Chapter – 7

Conclusion and Suggestions

‘A hundred times every day I remind myself that my inner and outer life depend on the labours of other men, living and dead, and that I must exert myself in order to give in the same measure as I have received and am still receiving.’¹

Scheme of Chapter

7.1 Conclusion
7.2 Suggestions

7.1 Conclusion

The introduction to this study traces the genesis of the problem and details out the objectives, research questions, hypothesis and significance of the present work. The present research work examined three aspects of accountability of TNCs for the violations of right to clean and healthy environment in India, namely – Rights based, CSR based and BITs based. Conclusions drawn on the basis of this study are as follows:

TNCs have emerged as dominant players in the global arena in mobilizing investments on massive scale and also in the development of cutting-edge technology. Despite their dominance, they are essentially artificial entities upon which statutes regulating companies (i.e. Companies Act) have conferred legal personality. Our understanding about the nature of corporations, which has largely been dominated by shareholders’ interest, has gradually shifted in favour of stakeholders’ interest in recent times. This shift has resulted in heightened expectations of society from them.

Since TNCs conduct their commercial operations by designing highly complex ownership and functional structures across the globe, through and for the people from diverse cultural background and geographical environment, their accountability has come up for serious scrutiny particularly in the context of human rights. Accordingly, the term ‘Transnational Corporation’ is given a wide meaning in the regulatory framework meant for ensuring accountability for their human rights violations.

While advancement in science and technology (particularly in the last century) has tremendously enhanced the capacity of man to damage environment, it has also caused paradigm shift in our own understanding about our environment. It has led to enhanced sensitivity towards environment which is sought to be protected in the context of TNCs through various approaches – Rights based approach, CSR based approach and BITs based approach. However, it is interesting to note that over a period of time, TNCs have played instrumental role in shaping the development of these approaches.
International Scenario

Right to Clean and Healthy Environment

Under international law, responsibility is imposed on States instead of non-state actors for violations of right to clean and healthy environment. Therefore, TNCs has largely remained immune from obligations under international law. However, right to clean and healthy environment was protected implicitly under the international Bill of Human Rights. The journey from Stockholm Conference to Rio Conference was essentially from implicit to explicit recognition of right to clean and healthy environment entailing certain principles as its integral component, namely – sustainable development, precautionary principle, polluter pays principle, intergenerational equity, intra-generational equity, common but differentiated responsibility, public participation and public trust. Thus, right to clean and healthy environment is protected in the form of a third generation human right.

UN is the most representative global organization in our contemporary world. It is a platform where all its Members States can express their concerns, views and participate in setting the international agenda including environment. UN deserves credit for its sincere efforts due to which right to clean and healthy environment has become one of the foremost considerations for the international community – movement from implicit to explicit. It is because of the perseverance and commitment of UN that environmental concerns formulated themselves into sustainable development and has become integral part of law and policy making at the international level. Johannesburg Declaration envisaged larger role for TNCs in creating sustainable societies but in the language of responsibility instead of accountability. UN too has replaced its erstwhile MDGs by SDGs. Sustainable development has emerged as the quintessential principle which has now impregnated every aspect of human discourse. TNCs have been vital stakeholders in this development and have partnered with other state and non-state actors.

Extraterritorial jurisdiction (of which ATCA of the US is the most classical example) provided the platform on which worst battles (mired in legal technicalities) have been fought by the victims of alleged violations of right to clean and healthy environment by TNCs. Victims approached US courts under ATCA in the hope of getting redressal of their grievances against various TNCs, namely – UCC, Amlon Metals Ltd., Texaco
Inc., Freeport, Southern Peru Corporation, Rio Tinto. However, despite prolonged litigation, rigid application of certain doctrines (*forum non conveniens*, act of state, political question and international comity) shattered their hopes of such redressal. Recent judgment of US Supreme Court in *Kiobel case* further narrowed down the scope of ATCA substantially reducing its efficacy in securing accountability of TNCs for violations of human rights including the right to clean and healthy environment.

