Chapter – 1

Transnational Corporations and Corporate Social Responsibility vis-à-vis Right to Clean and Healthy Environment: A Conceptual Analysis

Nature is divine but there is nothing natural about a corporation.

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The Frame

Jurisprudence has never been static. It has continuously evolved to cater to the needs of an ever changing society. Undertaking the task of strengthening accountability of TNCs presents the classical instance of such jurisprudential evolution. Further, right to clean and healthy environment is a relatively recent emergence on jurisprudential canvas. Jurisprudential engagement with CSR is still in its infancy. BITs too are a relatively recent emergence on the international scene and their jurisprudential implications are significantly shaping the rights of TNCs. This chapter discusses jurisprudential aspects of three approaches developed to strengthen accountability of TNCs for violation of the right to clean and healthy environment, namely – Rights based approach, CSR based approach and BITs based approach.

The Focus

The focus of this chapter lies in developing the conceptual understanding of the three different approaches to strengthen the right to clean and healthy environment vis-à-vis TNCs for violation of Right to clean and healthy environment namely – Human rights based, CSR based and BITs based approach.

The Objective

The objective of writing the chapter is to understand the way in which the concept of TNCs has evolved with time and also to comprehend the theoretical basis of three distinct approaches developed to strengthen accountability of TNCs for violation of right to clean and healthy environment.

1.1 Introduction

Emergence of TNCs in our contemporary human society is indicative of the level of sophistication acquired by corporations in leveraging their operations on a global scale. By virtue of the gigantic scale of their operations, they greatly impact human lives. In this sense, they have become integral component of human society. Although artificial in nature, yet they really exist for all practical purposes. Their actions are real, their influence on our day-to-day life and thought is real, impact of their actions
on our environment is real, destruction of environment caused by their operations is real and the pain and suffering caused thereby is equally real.

1.2 Unravelling Corporation

In order to fully comprehend the meaning of the term ‘Transnational Corporation’, it is imperative to understand the jurisprudence behind the term ‘corporation’. Law confers personality only on those entities that are ‘capable of being right-and-duty-bearing units’. Law classifies persons into two kinds – natural and legal. While former is a human being, latter are ‘beings, real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings’. Thus, a legal person is any non-human entity on which law confers legal personality. Such extension of conception of personality beyond the class of human beings is ‘one of the most noteworthy feats of the legal imagination’. Corporations are classical example of such artificial personality. Following theories constitute the theoretical framework for a corporation –

a) **Fiction Theory** – Savigny and Salmond are its main proponent. According to this theory, corporations are not real persons but are imputed personality through fiction of law. Once personality is so imputed in this manner, it can have only as much will, mind and ability to act, as the law imputes to it.

b) **Symbolist Theory** – This theory is philosophically similar to fiction theory and is propounded by Ihering. It locates ‘the subjects of rights of juristic person’ in the members of the corporation who are ‘human beings really behind it’. It is also referred to as Bracket theory since a bracket is placed around natural persons who form a corporation and a name is give to them in order to

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3 Ibid 305.
5 Marshall CJ in 1819 defined corporation as ‘an artificial being, invisible, intangible, and existing only in contemplation of law.’ *Trustees of Dartmouth College v Woodward* 17 U.S. 518 (1819), 636.
6 Paton and Derham (n 1) 411.
7 Friedmann (n 4) 557.
conveniently refer to them. However, their real position becomes clear only when this bracket is removed.\(^8\)

c) **Concession Theory** – According to this theory, law is the only source which can confer legal personality. Therefore, corporation has no legal personality except to the extent conceded by law. This theory bears more proximity to the philosophy of sovereign nation in comparison to fiction theory.\(^9\)

d) **Purpose Theory/Theory of Zweckvermogen** – According to this theory, property of a corporation ‘may be dedicated to, and legally bound by, certain objects, but that they are subjectless property, without an owner’.\(^10\) The basis of this theory is that ‘only human beings can have rights’.\(^11\)

e) **Realist or Organic Theory** – According to this theory, Corporation is a *reale Verbandsperson* which does not owe its personality to state recognition and is not a fictitious legal creation whose personality resides in its component members.\(^12\) It is associated with Gierke and Maitland too has supported it to some extent.\(^13\)

The moment a corporation comes into existence, law ensures that it acquires certain characteristics.\(^14\) Its following two characteristics deserves special mention due to which a corporation is virtually transformed into the most suitable and hence most preferred form of ownership of business across the world –

a) Firstly, a corporation has a personality separate from its members. It has found expression in the form of doctrine of Corporate Veil. Doctrine was first laid down by House of Lords in the celebrated *Salomon Case*\(^15\). Since then, Judiciary has followed this doctrine as a sacrosanct principle of corporate

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\(^8\) Paton and Derham (n 1) 412.
\(^9\) Friedmann (n 4) 556.
\(^10\) ibid 557.
\(^11\) ibid.
\(^12\) ibid.
\(^13\) ibid.
\(^14\) Important characteristics of a corporation include – legal entity separate from its members; limited liability; common seal; capacity to sue and be sued; capacity to acquire property; perpetual existence; separation of management from ownership.
\(^15\) ‘Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.’ As per Lord Halsbury in *Salomon v Salomon & Co Ltd*, [1897] AC 22, 31.
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law. Further, judiciary has also developed the doctrine of lifting of corporate veil in order to check misuse of the doctrine of corporate veil. According to this doctrine, courts may lift the corporate veil in appropriate cases derecognizing the separate identity of the company and merge the identity of the company with that of its members. Doctrine can be applied on various grounds which are not exhaustive in nature. Accordingly, courts may create new grounds depending upon the facts and circumstances of the case before it. Thus, the principle of corporate veil is the rule and the principle of lifting of corporate veil is its exception.

b) Secondly, corporations are usually incorporated with limited liability of its members. It means that in the event of loss, liability of members of a corporation is limited to the extent of amount unpaid on the shares held by them. Under no circumstances, they can be called upon to pay anything more than such unpaid amount. By ascribing this feature to a corporation, law enhances the risk taking capacity of investors thereby encouraging them to invest in big projects without taking too many risks. This feature has been responsible for making a corporation an exceptionally attractive vehicle for large scale investment.

It is essentially due to the above-mentioned twin characteristics that corporations have became the most preferred choice of entrepreneurs the world over for doing business on a large scale. Not only has it succeeded in attracting unprecedented financial resources but intellectual resources as well.

16 Macaura v Northern Assurance Co. Ltd. [1925] AC 619; Re, FG (Films) Ltd. (1953) 1 All ER 615 (ChD); Lee v Lee's Air Farming Ltd. [1961] AC 12 PC; Adams v Cape Industries Plc [1990] 2 WLR 657; Life Insurance Corporation of India v Escorts Ltd. (1986) 59 Com Cases 548; Vodafone v Union of India (2012) 170 Com Cases 369 (SC).
1.3 Transnational Corporations: A Complex Genre

1.3.1 Definitional Challenge

Defining a TNC has proved to be an extremely difficult task largely due to highly complex organisational and functional structures innovated and adopted by them over the years.\(^{18}\) Despite various attempts to define TNCs, their precise definition having universal acceptance has proved elusive. At the international level, they are commonly referred to by the use of different terms, namely - Multinational Corporations (MNCs) or Multinational Enterprises (MNEs) or Supranational entity (SNEs). OECD Guidelines for Multinational Enterprises 2011 has used the term Multinational Enterprise (MNE) though the Guidelines stop short of defining it.\(^{19}\) However, Guidelines simplify the term MNE as:

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\text{[C]ompanies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.}^{20}\]

Guidelines covered ‘all the entities within the multinational enterprise (parent companies and/or local entities).’\(^{21}\)

Interestingly, United Nations (UN) use the term Transnational Corporation (TNCs) to refer to them in two different contexts, namely – international trade and human rights. United Nations Conference on Trade and Development (UNCTAD) generally defines a TNC as an –

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\text{[E]nterprise, which is irrespective of its country of origin and its ownership, including private, public or mixed, which comprises entities located in two or}
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\(^{18}\) Classical example is the operational structure adopted by Vodafone in \textit{Vodafone v Union of India} (2012) 170 Com Cases 369 (SC).


\(^{20}\) ibid.

\(^{21}\) ibid.
more countries which are linked, by ownership or otherwise, such that one or more of them may be able to exercise significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others. TNCs operate under a system of decision making which permits coherent policies and a common strategy through one or more decision-making centres.\textsuperscript{22}

