(^\text{165}\)

b) States’ duty to protect may be of only limited help in their dealings with TNCs because of the dependence of former on the latter for foreign capital and transfer of technology. Due to this dependence, the State concerned may be lacking capacity or even unwilling to discharge this duty.

c) UN Guiding Principles have listed human rights in reference to international bill of rights. However, one should not lose sight of the fact that international bill of rights was not drafted keeping corporations in mind.

d) UN Guiding Principles failed to explicitly mention any independent responsibility on the part of TNCs regarding right to clean and healthy environment although their complicity in causing environmental damage is seen in many cases across the world. \(^\text{166}\) This is a huge setback since UN Norms had already expressly included right to clean and healthy environment and that too in a regulatory framework dedicated to human rights.

e) UN Guiding Principles preferred the term ‘impact’ over ‘violation’ (latter is used twice and that too in relation to obligations of the States). \(^\text{167}\) Such preference is inappropriate to represent the gravity of corporate human rights violation as the term is not even defined as a legal term in Black’s Law Dictionary. \(^\text{168}\)

\(^{161}\) ibid 110.
\(^{162}\) ibid 106.
\(^{163}\) ibid 110.
\(^{164}\) ibid.
\(^{165}\) ibid.
\(^{166}\) ibid 112.
\(^{167}\) ibid 113.
\(^{168}\) ibid.
f) UN Guiding Principles offer no solution to overcome barriers of *forum non conveniens* which is so ingenuously deployed by TNCs to their advantage at huge cost to victims of environmental damage (as discussed in the previous chapter).\(^{169}\)

g) Monitoring mechanism in practice is non-existent or deficient to deal with specific instances.\(^{170}\) Failure to approach designated body for grievance redressal makes UN Guiding Principles far weaker a framework than OECD Guidelines which permitted establishing NCPs.\(^{171}\)

Overall, the rigour of UN Norms for TNCs stands severely diluted by Guiding Principles leading to predictable change in responses. UN Norms invited strong protest from the business associations whereas Guiding Principles have succeeded in avoiding such ire. However, the compromise made to achieve this success has created a confidence deficit amongst the various stakeholders of TNCs.

**Binding Treaty for Business and Human Rights – Revived Attempt**

Nations have yet not given up on their dream of drafting a binding treaty for business and human rights. Human Rights Council decided to establish an open-ended intergovernmental working group with the objective of elaborating ‘an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.\(^{172}\) However, unanimity became a casualty in the very beginning of this effort.\(^{173}\) USA expressed disappointment over the development and refused to participate in IGWG.\(^{174}\)

---

\(^{169}\) ibid.

\(^{170}\) ibid 114.

\(^{171}\) ibid 113.

\(^{172}\) *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (A/HRC/RES/26/9)* Twenty-sixth session Human Rights Council (14 July 2014) <https://www.ihrb.org/pdf/G1408252.pdf> accessed 15 February 2017. \(^{173}\) Twenty countries voted in favour (Algeria, Benin, Burkina Faso, China, Congo, Côte d’Ivoire, Cuba, Ethiopia, *India*, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Vietnam). 14 countries voted against (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America). 13 countries abstained (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates). ibid. (emphasis supplied)

Rights Council decided to dedicate the first two sessions of the working group to ‘conducting constructive deliberations on the content, scope, nature and form of the future international instrument’.  

These sessions took place during 6-10 July 2015 and 24-28 October 2016 respectively. It also decided to dedicate third session to ‘prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions’. Accordingly, the third session took place during 23-27 October 2017 which sets the stage for the negotiation of the draft treaty in 2018.

However, it is interesting to note that Argentina, Ghana, Norway, and Russia along with forty additional co-sponsors from all regions of the world including India introduced another resolution before Council on 23 June 2014. It extended the mandate of the expert working group established by the Council in 2011 to promote and build on the Guiding Principles. It requested the High Commissioner to explore full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses. Thus, both the processes are underway and future outcome is difficult to predict but former has become highly polarized in comparison to the latter.

3.2.2 Other International Organizations’ Driven Initiatives

Besides UN, various other organizations have also played instrumental role in developing standards, guidelines, codes of conduct etc. regarding CSR. Significant ones are discussed hereinafter –


176 ibid.


179 ibid.

180 ibid.
3.2.2.1 OECD Guidelines for Multinational Enterprises 2011

Guidelines for Multinational Enterprises (OECD Guidelines) were adopted by Organisation for Economic Co-operation and Development (OECD) in 1976.\(^{181}\) It is interesting to note that these guidelines were part of the Declaration on Investment and Multilateral Enterprises (hereinafter OECD Declaration) instead of being an outcome of any human rights deliberations. Such an outcome comes as no surprise since one of the objectives of OECD is to ‘measure productivity and global flows of trade and investment’.\(^{182}\) This context reflects in the overall approach adopted by the OECD Guidelines and is evident in the language and the framework created thereby. OECD Guidelines were revised in June 2000 and subsequently a decade later in 2011. Third revision constitutes the present framework in force.

A peculiar feature of the OECD Guidelines is that they are exclusively aimed at Multinational Enterprises (MNEs) – a term which is not defined therein despite two revisions.\(^{183}\) However, MNEs are characterized by the following features, namely – established in more than one country but are coordinated operationally; may be owned by private, state or mixed entities; varied levels of autonomy although significant influence by few; operate in all the sectors.\(^{184}\)

OECD Guidelines are visualized as a means of encouraging foreign investment by the MNEs which in turn are encouraged to follow the guidelines.\(^{185}\) States adhering to OECD Guidelines are also required to accord national treatment to foreign controlled enterprises.\(^{186}\) Although OECD Guidelines contain commentaries but such commentaries do not constitute part of the Declaration.\(^{187}\)

Paragraph 2 of OECD Guidelines clarifies that they neither override nor substitute domestic law although they may go beyond it.\(^{188}\) In this sense OECD Guidelines maintain the sanctity and primacy of domestic law which the MNEs must comply


\(^{184}\) ibid.

\(^{185}\) ibid Declaration on International Investment and Multinational Enterprises para 1.

\(^{186}\) ibid.

\(^{187}\) ibid (Note by Secretariat).

\(^{188}\) Concepts and Principles (n 183) para 2 ch-I.
with. 2011 revision introduced a separate section exclusively on human rights. As a matter of general policy, MNEs should contribute *inter alia* towards ‘environmental progress in order to achieve sustainable development’ and ‘respect the internationally recognised human rights’. Further, they should not ‘seek or accept exemption’ from regulatory framework meant for environment, human rights etc.  

