



REGULATORY CHILL, CORPORATE TAKEOVER AND ENVIRONMENTAL GOVERNANCE

Hasrat Arjjumend*

MMAJ Academy of International Studies, Jamia Millia Islamia (Central University)
New Delhi – 110025 India

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ABSTRACT

The large corporations have an inevitable presence in the modern world. Generally, all developing countries have formulated environmental standards and regulations to preserve their environment. However, the 'regulatory chill' by powerful companies supersedes environmental regulations. Moreover, an increasing number of global corporations prefer suing the States in international arbitration court under investor-State dispute settlement clauses of bilateral investment treaties. As a result, the States either adopt 'regulatory chill' or 'race to the bottom' principles to keep the economic investment within countries. Adding to the plight of weak States, the 'corporate takeover' occupies the State, and the environmental regulations are either diluted or suspended to pave way for complete economic liberalization. It is an outcome of intrusion and takeover by corporate power into governance structures and institutions, apart from financial sponsorship of election contestants. In such precariousness of domestic environmental affairs, what are future implications? May the 'corporate environmental accountability regime' be shaped internationally, and appreciated and enforced by already weak States? In case of perfect corporate takeover of the State, what will happen to State sovereignty or regulatory autonomy? How will the global environmental governance institutions respond to overall failure of States in fixing the corporate hegemony?

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INTRODUCTION

The large corporations, domestic as well as transnational, have increasingly been seen influencing or interfering the governance systems in entire world. Common citizens generally perceive that the corporate sector contributes to national and global economy while taking care of social good. As Roach (2007) articulates that a large number of people usually perceive the global corporations as a positive force, engines of economic growth, jobs, lower prices, and quality products to world's population. However, a set of other people, contrarily, views large firms as exploiting the workers, dominating the public policy process, damaging the environment, and degrading cultural values. Nevertheless, the giant corporations have an inevitable presence in the modern times and will be so for the foreseeable future. Here the relevant issue should not be whether corporations play key role in our economy and our society; instead, it needs to be ensured that the behavior of large corporations aligns with the broader goals of society, and environmental preservation. Lastly, we may assert that the production decisions of large firms have significant environmental implications at the national and

global level (also see Roach, 2007), and that such implications need to be examined critically.

Perchance from the time of Industrial Revolution, the environmental problems emerged in industrialized world, and later these problems extended to most parts of the globe. Facing the stiff challenges of environmental crises (which were caused by corporate sector again) domestically, the developed countries imposed stringent laws and regulations on the polluting industries. However, the industries existing or shifted in developing world continue to pollute and damage the environment in absence of significantly effective regulatory frameworks. The issues of environmental damage by large corporations worldwide cannot be viewed in isolation, rather should be understood in perspective of global governance. Clapp (2005) put it as, "since the large corporations are important global actors, because they tend to invest in sectors that are environmentally sensitive, they are especially important players in international environmental politics and policy". And, the global environmental governance is believed to have profound impact on the regulatory make-up of States and, resultantly, the behavior of corporations internationally and nationally.

Domestically, the corporate sector usually attempts to fail the State; to some extent, it succeeds. Literally all developing countries have formulated environmental standards and

*Corresponding author: **Hasrat Arjjumend**

MMAJ Academy of International Studies, Jamia Millia
Islamia (Central University) New Delhi – 110025 India

regulations to preserve the air, water, soil, forests, human health and so on. However, the 'regulatory chill' imposed by powerful companies supersedes, by which the corporate groups influence the statutory bodies either to tone down the legal provisions or at least not to enforce them in true spirit. These efforts are logically made to maximize the profits while exploiting the nature and resources recklessly, and escaping the expenditure involved in managing the externalities of the production process. Additionally, an increasing number of large corporations nowadays prefer suing the States in international arbitration court under investor-State dispute settlement (ISDS) clauses of bilateral investment treaties (BITs). As a result, the States either adopt 'regulatory chill' or 'race to the bottom' principle to keep the economic investment within countries; otherwise, because of huge costs of environmental compliance, the corporations shift to nations where environmental standards are less stringent (described as 'pollution haven' in subsequent sections) or deliberately adjusted to lure the foreign investment (explained as 'race to the bottom').

Corporations that fail the governance and regulatory apparatus are not confined to States only, but they act at global level. For example, various corporate giants lobby and influence the international treaties out of their vested interests. There are various global institutions¹ where powerful corporations interfere and influence. At those forums it appears that the money rules the world, as the World Bank, International Monetary Fund, International Finance Corporation, International Fund for Agriculture Development (IFAD), Asian Development Bank, African Development Bank, etc. are the institutions operating from investments of these giant corporate groups. Lastly, as the mandate of global governance institutions guides the States, the member States need to behave accordingly and formulate regulations, standards, policies, laws, etc. in respective countries. Having a trickledown effect, the large corporations often succeed in achieving their domestic agenda too through influencing at global level. However, the role of global environmental governance is still more than desired in pursuing States as well as the corporations to sustain or build domestic environmental governance in safeguarding the environment and human rights.

Amid complexity of issues, the 'corporate takeover' is relatively new phenomenon wherein the State is eventually occupied by corporate entities or power; and, as a result, the existing environmental regulations are either diluted or suspended to pave way for complete economic liberalization. This may be perceived as 'race to the bottom' phenomenon or threatened regulatory autonomy of State. But it is happening factually not due to the fear or pressure of the corporations; it is rather the effect of intrusion and takeover by corporate power into governance structures and institutions, apart from financial sponsorship of election contestants. So, the 'corporatization of State' appears inevitable with the implications of decaying State sovereignty or State's right to regulate. It appears something like invasion and conquest of fortified State by the corporate hegemony.