This definition is irrespective of their legal form and fields of their activities. However, for working purposes, UNCTAD considers a TNC to be ‘an entity controlling assets abroad’.\textsuperscript{23} It is noteworthy that TNCs generally deploy various instrumentalities to structure their investments overseas in order to fulfill their business objectives namely – Parent enterprise;\textsuperscript{24} Holding company;\textsuperscript{25} Affiliate enterprise;\textsuperscript{26} Subsidiary enterprise;\textsuperscript{27} Associate enterprise;\textsuperscript{28} Joint venture;\textsuperscript{29} and

\begin{itemize}
\item \textsuperscript{23} ibid.
\item \textsuperscript{24} Parent Enterprise means ‘an incorporated or unincorporated enterprise, or group of enterprises, which has a direct investment enterprise operating in a country other than that of the parent enterprise’. Parent Enterprise <http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/Parent-Enterprise.aspx> accessed 12 January 2017.
\item \textsuperscript{25} Holding Company means ‘A corporation that owns voting stock in another corporation and is able to influence its board of directors, and therefore control its policies and management. A holding company need not own a majority of the shares of the corporation or be involved in activities similar to those of the company it holds’. Holding Company <http://unctad.org/en/Pages/DIAE/World%20Investment%20Forum/Holding-Company.aspx> accessed 12 January 2017.
\item \textsuperscript{26} Affiliate Enterprise means ‘an incorporated or unincorporated enterprise in which a foreign investor has an effective voice in management. Such an enterprise may be a subsidiary, associate or branch’. Affiliate Enterprise <http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/Affiliate-Enterprise.aspx> accessed 12 January 2017.
\item \textsuperscript{27} Subsidiary Enterprise means ‘an incorporated enterprise in the host country in which another entity directly owns more than half of the shareholders’ voting power, or is a shareholder in the enterprise, and has the right to appoint or remove a majority of the members of the administrative, management or supervisory body’. Subsidiary Enterprise <http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/Subsidiary-Enterprise.aspx> accessed 12 January 2017.
\item \textsuperscript{28} Associate Enterprise means ‘An incorporated enterprise in the host country in which an investor, together with its subsidiaries and associates, owns a total of at least 10 per cent, but not more than half, of the shareholders’ voting power (the figure may be less than 10 per cent if there is evidence of an effective voice in management)’. Associate Enterprise <http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/Associate-Enterprise.aspx> accessed 12 January 2017.
\item \textsuperscript{29} Joint Venture means ‘share-holding in a business entity having the following characteristics; (i) the entity was established by a contractual arrangement (usually in writing) whereby two or more parties have contributed resources towards the business undertaking; (ii) the parties have joint control over one or more activities carried out according to the terms of the arrangements and none of the individual investors is in a position to control the venture unilaterally’. It may be in the form of ‘jointly controlled entity’ or ‘jointly controlled assets’ or ‘jointly controlled operation’. Joint Venture <http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/Joint-Venture.aspx> accessed 12 January 2017.
\end{itemize}
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Branch.\textsuperscript{30} The World Investment Report 2014 has also explained the above-mentioned terms on the same lines.\textsuperscript{31}

However, from human rights perspective, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms) adopted in 2003 defines the term TNC as follows:

\[\text{Economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.}\textsuperscript{32}

However, it is pertinent to note that UN Norms also define another term in this regard i.e. ‘Other Business Enterprises’. The phrase includes:

\[\text{Any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security \ldots}\textsuperscript{33}

The framework of UN Norms was developed with the singular aim of strengthening the accountability of TNCs at the international level. Therefore, both the terms ‘Transnational corporation’ and ‘other business enterprises’ are defined in such a

\textsuperscript{30} Branch means ‘an unincorporated enterprise in the host country which is one of the following: (i) a permanent establishment or office of the foreign investor; (ii) an unincorporated partnership or joint venture between the foreign direct investor and one or more third parties; (iii) land, structures (except structures owned by government entities), and/or immovable equipment and objects directly owned by a foreign resident; (iv) mobile equipment (such as ships, aircraft, gas or oil-drilling rigs) operating within a country other than that of the foreign investor for at least one year’. \textit{Branch} <http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/Branch.aspx> accessed 12 January 2017.


\textsuperscript{33} ibid.
wide manner as to bring within its scope as many of their operational forms as possible.

In India, Companies Act 2013 defines their key instrumentalities in the municipal context. Section 2 (87) of Companies Act 2013 regards a company as subsidiary of another company (i.e. holding company) if the holding company ‘controls the composition of board of directors or exercises or controls more than one-half of the total share capital either on its own or together with one or more of its subsidiary companies’. Further, according to Sec. 2 (6) of Companies Act 2013 a company becomes ‘associate’ to another company if the latter has significant influence in the former. Explanation to Sec. 2 (6) regards ‘controlling at least twenty percent of total share capital or of business decisions under an agreement’ as sufficient for this purpose. Such influence is lesser than the one required to make former a subsidiary of the latter but includes a joint venture company.\(^{34}\) Further, according to Sec. 2 (42), a foreign company is a company or body corporate which is ‘incorporated outside India but has a place of business in India or conducts any business activity in India in any other manner’. Such place of business may be either through itself or an agent. It may have such place of business physically or through any other mode.

### 1.3.2 Origin and Evolution of TNCs

Emergence of TNCs on the global scene, in their present form, is not a sudden occurrence. They owe their emergence largely due to the interplay of dominant political, economic and social philosophy and the consequent legal framework prevalent during various phases of their evolution. Their evolution may be classified in the following three distinct phases –

a) First Phase – State Protected Monopoly  
b) Second Phase – *laissez faire*  
c) Third Phase – Emergence of Era of Human Rights

Doing business has not been the same in these phases. In fact, the third phase has marked the beginning of an era which has changed the course of human civilization forever.

\(^{34}\) The term ‘Associate’ was not defined under Companies Act 1956. This new definition is aimed at widening the scope of linking the two companies.
1.3.2.1 First Phase – State Protected Monopoly

It is difficult to precisely fix the beginning of emergence of TNCs at the world stage.\textsuperscript{35} However, precursors of modern day TNCs emerged in this phase which was dominated by the philosophy of mercantilism (16\textsuperscript{th} – 17\textsuperscript{th} century). Mercantilism encouraged protectionism through establishing monopolies and thereby eliminating foreign competition. This was achieved by issue of Charters by the sovereign in England, Netherlands, Portugal, Spain etc. establishing monopoly over designated territories purely for trading purposes. Mercantilism eventually lead to colonialism for which TNCs were used as agents. British took the lead in this regard followed by Netherlands. Notable examples include – Muscovy Company; British East India Company (EIC); Dutch East India Company; Royal African Company; Hudson’s Bay Company (HBC). In order to further their trade, they started governing their colonies. All these corporations were private commercial undertakings (neither state owned nor ordinarily subsidised or guaranteed by States).\textsuperscript{36} They became very active players in the international affairs of that time due to continued support of their creator states. In fact, all of them got involved in rampant slave trade though to varying degrees and became ‘wealthy and prosperous’.\textsuperscript{37}

These corporations not only advanced the cause of their creator states but achieved much more than what anyone could have anticipated at the time of their creation. They became well-controlled agents in the hands of their creator states to further the ends of colonialism namely – to expand, control and administter territories. Their creator states found them suitable for this purpose primarily because these corporations were having hardly any responsibility as compared to their creator states. It equipped the creator states with enhanced risk taking capacity while at the same time permitting more freedom to the latter to distance themselves from the former in case anything goes wrong. In comparison to their creator states, these corporations were also free form parliamentary control and bureaucracy.\textsuperscript{38}

\textsuperscript{35} Peter T Muchlinski, Multinational Enterprises and the Law (2\textsuperscript{nd} edn, Oxford University Press 2007)
\textsuperscript{36} Olufemi Amao, Corporate Social Responsibility, Human Rights and the Law (Routledge 2011)
\textsuperscript{37} ibid 12.
\textsuperscript{38} ibid 14.
Creator states exercised formidable control over these corporations through limiting the duration of their existence in the Charter itself.\textsuperscript{39} Their fate completely depended on the wishes of their governments (like merger of NWC and HBC or extension of their life by renewing their Charter from time to time or controlling their governing boards). So, unlike the present day corporations, they did not have the feature of perpetual existence. This made these corporations perennially dependant on their creator states for survival. All these corporations got increasingly involved in the governance of territories (establishing and maintaining their own armies) ignoring their core purpose i.e. trading, incurring huge losses in the process, that ultimately lead to their demise. Both British and Dutch East India Company met the same fate (former lasting for nearly two and a half century). With rampant corruption amongst their top officials, they had to be dissolved by their respective creator states since their focus got diverted from their core trading activity to administration of their territories. HBC, however, is still doing business\textsuperscript{40} in sharp contrast to its competitors.

1.3.2.2 Second Phase – \textit{Laissez Faire}

Philosophy of \textit{laissez faire} replaced mercantilism. The stage for this transition was set by Adam Smith’s rejection of mercantilism and staunch advocacy of \textit{laissez-faire} based on free trade and open competition.\textsuperscript{41}

Corporations in this phase were not the ones which were incorporated through direct involvement of sovereign through issue of Charter and creating monopolies for them. Instead, realising the benefits of corporate form of ownership of business, States enacted general statute i.e. Companies Act, to facilitate the incorporation of companies. It provided procedures through which any two or more persons can get their business incorporated in the form of company.\textsuperscript{42} Upon the Registrar of Companies (RoC) issuing certificate of incorporation, a corporation will come into existence with all the advantages associated with incorporation.

\textsuperscript{39} ibid.

\textsuperscript{40} HBC announced on 26 November 2012 closing of IPO of 21,475,000 common shares of the Company at a price of $17.00 per share resulting in gross proceeds of $365,075,000. See ’Hudson’s Bay Company Completes $365 Million Initial Public Offering’ (26 November 2012) <http://investor.hbc.com/releasedetail.cfm?ReleaseID=723148> accessed 7 January 2017.

\textsuperscript{41} Adam Smith, \textit{Wealth of Nations} (first published 1776, Bentaman Book 2003) 839-841.

\textsuperscript{42} Companies Act 2013 has permitted One Person Company (OPC) u/s 3(1) (c) in order to facilitate even a single person to take advantage of limited liability under corporate form of ownership of business.
Another remarkable development around that time was the generation of surplus capital created during mercantilist phase, setting the stage for occurrence of industrial revolution. Industrial revolution created the need to discover new markets for supplying raw materials as well as new markets for finished products. More crucially, it also created need for developing better technology for more and more efficient utilisation of resources. Industrial revolution sowed the seeds of greatest threat to the environment in future. It triggered rapid scientific and technological advancement which lead to sophisticated mechanization giving capacity to man to extract resources from nature beyond her capacity to replenish. Further, man believed that nature has infinite reservoir to provide resources till eternity and whatever nature provides is for human consumption (referred to as anthropocentrism). All these factors came together to aggravate exploitative extraction so much so that even non-human life also fell prey to such approach, being regarded as a resource to be exploited towards human ends. It is no surprise, therefore, that big industries continue to be the greatest cause of environmental pollution across the world.