Environmental protection constitutes the focus of Part VI of the OECD Guidelines. It is based on primarily three instruments namely – Rio Declaration; Aarhus Convention and ISO Standards on Environmental Management Systems. MNEs are required to ‘establish and maintain’ an environmental management system which undertakes ‘collection and evaluation of adequate and timely information’ regarding environmental, health and safety impacts of their activities; set measurable objectives, targets for ‘improved environmental performance and resource utilization’ and ‘regular monitoring and verification of progress’ thereof. For the purpose of OECD Guidelines, a sound environmental management broadly consists of all such activities which are aimed at controlling long term environmental impacts (direct as well as indirect) relating to pollution as well as resource management. They should make available ‘adequate, measurable, verifiable and timely information’ regarding potential environmental, health and safety impacts of their activities to workers as well as to the public at large. They should engage with communities directly affected by their environmental, health and safety policies. They should assess and redress predictable environmental, health and safety related impacts, mitigate unavoidable ones and prepare environmental impact assessment and create mechanism for their mitigation. OECD Guidelines categorically include Precautionary principle. In case any serious environmental and health damage is caused by their activities, they should put in place contingency plans to ‘prevent, mitigate and control’ the same. They should develop products and provides services which are devoid of adverse environmental impacts; reduce greenhouse gas

---

189 ibid *General policies of OECD Guidelines for Multinational Enterprises* A(1) ch-II.
190 ibid A (5) ch-II.
191 ibid Commentary on para 60 ch-VI (Environment).
192 ibid para 1.
193 ibid Commentary on para 63ch-VI (Environment).
194 ibid para 2 (a).
195 ibid para 2 (b).
196 ibid para 3.
197 ibid para 4.
198 ibid para 5.
emissions; energy efficient; reusable; recyclable; safety disposable; safe in intended use; efficient in natural resources consumption.\textsuperscript{199} They should provide correct information to their customers regarding environmental implications of their products and services.\textsuperscript{200} They should also endeavour to improve their environmental performance in the long run.\textsuperscript{201} They should train workers regarding environmental health and safety matters including handling hazardous materials and accident prevention.\textsuperscript{202} Significantly, MNEs (being pioneer in development of innovative technologies) should act as role model for other business enterprises in terms of raising their overall environmental performance.\textsuperscript{203}

At the conceptual level, entire OECD Guidelines are based on business case of CSR which recognise sustainable development both as a business responsibility as well as an opportunity wherein MNEs will have a significant role to play. OECD Guidelines clearly mention that they are mere recommendations regarding the manner of their implementation by MNEs and neither give rise to new commitments for governments nor reinterpret existing instrument.\textsuperscript{204}

**Implementation Mechanism**

OECD Guidelines establish innovative implementation mechanism. In order to implement them, States are required to establish NCPs for issue resolution and promotional activities.\textsuperscript{205} NCPs are to be based on the pillars of ‘visibility, accessibility, transparency and accountability’.\textsuperscript{206} States have the liberty to organize NCPs in any form since no particular form is prescribed for this purpose. It may include representative of business community, worker organisations, NGOs, Ministries and even independent experts.\textsuperscript{207}

NCPs will adopt an impartial, predictable and equitable mechanism for issue resolution. If the issue requires further examination, NCP will offer its ‘good offices’ so as to enable the parties to resolve issues. NCP may consult any NCP based in other

\textsuperscript{199} ibid para 6 (b).
\textsuperscript{200} ibid para 6 (c).
\textsuperscript{201} ibid para 6 (d).
\textsuperscript{202} ibid para 7.
\textsuperscript{203} ibid Commentary on para 72 ch-VI (Environment).
\textsuperscript{204} ibid para 70.
\textsuperscript{205} ibid Implementation Procedures I (1) Part-II.
\textsuperscript{206} ibid.
\textsuperscript{207} ibid Procedural Guidance IA (2).
country for this purpose. It will adopt conciliation or arbitration to assist parties.\textsuperscript{208} NCPs should make their decisions available to the public at large. In case of an agreement between the parties, NCP concerned should report describing issues raised, procedures initiated, date of agreement and agreement’s content (to the extent permitted by parties).\textsuperscript{209} Statement is also required to be issued on both the occasions – when issues involved do not merit further examination or when no agreement could be reached or any party involved does not agree to participate in the procedure.\textsuperscript{210} Proceedings will have due regard to confidentiality.\textsuperscript{211} In case the issue arises in a non-adhering country, NCP concerned should develop understanding thereof, enquire and engage in fact finding.\textsuperscript{212}

**Merits of OECD Guidelines**

a) Framework devised for implementing the OECD Guidelines is unique. It uses the term ‘issues’ instead of ‘dispute’.

b) In consonance with its voluntary nature, the framework adopts essentially non-adversarial methods like conciliation and arbitration. When coupled with media glare, these mechanisms have the potential to produce impressive and tangible outcomes with less costs and formal procedures.

c) 2011 revision of OECD Guidelines took into consideration ‘protect, respect and Remedy’ framework developed by SRSG of UN. In fact, addition of a dedicated chapter on human rights in 2011 revision seems to be influenced by UN Guiding Principles.

**Demerits of OECD Guidelines**

a) Conciliation and mediation have proved very effective for issues pertaining to matters relating to business, however, their effectiveness is doubtful against claims relating to environmental damage and human rights. In fact, these mechanisms have been used in various cases by the TNCs to avoid detailed judgment by the courts on merits leading to non-development of jurisprudence in this regard leaving the whole field ambiguous.

\textsuperscript{208} ibid C (2) (d).
\textsuperscript{209} ibid 3 (b).
\textsuperscript{210} ibid 3 (a) and (c).
\textsuperscript{211} ibid 4.
\textsuperscript{212} ibid para 39.
b) OECD is an international organization of developed nations. Accordingly, NCPs have been established in few countries only. OECD Watch conducted a study which showed – maximum number of complaints pertained to environment; two sectors (Mining and Oil and Gas) dominated these complaints; insufficient substantiation emerged as the most common ground for rejection of complaints and the percentage of rejection increased from 43% in 2001-2015 to 52% in 2012-2015 (i.e. post 2011 revision); UK NCP received maximum number of complaints followed by NCPs of US, Netherlands and Germany. The report pointed out that even in those countries where NCPs have been established, they suffer from following shortcomings of structural and functional nature –

- Filing complaints with them can be prohibitively costly owing to complainants travelling to NCP of home country at their own costs to participate in mediation process, as well as translation costs of documents. NCPs themselves are constrained by resources. However, Norwegian NCP which hired consultant for providing guidance without expense to parties in a complaint against Sjøvik’s fish processing plant operations in the Western Sahara and Dutch NCP which offered to host mediation proceedings at the location of project in Manila in a complaint against Shell Philippines emerged.

---

214 Presently following countries have established NCP – Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Costa Rica, Czech Republic, Colombia, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Norway, Netherlands, New Zealand, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States. See <http://mneguidelines.oecd.org/ncps/> accessed 15 February 2017.
215 OECD Watch is a global network with more than 100 members in 50 countries promoting corporate accountability. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe. See for details <http://www.oecdwatch.org/about-us/> accessed 16 February 2017.
216 Study was conducted through a variety of qualitative and quantitative research methods including empirical research spread over a period of 14 year (i.e. May 2001- May 2015). Its scope was confined to cases filed by communities, individuals and NGOs. See Remedy remains rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct (June 2015) 11 <http://www.oecdwatch.org/publications-en/Publication_4201/at_download/fullfile> accessed 16 February 2017.
217 ibid 12-15.
218 ibid 22.
219 ibid 23.
220 ibid.
as notable and welcome exceptions. Report suggested that costs may be minimized in appropriate cases through video-conferencing.

