

Transnational Companies

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The UN working group on 'human rights, transnational corporations (TNCs) and other businesses' has published a new report on human rights-compatible international investment agreements. It urges states to ensure that their bilateral investment treaties (BITs) are compatible with international human rights obligations. Thus, fixing accountability of TNCs becomes a very important topic for the Mains exam.

In news: Holding transnational corporations accountable

Placing it in syllabus: Economy

Dimensions

- What are Transnational Companies (TNCs)
- 2. How are they different from MNCs?
- 3. Accountability of TNCs in international law
- 4. Bilateral Investment Treaties and TNCs
- 5. UN working group report on TNCs
- 6. Accountability of TNCs in India

Content:

What are Transnational Companies (TNCs):

- TNCs are companies that operate in more than one country i.e. they have business activities of a transnational character.
- However, they do not have a centralized management system.
- TNCs tend to have offices and headquarters located in the developed world. They often have factories in countries that are not as economically developed to take advantage of cheaper labour.

“Business activities of a transnational character” means any

business activity when:

- It is undertaken in more than one jurisdiction or State; or
- It is undertaken in one State but a significant part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or
- It is undertaken in one State but has significant effect in another State or jurisdiction.

Key characteristics of TNCs:

- They seek competitive advantage and profit maximization by constantly searching for the cheapest and most efficient production locations across the world
- They have geographical flexibility – they can shift resources and operations to any location in the world
- A substantial part of their workforce is located in the developing world, but often employed indirectly through subsidiaries.
- TNC assets are distributed worldwide rather than focused in one or two countries – for example, 17 of the top 100 TNCs have 90% of their assets in a different country from their head office.

How are they different from MNCs?

- Multinational companies are not a recent phenomenon, but it is a fact that today because of modern and fast and efficient means of communications and transportation, companies and businesses find it easy to operate in many other countries apart from their parent country. It is customary to call such companies as multinational corporations.
- Transnational corporations are a type of multinational corporations.

Definition

- Multinational Company refers to a corporation that has assets and facilities in one or more countries, other than the home country, and has a centralized office where global management is coordinated i.e. they have an international identity as belonging to a particular home country where they are headquartered
- On the other hand, a Transnational Company refers to a corporation which operates in other countries, other than the home country, and does not have a centralized management system.

Operations

- While multinationals have subsidiaries in other countries, a transnational does not have subsidiaries in other countries.

Decision making

- Decision making in a multinational is made in the mother country and should be effected in all the subsidiaries globally.
- On the other hand, decision making in a transnational is made by individual transnational corporations. Strategy is made keeping in mind the requirements of the local markets and the rules and regulations of the government.

Local markets

- Multinationals face restrictions when it comes to local markets since they have centralized management systems.
- On the other hand, transnational companies are free to make decisions independently based on local markets.

Given the enormous power that TNCs wield, questions about their accountability have arisen often. There have been many instances where the misconduct of TNCs has come to light such as the corruption scandal involving Siemens in Germany

Accountability of TNCs in International Law:

- The accountability of transnational corporations (TNCs) remains an issue of global concern
- There are grave concerns that those at the helm of affairs in TNCs are engaged in a race to the bottom through the ruthless pursuit of the profit maximisation objective.
- The enactment of notable corporate governance (CG) codes such as the United Kingdom's Combined Code 2006 now replaced by the the UK Corporate Governance Code 2012; the USA's Sarbanes-Oxley Act 2002; CG standards, principles and guidelines being championed by supra-national authorities such as the OECD (Organization for Economic Cooperation and Development) and the World Bank have done little to ensure the accountability of TNCs on a global basis.
- Many researchers have opined that the dominant voluntarism approach to the accountability of transnational corporations (TNCs) is inadequate and not fit-for-purpose.
- Former U.S. Secretary of State Henry Kissinger said in 1975 in the UN General Assembly that the international community should articulate standards of conduct for TNCs.
- Subsequently, an audacious effort was made at the UN to develop a multilateral code of conduct on TNCs.
- However, due to differences between developed and developing countries, it was abandoned in 1992.
- An integral feature of the neoliberal project was to use international law to institutionalise the forces of economic globalisation, leading to the spread of BITs.
- These treaties promised protection to foreign investors under international law by bestowing rights on them and imposing obligations on states.
- This structural asymmetry in BITs, which confer rights on foreign investors but impose no obligations,

- relegated the demand for investor accountability.
- However, after the 2011 report of John Ruggie, UN Special Rapporteur on business and human rights, the issue of holding TNCs accountable gathered momentum again.
 - In 2014, the UN Human Rights Council established an open-ended working group with the mandate to elaborate on an international legally binding instrument on TNCs and other businesses concerning human rights.
 - Since then, efforts are being made towards developing a treaty and finding ways to make foreign corporations accountable.