During 1890-1914, European TNCs started to show appearance – Philips (Holland), Nobel Company and SKF (Sweden), Margarine Uni (which later merged with Lever of UK to form Unilever), Royal-Dutch Shell (Anglo-Dutch), although German TNCs dominated. This was also the period when TNCs from USA underwent strong growth due to attractiveness of foreign markets caused by domestic recession and stock market conditions and encouragement by antitrust laws for merger of corporations into giant TNCs.

1.3.2.3 TNCs and the World Wars of 20th Century

Last century witnessed two World Wars – First World War (1914-1918) and Second World War (1939-1945). Both the World Wars took place in an era when colonialism was at its peak (fortunately, Second World War marked the beginning of the gradual process of an end to the era of colonialism). Although both the world wars were man-made disasters, Second World War proved to be the worst tragedy suffered by

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43 Muchlinski (n 35) 11.
44 Ibid.
45 After the end of First World War, international community made efforts to ensure that this butchery is not repeated again by establishing League of Nations and many other measures which proved futile as within short span of just two decades, Second World War erupted.
human civilization till date. It surpassed the First World War in terms of loss of human life and property.

After the first world war (1918-1939), TNCs continued to grow though at the relatively slower pace in comparison to the earlier phase due to various factors like – Bolshevik Revolution causing blockage of private foreign investment in erstwhile major region; break up of Austro-Hungarian and Ottoman Empires; collapse of international capital markets in late 1920s and early 1930s leading to Great Depression and consequential massive decline in world trade; and adoption of fascist economic policies by Germany and Italy. This period was marked in Europe by enhanced integration of corporations at the national level which in turn entered into international cartels. US corporations could not match their European counterparts in cartelization due to strong anti-trust laws. However, it did not deter US corporations from entering overseas cartels.

During the Second World War, corporations were allegedly involved in violations of human rights. However, despite such involvement, none of them was brought to trial after the war, although leaders of few of them were tried. In these trials, courts did make reference to activities of corporations as well.

1.3.2.4 Third Phase – Emergence of Era of Human Rights

Period after Second World War marked the beginning of the age of Human rights (in their modern sense) with the establishment of UN. This was also the period when the regulatory framework for international monetary and financial system was developed in the form of International Bank for Reconstruction and Development (World Bank) and International Monetary Fund (IMF). However, similar attempts regarding regulatory regime for international trade in the form of International Trade Organisation (ITO) could not succeed. Under such international situation, TNCs acquired precedence over other instrumentalities for development of modern technology as well as cross border investments on the global scale. In comparison to

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46 Muchlinski (n 35) 13.
47 ibid.
48 ibid 14.
49 ibid.
50 Amao (n 36) 19.
51 ibid.
Europe, TNCs from US emerged stronger after second world war and dominated overseas investments due to various factors – huge economic and industrial devastation in Europe; Marshall aid in 1948 became capital basis for reconstruction of Europe opening new opportunities for them; dollar becoming standard currency for international transactions in the newly established international monetary and financial regime; tax concessions by US governments to overseas investments by their corporations permitting them to credit tax paid overseas against US tax liability; improvements in international communications and transport ensuring effective control over their overseas subsidiaries. 52 This period also saw beginning of emergence of European TNCs – big German corporations like IG Farben, Hoechst, and Bayer were reconstituted and began to buy back their confiscated foreign plants in Latin America and Siemens, AEG and Daimler-Benz rebuilt their international sale networks; Fiat and Olivetti from Italy established foreign manufacturing plants in Europe and Latin America.53

During 1960-1990, European TNCs gave stiff competition to their US counterparts and the period also saw emergence of TNCs of Japan.54 TNCs form developing countries (Korea and Mexico) also emerged on the global investment map during 1980s.55 By the end of 1980s, USSR disintegrated leaving the world unipolar. From 1990 onwards, TNCs from Brazil, Russia, India and China emerged as important new players.56 Early 1990s also witnessed the successful completion of Uruguay round of trade negotiations culminating in World Trade Organisation (WTO). It increased dependence of developing and underdeveloped nations on foreign investment as well as cutting edge technology of which TNCs emerged as a crucial source. All these developments set the stage for a very dominating role of TNCs across the world. This brought the focus of international community on the corporate governance of corporations generally and TNCs in particular. Many scams leading to corporate collapses also brought corporate governance into limelight.57 With such increasing dominance, TNCs also got embroiled in allegations of violations of human rights

52 Muchlinski (n 35) 16.
53 ibid 17.
54 ibid 18.
55 ibid 21.
56 ibid 23.
57 Texaco, Polly Peck, Bank of Credit and Commerce International, WorldCom, Enron, Parmalat, Tyco, Lehman Brothers, AIG, Barclays, Satyam etc.
including right to clean and healthy environment leading to demands of their enhanced accountability.

During the course of their evolution, TNCs were naturally concerned about the protection of their investments abroad and therefore were involved in efforts to develop regulatory framework in the form of international investment law. Such protection came in the form of recognition of a number of rights. However, only limited success could be achieved through multilateral negotiations. Thus, they shifted focus to protection of their cross border investments through the mechanism of Bilateral Investment Treaties (BITs). Accordingly, 1980s and 1990s marked distinct rise in the conclusion of such BITs between their home states and host states.

1.4 Environment: A Definitional Conundrum

The term ‘environment’ is derived from the French verb *environner* which means ‘to surround or encircle’. Oxford dictionary defines it as ‘natural world in which people, animals and plants live’. It defines the term ‘nature’ as ‘all the plants, animals and things that exist in the universe that are not made by people. The way things happen in the physical world when it is not controlled by people.’

Understanding and defining environment in a comprehensive manner has proved to be a deceptively simple and accordingly an extremely vexed task. Our understanding of what constitute our environment is shaped by the depth of our knowledge about the world around us. Advancement in science and technology has broadened our knowledge base exponentially in the past two centuries and going by the fast pace of its advancement, it will continue to do so in the times to come. This exponential broadening of our knowledge base about us and about the world around us has constantly challenged our conception of environment.

Scientific and technological advancement has added two particular features to our understanding of environment. *Firstly*, the boundaries of what constitutes our environment are continuously expanding. For instance, earlier environment was conceived as things wedded to earth. However, space research has proved that it

60 ibid 1019.
stretches far beyond the earth, into the unknown abstraction that we call space. As we are concerned about pollution on earth, we are getting increasingly concerned about pollution in outer space as well. 61 Secondly, various segments that look not even remotely related to environment are now found to be intricately integrated with each other in giving birth to one single whole that we call environment. Sands has rightfully stated that environment ‘represents a complex system of interconnections’.62 The above two features have necessitated reformulation of the question itself as ‘what is not environment?’

However, it will be a grave mistake to believe that we owe our understanding of our environment exclusively to scientific and technological developments of the last two centuries. Political, cultural, geographical, religious, social, and philosophical approaches have immensely contributed to shaping our outlook towards environment ever since the dawn of human civilisation.

Hinduism (one of the most ancient of all the existing religions of our contemporary world) has a deep philosophical base which unequivocally and categorically points to the sacredness of both living and non-living universe as creation of God. Oneness of whole life is its fundamental tenet. Human beings are just one form of life like other fellow creatures, joined by the common thread of soul (atman).63 Transmigration of soul further cements the bond between all living creatures.64 Hindu scriptures and mythology are replete with innumerable instances which indicate that the approach was not anthropocentric and the emphasis was on sustaining the entire universe rather than merely earth or human beings or animals and plants (which were indeed regarded as its integral part). In short, Hindu conception of universe is neither earth centric nor earth is human centric. Other leading religions too have broadly pointed towards oneness and sacredness of nature.65 People belonging to indigenous communities

61 Problem of orbital debris is one such instance.
63 Soul is characterized as: ‘weapon cannot cut it nor can fire burn it; water cannot wet it nor can wind dry it. For this soul is incapable of being cut; it is proof against fire, impervious to water and undriable as well. This soul is eternal, omnipresent, immovable, constant and everlasting.’ Srimad Bhagavadgita ch-2 Verse 23 and 24 (Gita Press 2005) 30.
64 ‘As a man shedding worn-out garments, takes other new ones, likewise the embodied soul, casting off worn-out bodies, enters into others which are new.’ ibid 30 Verse 22. See also M K Gandhi, Hindu Dharma (Orient paperbacks 1978) 8.
across the world have gone to the extent of worshipping various components of their respective environment (plants, animals, planets, stars, mountains, rivers, forests etc.) as their God.

This complexity in our contemporary understanding of the term ‘environment’ finds reflection in the complexity of environmental issues and the consequential challenges it poses for existing legal framework. Legal definitions are indicative of scientific categorizations, cultural and economic considerations. Defining environment has been approached variedly – flora and fauna in earlier treaties; obviously narrowed version in the form of ‘human, animal or plant life or health’ in GATT; no definition in Stockholm Declaration; broad working definitions out of necessity in other treaties. It has not taken too long for the international community to realise that environmental problems have global dimensions which require global thinking aimed at finding global solutions. Such realization reflected in recognition of right to clean and healthy environment by the international community through various international instruments. In fact, it has become a very important consideration in other international regulatory frameworks. Most impressive formulation of such right is embedded in the concept of ‘sustainable development’ which was defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. Since then, the concept of ‘sustainable development’ has become the raison d’être of all contemporary human discourse and endeavours. Further, concerns about the need to develop comprehensive approach towards environmental protection has also found reflection in the term ‘Climate Change’ which was introduced as part of Rio conference and since then continue to dominate the international environmental discourse.