- NCPs insist on high degree of proof e.g. Dutch NCP required positive court ruling as a condition precedent in order for it to offer its offices in a complaint against Shell regarding its investment in the Sakhalin II integrated oil and gas complex. Report suggested that they should require only a reasonable standard of substantiation in the initial assessment phase. Otherwise the whole purpose of this kind of mediation will be lost.

- NCPs employ additional criteria for initial assessment over and above the specified ones e.g. refusal of parties to participate in mediation. Imposition of such additional criteria defeats the very purpose of the whole mechanism.

- NCPs reject allegations relating to future harm in case any company, against whom a complaint has been filed, continues with its activities.

- States structure NCPs in variety of ways for instance – monopartite, tripartite, multipartite, interagency, independent expert bodies, stakeholder advisory boards. Structure of NCPs though not determinative of its independence and impartiality, may have some bearing thereon. UK NCP is a notable exception having an inter-departmental steering board with four external members. Report suggested that NCPs should prefer independent experts selected through open, transparent and impartial process.

- NCPs base decisions on information not shared with both the parties. One noteworthy instance was the review of UK NCP decision [in the complaint against British Petroleum (BP) in Baku-Tbilisi-Ceyhan (BTC) oil pipeline case] conducted by Steering Board finding procedural failures and asking it to base its decision on information

---

221 ibid 24.
222 ibid.
223 ibid 28.
224 ibid 32.
225 ibid 33-34.
226 ibid 34.
227 ibid 35.
available to both the parties. Accordingly, UK NCP issued revised final statement concluding that BP breached guidelines by failing to properly consult impacted communities along the pipeline route.\textsuperscript{228}

- NCPs over-emphasise broad confidentiality requirements. US NCP maintain complete confidentiality.\textsuperscript{229}
- NCPs are not adhering to timelines and that too without mentioning any justification.\textsuperscript{230}
- NCPs generally do not make determinations of non-compliance with OECD Guidelines in case of failure of mediation.\textsuperscript{231} Dutch NCP decided in a case concerning Shell’s Pandacan oil depot in favour of conducting field visit to the site after Shell refused to discuss the issue and published a final statement with a thorough analysis of Shell’s compliance with OECD Guidelines.\textsuperscript{232}
- NCPs are not innovative in terms of engaging companies to discuss the issues. In a complaint against a subsidiary of China Gold International Resources owning Gyama Copper Polymetallic Mine in Central Tibet, Canadian NCP imposed sanctions (withdrawal of Trade Commissioner Services and other Canadian advocacy support abroad) in its final statement on China Gold for its non-participation in process.\textsuperscript{233}
- NCPs do not follow up on their final statements. For instance, in a complaint against Cermaq, Norwegian NCP hosted a meeting with the parties one year after signing of agreement. When complainants themselves conducted site visit to company’s plants in Chile, they found no change.\textsuperscript{234}

c) Absence of definition of MNEs, despite two revisions, is a serious drawback of the OECD Guidelines since such definition can enhance clarity at the level of implementation of the Guidelines themselves.

\textsuperscript{228} ibid 36.  
\textsuperscript{229} ibid 37.  
\textsuperscript{230} ibid 40.  
\textsuperscript{231} ibid 41.  
\textsuperscript{232} ibid 42.  
\textsuperscript{233} ibid 46.  
\textsuperscript{234} ibid 47.
OECD Guidelines vis-à-vis India

With regard to OECD Guidelines, the following instances are noteworthy in Indian context –

(a) London based Survival International approached UK NCP in 2008 with a complaint against Vedanta Resources regarding operation of open pit bauxite mine in Orissa alleging Vedanta’s failure to consult indigenous people. While Vedanta denied all the claims and refused to participate in mediation process, UK NCP in its final statement found Vedanta in breach of OECD Guidelines. It concluded that Vedanta had not undertaken sufficient consultations with local indigenous people in absence of submission of any evidence to this effect by Vedanta.\(^{235}\) Although Vedanta completely rejected the findings of UK NCP but Church of England divested shares worth £3.8m on the basis of advice of its Ethical Investment Advisory Group (EIAG).\(^{236}\)

(b) In October 2012, Korean NCP received complaint that the proposed steel plant and related infrastructure by POSCO in Odisha, India, will displace around 20,000 people, without any meaningful consultation with affected communities and without undertaking human rights and environmental impact assessments. After conducting initial assessment, Korean NCP rejected the complaint on the ground that issues raised relate to decisions of Government of Odisha in giving environmental clearances instead of any links with POSCO’s activities.\(^{237}\)

(c) *Michelin Rubber Factory in Tamil Nadu, India\(^{238}\)*: NGOs [Association Sherpa, CCFD-Terre Solidaire, Tamil Nadu Land Rights Federation (TNLRF) and the Thervoy Sangam] and Trade Union (Confédération Générale du Travail) referred issue relating to violation of OECD guidelines (destruction of forest and consequent livelihood) in the process of establishing tyre factory in Tamil Nadu by a French company Michelin to the OECD National Contact Point (NCP) in France on July 10 July 2012. In 2013, NCP France issued its final statement of non-violation of OECD Guidelines by Michelin while at the same

---

\(^{235}\) ibid 31.


\(^{237}\) *Remedy remains rare* (n 216) 28.

\(^{238}\) *CCFD v Michelin* <https://www.oecdwatch.org/cases/Case_254> accessed 2 June 2017.
time recognizing insufficiency of impact studies conducted by it and adverse impacts thereof on local stakeholders. However, complainant withdrew complaint just before NCP France issued final statement pointing out deficiencies in the procedure followed by NCP France. In a follow up statement in 2014, NCP France recognized various measures taken by Michelin to implement its recommendations made in final statement. After concluding that Michelin has followed all its recommendations, NCP France also ceased its monitoring in February 2016.

India is a not a member of OECD.\textsuperscript{239} Therefore, Indian government is not under obligation to establish NCP. However, OECD has working relationship with India and it adopted a resolution in 2007 to strengthen cooperation with India which may eventually lead to membership.\textsuperscript{240} Decision in this regard will lie with India since OECD has expressed its willingness to give membership.\textsuperscript{241} A full-fledged membership may help at this juncture since Indian government is easing norms for foreign investment in a phased manner leading the entry of TNCs though various routes in different sectors of Indian economy. With membership, Indian people will get the advantage of establishment of NCP in India itself. There will be no need for Indian people to approach NCP based in other countries for redressal of issues relating to violation of right to clean and healthy environment against TNCs.

\subsection*{3.2.2.2 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy}

After a year of the OECD issuing its guidelines, ILO Governing Body adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) in 1977 which was revised in 2000, 2006 and March 2017. The 2017 revision adopts UN Guiding Principles 2011.\textsuperscript{242} Besides, it takes into

\begin{footnotesize}
\textsuperscript{239} India, China Brazil, Indonesia and South Africa are key partners along with 35 member countries at present. See History \textlangle http://www.oecd.org/about/history/\textrangle accessed 20 February 2017.

