

# HOLDING TRANSNATIONAL CORPORATIONS ACCOUNTABLE

Relevant for: Polity | Topic: Rights Issues - Human Rights and NHRC

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. It emphasises investor obligations at the international level i.e., the accountability of TNCs in international law. 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.

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. The latest UN report is a step in that direction.

BITs can be harnessed to hold TNCs accountable under international law. 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.

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.

The recent UN report has important takeaways for India's ongoing reforms in BITs. India's new Model BIT of 2016 contains provisions on investor obligations. However, these exist as best endeavour clauses. They do not impose a binding obligation on the TNC. 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.

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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