1.5 Accountability of TNCs for Violation of Right to Clean and Healthy Environment – Three Emerging Approaches

‘Accountability’ of a corporation is different from ‘responsibility’ of a corporation as the term in used in CSR. While the latter is generally indicative of voluntary adherence to certain norms relating to CSR, the former seems stronger in terms of its

66 Sands and Peel (n 62) 14.
67 ibid.
enforceability. TNCs have faced allegations for violations of environmental damage during the course of their usual business operations. Developing regulatory framework with the aim of strengthening accountability of TNCs for environmental damage caused by them has engaged experts since the later half of the last century. Following three approaches are mainly adopted to achieve this objective –

I. Rights based Approach
II. CSR based Approach
III. BITs based Approach.

These approaches are discussed hereinafter –

1.5.1 Rights based Approach

The concept of ‘right’ is central to modern jurisprudence. Its centrality is evidenced by the fact that human relations and even day to day affairs are usually comprehended in terms of rights. It has classical western roots. It was first developed in Rome where rights belonged to an individual not as individual but as the head of a family making family the primary subject of rights. At that time rights were restricted in depth as well as in scope and customs, usages and traditions also generated rights which were at par with those generated by law. Under feudalism, along with individuals, traditional communities and groups like cities, guilds and estates also became bearers of rights. From 17th century onwards, concept of right began to acquire its modern sense and acquired number of features, namely – claim requiring a specific pattern of behaviour from others irrespective of their personal feelings and sentiments; claim having the nature of a title whose bearer is entitled to make it in accordance with recognised procedure; title is conferred upon its bearer by an established legal authority which becomes exclusive source of rights rendering other sources like customs, traditions and usage irrelevant unless so recognised by such authority; right holder is free to do whatever one likes with it, subject to the

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69 ‘Not only were traditional Asian societies structured around duties, not rights, but any rights held by individuals, families, or communities were largely dependent on the discharge of duties.’ Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 114.


71 ibid.

72 ibid.
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conditions of its grant excluding all others from its access who are further required to perform a specific set of services by them; right is legally enforceable, guarded by State which punishes others for their transgression; its possession does not guarantee the possessor’s ability to exercise it.\(^{73}\)

Rights based approach towards accountability of TNCs may be further classified into the following –

i. Private Law including Property Law and Tortious Action

ii. Public Regulation including Criminal Law

iii. Human Rights Approach

These approaches are discussed hereinafter –

1.5.1.1 Private Law including Property Law and Tortious Action

Tortious action is in the nature of a civil wrong other than a breach of contract or breach of trust and is redressible through an action for unliquidated damages. Tortious actions have been used particularly in developed countries to enforce environmental protection which has given rise to rich jurisprudence on the subject. Remedies relating to doctrine of strict liability, nuisance\(^{74}\) and trespass\(^{75}\) have been particularly relevant in environmental issues. Further, doctrine of public trust otherwise relevant to property law has been invoked in many countries to protect natural environment.\(^{76}\) India is no exception. However, it has modified the principle of strict liability to that of absolute liability in case of inherently hazardous activities (discussed in chapter-6).

1.5.1.2 Public Regulation including Criminal Law

This approach consists of ‘legislative texts’ containing ‘general environmental policy, supplemented by specific laws and administrative regulations’.\(^{77}\) Further, laws have been enacted to take care of one or the other form of environmental pollution e.g.

\(^{73}\) ibid.

\(^{74}\) Nuisance refers to an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it. It enjoys close connection with environmental protection e.g. oil pollution, noxious fumes, offensive smells, noise etc. Edwin Peel and James Goudkamp, *Winfield & Jolowicz on Tort* (19\(^{th}\) edn, Sweet & Maxwell 2014) 446.

\(^{75}\) ibid 427 and 55.


\(^{77}\) ibid 36.
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Water, Air etc. Experience suggests that this approach is not suitable at all to environmental protection in the long run as it is conceptually flawed. It ignores the fact that nature constitutes one integral whole devoid of segmentation. This approach has a tendency to ignore the ‘interrelated and interdependent nature of environment’. It can only be tackled through ‘cradle-to-grave approach’. In recognition thereof, umbrella legislations have become the trend relying on ‘common regulatory techniques and procedures including environmental impact and risk assessment, prior licensing and emission standards’ generally enforced through more specific administrative regulations. However, the success of this framework largely depends on quality of enforcement which comes through quality of governance. In countries where standards of governance are poor, the effectiveness of this framework will only have mixed results or hardly any result at all.

In addition, there are also statutes enacted for environmental protection which impose criminal liability for polluting environment. Further, criminal law also includes offences which have been invoked for environmental protection e.g. Nuisance. But, when the culprit is a corporation, corporate criminal liability generally and in particular context of environmental protection becomes a vexed issue. Furthermore, ‘tensions exist at the crossroads of environmental law and criminal law and the divergent characteristics of each pose significant challenges to their integration’.

1.5.1.3 Human Rights

Human rights mean rights that are vested in a person by virtue of him being human. They are ‘inherent to all human beings’ irrespective of their ‘nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status’. It includes all internationally recognised civil, political, social, economic and cultural rights. International Bill of Rights (comprising Universal Declaration of

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78 ibid.
79 ibid 37.
80 ibid 36.
81 ibid 37.
Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural rights) has enumerated them comprehensively at a given point of time and the debate for recognition of newer human rights continues even thereafter. Although state-centric in focus, they may still be invoked against corporations in case of their violations since ‘over a period of time many non-state actors have been accepted as subjects of international law’.  

The justification of doing so is the withdrawal of States from those areas of activity which they hitherto reserved for themselves (through devices like disinvestment etc.) and the same has been opened up for private players (through devices like investment particularly foreign direct investment). Thus, corporations have substituted states in those areas of activity. A TNC may violate human rights either directly (by the parent company itself or through its assistance or contribution) or indirectly (through independent entities to which parent company is related like its subsidiary or affiliate or associate or supply chain). However, there is hardly any need to redefine human rights. On the contrary, the need is to ‘reconceptualise and extend the existing obligations to include companies (and such other entities) as new duty-holders together with states’.  

Human rights based approach towards environmental protection has emerged in the second half of the last century but has acquired wide appeal during this period. Conceptually, it underscores the fact that a certain standard of environmental protection is sine qua non for the enjoyment of scores of other internationally and even domestically guaranteed human rights. Conceptually, the relationship between the cause of environmental protection and human rights seems to be harmonious i.e. ‘interdependent, complementary, and indivisible’ on the face of it. However, when one delves deep into this relationship, inherent stresses become evident. 

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85 ibid 18.
86 Anton and Shelton (n 76) 56.
87 Michael R Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’ in Alan E Boyle and Michael R Anderson (eds), Human Rights Approaches to Environmental Protection (Oxford University Press 1996) 3.
88 ibid.
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Human rights scholars differ with regard to how environmental protection can best be achieved within the framework of human rights law. Basically, there are following three distinct approaches –

a) *Mobilising already recognised Human Rights and their Enforcement Mechanisms*

Vasak has classified human rights into three generations namely – *first generation* concerns ‘negative rights’ roughly corresponding to civil and political rights which require that state to do nothing to interfere with individual liberties; *second generation* corresponds to social, economic and cultural rights which requires positive action by the state for their implementation; and *third generation* (referred to as ‘rights of solidarity’) requires a particular conception of community life. He categorized ‘right to healthy and ecologically balanced environment’ as a third generation right along with ‘right to development’, ‘right to peace’ and ‘right to ownership of common heritage of mankind’. Vasak’s classification continues to guide the international community. Existing framework of substantive as well as procedural human rights law is so comprehensive in its nature and scope that its full realisation will help in achieving the goal of environmental protection.

b) *Interpreting already recognised Human Rights and their Enforcement Mechanisms*

Some scholars believe that mere mobilisation of existing human rights will not go really far in achieving the goal of environmental protection. In order to achieve this end, they must be ‘interpreted with imagination and rigour’ in particular environmental contexts. This need is felt more because when they were drafted, environmental issues were not the concerns in the minds of their drafters. Therefore, by imaginative interpretation in the hands of judicial

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90 ibid.
91 ‘Vasak’s metaphorical generations have come to assume an intellectual prominence far greater than where they first appeared in print. Classifications that comprehend human rights in terms of generations are now legion in international legal scholarship.’ Patrick Macklem, The Sovereignty of Human Rights (Oxford University Press 2015) 51.
92 Anderson (n 87) 7.
93 ibid.
authorities, these rights are capable of jurisprudential enrichment. Indian Supreme Court is rightly acknowledged across the world for such jurisprudential enrichment of right to life u/A 21 of the Indian Constitution.

c) **Creation of a Separate Human Right to Environment**

Some scholars argue that the above two approaches, even when put together, may still prove grossly inadequate in achieving the task of environmental protection. They argue in favour of creating a comprehensive norm specifically dealing with environmental goods. They use different phrases for this purpose as is clear from the following observation:

In a survey of existing constitutional and statutory provisions relating to environmental quality, one finds a series of adjectives attached to the word ‘environment’ to describe what is actually being protected. References are made to a ‘clean’, ‘healthy’, ‘decent’, ‘viable’, ‘satisfactory’, ‘ecologically balanced’, ‘sustainable’ environment.