\textsuperscript{240} \textlangle India and the OECD \textrangle \textlangle http://www.oecd.org/india/indiaandtheoecd.htm\textrangle accessed 22 February 2017.


\end{footnotesize}
account developments that have occurred since the 2006 revision including Paris Agreement (2015) concerning climate change; OECD Guidelines 2011; ILC Conclusions concerning the promotion of sustainable enterprises 2007; and goals and targets of the 2030 Agenda for Sustainable Development 2015.

Although the Declaration is aimed at encouraging positive contribution of MNEs to economic and social progress, it does not indicate the need to precisely define the term MNE. In absence of such precise definition, the term MNE refers to ‘designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the Declaration principles’. Their activities should be in ‘compliance with national law’ and in tune with the ‘development priorities and social aims and structure of the country in which they operate’ and consultations should be undertaken between them and government as well as concerned national employers’ and workers’ organizations.

The Declaration contains principles relating to employment, training, conditions of work and life and industrial relations with governments, employers’ and workers’ organizations, observance whereof by MNEs is purely voluntary. They should provide ‘highest standards of safety and health, in conformity with national requirements, bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards’. They should provide relevant information, relating generally to safety and health standards of their local operations as well as of any special hazard concerning new products or processes developed by them, to workers’ representatives as well as competent authorities. They should play leading role in examining causes of industrial safety and health hazards and in applying consequential improvements within them. They should also cooperate with international organizations in preparation and adoption of international safety

243 ibid para 6.  
244 ibid para 11.  
245 ibid para 7.  
246 ibid para 44.  
247 ibid.  
248 ibid.
Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

and health standards.\textsuperscript{249} Further, they should fully cooperate with the ‘competent safety and health authorities, the representatives of the workers and their organizations, and established safety and health organizations’ in accordance with national practice.\textsuperscript{250}

Declaration requires MNEs to respect right to their workers and provide procedure for redressal of all their grievances without suffering any prejudice in the process.\textsuperscript{251} They are further required to use their leverage in encouraging their business partners to provide effective means for remedying abuses for internationally recognised human rights.\textsuperscript{252} Governments are under duty to protect workers within their jurisdiction through ‘judicial, administrative, legislative or other appropriate means’ against business-related human rights abuses.\textsuperscript{253}

**Merits of ILO Tripartite Declaration**

a) Workers constitute the most vulnerable stakeholders in case of environmental harm inflicted by TNCs in the course of their operations. They cannot shun their workplace due to socio-economic compulsions. Although the Declaration does not explicitly mention the right to clean and healthy environment particularly for workers but certainly provides implied scope of reading the same into it. Therefore, ILO Declaration targeting MNEs is a welcome measure.

b) Adequately trained workers can help avoid accidents causing environment damage as well minimize casualties in case an accident occurs. It is in this sense that ILO Declaration containing principles regarding information sharing by MNEs assumes significance.

**Demerits of ILO Declaration**

a) The title of ILO Declaration indicates exclusive focus on MNEs but its principles are categorically made applicable to domestic enterprise as well.

\textsuperscript{249} ibid para 45.
\textsuperscript{250} ibid para 46.
\textsuperscript{251} ibid para 66.
\textsuperscript{252} ibid para 65.
\textsuperscript{253} ibid para 64.
This kind of blurred focus has caused unnecessary confusion regarding their scope.\textsuperscript{254}

b) Being voluntary, ILO Declaration does not have independent monitoring mechanism.\textsuperscript{255}

c) ILO Declaration lacks any mechanism of naming and shaming of the violators.\textsuperscript{256}

d) Being established for profit maximisation, TNCs are accordingly structured for achieving this objective. Therefore, their potential to fulfil general policy objectives of the countries in which they operate (which may vary considerably depending on the level of their respective socio-economic development) is extremely doubtful, if not impossible.

\subsection*{3.2.2.3 International Organization for Standardization (ISO)}

As the name suggests, ISO\textsuperscript{257} is engaged in the task of developing internationally applicable standards.\textsuperscript{258} Although developed through consensus, they are purely voluntary. They are meant to facilitate international trade. It has developed certain standards which are environment specific and corporation may adhere to them. Some of the important ones are as follows –

a) \textit{ISO 26000} is unique. It is not exactly a requirement to be adhered to by corporations. It is in the form of guidance and hence cannot be certified in the manner other ISO standards are normally certified.\textsuperscript{259} It is meant for elucidating the meaning of social responsibility, translating its principles into actions and globally sharing its best practices.\textsuperscript{260} It was developed in 2010 through five years of negotiations between various stakeholders like

\begin{itemize}
  \item \textsuperscript{254} Deva (n 81) 90.
  \item \textsuperscript{255} ibid 92.
  \item \textsuperscript{256} ibid.
  \item \textsuperscript{257} ISO is an independent, non-governmental international organization with a membership of 163 national standards bodies. See for details <http://www.iso.org/iso/home/about.htm> accessed 21 February 2017.
  \item \textsuperscript{258} ISO defines standards as ‘world-class specifications for products, services and systems, to ensure quality, safety and efficiency’. It has published more than 20,500 International Standards and related documents, covering almost every industry. ibid.
  \item \textsuperscript{259} \textit{ISO 26000 - Social responsibility} <http://www.iso.org/iso/home/standards/iso26000.htm> accessed 22 February 2017.
  \item \textsuperscript{260} ibid.
\end{itemize}
government, NGOs, industry, consumer groups and labour organizations from around the world.\footnote{ibid.}

b) \textit{ISO 14000} family of standards provides practical tools for companies and organizations of all kinds looking to manage their environmental responsibilities. ISO 14001:2015 in particular requires a corporation to set up an effective environmental management system.\footnote{\textit{ISO 14000 family - Environmental management} <http://www.iso.org/iso/home/standards/management-standards/iso14000.htm> accessed 22 February 2017.}


d) ISO has developed standards relating to ‘principles, practices and key characteristics’ of voluntary environmental labeling which is classified into three categories namely – Type I (environmental labelling); Type II (self-declaration claims); Type III (environmental declarations). Ecolabel\footnote{Eco-label is given by an impartial third party (as distinguished from a manufacturer or service provider) for environmental performance of a product or service having regard to its overall life cycle.} falls in the Type I category. ISO 14024 contains guiding principles for Type-I ecolabels.

Although none of the standards are specific to TNCs, yet they constitute an important stakeholder in all of them.