*Regulatory Framework for CSR*

Although there is no consensus on any universally accepted definition of CSR, various theories of CSR have been developed focusing on one or the other aspects thereof. Significant initiatives have been taken in the later half of the last century in the evolutionary course of regulatory framework for CSR at the international level. These initiatives have come from UN (UNGC, UN Norms, UN Guiding Principles), regional organizations (in the form of EU), other international organizations (OECD, ILO, ISO, WBCSD, ICC, CERES, GRI, CRT, Amnesty international, AccountAbility), individuals (Leon H. Sullivan) and nations (Indonesia and India). As UN deserves credit for developing the right to clean and healthy environment at the international level, similarly it also deserves credit for playing a major role in developing the regulatory framework for CSR.

The resultant regulatory framework consists of multiple initiatives taken at different points of time. These initiatives are not coordinated in any meaningful manner. Different initiatives are titled differently, deploying different terminology and language. They have different focus and ends to achieve. They are being reviewed and revised to accommodate fast changing business environment. All these initiatives have contributed in their own way in the resultant outcome.

The regulatory framework for CSR at the international level has acquired certain peculiar characteristics. Firstly, it consists of initiatives which are purely voluntary in nature. Therefore, 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 to what extent to implement these initiatives. TNCs either subscribe to one or the other such initiatives or develop their own CSR strategy making modifications therein to suit their own business priorities. Secondly, 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. Thus, environmental protection is integrated into all these initiatives in the form of ‘sustainable development’. Further, their environmental component is directly or indirectly based on Rio Declaration. In this sense, regulatory framework for CSR does carry forward, though to a limited extent, right to clean and healthy environment without deploying rights terminology. Thirdly, these initiatives are based on stakeholder theory and business case justification. Fourthly, while these initiatives assume compliance with national laws as the bare minimum, they encourage business including TNCs to go beyond mere compliance (from letter of law to spirit of law). Fifthly, apart from UN Norms and OECD Guidelines, all the other initiatives concerns business entities in general, leading to compromised appreciation of the significant role of TNCs in this regard. Most importantly, regulatory framework does not envisage CSR as a substitute for state responsibility. States continue to be primarily accountable for environmental protection and to facilitate CSR within their respective jurisdiction.

*Bilateral Investment Treaties*

BITs are aimed at protecting foreign investors by extending protection to their overseas investments in the form of certain rights. In this sense, they restrict the sovereignty of the host states in taking measures aimed at environmental protection. TNCs have emerged as the biggest beneficiary of such an approach. BITs, as instruments of international investment law, has played crucial role in enabling TNCs in furthering their investments across the world. BITs are conceptually not meant for protecting right to clean and healthy environment. But their interpretations in the form of arbitral awards have raised serious concerns regarding their adverse impact on right to clean and healthy environment. Certain measures taken by host states to protect right to clean and healthy environment were interpreted by leading international investment arbitral awards as amounting to expropriation. On the other hand, there are certain arbitral awards which show the tendency of taking environmental factors into consideration while deciding investment disputes. Further, certain arbitral awards against erstwhile capital exporting home nations have necessitated redrafting and renegotiation of the BITs in order to protect their interests. TNCs from emerging economies have also entered into fray by the end of the last century, complicating the
international investment climate and consequently challenging the international investment law regime dominated by BITs.

**Indian Legal Regime**

India represents one of the most ancient civilizations which is recognized across the globe for its rich cultural heritage. British Colonial Rule, established by EIC (a chartered corporation) and later on acquired by the Crown as a result of the first Indian freedom movement in 1857, perpetrated the most brutal assault on her environment. India earned independence after a long freedom struggle (both violent and non-violent) involving supreme sacrifices by brave men and women from all classes of society. They expressed their aspirations, after long deliberations undertaken in the Constituent Assembly, in the form of Preamble to Indian Constitution. They adopted the lengthiest Constitution containing provisions drafted to fulfil their aspirations from the independent Indian State. While Indian Constitution gave continuity to the pre-Constitutional laws of British colonial rule (which were used, though in a limited way, to protect environment), it offered adequate scope to impliedly locate environmental concerns. It also conferred jurisdiction on Panchayats over many items which constituted core concern for right to clean and healthy environment. However, 42nd amendment in 1976 expressly included environmental concerns both as Directive Principles and as Fundamental Duties in the Constitution.