Although the word environment is prefixed by different words, they essentially convey the same idea, though the most commonly used is ‘right to clean and healthy environment’. However, experts are divided regarding the nature of such a norm. Two viewpoints are prevalent in this regard –

*Procedural Human Right to Environment*

Many scholars argue that effective environmental rights should be principally procedural in nature like right to information, right to participate in decision making process both at international and domestic level, right to environment impact assessment, right to effective remedies in case of environmental damage. Besides, they give another reason in support of their viewpoint in the following words:

[B]ecause the desired quality of the environment is a value judgment which is difficult to codify in legal language, and which will vary across cultures and communities, it is very difficult to arrive at a single precise formulation of a

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94 ibid 9.
95 ibid 10.
96 ibid 9.
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substantive right to a decent environment. Therefore, the more flexible, honest, and context-sensitive approach is to endow people with robust procedural rights which will foster open and thoroughgoing debate on the matter.\footnote{ibid 10.}

**Substantive Human Right to Environment**

There are scholars who point out that the massive task of environmental protection cannot be left to procedural nature of human right to environment. They do not trust procedures much for the following reason:

\[\text{E}ven\text{ if procedural or participatory rights are fully realized, and perfectly distributed throughout civil society, it is entirely possible that a participatory and accountable polity may opt for short-term affluence rather than long-term environmental protection. Democracies are entirely capable of environmental destruction, and may even be structurally predisposed to unfettered consumption. Indeed, the industrial democracies of the North, with their liberal rights-based legal systems, are disproportionately responsible for much environmental damage, including the consumption of finite resources and the emission of greenhouse gases.}\footnote{ibid.}

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Therefore, they argue in favour of nothing short of a substantive human right to environment.

Notwithstanding the conflicting views regarding the nature of the right to clean and healthy environment discussed above, human rights approach is beneficial for ensuring environmental protection for many reasons. Firstly, this approach has become universal language of humanity across the world in which claims are expressed. In this sense, human rights approach trump over all other approaches.\footnote{ibid 21.}

Human rights approach is ‘theoretically immune to the lobbying and trade-offs’.\footnote{ibid 21.}

Secondly, being the universal language of humanity, human rights approach succeeds in generating enormous pressure through human rights activists at the international level in socio-political terms. Thirdly, general expression of human right to clean and

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healthy environment leaves the scope wide open for its interpretation in various contexts to suit local conditions.

Experts also point out certain disadvantages associated with human rights approach. First and foremost, is the distinct possibility that following human rights approach may render the whole task of environmental protection anthropocentric in nature. Secondly, general expression of right to environment may prove grossly inadequate for matters which are intricately technical in nature. Thirdly, there is a possibility that human rights approach may weaken other approaches due to their overreliance on it.

Above demerits are not entirely misplaced. However, it is possible to redress the concerns expressed above. Whether human rights approach will eventually render the whole task of environmental protection anthropocentric in nature will depend on how we conceive human being. As has been mentioned earlier, human beings, endowed with higher degree of rationality and ability to think, are not in competition with other species – be it plants or animals. In fact, in the ecological scheme of things, they are part of one ecosystem being one unit thereof – no less no more. Even if one unit in this chain goes missing, human survival itself gets seriously threatened since it is impossible for human species to survive alone. Therefore, human beings are custodian of the entire ecosystem in which all other species will not only survive but grow with dignity. Secondly, general expression of right to environment does not exclude existence of laws mandating technical specification for environmental regulation. Further, a general expression of right to environment is also an evidence of priority when conflict with development arises. In absence of such a general expression, environmental protection will continue to be relegated to secondary position. Anderson rightly concludes that despite demerits, human rights approach to environment ‘offers many attractions and could play key role in fostering equitable and sustainable human communities.’

However, the debate as discussed above is not so divergent when one looks at it in the municipal context. Boyle although has not favoured human rights approach for environment at international level, yet has advocated the same at the municipal

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101 Anderson (n 87) 21.
102 ibid 23.
level. Thus, human rights thinkers generally agree that human rights regime has immense potential in seeking the objective of environmental protection although they differ regarding its nature. However, when it comes to municipal jurisdictions, they agree that human rights framework can go really far in ensuring environmental protection. This is so because even at the municipal level, implementation of laws enacted to protect environment is pathetic particularly in developing countries with low rights consciousness, poor governance standards and miserable failure of justice delivery system to cater to the needs of poor and disadvantaged people. In such a situation, human rights approach to protect environment holds immense potential.

Human rights being state centric in nature, the arguments discussed above need to confront serious challenge when the culprits are TNCs. However, despite the serious contradictions amongst the human rights thinkers as to what kind of human rights regime would be most appropriate for environmental protection, human rights approach seems, in the present set of circumstances, to be the most effective over all the other prevailing approaches. Human rights framework is singularly crucial in the particular context of environmental violations committed by the TNCs.

1.5.1.4 Right to Clean and Healthy Environment – Surpassing Anthropocentrism

In the recent past, right to clean and healthy environment seems to have acquired its independent identity. It has its separate recognition through various international instruments and relies on enforcements mechanisms created through such instruments. In this sense, it has succeeded in shedding anthropocentric nature at least to a certain extent. It need not necessarily invoke human rights jurisprudence any more for its recognition or enforcement. It this sense, it has emerged out of the shadow of human rights. Following principles inter alia constitute the integral part of right to clean and healthy environment –

103 [T]he extent of this internationalisation of the domestic environment should not be exaggerated. National legal systems will continue to vary greatly in the degree to which they give priority to environmental protection. So will the policies of governments. Arguments for the protection of the environment as a substantive human right are almost certainly better addressed not in global terms, but in the context of particular societies, and of their own legal systems. To argue, as I have done, that international law does not need a human right to the environment, save in matters of public participation, does not mean that the same is necessarily true of national legal systems.’ Alan Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’ in Alan E Boyle and Michael R Anderson (eds), Human Rights Approaches to Environmental Protection (Oxford University Press 1996) 64.
1.5.1.4.1 Sustainable Development

The concept of sustainable development can be traced back to ancient heritage of mankind. Justice Weeramantry rightly stated that sustainable development is ‘one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important role to play in the service of international law.’\textsuperscript{104} Its most widely accepted definition was given in Brundtland Report as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’\textsuperscript{105} Later on, it not only became proclaimed objective of various multilateral and regional treaties but also emerged as subject of discussion in the judgments of ICJ, WTO dispute settlement bodies and by the law of sea tribunals.\textsuperscript{106} The concept has ‘broadened and deepened over time\textsuperscript{107} to acquire ‘more anthropocentric and also socio-economic substance’\textsuperscript{108}. Social development, economic development and environmental development constitute its ‘interdependent and mutually reinforcing pillars’\textsuperscript{109}. Recently, it has been adopted by UN as one of the core value in the form of Sustainable Development Goals (SDGs).

1.5.1.4.2 Precautionary Principle

Roots of origin of the precautionary principle are claimed to lie in Germany.\textsuperscript{110} Art. 11 of the World charter for Nature incorporated its early version through twin concepts of irreversible damage and scientific uncertainty. Its inclusion in London Declaration of the Second International North Sea Conference was the beginning of its international recognition both in hard and soft law instruments.\textsuperscript{111} Thereafter, it was included under various other international instruments.\textsuperscript{112} However, there was no

\textsuperscript{105} Our Common Future (n 68).
\textsuperscript{106} Schrijver (n 104) 24.
\textsuperscript{107} ibid 208.
\textsuperscript{108} ibid 217.
\textsuperscript{110} See for various claims Rajendra Ramlogan, Sustainable Development: Towards a Judicial Interpretation (Martinus Nijhoff 2011) 65.
\textsuperscript{111} ibid 66.
\textsuperscript{112} ibid.
looking back after it was incorporated in Rio Declaration as Principle 15 which provides as follows:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

It was also incorporated into United Nations Framework Convention on Climate Change (UNFCC) as well as Convention on Biological Diversity (CBD).

With the passage of time, its appeal to international community has increased as evidenced by its inclusion in varied contexts, reference by International Court of Justice (ICJ) and incorporation in national legislations of developed as well was developing countries\textsuperscript{113}. This has led many people to regard it as part of customary international law.\textsuperscript{114} However, USA does not regard it as such.\textsuperscript{115}

1.5.1.4.3 Polluter Pays Principle

Polluter Pays Principle emerges from general principle that the one who generates pollution should bear the cost of its abatement. Its main objective is ‘cost allocation and cost internalization’.\textsuperscript{116} Environment protection measures should not be subsidised since doing so may lead to trade distortion while at the same time burdening the public by funding the profits of private enterprises.\textsuperscript{117} It was first incorporated by OECD but no government ratified the same.\textsuperscript{118} However, Principle 16 of Rio Declaration required national authorities to promote it in the following words:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution,

\textsuperscript{113} ibid 68.
\textsuperscript{114} ibid.
\textsuperscript{115} ibid.
\textsuperscript{116} ibid 101.
\textsuperscript{117} ibid 102.
\textsuperscript{118} ibid.
with due regard to the public interest and without distorting international trade and investment.