**3.2.2.4 World Business Council for Sustainable Development (WBCSD) Recommendations on CSR**

WBCSD\footnote{WBCSD is a global, CEO-led organization of over 200 leading businesses engaged in the task of transition to a sustainable world. See \textit{Overview} <http://www.wbcsd.org/Overview/About-us> accessed 24 February 2017.} initiated a two years study in 1998 to develop better understanding of meaning and practice of CSR. Initial report came out in 1999 with following main conclusions regarding CSR – firstly, human rights and environment protection \textit{inter alia} are part of priority for CSR; secondly, a coherent CSR strategy offers business benefits; thirdly, corporations should either develop and implement their own codes of conduct regarding their approach towards CSR or subscribe to the ones created by others; fourthly, they should be responsive to local and cultural differences while
implementing their global policies. In 2000, WBCSD came out with final report titled ‘Corporate Social Responsibility: Making Good business Sense’. The report revised its earlier definition of CSR as ‘the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life’. Report developed practical steps and hands on tool for CSR. Conclusions of the Report inter alia included –

i) Universal codes for CSR will not be suitable in the light of the varying local geographical, social and cultural realities.

ii) CSR is an opportunity to companies to show that FDI, as opposed to the popular perception, is sensitive to local needs and circumstances.

iii) Stakeholder engagement was given central focus in all the six phases of CSR.

iv) Companies should show to its stakeholders in a detailed manner that its activities are contributing to environmental protection.

v) In order to enhance reliability of their CSR reports, companies should include assurance processes therein.

vi) As part of their CSR approach, companies should develop transparent dialogue with neighbouring community in order to understand impact of its activities on individuals. This can be meaningfully done by finding out how approach of their management is conflicting or complementing with local language, culture and religious values of the neighbouring community.

The above-mentioned recommendations are crucial for TNCs as they are the principal decision makers and leading providers of foreign investment. It is this foreign investment which takes them to those areas of the world which are likely to be alien to

---


267 In 1998, it defined CSR as ‘the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.’ ibid 8.

268 ibid 7.

269 ibid 6.

270 ibid 10.

271 ibid 15.

272 ibid 18.
its managers in terms of geographical terrain, language, religious and cultural values of which clean and healthy environment is an integral part. This is more so as WBCSD itself consists of many TNCs.

3.2.2.5 ICC Business Charter for Sustainable Development

International Chamber of Commerce (ICC) formally launched first edition of ‘Business Charter for Sustainable Development’ in April 1991 at second World Industry Conference on Environmental Management in Rotterdam, Netherlands. ICC came out with its revised version in 2000. It was further revised by the Commission on Environment and Energy of ICC in 2015. ICC adopted a more holistic business approach to new global realities. Charter added economic and societal aspects also to the environmental considerations unlike earlier versions which focused exclusively on environment. The aim of the Charter is to provide business a practical framework including tools in such a manner that they are able to develop their own business sustainability strategy. It has reduced sixteen principles to just half. Principle 3 specifically focus on Environmental responsibility and management requiring recognition and assessment of environmental impacts of business activities; implementation of effective environmental management systems aimed at minimizing actual and potential adverse effects; maximization of resource efficiency of all natural resources particularly water, energy and soil. However, certain principles having undisputed environmental significance are found to be part of other principles as well, for instance – Principle 5 refers to development of such product and services which are not only safe in their intended use but also minimize environmental impacts, maximization of environmental benefits of the products and services having regard to

---

273 ICC is engaged in the task of promotion of international trade, responsible business conduct and a global approach to regulation. It is a global network of 6 million members in more than 100 countries. See <https://iccwbo.org/about-us/who-we-are/> accessed 1 June 2017.


275 Eight principles of the Charter are as follows –

i) Sustainable development as a business priority;
ii) Inclusive economic growth and development;
iii) Environmental responsibility and management;
iv) Responsibility towards people and societies;
v) Products and services;
vi) Value chain approach;
vii) Transparency, communications and reporting
viii) Collaboration and partnerships for continuous improvement.

See (for elaboration of these principles) ibid.
their whole product life cycle; Principle 4 recognize the importance of people as external stakeholders, to respect and follow human rights guidelines; Principle 2 contribute to the concept of relative decoupling economic activity from adverse environmental impacts; Principle 6 refers to collaboration with all actors in the value chain for responsible behaviour across the entire product or service life cycle and promotion and mutual recognition of relevant corporate responsibility codes and supplier guidelines.

Charter rightly does not adopt ‘one size fit all’ approach. Businesses can adapt these principles to ‘their particular circumstances, assessed risks and opportunities’ through opting those which best fit in their own situation. Many TNCs are themselves members of ICC. All the above principles are applicable to TNCs as their activities are widely spread across the world; they pioneer modern technologies and invest in remote areas through their subsidiaries and other form of business collaborations.

3.2.2.6 Coalition for Environmentally Responsible Economies (CERES) Principles

CERES came out with ten CERES principles which require companies to commit to protecting the earth, using energy and resources wisely and sustainably, minimizing waste, and selling safe products and services. Signatories support their commitment in the form of pledge to reduce risk, disclose hazards, and compensate for damages. Sun Company became the first fortune 500 company to sign up the principles in 1993. Thereafter, many others have also signed.

3.2.2.7 Global Reporting Initiative Guidelines (GRI)

GRI released first version of its voluntary GRI Sustainability Reporting Guidelines in 2000 whereupon CERES separated it as an independent organisation. Second

---

276 ibid 7.
277 CERES is a sustainability non-profit organization. It is involved in sustainability challenges like pollution, climate change etc. See for details <http://www.ceres.org/about-us> accessed 1 June 2017.
279 ibid.
280 ibid.
281 GRI was set up in 1997 by CERES in Boston. It was formally inaugurated as a UNEP collaborating organization in 2002 in the presence of the then UN Secretary General Kofii Annan and relocated to Amsterdam as an independent non-profit organization. See for details GRI’s History <https://www.globalreporting.org/information/about-gri/gri-history/Pages/GRI's%20history.aspx> accessed 25 February 2017.
Chapter 3: Evolution of Regulatory Framework for CSR of TNCs relating to Right to Clean and Healthy Environment: International Scenario

generation of Guidelines (G2) was released in 2002 at the World Summit on Sustainable Development in Johannesburg. The year 2006 saw the launch of third generation of Guidelines (G3) which was developed by over 3,000 experts from business, civil society and the labour movement. Fourth version of the Guidelines (G4) was released in May 2013. They provided ‘Reporting Principles, Standard Disclosures and an Implementation Manual’ for preparing sustainability reports by organizations.  

Based on G4, GRI came out with ‘Consolidated Set of GRI Sustainability Reporting Standards’ on 19 October 2016. New Standards are developed by Global Sustainability Standards Board (GSSB), a fully independent standard-setting body, on the basis of inputs from business, labour, government, investors, civil society, academia and sustainability practitioners. New standards will replace G4 by 1 July 2018. They simplify non-financial reporting by corporations. They have new modular structure comprising a set of 36 modular Standards to facilitate corporate reporting. New Standards are divided into universal and topic specific. Latter *inter alia* includes standards on environmental reporting (GRI 300) which is further classified under following heads – Materials, Energy, Water, Biodiversity, Emissions, Effluents and Waste, Environmental Compliance and Supplier Environmental Assessment.

According to a recent survey (on the basis of public CSR statements of 200 randomly selected large companies) of most frequently referenced CSR instrument, its guidelines came close (31%) to that of UNGC (32%). Thus, GRI reporting standards are increasingly being adopted by TNCs.

