ABSTRACT

Transnational Corporations (TNCs), like any other corporation, are artificial entities. They owe their existence to the motive of profit maximization which they fulfil through massive pooling of financial, intellectual and human resources across the globe. However, in the course of their commercial operations, they have been involved in violation of the right to clean and healthy environment in different parts of the world. Their accountability has posed a serious regulatory challenge which is addressed through three approaches – Rights based, CSR based and BITs based.

Right to clean and healthy environment is protected as a third generation human right at the international level. It owes its emergence on the international scene due to persistent efforts of UN in the form of Stockholm Conference and Rio Conference. However, enforcement mechanisms, particularly in the context of its violations by TNCs, are weak. It has compelled victims to seek redressal of such violations under ATCA having extraterritorial jurisdiction. But due to its restrictive interpretation by the judiciary, their grievances are not adequately redressed.

Despite absence of any uniformly acceptable definition of CSR, its regulatory framework comprises multiple initiatives from various agencies at the international level. They are voluntary in nature, stakeholder centric, having environmental protection as their implicit or explicit component but inadequately coordinated. They assume compliance with national laws as the basic minimum while encourages businesses including TNCs to go beyond mere compliance. Most of them are applicable to business generally (except UN Norms and OECD Guidelines) thereby diluting focus on the crucial role of TNCs in this regard.

BITs are developed as instruments to facilitate foreign investment. They are also used to restrict the capacity of host states to take measures to protect right to clean and healthy environment in their respective jurisdictions. Many leading international arbitral awards have regarded such measures as amounting to expropriation. However, there are other arbitral awards which have taken environmental aspects into consideration in deciding investment disputes.

India is not only the world’s most ancient civilization having deep rooted sense of environmental protection and conservation but also the largest and most vibrant
Indian judiciary has played crucial role in shaping the right to clean and healthy environment. It has innovatively interpreted right to clean and healthy environment as an integral part of the right to life u/A 21 of the Indian Constitution. It has also relaxed the rule of *locus standi* to encourage PIL so that violation of right to clean and healthy environment can be brought before it. The limitations confronted by it in adequately redressing the grievances of victims of Bhopal Gas Leak Disaster too played part in causing shift in its approach. It has also repeatedly emphasised the need of establishment of an expert body to decide the issues involving complex environmental aspects which has been fulfilled in the form of NGT. However, disputes involving violations of the right to clean and healthy environment by TNCs, namely – UCC, Coca Cola, POSCO, Vedanta Resources Plc. and Monsanto have shown strength and weaknesses of legal regime. Its judgments on pending issues involving UCC and Monsanto, which are eagerly awaited, will surely have enormous impact on the issue of accountability of TNCs.

After the adoption of NEP in 1991 in response to BoP crisis, corporate governance came into sharp focus in India. Efforts in strengthening standards of corporate governance lead to adoption of separate voluntary guidelines for corporate governance and corporate social responsibility in 2009. Voluntary guidelines were revised in 2011 with distinct focus on environmental component. It marked the beginning of independent development of regulatory framework for corporate social responsibility. SEBI introduced mandatory element by requiring top 100 companies
by market capitalization in BSE and NSE to file BR Report as part of their Annual Report. However, Companies Act 2013 has brought a new paradigm to the regulatory 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 thereof in its BoD report. Thus, while CSR expenditure is voluntary, 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. This regulatory framework is equally applicable to all corporations including TNCs meeting the stipulated criteria. It has been subsequently reviewed and amended to clarify the doubts. Nevertheless, its scope is much narrower than that of the voluntary CSR guidelines of 2011. Further, voluntariness is also maintained through not providing any specific penalty for non-compliance with Sec. 135. Thus, India is the first country to stipulate 2% limit while Indonesia has opted for mandatory CSR well before India and various other countries have made disclosures regarding CSR mandatory. CSR committee comprises directors. Companies Act 2013 also contain codified duties of directors which require them to take into consideration the interests of environmental protection in promotion of company’s objects and they must do it carefully, skillfully, diligently and independently. Duty is applicable on all kinds of companies including TNCs. Also Schedule IV of Companies Act 2013 contains a Code for Independent Directors. Thus, regulatory framework for CSR in India is heavily dependent on directors.

Aimed at encouraging foreign investment, India has entered into many BITs with other nations. However, it has faced serious threat when faced with international investment arbitration in its dispute with Enron Corporation. Further, the recent international investment arbitral award in its dispute with White Industries has also necessitated serious rethink on the part of the Indian government to review and renegotiate its existing BITs. It has come out with Final Model Indian BIT which will become the basis of signing new BITs in future. Final Model Indian BIT contains clauses aimed at protecting the right to clean and healthy environment and CSR and amalgamates the two approaches.
Accountability of TNCs for their violation of the right to clean and healthy environment should be ensured through combination of the three approaches. Rejection or ignorance by the one approach of the other approaches will be an exercise of self-defeating nature. The carpet to be rolled for welcoming TNCs in India should be green instead of red.