It is also implicitly recognized in Agenda 21. Its inclusion in various international legal documents concerning international environment law is indicative of its ever increasing significance and acceptability.119

1.5.1.4.4 Inter-generational Equity

Inter-generational equity emerges from the ‘context of fairness among all generations’.121 This principle is based on the premise that each generation has a right to inherit same diversity in natural and cultural resources as was enjoyed by previous generations. In this sense, each generation is ‘both a custodian or trustee of the planet for future generations and a beneficiary of its fruits’.122 Going by the ongoing rapacious exploitation of nature, mankind may succeed in maximizing welfare of ‘few immediate successors’ and that too ‘only at the expense of’ its ‘more remote descendants’ who will be left with no option but to inherit a disfigured ‘natural and cultural environment’.123 It is deeply rooted in diverse legal traditions in the world.124

Three principles namely – conservation of option (obliges present generation to so conduct itself that conserve diversity of natural resource base); conservation of quality (quality of planet should be so maintained as leave it in no worse condition for future generations); and conservation of access (preservation of legacy of past generations) – provide foundation for its international framework.125

Although principle is not mentioned in international legal instruments as such, it is not uncommon to find reference to the interests of future generations. Although ICJ is yet to endorse it in its judgments but dissenting opinion of Justice Weeramantary leaves the scope ripe for favourable interpretation in future.126

119 ibid 103.
120 ibid 102.
122 ibid 17.
123 ibid 27.
124 ibid 18-21.
125 ibid 38.
126 Ramlogan (n 110) 215.
1.5.1.4.5 Intra-generational Equity

It refers to equality within the present generation so that each member enjoys equal right to the natural and cultural resources of the earth. Although on the face of it, principles of inter-generational equity and intra-generational equity look opposed to each other, in fact they are not so opposed since those who care for their descendents would generally care for their contemporaries.\(^{127}\) International legal texts refer to intra-generational equity in a more detailed manner in comparison to inter-generational equity that too in the context of equity among nations rather than domestic equity.\(^{128}\)

1.5.1.4.6 Common but Differentiated Responsibility

This principle recognises that the development, interpretation and application of international environmental law should take into consideration special needs of developing countries. Although there is a common responsibility of states to protect certain environmental resources, differential circumstances of various states regarding their contribution to creation of a particular environmental problem and their ability to respond to, prevent, reduce, and control the threat should be taken into consideration.\(^{129}\) Consequently, principle results in all states participating in international efforts to resolve environmental problems but they do so through adoption and implementation of differential commitments.

1.5.1.4.7 Public Participation

Public participation is a process meant for giving consideration to the opinion and views of interested stakeholders through holding consultation with them. Effective public participation \textit{inter alia} include – access to information; having voice and transparency in decision-making; post-project monitoring; access to independent tribunals for public’s grievance redressal. Demand for public participation in environmental decision making is based on the requirement of considering public interest. Public participation helps generally in strengthening accountability of government as well as participatory democracy and specifically in exploring socially

\(^{127}\) ibid 235.
\(^{128}\) ibid 237.
acceptable solutions to environmental problems. It is ensured through the process of Environmental Impact Assessment (EIA) which gives consideration to public opinion in the course of granting approval to a project which may involve environmental risks. In this sense, EIA has emerged as the most important tool for ensuring public participation. Many international legal instruments specifically include provisions for undertaking EIA.\textsuperscript{130} Even ICJ in The Case Concerning Pulp Mills on the Uruguay River (\textit{Argentina v Uruguay}) has expressed opinion in favour of EIA in situation where the proposed activity entails significant adverse impact on environment at the transboundary level.\textsuperscript{131}

1.5.1.4.8 Public Trust

Certain natural resources are so crucial to human existence and therefore so intrinsically important to every citizen that they should not be privately owned. On the contrary, they belong to the people as a whole. They take the form of ‘perpetual trust for future generations’.\textsuperscript{132} According to this principle, government should act as a trustee in controlling and managing such natural resources exclusively for the benefits of people at large and public welfare. Acceptance of this doctrine distinguishes a society of citizens from that of serfs.\textsuperscript{133} Western scholars trace the roots of this doctrine back to Roman Empire.\textsuperscript{134} Mahatma Gandhi was the greatest advocate of this principle in India.\textsuperscript{135} It finds due mention in international legal texts.

However, despite exceptional yet avoidable anthropocentric tilt, human rights jurisprudence, continue to hold tremendous appeal supporting right to clean and healthy environment and strengthening it thereby.

\textsuperscript{130} Ramlogan (n 110) 170-175.
\textsuperscript{131} ibid 176.
\textsuperscript{135} ‘Everything belonged to God and was from God. Therefore it was for His people as a whole, not for a particular individual. When an individual had more than his proportionate portion he became a trustee of that portion for God’s people. God who was all-powerful had no need to store. He created from day to day; hence men also should in theory live from day to day and not stock things. If this truth was imbibed by the people generally, it would become legalized and trusteeship would become a legalized institution. He wished it became a gift from India to the world.’ MK Gandhi ‘Gandhiji’s Walking Diary’ (1947-48) Vol. XI Harijan 37, 39.
1.5.2 CSR based Approach

Our conceptual understanding of corporations determines our expectations from them regarding their role in our society. Being an artificial entity, the precise nature of a corporation and ‘corporate governance’ has been extensively debated during since the second half of last century. Developing a comprehensive definition of the term ‘corporate social responsibility’ has proved to be elusive, although many attempts have been made in this regard. The following observation encapsulates the various shades of the understanding about CSR:

The term is a brilliant one; it means something, but not always the same thing, to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means socially responsible behaviour in the ethical sense; to still others, the meaning transmitted is that of “responsible for,” in a casual mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for “legitimacy,” in the context of “belonging” or being proper or valid; a few see a sort of fiduciary duty imposing higher standards of behaviour on businessmen than on citizens at large. Even the antonyms, socially “irresponsible” and “non-responsible,” are subject to multiple interpretations.136

1.5.2.1 For Whom to Manage Corporations: The Great Debate

In US (home to many TNCs) one issue has been a matter of long drawn debate – ‘for whose benefits managers should manage corporation?’ In 1919, Judgment of Supreme Court of Michigan in Dodge v Ford Motor Co.137 highlighted the intricacy of this issue in practice while managing a big profitable corporation. Henry Ford (majority shareholder as well as the President of the company) decided to invest surplus money of the company in expanding its business with the aim of reducing the price of the car to make it more affordable to public and to generate more employment. However, this was done at the expense of not paying special dividend (in addition to the regular quarterly dividends of 5%) to the shareholders which was the practice since many years. Shareholders of the company challenged the decision of the company. Court

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gave decisive primacy to the shareholders in management of a company through its following observation:

there should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to the change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.\textsuperscript{138}

Judgment of the court was despite the acknowledgment of the high stature of Mr. Henry Ford in the company.\textsuperscript{139}

In the early 1930s issue again became subject-matter of intense scholarly debate between Prof. A. Berle Jr. (Professor of Columbia Law School) and Prof. E. Merrick Dodd (Professor at Harvard Law School) in US.\textsuperscript{140} Prof. Berle triggered this debate by advocating in favour of shareholders primacy in all actions of corporate managers in the following words:

[A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.\textsuperscript{141}

Prof. E. Merrick Dodd presented a detailed counter to Berle’s view. He viewed business corporation as an ‘economic institution which has a social service as well as

\textsuperscript{138} ibid 684. (emphasis supplied)

\textsuperscript{139} ‘Mr. Henry Ford is the dominant force in the business of the Ford Motor Company. No plan of operations could be adopted unless he consented, and no board of directors can be elected whom he does not favour.’ ibid 683.

\textsuperscript{140} US proved fertile ground for such a debate at that point of time primarily for two prevailing conditions. Firstly, it was home to many TNCs at that time. Secondly, this was also the time when US economy was suffering from the Great Depression and the US government was engaged in the uphill task of exploring newer ways of coming out of it.

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a profit-making function’. According to him, legislature encourages and permits business not because of it being a source of profit to owners but because it is a service to community. He pointed towards ‘substantially changing public opinion regarding obligations of business to community’ and emphasised that ‘corporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfil those responsibilities’. He argued that ‘business – which is the economic organization of society – is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby curtailed.’

Berle, while acknowledging that Dodd’s point of view cannot be ignored, however, remained unconvinced. He aptly expressed his apprehensions in the following words:

Most students of corporation finance dream of a time when corporate administration will be held to a high degree of required responsibility – a responsibility conceived not merely in terms of stockholders’ rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community. Indications, indeed, are not wanting that without such readjustment the corporate system will involve itself in successive cataclysms perhaps leading to its ultimate downfall. But apart from occasional and brilliant experiments of men like Mr. Swope and Mr. Young (who after all are the exceptions rather than the rule), we must expect our evolutionary process to be stimulated from quite different quarters.

1.5.2.2 Theoretical Foundations of CSR

Over a period of time, different theories have been developed relating to CSR and numerous attempts have been made to classify them. Elisabet Garriga and Domènea

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143 ibid 1149.
144 ibid 1153.
145 ibid.
146 ibid 1162.
147 A Berle Jr., 'For Whom Corporate Managers are Trustees: A Note' (1932) Vol. 45 Harvard Law Review 1366.
148 ibid 1372.
Melé have developed a comprehensive classification thereof.\textsuperscript{149} A brief overview of main theories relating to CSR is as follows –

1.5.2.2.1 **Instrumental Theories**

This class of theories regard corporation as an instrument to fulfil its economic objective of wealth creation.