GRI entered into a MoU with Bombay Stock Exchange (BSE) in 2016 to collaborate and support top 500 listed companies in establishing sustainability reporting processes

---

282 ibid.
285 ibid.
and preparing sustainability reports by the end of 2017. It resulted in a linkage
document between Business Responsibility Report (BRR) Framework developed by
Securities and Exchange Board of India (SEBI) (discussed in chapter-5) and GRI
Standards.288

### 3.2.2.8 Caux Round Table Principles for Responsible Business

The Caux Round Table (CRT)289 launched Principles for Responsible Business in
1994 and presented them at the United Nations World Summit on Social
Development in 1995.290 These are comprehensive set of ethical norms for businesses
operating internationally.291 They were result of deliberations catalyzed by the Caux
Round Table during preceding decade.292 After recent global financial crisis,
principles were reformatted in 2009 and updated in 2010 to address contemporary
challenges. Three ethical foundations constitute the root of these principles, namely -
responsible stewardship; living and working for mutual advantage; and the respect
and protection of human dignity.293

First principle sets the tone by requiring responsible business to consider interests of
stakeholders (customers, employees, suppliers, competitors, and the broader
community) besides shareholders. Third principle encourages responsible business to
comply with not only the letter but also spirit of law by going beyond minimum legal
obligations. Sixth principle is exclusively dedicated to respecting environment. It
requires responsible business to protect and improve environment; avoid wasteful use
of resources; compliance with best environmental management practices on principle
of inter-generational equity. Second principle requires responsible business to
contribute to the economic, social and environmental development of the
communities in which it operates.

---


289 It is an international network of principled business leaders promoting moral capitalism. It was established in 1986 by Frederick Phillips, former President of Philips Electronics and Olivier Giscard d’Estaing, former Vice-Chairman of INSEAD. Although initial objective was to reduce trade tensions but over a period of time it expended to the field of global corporate responsibility. See for details <http://www.cauxroundtable.org/index.cfm?&menuid=2> accessed 23 February 2017.


291 See ibid.

292 See ibid.

Principles are annexed with Stakeholder Management Guidelines. In the context of communities, Guidelines provide responsible businesses to actively promote sustainable development in order to preserve and enhance the physical environment while conserving the earth's resources as well as to respect human rights and democratic institutions in the communities where they operate.

These principles are very lucidly drafted. They are appropriate to TNCs including their supply chains.

### 3.2.2.9 AA 1000 Assurance Standard

AccountAbility\(^{295}\) published AA 1000 Assurance Standard in 2003 (first such standard at that time). It was the result of two years of deliberations involving hundreds of organisations from the professions, the investment community, non-governmental organisations (NGOs), labour and business.\(^{296}\) Its second edition came out in 2008. It is a principles-based standard which provides a mechanism for making an organization accountable for its management, performance and reporting on sustainability issues.\(^{297}\)

### 3.2.2.10 Amnesty International Human Rights Guidelines for Companies

Amnesty international\(^{298}\) developed a set of principles in 1998 that aimed at helping companies in respecting and promoting human rights while conducting their operations.\(^{299}\) Principles do not make specific mention of clean and healthy environment as such. However, it may be understood to be covered in the wider sweep of the term human rights itself. It calls upon companies to formulate an explicit human rights policy; train their employees; consult NGOs on extent and nature of human rights abuses in the world and establish an independently verifiable framework.

\(^{294}\) ibid.

\(^{295}\) Accountability is a leading global organization which helps business in improving their performance through the environmental and social impact of their operations, stakeholder engagement, sustainability strategy and reporting. See What We Do <http://www.accountability.org/about-us/about-accountability/> accessed 28 February 2017.


\(^{297}\) ibid.


for assessing potential impact of not only its own operations but also that of its sub-contractors on human rights.\textsuperscript{300} Emphasis on independently verifiable mechanism is particularly significant, more so when it comes from a leading international organization like Amnesty International which is recognized for its work in the field of human rights.

\textbf{3.2.3 Individual Driven Initiative: Global Sullivan Principles of Corporate Social Responsibility}

Reverend Leon H. Sullivan developed these principles in 1977. However, new version of these principles was jointly unveiled by Rev. Sullivan and United Nations Secretary General Kofi Annan in 1999. Their objectives \textit{inter alia} included companies (large and small in every part of the world) to support economic, social and political justice.\textsuperscript{301}

In the particular environmental context, principles require companies to promote sustainable development, protect human health and the environment and provide a safe and healthy workplace.\textsuperscript{302} Generally, the principles \textit{inter alia} require companies to express support in a transparent manner for universal human rights particularly of their employees, the communities within which we operate, and parties with whom they do business.\textsuperscript{303} Companies should not only comply with these principles but also promote them with their dealers.\textsuperscript{304}

All these initiatives are developed by organisations which are independent in nature. Therefore, the standards, principles or codes developed by them carry a lot of weight. They have played a very crucial and prominent role in shaping the regulatory framework of CSR for TNCs particularly in regard to environmental protection. Apart from the above-mentioned initiatives, there are others which exclusively focus on one or the other aspects of CSR.\textsuperscript{305}

\textsuperscript{300} ibid 4.
\textsuperscript{302} ibid.
\textsuperscript{303} ibid.
\textsuperscript{304} ibid.
\textsuperscript{305} For instance, Social Accountability International (SAI) ; ETI Base Code ; International Code of Marketing of Breast-milk Substitutes.
3.3 Regional Initiatives: European Union (EU)

Organisations established at the regional level play instrumental role in development of international law. On occasions, such law is more effective in terms of its implementation. EU has been a dominant regional player since its coming into existence. Therefore, its approach towards CSR has profound influence on the regulatory framework for CSR.

European Council agreed (in a special meeting) in Lisbon in 2000, to a new strategic goal (also referred to as Lisbon agenda) for the next decade.\(^{306}\) The goal was ‘to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’.\(^{307}\) Sustainability of economic growth was devised to be an integral part of the entire strategy. However, one year later in European Summit in Gothenburg, environmental dimension was explicitly added as third pillar to the Agenda adding a new approach to policy making.\(^{308}\) In this regard, it sets four priority areas, namely - climate change, transport, public health and natural resources.\(^{309}\) Council was invited ‘to integrate environment into all relevant Community policy areas’.\(^{310}\)

**EU Green Paper 2001**

It was in the above backdrop that EU Commission came out with a Green Paper in 2001 titled ‘Promoting a European framework for Corporate Social Responsibility’ with the objective of initiating a debate and to solicit views of various stakeholders. It understood CSR as ‘a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment’.\(^{311}\) It defined being social responsible as ‘not only fulfilling legal expectations, but also going beyond compliance and investing “more” into human capital, the environment and the relations with


\(^{307}\) ibid para 5.

\(^{308}\) ibid para 20.

\(^{309}\) ibid para 27.

\(^{310}\) ibid.

stakeholders’. Two aspects of the definition are noteworthy – firstly, voluntary nature of CSR and secondly, explicit recognition of clean environment as its separate yet integral component. It strived to alien CSR contribution towards Lisbon Agenda. Where CSR is present, it recognized the legislative role and in case of absence of CSR, it advocated for putting in place ‘a proper regulatory or legislative framework’ for CSR. Therefore, States should continue to strengthen the legislative framework for enhancing accountability of corporations regarding violations of right to clean and healthy environment generally instead of relying exclusively on CSR framework. Most importantly, it recognized relevance of CSR for all types of companies despite the greater role played by TNCs in promoting CSR.