However, the real impetus in statutory framework of right to clean and healthy environment came in 1970s which also coincided with Stockholm Conference. Indian Parliament enacted Water Act, FCA, and Air Act. Bhopal Gas Leak Disaster (worst industrial accident ever) showed the frailties of the then existing statutory framework in India compelling Parliament to think far more comprehensively regarding environmental protection than ever before. It responded by enacting EPA.

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2 ‘If I were to look over the whole world to find out the country most richly endowed with all the wealth, power, and beauty that nature can bestow – in some parts a very paradise on earth – I should point to India. If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered on the greatest problems of life, and has found solutions of some of them which well deserve the attention even of those who have studied Plato and Kant – I should point to India. And if I were to ask myself from what literature we, here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans, and of one Semitic race, the Jewish, may draw that corrective which is most wanted in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human, a life not for this life only, but a transfigured and eternal life – again I should point to India.’ Friedrich Max Müller, *India: What can it Teach Us?* (Rupa Publication India Pvt. Ltd. 2002) 5.
India underwent a paradigm shift in approach towards governance by adopting NEP in 1991 which mandated liberalisation, privatisation and globalisation of Indian economy. In the resultant newly emerging business and economic environment, Parliament enacted PLIA, FRA, notified EIA under EPA, Biodiversity Act and RTIA. Recognizing the long felt need of having a specialized and separate adjudicatory body for timely resolution of environmental disputes, Parliament enacted NGTA to establish NGT giving it wide jurisdiction and powers over disputes arising out of six environmental statutes named therein. However, getting ECs for projects involving foreign investment was perceived by project proponents (involving TNCs) as ridden with prolonged litigations resulting in delay and cost escalation amidst allegations of violations of right to clean and healthy environment. Appreciating the concern, Indian government constituted High Level Committee under the Chairmanship of Mr. TSR Subramanian to review environmental legislations (selected for this purpose) with the objective of speeding up the clearing process of investment projects in India. Committee found the legislations to be weak, their monitoring weaker and their enforcement weakest. Committee recommended enacting ELMA to establish NEMA (at the central level) and SEMA (at the state level) and many other comprehensive changes to the existing regulatory framework for enforcing right to clean and healthy environment. However, such review of select environmental statutes is exactly contrary to the integrated cradle-to-grave approach towards environmental protection through right to clean and healthy environment. Further, it is not about new set of environmental laws and new bodies proposed to be created under it but improving governance of such bodies.

Indian Supreme Court deserves the credit and is rightly acknowledged, across the world, for interpreting Fundamental Rights and Directive Principles harmoniously in such a manner that right to clean and healthy environment is recognized as an integral part of right to life u/A 21 of the Constitution. This integration has enabled the Supreme Court to enforce right to clean and healthy environment as a fundamental right u/A 32 of the Constitution. It has also relaxed the rule of locus standi to permit PIL so that the violation of right to clean and healthy environment could be brought before it in public interest. NGO’s have indisputably played instrumental role in knocking the doors of the court highlighting violations of right to clean and healthy environment and seeking appropriate redressal. High Courts has also carried the same
spirit forward and accordingly interpreted and enforced right to clean and healthy environment. Further, statutory framework for right to clean and healthy environment has also been strengthened through its more effective implementation in the course of adoption of such an approach. Besides, adoption of such an approach by the Indian judiciary has led to the development of a rich jurisprudence strengthening right to clean and healthy environment. Establishment of NGT as a statutory body by Indian Parliament is also the result of such enriched jurisprudence. It is conferred with wide jurisdiction and powers. NGT too has played an instrumental role, since its establishment, in further enrichment of environmental jurisprudence in India.