\textit{a) Shareholder Value}

The viewpoint of Milton Friedman (noted economist and noble laureate) is the most representative of this theory. He provided sharp critique for corporate social responsibility in his book ‘Capitalism and Freedom’. He took note of the view ‘gaining widespread acceptance that corporate officials and labor leaders have a ‘social responsibility’ that goes beyond serving the interest of their stockholders or their members’.\textsuperscript{150} However, he regarded this view as a ‘fundamental misconception of the character and nature of free economy’.\textsuperscript{151} He felt that ‘acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible’ would be ‘a fundamentally subversive doctrine’ and could ‘thoroughly undermine the very foundations of our free society’.\textsuperscript{152} He argued that ‘in such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within rules of the game’.\textsuperscript{153} And according to him these rules are ‘engaging in open and free competition, without deception and fraud’.\textsuperscript{154} He regarded corporation as ‘an instrument of the stockholders who own it’.\textsuperscript{155}

He distinguished the case of an individual proprietor from corporate executives. Whereas the former can rightfully spend his own money, latter cannot as it is the

\textsuperscript{149} Andrew Crane, Dirk Matten and Laura J Spence (eds), \textit{Corporate Social Responsibility: Readings and Cases in a Global Context} (2\textsuperscript{nd} edn, Routledge 2014) 70. In addition, classification made by Klonoski, and Windsor are noteworthy. See also Domènec Melé, ‘Corporate Social Responsibility Theories’ in Andrew Crane, Abagail McWilliams, Dirk Matten, Jeremy Moon and Donald S Stegel (eds), \textit{The Oxford Handbook of Corporate Social Responsibility} (Oxford University Press 2008) 48.
\textsuperscript{150} Milton Friedman, \textit{Capitalism and Freedom} (40th Anniversary edn, University of Chicago Press 2002) 133.
\textsuperscript{151} ibid.
\textsuperscript{152} ibid.
\textsuperscript{153} ibid.
\textsuperscript{154} ibid.
\textsuperscript{155} ibid 135.
money of the shareholders\(^{156}\), they being just ‘an employee of the owners of the business’\(^{157}\) and therefore have ‘direct responsibility to his employers’ functioning ‘in a free-enterprise, private-property system’.\(^{158}\) He was also fine with corporate executive spending part of his income for purposes dear to his heart because he is spending his own money, or time or energy as principal not as agent of his employers.\(^{159}\)

**b) Competitive Advantages**

This class belongs to the theories concerning resource allocation aimed at creating competitive advantage.

**Social Investments**

This theory was developed *inter alia* by Drucker and Porter. According to this theory, corporations can improve their competitive context (i.e. quality of business environment in the location where they operate) through use of their charitable efforts.\(^{160}\) Such a strategy will align their social and economic goals and improve their long term business prospects.\(^{161}\) It is equally true for TNCs in relation to their operation in both home and off-shore markets. However, in order to harness the competitive advantage to its full potential, CSR should be developed in a well harmonized, coherent and sustainable strategy instead of ‘ad-hoc’, ‘piecemeal’ or ‘dispersed and unfocused donating’.\(^{162}\)


\(^{157}\) ibid.

\(^{158}\) ibid.

\(^{159}\) ibid.


\(^{161}\) ibid.

\(^{162}\) Christina Keinert *Corporate Social Responsibility as an International Strategy* (Physica-Verlag 2008) 73.
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Natural Resource-based View and Dynamic Capabilities

Resource-based view of the firm integrates internal and external perspectives. But this theory focuses on political, economic, social, and technological aspects and ignores natural environment from its ambit. This limitation is cured by the Natural Resource-based view of the firm through insertion of natural (biophysical) environment as an important driver. A resource/capability can give a sustained advantage only if it possesses certain characteristics namely – valuable, non-substitutable and most importantly either tacit, socially complex, or rare. This will enable the corporation to excel better in comparison to its competitors. Hart has explained it comprehensively through three main interconnected strategic capabilities – pollution prevention, product stewardship and sustainable development.

Bottom of Economic Pyramid

This theory focuses on the bottom of the economic pyramid instead of the upper and middle class. It regards poor people as an opportunity to innovate instead of being a problem and accordingly argues for adoption of new and creative approaches for converting poverty into an opportunity. Traditional bottom line theory exclusively focused on financial performance. However, its improved version developed later focused on triple (P) i.e. profits, people and planet (not necessarily in the same order). A corporation need to concentrate on profits but social and environmental aspects constitute equally strong and important dimensions of its consideration as well as its activities.

164 ibid 987.
165 ibid 989.
166 ibid 998.
167 ibid 999.
170 Keinert (n 162) 72.
c)  Cause related Marketing

This theory stresses on marketing strategies involving commitment of the corporation to contribute a designated amount to a specific charitable cause beneficial to society, if customer buy its product. It enables brand building of the corporation by associating itself with such a social cause. Other activities include classical musical concerts, art exhibitions, golf tournaments or literary campaigns. 171 It creates a win-win situation for the corporation as well as the charitable cause. 172

1.5.2.2.2  Political Theories

These set of theories focus on power and position of business and its inherent responsibility. It includes two major theories –

a)  Corporate Constitutionalism

According to this theory, business is a social institution and it must use power responsibly. 173 Both internal and external factors are responsible to generation of social power. Social responsibilities of corporation arise from the quantum of its social power. In a society which expects business responsibility, if a corporation fails to use this power, it will lose its position in society and will be replaced by other corporations who are willing to assume those responsibilities. 174 Different constituency groups will limit this functional power in much the same way as is done by governmental constitution. 175

b)  Corporate Citizenship

This theory is based on TNCs wielding enormous economical and social power dwarfing that of even some governments due to crisis of welfare state, globalisation associated with deregulation and ever decreasing costs of technological advancement. 176 It commonly regards corporate citizenship as equivalent to CSR. 177

172 ibid.
174 Garriga and Melé (n 171) 81.
175 ibid.
176 ibid 82.
Despite variations in the corporate citizenship theories, experts are unanimous on certain aspects namely – forging partnership to improve local community and environmental considerations.\(^{178}\)

### 1.5.2.2.3 Integrative Theories

These set of theories demands that corporate management need to integrate social demands in such a manner that operations of the corporations are undertaken in consonance and furtherance with social values.

**a) Issues Management**

This theory focus on the gap between a corporation’s expected performance by the public and its actual performance. As a mark of social responsiveness, a corporation should detect the gap and plug the same.\(^{179}\) Corporate conduct needs to seen not as a ‘set of outcomes, but as a process’.\(^{180}\) Over a period of time, concept of ‘social responsiveness’ was broadened to include ‘issues management’ which means ‘processes by which the corporation can identify, evaluate and respond to those social and political issues which may impact significantly upon it’.\(^{181}\) It acts as a ‘coordinating and integrating force within a corporation’ leading to early warning system for potential environmental threats.\(^{182}\)

**b) Principle of Public Responsibility**

The selection of the word ‘public’ over ‘social’ is indicative of the public nature of the process. Relevant public policy provides the guidance to managerial problem. Public policy includes ‘not only literal text of the law but also broad pattern of the social direction as reflected in public opinion, emerging issues, formal legal requirements and enforcement or implementation practices’.\(^{183}\)

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\(^{177}\) ibid.  
\(^{178}\) ibid 83.  
\(^{182}\) Garriga and Melé (n 171) 85.  
c) **Stakeholder Management**

This theory is oriented towards ‘stakeholders’ who are affected by operations of the corporations. The main goal is to ‘achieve maximum overall cooperation between the entire system of stakeholders and the objectives of the corporation’. ¹⁸⁴ Efficient strategies need to be developed for managing stakeholder relations which simultaneously deal with issues affecting multiple stakeholders. ¹⁸⁵

*d) Corporate Social Performance*

This theory has emerged as one of the most valuable in the field of CSR. It acknowledges primacy of profit motive for a corporation that exists at the bottom of the pyramid developed by Carroll. However, as one moves up the pyramid, Carroll has identified – legal, ethical and philanthropic responsibilities besides the economic ones as shown in the following figure - ¹⁸⁶

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¹⁸⁴ Garriga and Mele (n 171) 86.
¹⁸⁵ ibid 87.
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The lowest level of pyramid (i.e. economic) is naturally the widest in scope and the highest level of the pyramid (i.e. philanthropic) is narrowest in scope and is voluntary.\(^\text{187}\) Carroll’s pyramid clearly shows that social responsibilities need to be considered by a corporation irrespective of its legal mandate.\(^\text{188}\) Carroll’s pyramid of CSR is distinguishable from Maslow’s pyramid of needs in the sense that there is no need to fulfil completely one level in pyramid in order to move to the next level in pyramid.\(^\text{189}\)

\(^{187}\) Keinert (n 162) 70.
\(^{188}\) ibid 71.
\(^{189}\) ibid 70.
1.5.2.2.4 Ethical Theories

These set of theories are based on the ethical component which govern the relationship between the corporations and society. They focus on the objective of establishing a good society.

a) Normative Stakeholder Theory

This theory was developed by R. Edward Freeman in response to the theory of primacy of shareholders. It acknowledges existence of shareholders in a corporation but refuses to accord them exclusive primacy by its managers in its management. On the contrary, they are just one of the many other stakeholders. It regards consumers, creditors, employees and even society as holding stakes in a corporation like shareholders. The following diagram indicates the relationship of a corporation with its principal stakeholders.

With the international community ever increasing unanimity regarding sustainable development, environment also has emerged as one of the important stakes in a corporation. According to this theory, a corporation should be managed by its executives in accordance with the wishes of not only shareholders but other stakeholders as well. Importantly, these stakeholders have intrinsic value in the sense that they demand consideration for their own sake, irrespective of whether corporation
has functional interest therein.\textsuperscript{190} Furthermore, the stakeholder interests may be compatible or incompatible to each other.\textsuperscript{191}

In the contemporary global investment climate (facilitated by online trading of securities in global financial markets), not all investors in corporations have long-term stakes in their corporation. While investing in the shares of a corporation, they may be governed by short-term considerations and may exit by withdrawing their capital at a short notice. This is a vital reason for present day shareholders being different from traditional shareholders and therefore creating a space for enhanced appeal to stakeholders’ theory.\textsuperscript{192}

\textit{b) Universal Rights}

This theory finds the basis of CSR in the human rights. It traces human rights for the purpose of CSR in the Universal Declaration of Human Rights adopted by UN General Assembly in 1948 as well as other international declarations of human rights, labour rights and environmental protection. Since human rights have come to acquire a universal appeal across the globe, this theory being based on human rights, enables CSR to gain wider appeal and acceptance amongst people.