**EU White Paper 2001**

On the basis of more than 250 responses received on the Green paper, EU Commission came out with a white paper titled ‘Corporate Social Responsibility: A Business Contribution to Sustainable Development’ in 2001. On predictable lines, industry pitched for voluntary nature of CSR whereas trade unions and civil society organizations argued that regulated framework should be developed which should prescribe certain minimum standards for CSR and should involve relevant stakeholders avoiding unilateralism of the corporations. European Parliament proposed to create a EU multistakeholder CSR platform and to streamline regional and social funding in EU. It further proposed triple bottom line reporting on their environmental performance. White paper presented EU strategy to promote CSR. Such strategy was built upon certain principles which *inter alia* included – voluntary nature of CSR; credibility and transparency of CSR; balanced and all encompassing approach to CSR including environmental issues. This was also the time when 2002 was declared as the ‘European year for Corporate Social Responsibility’.

---

312 ibid.
313 ibid.
314 ibid.
315 ibid.
316 ibid.
318 ibid 5.
319 ibid.
After a couple of years in 2004, EU Multistakeholder Forum on CSR (created by EU in 2002 for the purpose of developing a common EU approach) came out with its final report. In particular reference to developing countries, the report placed the onus on national governments for providing legal framework for protecting inter alia human rights as well as a conducive climate for environmental progress. Report recommended that public authorities need to ensure two things regarding CSR – firstly, creation of legal framework and secondly, creation of right economic and social conditions so that those corporations who wish to go further through CSR draw benefit there from in market place. Thus, the argument was for incentive based business case regime for CSR in Europe. In this regard, CSR approach may at best be complementary to other approaches towards environmental accountability of corporations. This is an acknowledgement of a serious limitation of CSR framework in ensuring right to clean and healthy environment.

On 22 March 2006, EU Commission backed European Alliance for CSR (created by business community). European corporations, irrespective of their size were invited to voluntarily support it. Alliance continued to regard CSR as voluntary, creating an opportunity for win-win situation for corporations and society. It was projected as ‘political umbrella for new and existing CSR initiatives by large companies’. This new political approach not only recognised the primacy of enterprises (including TNCs) as prime actors in CSR but also that ‘active support and constructive criticism of non-business stakeholders’ is crucial to its success.

EU’s New CSR Strategy

EU unveiled new strategy of CSR for the period of three years (i.e. 2011-2014) in October 2011. Strategy needs to be looked in the backdrop of ‘Europe 2020’ (EU’s growth strategy for the decade) which set sustainability as one of the priorities and

---

321 ibid 15.
324 ibid.
definitive targets regarding Climate change and energy sustainability in particular.\textsuperscript{325} This strategy was significant in the sense that it revised the existing definition of CSR. According to the strategy, CSR is defined as ‘responsibility of enterprises for their impacts on society’.\textsuperscript{326} This definition of CSR is relatively wider in scope than the earlier one.\textsuperscript{327} Such a wider conception required enterprises to have a mechanism for integration of environmental, human rights, social, ethical and consumer concerns.\textsuperscript{328} This definition presumed respect for ‘applicable legislation’ as well as respect for ‘collective agreements with social partners’.\textsuperscript{329} Such mechanism will be more complex and formal in case of CSR by TNCs due to the nature as well as gigantic scale of their operations. TNCs involved in particularly risky ventures would need to carry out risk-based due diligence. Strategy also aligned itself in consonance with internationally recognised principles and guidelines like OECD Guidelines, UNGC, ILO Tri-partite Declaration, UN Guiding Principles.\textsuperscript{330} Such alignment makes environmental concerns (which are already included in such principles and guidelines) a part of EU strategy. Strategy envisaged supporting role for public authorities (through a blend of ‘voluntary policy measures and complementary regulation’) in development of CSR which will invariably be led by enterprises themselves.\textsuperscript{331}

Thus, approach of EU towards CSR shows twin characteristics. Firstly, right from the very beginning, CSR in EU is essentially a business driven initiative that is purely voluntary in nature. Therefore, language of rights so inherent in human rights discourse is a misfit. Secondly, sustainable Development has been an integral part of EU’s approach towards CSR.

\textsuperscript{327} According to earlier definition developed by European Commission CSR meant ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’, ibid 6.
\textsuperscript{328} ibid.
\textsuperscript{329} ibid 6-7.
\textsuperscript{330} ibid 7.
\textsuperscript{331} ibid.
3.4 Individual State Driven Initiatives: Indonesia and India

Many developed countries in the world have engaged themselves with CSR initiatives within their domestic jurisdiction in one way or the other.\(^{332}\) While such CSR initiatives undertaken in developed countries have remained voluntary, two developing nations have decided to tread the hitherto unchartered territory. Indonesia and India have laid down legislative framework for mandatory CSR regime and therefore are particularly notable.

**Indonesia**

Indonesia replaced law regarding limited liability company (no. 1 of 1995) by a new legislation (Law on Limited Liability Company, Number 40 of 2007).\(^ {333}\) Art. 74 (1) mandates undertaking Social and Environmental Responsibility mandatory for a corporation having ‘business activities in the field of and/or related to natural resources’. Art. 1 (3) defines the term ‘social and environmental responsibility’ as company’s ‘commitment to participate in the sustainable economic development’ with the objective of ‘increasing the quality of life and environment, which will be valuable to company itself, the local community and society in general’. Sec. 74 (2) makes it company’s obligation which is ‘budgeted and calculated’ as its cost, implementation whereof is required to be performed with due regard to ‘appropriateness and fairness’. Article 74 (3) provides for imposition of sanction for failure to perform obligation u/A 74 (1). Further, Art. 74 (4) provides for further regulation by Government of provision relating to Social and Environmental Responsibility. The above framework was implemented in 2012 by Government Regulation No. 47/2012 on Social and Environmental Responsibility of Limited Liability Companies making BoD of a company responsible for providing for preparation of a Social Responsibility Plan and Budget. Sec. 66 (2) (c) further provides annual reports submitted by BoD should contain report on the

---


implementation of Social and Environmental Responsibility. The exact sanction is not mentioned as yet, leading the scholars to doubt its mandatory nature.\footnote{Sri Wartini and Dodik Setiawan Nur Heriyanto, ‘Enhancing the Implementation of CSR in Developing countries to Achieve Sustainable Development: Indonesian Perspective’ (2014) Vol. 11 US-China Law Review 1022, 1030.}

Indian legislative framework for CSR is discussed in detail in chapter-5.