**Indian Regulatory Framework for CSR**

Indian culture and tradition regards giving money for philanthropic causes for the overall benefit of society, as integral part of a person’s existence. In this sense, CSR is in consonance with her tradition and culture and carries it further. Indian people have faced the victimization of being ruled by EIC as part of British rule. Like in England, Companies Act in India has regulated the incorporation and governance of companies in India. Being a British colony, Companies Act has been reformed on many occasions but such reformation is structured on the pattern very similar to that of England. Inspired by Mahatma Gandhi’s Trusteeship concept, even during British rule, few companies engaged voluntarily in CSR activities. After independence, Companies Act was enacted in 1956 (modeled on its British counterpart) and was largely based on primacy of shareholders interests. Barring few exceptions, Indian Judiciary also followed the same approach for its interpretation. Adoption of NEP in 1991 proved a watershed moment for governance in India. It gave Indian economy a substantial capitalist tilt while her Constitution remained wedded to socialist ideals.

TNCs were encouraged to invest and bring their cutting-edge technology in India by a regime which substituted FERA by FEMA coupled with FDI policy which was amended in a phased manner to open more and more sectors of Indian economy for foreign investment. Under such a regime, corporate governance came up for close scrutiny in India and Indian government constituted various committees to strengthen standards of corporate governance in India. Dr. J.J. Irani Committee recommended a comprehensive reform of the Companies Act 1956 replacing it with new Companies Act.
In 2007, Indian Prime Minister exhorted corporate sector to embrace CSR and thereby contribute to the mission of inclusive growth. Government gave shape to his exhortation two years later in 2009 by coming out with separate voluntary guidelines for Corporate governance and CSR indicating exclusive focus on CSR. After receiving feedback thereon, Government came out with ‘National Voluntary Guidelines on Social, Environmental and Economic Responsibilities’ in 2011. SEBI brought mandatory element into the hitherto voluntary regulatory framework for CSR in India by issuing a circular mandating top 100 listed companies (based on market capitalisation on BSE and NSE) to include BR Reports as part of their Annual Reports. In 2013, Government also issued revised CSR Guidelines for CPSEs.

It was under this backdrop and after long debate that mandatory CSR provision was incorporated in the Companies Act 2013. Companies Act 2013 provides the most elaborate statutory framework for CSR in India. Sec. 135 makes CSR mandatory on certain companies meeting the stipulated criteria to spend minimum 2% of its average net profits made during the last three immediately preceding financial years in every financial year on prescribed CSR activities. Failure to spend is required to be disclosed along with reasons therefore in its BoD report. Thus, CSR expenditure is voluntary but its disclosure is mandatory. Such companies are required to establish CSR committee which is entrusted with the responsibility to develop CSR Policy for undertaking CSR obligations. It makes BoD accountable for ensuring compliance with the provisions of Companies Act 2013 relating to CSR. Framework is applicable on TNCs including foreign companies. Report of the HLC in 2015 made recommendations for strengthening statutory framework for CSR. Further, report of CLC 2016 also made certain recommendations for improving the existing statutory framework for CSR. The statutory framework for CSR has adopted a narrower approach in comparison to voluntary CSR guidelines. Its implementation is left to the wisdom of the shareholders. The regulatory framework seems to be a mixed blessing having its own merits and demerits.

India is not the first nation to legislate on CSR. Indonesia provided mandatory CSR in 2007 and UK, Denmark, France and Norway require mandatory disclosure by companies about CSR information in their annual reports. However, India is the first country in the world to stipulate mandatory minimum 2% ceiling on CSR expenditure on ‘comply or explain’ model. The regulatory framework for CSR hinges heavily on
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the institution of directors including the independent directors. Companies Act 2013 has codified duties of directors for the first time in India. Codified duties require directors to take into consideration the interests of environmental protection and the same must be done carefully, skillfully, diligently and independently. Duty is applicable equally on all companies including TNCs. Thus, regulatory framework of CSR in its present form can at the most be only a facilitator of protection of right to clean and healthy environment vis-à-vis TNCs and in no way absolves the State from its own responsibility.