In contemporary world, any CSR strategy needs to integrate human rights issues including environment within its fold. It is equally true for the global level as well as the domestic level. It is equally true whether such strategy is developed by one corporation or by industry. Such integration is evident in the outcome documents of most of the international organizations engaged in the field of CSR. It is due to these developments, one find that the language of human rights has impregnated the linguistics of CSR. This theory creates opportunity of strengthening accountability of TNCs by rooting CSR in human rights.

\textit{c) Common Good approach}

This theory bases CSR on common good of society. According to this theory, corporations being part of the society must contribute to the common good thereof. Corporations contribute to the common good by providing goods and services in

\textsuperscript{190} ibid 66.\textsuperscript{191} ibid.\textsuperscript{192} ibid 67.
efficient and fair manner with due regard to the inalienable and fundamental rights of an individual.

Out of the above theories, shareholder value maximization theory and stakeholder theory are the two dominant ones with stakeholder theory finding increasingly wide acceptance at the international level. Equally interesting is the linkage between human rights and CSR since most of the regulatory initiatives for CSR at the international or domestic level respectfully integrate human rights therein. It is interesting to note that environmental protection finds implicit as well as increasingly explicit mention in various regulatory frameworks for CSR.

1.5.3 BITs based Approach

TNCs make cross border investments across the globe through entering into international investment contracts with domestic players. They are facilitated in making such investments by the protection offered through international investment law. Failure of multilateral efforts in this regard has left the space open for regional and bilateral mechanisms developed for this purpose including Bilateral Investment Treaties (BITs). Bilateral Investment Treaties (BITs) are the most common form of International Investment Agreements (IIAs) that are entered into by two nations with the proclaimed object of protecting foreign investments between them. Capital importing nations are particularly inclined to enter into BITs under the impression that latter will encourage and facilitate foreign investments. Therefore, resulting BITs are accordingly structured.

1.5.3.1 Principles governing International Investment Law

Following principles are integral component of this approach and are briefly discussed hereinafter –

a) International Law as Governing Law

This principle requires international law to be the proper law which governs the international investment agreements.
b) Stabilization of Foreign Investments

This principle requires that host state will not amend its law or policy relating to the investment contract. This principle has originated from the doctrine of sanctity of contract.

c) Taking of Foreign Corporate Assets (Expropriation)

Principle of expropriation involves compulsory taking of property belonging to a foreign investor upon payment of compensation. Expropriation may be direct or indirect. Direct expropriation means a ‘mandatory legal transfer of the title to the property or its outright physical seizure.’\(^\text{193}\) Indirect expropriation refers to ‘total or near-total deprivation of an investment but without a formal transfer of title or outright seizure’.\(^\text{194}\) Creeping expropriation refers to the ‘slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment’.\(^\text{195}\) On the other hand, ‘Regulatory Taking’ refers to those takings of property that ‘fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country’.\(^\text{196}\)

Expropriation covers wide ranging measures viz. outright nationalizations in all economic sectors; outright nationalizations on an industry-wide basis; large-scale taking of land by the State; specific takings; creeping expropriation and regulatory takings.\(^\text{197}\) Revolutionary movements in Russia and Mexico marked the first phase of mass expropriations in the form of nationalization.\(^\text{198}\) Decolonization marked the second phase of expropriations post Second World War.\(^\text{199}\) Since then, such massive direct expropriations have been replaced by indirect expropriations.\(^\text{200}\)


\(^{194}\) ibid 7.


\(^{196}\) ibid 12.

\(^{197}\) ibid 10.

\(^{198}\) Expropriation (n 193) 1.

\(^{199}\) ibid.

\(^{200}\) Ibid.
d) National Treatment

This principle requires that the host state should not make any distinction between its own national investors and foreign investors engaged in the same business activity. It ensures equality of competitive conditions between foreign and domestic investors.

e) Most Favoured Nation Treatment (MFN)

According to this principle, foreign investor may ask the host state to provide more favourable protection to it if the same has been provided by such host state to another foreign investor from another state. Principle ensures equality of competitive conditions in the host country amongst foreign investors of different countries. It is commonly included in BITs.

f) Fair and Equitable Treatment

According to this principle, a host state is required to act in a consistent, unambiguous and transparent manner in its dealings with the foreign investor. Host state should act in good faith without any arbitrariness. Due process will be followed in dealing with claims of the foreign investors and authorities in the host state will act proportionate to the policy objectives involved.

g) Full Protection and Security

This principle requires that property of foreign investor should not be utilized by forces of the host state and the latter should also protect the former against violence by other actors. It has been interpreted to include maintenance of stable conditions for investment.

1.5.3.2 Dispute Redressal Mechanism under International Investment Law

Principles discussed above are operationalised through incorporating them in the form of specific clauses in BITs. The disputes arising out of the application and interpretation of these principles are addressed through the following methods of dispute redressal under international investment law –

i. **Diplomatic Protection on behalf of Foreign Investor**  
Absence of international personality for TNCs under international law leaves them with only one option for filing action against the host state i.e. States which are entitled to exercise diplomatic protection (i.e. state of nationality of TNC) should do so on their behalf. But even this option is riddled with its own kinds of problems. Before taking such action, TNC concerned is required to exhaust local remedies available in the host state and only if they are ineffective, can opt for diplomatic protection.\(^{202}\) Further, such an action may in fact becomes the claim of the State which such state is under no obligation to pursue and which may by its very nature become dependent on its relationship with the concerned host state.\(^{203}\) Adoption of complex organizational structures by TNCs makes the determination of their nationality itself problematic.\(^{204}\)

ii. **Alternative Mechanisms** –  
While disputes of TNCs with private entity within host state are normally settled by domestic law of the host state, their disputes with host state itself are normally settled through international investment negotiation or conciliation or arbitration.

a) **Negotiation**  
This is the most basic level of dispute settlement. It is specified as the first step in settlement process.

b) **Conciliation or Arbitration** –
It is generally of the following two kinds –

- **Ad-hoc Conciliation and Arbitration**  
It is purely parties driven. They make their own arrangements regarding procedure, selection of arbitrators/conciliators and administrative aspects. But this mechanism has its pitfalls, namely – bargaining position of parties play dominant in the outcomes; agreeing on precise nature of dispute, applicable law and identifying arbitrators becomes elusive; proceedings get delayed due

\(^{202}\) Muchlinski (n 35) 705.  
\(^{203}\) ibid.  
\(^{204}\) ibid 706.
to the conduct of one or both the parties; and enforcing arbitral award though municipal courts becomes difficult.\footnote{ibid 709.}

\begin{itemize}
\item Institutionalised Mechanism of Conciliation or Arbitration
\end{itemize}

Institutionalized mechanism takes care of the problems associated with the Ad-hoc conciliation and arbitration. At present, various such systems exist out of which International Centre for Settlement of Investment Disputes (ICSID) is the most advanced.\footnote{Art. 25 ICSID Convention 1965.} It specifically caters to dispute settlement between foreign investors and host states. Its jurisdiction is consensual.\footnote{ibid Art. 26.} Consent once given, excludes other national\footnote{ibid Art. 27.} and international\footnote{ibid Art. 42 (1).} remedies. Applicable law is the law chosen by parties to the dispute and in case of absence of such choice, law of the contracting state party to the dispute (including its rules of conflict of laws) and relevant rules of international law will apply.\footnote{ibid Art. 42 (1).}

TNCs have frequently invoked these principles and have emerged as the biggest beneficiary of such international investment arbitrations.

Ideally, BITs are not meant for enforcing right to clean and healthy environment. However, arbitral awards have implications on the ability of the host states to enforce right to clean and healthy environment by curtailing their sovereignty over the subject matter. Such space is being consciously created as part of review process undertaken by various countries of their respective BITs.

\section*{1.6 Chapter Conclusion}

Artificial yet separate personality is embedded in the nature of a corporation as its typical characteristic. Limited liability of its members tremendously enhance its risk taking capacity, making it highly suitable for investing in large scale project as well as development of modern technology.
It is common to find different terms being used for TNCs. Owing to their highly complex organisational and functional structures, they are extremely difficult to define. This has posed greatest challenge in strengthening their accountability for their human rights violations. In this regard, UN Norms has rightly opted for their broad definition. Indian Companies Act 2013, although has not defined the term TNC *per se*, but has defined their associated entities through which they do business in India.

TNCs have continuously evolved ever since their emergence on the international scene. However, devastation of Second World War has changed the world forever. Search for restoring human dignity set the international community on the path of recognition of human rights and enforcement thereof. With the cutting edge development in science and technology, our conception of the term ‘environment’ has also undergone transformation. On the one hand, science and technology has increased our capacity to exploit nature and its resources, whereas on the other, it has enabled better appreciation of the effect of our activities on environment. With heightened human rights consciousness at the international level, instances of violations of right to clean and healthy environment by the activities of TNCs has been noticed and raised with new vigour. Their accountability is sought to be strengthened *inter alia* through three different approaches, namely – Rights based, CSR based, and BITs based approach. Out of these, human rights based approach has emerged as the most appealing, both at the international and municipal level. Of late, right to clean and healthy environment has emerged out of the paternalism and anthropocentrism of human rights thereby leading to development of its own unique jurisprudence which consists of certain principles, namely – Sustainable Development, Precautionary Principle, Polluter Pays Principles, Inter-generational equity, Intra-generational equity, Common but Differentiated Responsibility, Public participation and Public Trust. CSR based approach consists of various theories of which shareholder and stakeholder theory are dominant along with their integration with human rights. These theories have lead to many initiatives that comprise the regulatory framework of CSR at the international level which is also applicable to TNCs. BITs based approach has started to emerge with existing BITs being reviewed and renegotiated by nations aimed at broadening their legislative space as an attribute of exercise of sovereignty particularly with regard to right to clean and healthy environment.