Bilateral Investment Treaties and TNCs:

- BITs can be harnessed to hold TNCs accountable under international law.
- Bilateral investment Treaties (BITs) or Bilateral Investment Protection Agreements (BIPAs) are agreements between two countries for the reciprocal promotion and protection of investments in each other's territories by individuals and companies situated in either State.
- They provide treaty based protection to foreign investment.
- The BITs are thus bilateral agreements by countries to protect the investment by each country's investors in the other country.
- Though they are signed by governments, their beneficiaries are business entities.

CASE STUDY:

- The issue of fixing accountability of foreign investors came up in an international law case, **Urbaser v. Argentina (2016)**. It involved a concessionaire that was looking after the supply of water and sewerage services in Argentina, in which Urbaser, a Spanish environment management company, was a shareholder.

- Argentina adopted emergency measures to ward off a financial crisis in 2001, which caused losses to the concessionaire, ultimately leading to its insolvency.
 - Urbaser brought a claim against Argentina alleging breach of its rights guaranteed under the Argentina-Spain BIT.
 - Argentina filed a counterclaim charging the investors for floundering in ensuring the required level of investment in the services provided and thus violating the international human right to water.
 - The tribunal held that corporations can be subjects of international law and are under a duty not to engage in activities that harm or destroy human rights.
 - However, as regards the question of whether the foreign investor was under an international law obligation to provide drinking water and sanitation, the tribunal held that only states have a positive obligation to meet the human right to water; corporations only have a negative obligation in this regard unless specific human rights obligations are imposed on the foreign investor as part of the BIT.
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- The case played an important role in bringing human rights norms to the fore in BIT disputes.
 - It also opened up the possibility of using BITs to hold TNCs accountable provided the treaty imposes positive obligations on foreign investors.
 - In the last few years, states have started recalibrating their BITs by inserting provisions on investor accountability. However, these employ soft law language and are hortatory.
 - They do not impose positive and binding obligations on foreign investors. They fall short of creating a framework to hold TNCs accountable under international law.

UN working group report on TNCs:

- The UN working group on 'human rights, transnational corporations (TNCs) and other businesses' has published a new report on human rights-compatible international investment agreements.
- It urges states to ensure that their BITs are compatible with international human rights obligations.
- It emphasises investor obligations at the international level i.e., the accountability of TNCs in international law.

Accountability of TNCs in India:

India's new Model BIT of 2016 contains provisions on investor obligations.

Features of Model BIT 2016:

- The Model has adopted an 'enterprise-based' definition of investment under which investment is treated as the one made by an enterprise incorporated in the host state. Intellectual property assets are not considered.
- It dropped the Most Favoured Nation (MFN) status which was previously included.
- Actions of the state governments are included.
- It links "Fair and Equitable Treatment" to international laws, aimed at countering a broad interpretation and risk misuse. Any potential violation listed in the provisions of denial of justice, breach of due process etc.. requires a violation of customary international law for a claim to be justified.
- It provides that the State cannot nationalise or expropriate (nationalization of assets of foreign companies) an investment or take measures equivalent to expropriation, except "for reasons of public purpose". However any measure by a judicial body aiming to protect public interest will be outside the purview of

expropriation.

- It includes a new clause on non-discriminatory treatment for compensation of losses in circumstances like armed conflict, natural disasters and in the state of national emergency.
- It incorporates a clause for transparency, requiring the Parties to ensure that all the laws, regulations, procedures and administrative rulings regarding matters covered in the BIT are published.
- It mandates foreign investors to voluntarily adopt internationally recognized standards of corporate social responsibility(CSR).
- It stipulates that the aggrieved investor should use all local remedies as well as negotiations and consultations initiating arbitrations against the host State.
- It excludes matters relating to taxation.

Analysis:

- The investor obligations exist as **best endeavour clauses** in India's Model BIT Treaty and these clauses do not impose a binding obligation on the TNC.
- The recent UN report has important takeaways for India's ongoing reforms in BITs.

Suggestions:

- India should impose positive and binding obligations on foreign investors, not just for protecting human rights but also for imperative issues such as promoting public health.
- The Nigeria-Morocco BIT, which imposes binding obligations on foreign investors such as making it mandatory for them to conduct an environmental impact assessment of their investment, is a good example.
- These reforms would help in harnessing BITs to ensure the answerability of foreign investors and creating a binding international legal framework to hold TNCs to

account.

Mould your thought: How can accountability of transnational companies be fixed in the international laws? What can India do to impose investor obligations of TNCs?

Approach to the answer:

- Introduction
- Define TNCs and write about the concerns of accountability
- Write about the absence of international laws fixing accountability of TNCs
- Explain how BITs can serve as a mechanism
- Discuss India's Model BIT 2016 and its shortcomings
- Suggest measures to improve the situation
- Conclusion