**Indian Bilateral Investment Treaties**

India has signed many BITs with other nations from 1990s onwards to boost foreign investment in India. However, India got the bitter experience of adverse investment arbitral awards in White Industries case. An investment arbitration proceeding involving Enron Corporation though not resulting in an award, was also problematic. Further, notices were issued by various TNCs to Indian Government in response to judgment of Supreme Court in 2G scam as well as in tax disputes. Although none of them involved violation of right to clean and healthy environment, these developments have sufficiently shown that accountability of TNCs for their violation of right to clean and healthy environment cannot be adequately ensured without incorporating protective clauses for this purpose in Model BITs and renegotiating the existing BITs on that basis. Accordingly, India decided to review its existing BITs and came out with a new Final Model BIT in 2015 in order to protect *inter alia* its legislative and executive measures aimed at environmental protection. Final Model BIT amalgamates CSR approach with rights based approach by encouraging foreign investors including TNCs to voluntarily incorporate internationally recognized standards of CSR in their internal policies and practices. It will become the basis for future negotiations and resultant Indian BITs with other nations. It contains specific clauses aimed at protecting the right to clean and healthy environment.

**Select Case Studies in India**

Disputes involving violation of right to clean and healthy environment allegedly by TNCs, namely - UCC, Coca Cola, POSCO, Vedanta Resources Plc., and Monsanto has proved to be the most formidable challenge for environmental jurisprudence in India. Bhopal Gas Leak Disaster has proved to be a continuing nightmare for Indian
legal system as a whole. Dow Chemical has refused to undertake clean up of the contaminated site in Bhopal. It has left Indian government with no option but to clean up the site at the cost of state exchequer in violation of polluter pays principle. CEO of UCC successfully evaded criminal trial in India till his death due to refusal of US to extradite him. Settlement amount, despite having the stamp of approval of Supreme Court, did not include compensation for violation of right to clean and healthy environment and the matter is presently *sub judice* before it. Coca Cola (a leading TNC) is embroiled in a litigation against Perumatty Grama Panchayat (grass root level democratic institution) all the way up to the Supreme Court for excessive extraction of ground water in Kerala. Although Supreme Court has disposed the matter as infructuous after accepting intention of Coca Cola not to commence manufacturing operations at its Plachimada plant, the issue of compensation to be paid to villagers remains unresolved. Nevertheless, it shows that strong federal constitutional machinery through Panchayati Raj institutions and the grass root level awareness and struggle can prove to be the best safeguard for environmental protection. Litigation pertaining to Environmental Clearances by MoEF before NGT involving land acquisition for POSCO mining has ended in withdrawal by POSCO of the project itself. In case of mining by Vedanta Resources Plc. in Niyamgiri Hills where Niyamraja is worshipped as a deity by *Dongaria Kondh* and *Kutia Kondh* tribes, unanimous vote against the project by all the selected twelve Gram Sabha has sealed the very fate of the project itself. Parliament has granted the right to Gram Sabha through FCA and Supreme Court has enforced the same. In case of Monsanto, while Supreme Court is seized of the matter regarding putting in place an independent, transparent and competent regulatory framework for GM products, Indian Government has permitted Bt. Cotton. It put moratorium on Bt. Brinjal so that such framework could be developed but has recently permitted GM mustard. Meanwhile, it has permitted labeling of GM in India. But the pressure from Monsanto continues regarding permitting GM Food in India. Further, it has cancelled introduction of new varieties of Bt. Cotton over the issue of capping of royalty by Indian government. As a socially responsible corporation, Monsanto should have waited for the regulatory framework to be established rather than putting pressure on the government to permit various varieties of GM crops including food in India. Meanwhile, Indian government needs to expedite the process of establishing the regulatory framework for GM crops.
Conclusion and Suggestions

Approach of the Supreme Court in this matter is going to have a far-reaching impact regarding accountability of TNCs in India in the near future.

7.2 Suggestions

In the light of the foregoing discussion, the researcher humbly submits the following suggestions –

1. BITs based Approach

BITs are international instruments which are used to restrict sovereign legislative space of host countries regarding safeguarding right to clean and healthy environment. Protection offered to foreign TNCs through BITs and the consequential threat of adverse international arbitration awards resulting into payment of hefty sum of money in the form of compensation distinguishes them from India TNCs. Therefore, their accountability for violation of right to clean and healthy environment is required to be strengthened by shift in approach towards the objectives sought to be achieved through signing them. Following suggestions will help in strengthening the right to clean and healthy environment in India vis-à-vis TNCs –

a) Non-dilution of Environmental Clauses under Model Indian BIT

The Final Model Indian BIT 2015 includes clauses to protect environment which is a welcome step forward. However, Indian government should ensure that in its zeal to invite more and more foreign investment from TNCs, it does not end up diluting protection offered through these clauses and constrain its sovereignty by reducing the legislative and executive space in developing its laws and policies aimed at protecting environment. It is important to have foreign investment, but it is more important to have only that which is environmentally sustainable and hence compliant with the right to clean and healthy environment.