### 3.5 Salient Characteristics of the Emerging Regulatory Framework for CSR regarding TNCs

Regulatory framework for CSR at the international level is emerging rapidly with the involvement of many players having diverse nature. All the initiatives which comprise regulatory framework for CSR are essentially voluntary in nature. In this sense, regulatory framework for CSR is a soft law formulation which has come to acquire its own following characteristic features –

i. Framework comprises, unlike one consolidated set of rules, multitude of initiatives by different organisations undertaken at different points of time in largely non-coordinated and incoherent manner (UN initiatives are the most coordinated ones). They are not only differently titled and structured but also differently worded. They have different focus as well. From regulatory point of view, it is not a satisfactory scenario as different TNCs would not know which initiative to adhere to nor affected party would know which initiative to monitor in case of violation. In fact, TNCs are free to decide whether to join, when to join, which initiative to join, to what extent to join, for how long to continue, when to withdraw and most importantly to what extent to implement the initiatives on CSR. In the present scheme of things, all these decisions will depend on whether a particular initiative justifies itself as business case for CSR. There is a need to have one consolidated, coherent and yet comprehensive set of guidelines having uniform applicability. UN, having regard to its rich experience of working specifically with TNCs and generally in the field of environment and human rights, is the most suited institution for streamlining the sharp creases in the regulatory framework for CSR. Further, there is a need to adequately publicise them so that not only consumers but other affected stakeholders can know how best to use them. This will enable the stakeholders involved with TNCs to understand them since mere knowing
will not be sufficient regarding infringement of right to clean and healthy environment and seeking appropriate remedies. Various organizations established for facilitation of business and industry have been at the forefront at the international level to develop regulatory frameworks regarding CSR. Even within the industry, sectoral guidelines, tuned to the needs of that particular sector, have been developed.

ii. All the initiatives and their outcomes are based on the stakeholder theory of corporation. Since TNCs generally consists of the largest and most diverse composition of stakeholders in comparison to all other form of business entities, they constitute dominant focus of all such initiatives.

iii. ‘Sustainable Development’ not only constitutes the core focus of right to clean and healthy environment but also the core focus of all such initiatives relating to CSR.

iv. Framework permits high degree of discretion to TNCs in developing their own policies regarding CSR. TNCs have themselves been involved in development of most of such initiatives and in this sense are partners in the entire process of evolution of regulatory framework for CSR.

v. It requires compliance with existing laws as the bare minimum and encourages TNCs to go beyond it. Thus, emphasis is on going beyond the legal compliance. Legal compliance constitutes integral part of CSR. Thus, TNCs are required to adhere to right to clean and healthy environment which is integral part of domestic legal systems in various forms (Constitution, Acts, Policies, Regulations, Rules, Directives etc.) across the world. Therefore, effective domestic regulation continues to be the most crucial instrument of bringing accountability of TNCs for the environmental damage caused by them.

vi. Apart from UN Norms, no other initiative has engaged in the task of defining TNCs. In fact these initiatives have generally concluded that defining TNCs will not serve any purpose and hence is not required to be done. Thus, they focus on all business entities irrespective of their forms. Therefore, they invariably include TNCs, their subsidiaries, their supply chains, their contractors and sub-contractors etc. within their ambit. Consequently, such implied inclusion has diluted appreciation of their significant role in shaping the global investment and technological climate and their corresponding
impact on right to clean and healthy environment. This has resulted in diversion of focus from TNCs.

vii. Nature of initiating agency and the objectives of a given initiative seems to make substantive difference not only regarding their outcome but also receptivity of TNCs towards it. For instance, UN Norms developed by UN Human Rights Committee mandating binding obligations and rights centric approach was outrightly dismissed by TNCs whereas those mandating voluntary adherence did not invite that level of wrath.

viii. The principles which constitute integral part of right to clean and healthy environment are included in the regulatory framework of CSR, though not mentioned as such. Their environmental component is either directly or impliedly based on Rio Declaration. Thus, regulatory framework for CSR do carry forward, albeit to a limited extent, the right to clean and healthy environment though without using rights terminology.

ix. Although not all the initiatives regarding CSR have been TNCs specific or environmental protection specific but environmental protection and human rights constitute integral part of regulatory framework of CSR. Environment is included in all such initiatives either as part of human rights or separately from human rights. However, there are some initiatives which are exclusively aimed at environmental protection. The mere fact that in some of these initiatives environment finds a mention separate from human rights cannot be taken to conclusively affirm that environment is not part of human rights. In all likelihood, the underlying idea behind such separate mentioning is to emphasise significance of environment vis-à-vis overall human rights framework. This may also be viewed as keeping environmental protection at par with entire human rights framework.

x. Regulatory framework of CSR does not envisage CSR as a substitute for State responsibility. States continue to be primarily accountable for protecting their environment and it recognises their role in facilitating CSR in this regard. This may be so even in case when State concerned may be pursuing policy of liberalization, privatization and globalisation.

xi. All leading TNCs adhere to one or the other initiatives regarding CSR and have developed their own CSR policy making environment as its key component. Many of them report separately on sustainability. In fact, they are
found to compete amongst themselves in projecting them as being most serious towards environmental protection as part of their CSR strategy.

xii. Initiatives comprising regulatory framework for CSR can build upon each other in order to enhance their mutual effectiveness. For instance, partnering together of UNGC and GRI to further the SDGs and their joining hands with PRI and WBCSD to produce ‘Global Compass’ (for guiding companies to orient their strategies to SDGs).  

xiii. The fact that all the initiatives are voluntary does not obviate the need for independent monitoring. Even a voluntary measure can have such inbuilt monitoring mechanism which will instil more trust in the minds of various stakeholders involved with TNCs.

The salient features of the regulatory framework for CSR discussed above puts the onus squarely on TNCs to ensure that such voluntary approach leads to tangible outcomes in terms of redressing the grievances of victims of environmental damage. Their failure will ‘pose the most severe and unprecedented existential crisis for the global financial system (craftily created after Second World War)’ of which TNCs have turned out be the greatest beneficiary.

3.6 Chapter Conclusion

CSR has acquired central stage in the world. Lot of thought has been given in the last century regarding the role of business in general and TNCs in particular in the society. However, evolution of regulatory framework for CSR in the world has not been uniform. It has evolved at different pace in different regions of the world. It has varied from country to country, industry to industry and even corporation to corporation. Nevertheless, a momentum has built up over the last few decades in its favour and TNCs in particular are not only more amenable to CSR then any time before but also are pioneering in developing it further. The variety of sources from which these initiatives have emanated indicate the emerging consensus and conviction in favour of


337 ibid.
CSR. UN has lead from the front in not only devising but also sustaining major initiatives.

Regulatory framework of CSR, though voluntary, holds enormous significance in our contemporary world. It offer an opportunity to use CSR as a tool for transforming responsibility of TNCs into accountability for violation of right to clean and healthy environment at the national level. This is so because environment is the worst and generally ignored casualty particularly at the place of operation of TNCs.

It is due to initiatives discussed above and their universal appeal that that our world has entered into an era of CSR. Now the correct question to be asked is not whether corporations should do CSR or not (that has already been answered affirmatively), but how a corporation can do better CSR and what and how can a corporation learn from each other’s experience. 338 And since TNCs are pioneers in scientific and technological development as well major players in movement of capital in the form of cross-border investments at global level, they are rightly expected to lead the world in this regard. It seems that there is no going back now and the trend is likely to continue.