b) Voluntary to Mandatory CSR under Model Indian BIT

It is encouraging to note that Art. 12 of the Final Model Indian BIT 2015 requires investors including TNCs to incorporate, though on
voluntary basis, internationally recognized standards of CSR (relating *inter alia* to environment) in their practices and internal policies. Unlike, CSR mandate required u/s 135 of Companies Act 2013, above mandate is broader and accordingly more meaningful. However, Final Model Indian BIT should make compliance with CSR mandatory for foreign investor including TNCs in the era of CSR. At the same time, they should be given the option to choose out of the regulatory initiatives pertaining to CSR existing at the international level. BITs negotiated and agreed upon in this manner will transform the way business is understood and done in India and make TNCs more accountable instrumentalities for CSR pertaining to right to clean and healthy environment.

2) **CSR based Approach**

India is in a learning phase of the implementation of the regulatory framework for CSR. Enriched by the experience of its functioning, the framework will be further amended in the near future. However, following suggestions will strengthen the existing framework –

a) **Broaden the Scope of CSR Mandate**

The scope and ambit of Sec. 135 of Companies Act 2013 needs to be broadened. In addition to the requirement of expenditure of minimum 2% of its average net profits made during the last three immediately preceding financial years in every financial year, the CSR Policy of a company must declare intention and commitment of the company to strictly comply with the right to clean and healthy environment. TNCs which subscribe to international standards for CSR should be accordingly required to state so in unequivocal terms in their CSR policy. This should be done in accordance with the CSR commitment made under Final Model Indian BIT thereby aligning the two approaches.
b) **Make CSR Policy Fundamental to Corporate Governance**

Fulfilment or otherwise of the CSR obligations under Companies Act 2013 is left to the wisdom of shareholders. Once the CSR mandate is broadened as suggested above, CSR policy should be made amenable to judicial review on the model of Directive Principles of Indian Constitution (though non-justiciable yet fundamental to the governance of corporations including TNCs) in India. This will enable the Indian judiciary to interpret CSR policy for making the TNCs accountable. Such a step will be particularly relevant for TNCs engaged in inherently polluting industries.

c) **Establish Independent ‘National Corporate Social Responsibility Audit Agency’ (NCSRAA)**

The success or otherwise of regulatory framework for CSR in India depends greatly on the monitoring mechanism which is yet to be developed in true sense of the term. Discharge of CSR obligations will result in accumulation of huge amount of money for this purpose. At present, it’s monitoring and implementation is entrusted with BoD of the company itself and the final approval is left for the ultimate consideration of the shareholders of the company which may not prove to be adequate. This can be due to the poor financial literacy, investor protection and investor awareness in India coupled with domination of Indian corporate sector by family owned closely held companies. Therefore, Indian government should establish an independent statutory body ‘National Corporate Social Responsibility Audit Agency’ (NCSRAA) for conducting Annual Audit of CSR activities pertaining to environment of every company based on clear guidelines laid down for this purpose. Such agency should also give CSR rating (pertaining to environment) on clearly established criteria developed for this purpose. CSR rating should be required to be mandatorily mentioned along with the name of the company in its every official communication. CSR rating along with any change therein should be communicated to SEBI. Such rating should also be considered as one
of the factors by institutional investors (including banks and financial institutions) in their investment decisions.

d) **Impart Training to Directors including Independent Directors**

Companies Act 2013 has transformed the manner in which directors should appreciate their role in steering the company forward. They are assigned pivotal role in ensuring the success of CSR provisions. Their appreciation of their own role particularly in the light of their duties may determine the success or otherwise of the regulatory framework for CSR in India.

No specific educational qualification criterion is laid down for selecting a person as director. Therefore, there is need to train them about their newly assigned role (which is different from their traditional role) wherein they are required to promote objects of company not only for the benefit of its members but also in the best interest of the company and for the protection of environment.

Indian government should establish and develop, in collaboration with TNCs, a high level research and training institution for designing training programmes for imparting training to directors. Universities having expertise in the field should also undertake this task independently. Modules of such training programmes should have special component for environmental protection and should be structured according to the needs of the particular industry. Attending one such training programme in a year should be mandatory for continuing as a director.

e) **Train Shareholders regarding their Voting on Issues Pertaining to CSR**

The success of regulatory framework for CSR depends on the vigilance of shareholders particularly the institutional investors. It is they who should confront the management of the company by posing soul searching questions in case their company decides not to make CSR expenditure in a given year. Further, they are the ones who can
question their own company regarding the quality and quantity of CSR activities. On the issue of CSR, awareness programmes should be organized for investors by the institutions (including universities) that should be established for this purpose. With the aim of improving awareness, MCA should display list of companies which did not spend any money on CSR and the reasons thereof. Such company should also unscrupulously display its status on its website.

f) Define the term ‘Stakeholders’

Companies Act 2013 marks a distinct shift over its predecessor from shareholder centric approach to stakeholder centric approach. However, it lacks definition of the term ‘stakeholders’ despite the same being used in various sections. This brings ambiguity in the scope and ambit of interpretations of those sections. Sec. 2 should be amended to incorporate Sec. 2 (85A) containing the definition of the term ‘stakeholders’. Such definition should be inclusive in nature. It should include people living in the vicinity of the company’s area of operations, since they are the worst affected in case of violation of right to clean and healthy environment. Such inclusion will facilitate interpretation of various provisions by the judiciary particularly involving TNCs.

3) Rights based Approach

Regulatory framework for CSR cannot be a substitute for making efforts to establish a strong and robust regulatory framework for right to clean and healthy environment since the framework itself assumes the same to be the responsibility of the State. With this end in view, suggestions as follows –

a) Amend Preamble of the Indian Constitution

After gaining more than two and a half decades of experience of working of the NEP of 1991, time is appropriate to explicitly green the Indian Constitution. Preamble of Indian Constitution includes
‘political, social and economic justice’. It should be amended by inserting the world ‘environmental’ before the word ‘justice’.

b) **Amend Part III of the Indian Constitution**

Parliament should insert Art. 21B in Part III of the Indian Constitution which should explicitly provide for the right to clean and healthy environment. Such an amendment will send message (in unequivocal terms) across the world to state as well as non-state actors of international community including TNCs that making investment and doing business in India cannot be planned and strategized at the cost of environmental damage.

Constitution being the supreme law, the above two suggestions will serve following objectives – firstly, it will provide a very sound background to already existing regulatory framework for enforcing the right to clean and healthy environment. Secondly, Indian apex Court can be approached directly u/A 32 and its outcome will not depend on the discretion of the individual judges comprising the bench, as is the case with PIL. Thirdly, although right to clean and healthy environment is already an integral part of Art. 21 through judicial interpretation but having such a right separately and explicitly mentioned as a Fundamental Right will be evidence of the constitutional priorities in India. Any violation of right to clean and healthy environment will be redressed through the Supreme Court minimising delay, in case the situation so warrants. Fourthly, such inclusion will send a strong message to TNCs planning to invest in India about the unwavering commitment of Indian government to the right to clean and healthy environment.

c) **Promote NGOs and PIL**

PIL is collaborative and not adversarial in nature. NGOs have played decisive role in the success of PIL relating to violation of right to clean and healthy environment generally and particularly by TNCs. Many PIL proceedings have caught democratic Indian government and its executive machinery completely oblivious of the plight of poor victims
of violations of their right to clean and healthy environment. In this sense, these PILs, barring few exceptions, have filled a vacuum and strengthened Indian democracy. Therefore, Indian Government should encourage PIL by providing facilitative environment for NGOs. Supreme Court, on its part, should also encourage PIL by being supportive in exercise of its discretion in deserving cases.

d) **A Single Comprehensive Environmental Code**

Environment, being a single integrated whole, is not amenable to select review of six legislations as has been done by TSR Subramanian Committee. Entire set of environmental laws in India should have been reviewed since foreign investment by TNCs can have unforeseen and unanticipated adverse consequences for other environmental legislations which were excluded from the ToR of the Committee.

All environmental laws and rules (scattered in the form of different legislations and rules thereunder and enacted at different points of time in response to various kinds of pressures) should be consolidated in the form of a single comprehensive Environment Code. This will help in avoiding unnecessary overlaps and conflicts and facilitate harmonious interpretation by the judiciary. Further, it will also bring clarity to the bureaucrats entrusted with the task of implementing the Code. It will provide much needed clarity to TNCs who plan to invest in India regarding their environment compliances so that they can structure their investments accordingly. It will also avoid selective review of few environmental legislations in future.

e) **Strengthen Pollution Control Boards**

TSR Subramanian Committee report has suggested enactment of ELMA with NEMA and SEMA as the new set of authorities for management of environment. However, enactment of new laws and establishing new enforcement agencies under such laws may equally get inflicted with same ills as their predecessors. Given their role in the enforcement of environmental statutes, Pollution Control Boards (both
at the Centre and State) should be strengthened by providing adequate funds, enabling them to recruit adequate and trained personnel; and avoiding the situation of conflict of interests.

f) Adopt ‘Name and Shame’ approach
TNCs enjoy enviable global reputation and are very sensitive to any erosion thereof. In fact, any adverse impact on their reputation can have a very damaging impact on their existence itself. Accordingly, they protect the same very diligently. Any adverse judgment of the Court/Tribunal relating to the environmental impact of their business operations should be mandatorily posted on the website of the company. In fact, the concerned Court/Tribunal should make such requirement an integral part of its judgment. Further, a list of such TNCs should be duly notified and displayed on the website of MoEFCC as well as the concerned industry organization.

g) Shift from EIA to SEA
EIA is an integral part of project clearance. It plays crucial role in the foreign investment made by TNCs in India. However, the stage at which it is undertaken reduces it to a mere formality. Therefore, it should be substituted by SEA which is undertaken at the very initial stage of conceiving the projects. It will relieve the judiciary of the burden of allowing the projects to continue merely because huge amount of money has already been spent thereon. Further, if TNCs comply with the regulatory framework for CSR as suggested above, undertaking Public Hearing is likely to be less resistive since their investment projects will gain more receptivity among people. Therefore, the same may be completed more objectively and that too in a time bound manner. Trust so gained, will help in avoiding further delay by frequent recourse to judiciary as well as strengthen Indian democracy.
h) **Include a Chapter on TNCs as part of the Curriculum**

Secondary school curriculum should include a chapter dedicated to TNCs. Such chapter should sensitise the young minds about their positive contribution towards environmental protection but also about adverse impact of their activities on right to clean and healthy environment. Such sensitization at young age is crucially significant since they grow up and become shareholders (of corporations including TNCs on whose wisdom entire regulatory framework for CSR under Companies Act 2013 now rests), judges, advocates, bureaucrats, environmental activists etc.

Accountability of TNCs for violation of right to clean and healthy environment should be ensured through combination of all the above three approaches in a harmonised manner. Outright rejection of one by the other will be a self-defeating exercise and will fail to make any impact in improving their accountability.

The above suggestions do not require any discriminatory treatment of TNCs. They are uniformly applicable to TNCs as well as Indian corporations. Therefore, they will strengthen accountability of all kinds of corporations in India - Indian or TNCs and move India to a sustainable future in harmony with Indian culture and tradition. Nevertheless, if implemented in their true letter and spirit, they will go a long way in enabling India to strengthen her legal regime for the accountability of TNCs for their violation of the right to clean and healthy environment.

Governments of countries are legally, morally and ethically bound to work towards development of their people. Foreign investment (of which TNCs are major source), if properly regulated, has the potential to play significant contributory role therein. Naturally, governments extend warm red carpet welcome to proposals made by TNCs to invest in their respective jurisdiction. The carpet to be rolled out to welcome TNCs should not be *red* but *green* which should be reflected in the regulatory framework through incorporation of above-mentioned suggestions.

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