In such a precariousness of domestic environmental affairs, what are the future implications? When (softer) concept of corporate social responsibility (CSR) or voluntary corporate regulation is just inadequate, may the 'corporate environmental

accountability regime' be shaped internationally, and appreciated and enforced domestically by already weak States? In case of perfect corporate takeover of the State, what will happen to State sovereignty or regulatory autonomy? What will be the future shape of domestic environmental governance in event of perfect corporate takeover? How will the global environmental governance institutions react or act to overall failure of States in fixing the corporate hegemony? These are certain critical questions that need to be addressed in future discourses.

Size and Economy of Global Corporations

Transnational corporations (TNCs) or multinational corporations (MNCs) are reported to have grown in number from 7,000 parent firms in 1970 to over 65,000 in the year 2002. These parent firms are associated with over 850,000 foreign affiliate firms (Clapp, 2005). According to the United Nations Conference on Trade and Development (UNCTAD), there were about 75,000 TNCs operating worldwide in 2005 (UNCTAD, 2006). However, about 73% of MNCs are headquartered in developed industrial economies. The country with the most MNCs is Denmark with 12% of all MNCs. Denmark is followed by South Korea (10%), Germany (8%), Japan (7%), China (5%) and USA (3%). About 8% of the largest MNCs are now located in developing countries, such as China, Brazil, India, Malaysia and Mexico. It is observed that the MNCs are becoming more dispersed globally, spreading particularly to the developing nations. Overall, their number has increased considerably in recent years, more than doubling since 1990, when there were about 35,000 MNCs (UNCTAD, 1992). This growth has been especially dramatic in developing nations; while the number of MNCs in developed countries increased by 66% between 1990 and 2005 (Roach, 2007).

United Nations assessed that the world's 100 largest firms directly accounted for 4.3% of global economic activity in year 2000 based on value added (UNCTAD, 2002). An estimate shows that the world's 75,000 multinationals are responsible for about 20% of the world's economic activity². United Nations data shows that the portion of the world's gross product attributed to the world's top 100 MNCs increased from 3.5% to 4.3% between 1990 and 2000. The portion of world gross product, calculated as the sum of the GDPs of all countries, attributed to MNCs increased from 6.8% in 1994 to 7.3% in 2003 (Mataloni, 2005).

The Corporate Power

The corporate sector comprises several forms of power. One of the more obvious forms of power held by corporate actor is the instrumental power it attempts to wield in policy processes via corporate lobbying or political campaign financing (Clapp and Fuchs, 2009). Another form of significant power is the structural power, which the corporations derive from the ability to punish and reward countries for their policy choices by relocating investments and jobs (Cox, 1987; Gill and Law, 1989; Fagre and Wells, 1982).

The corporations can influence governments through political donations and direct lobbying. It is commonly known that the large corporations are also amid contributors to political campaigns. For example, of the top 100 donors to US federal

¹ For example, WTO, UNCTAD, CBD, UPOV, WIPO, UNFCCC, ITPGFRA, etc.

² World gross product data, obtained from the World Bank's World Development Indicators, is the sum of all nations' GDP.

political candidates during the 2004 election cycle, about half were corporations while many others were the organizations that represent business interests (Roach, 2007). Similarly, the ruling party in India received 79% of corporate donations³ on record during 2014-16, and two largest corporate houses are alleged to have funded 2014 general election to bring into power the current government. According to the Center for Responsive Politics (CRP) of US, the federal lobbying expenses⁴ in 2006 were about \$2.6 billion. Generally speaking, the political contributions and lobbying can be effective in influencing public policy (Roach, 2007). So, the corporations exert political influence to obtain, *inter alia*, subsidies, reduce their tax burdens, and shape public policy.

Notably, the more mobile a multinational corporation becomes, the more able it is to relocate production or seek new contractors as a result of changes in national regulations concerning workplace standards, minimum wages, and environmental quality. Consequently, the States, concerned about losing employers and tax revenues, forego their stricter regulations and may even repeal existing regulations (Roach, 2007). For example, Malaysia attracted manufacturing operations from several corporations in the 1980s by promising them no taxation on earnings for 5-10 years and a guarantee that electronics workers would be prevented from forming unions. Another example is of US state of Alabama that attracted a Mercedes factory in the early 1990s by providing tax breaks and other subsidies amounting to \$200,000 for each job that would be created by the factory, including a promise of purchasing 2,500 Mercedes sport utility vehicles for \$30,000 each (Greider, 1997). Similarly, Roach (2007) reported that Ireland and several Asian countries have attracted multinational production facilities in recent years primarily through offering low tax rates. The countries such as Bermuda and the Cayman Islands are even recognized as 'tax havens'. Corporate profits in countries classified as 'tax havens' rose 735% between 1983 and 1999, while profits in countries that are not tax havens grew only 130% (Johnston, 2002).

Corporations and Environment

What is the connection between environment and the need to regulate the corporate behavior? As Sheldon (2006) elaborates, the environmentalists have argued that any benefits from increased trade liberalization will be outweighed by damage caused to the environment, i.e. more trade will result in increased consumption and production, which in turn will cause more environmental degradation (Ulph, 1997). The environmentalists also express concern about the impact of increased world commodity prices on productions in terms of deforestation and greater chemical use (Anderson and Strutt, 1996). It is further articulated that with increased trade liberalization under the auspices of the GATT/WTO, governments will not set optimal environmental policies, because of the fact that they are constrained finally in their use of trade instruments (Sheldon, 2006). Under the process of economic integration, the additional competitiveness pressure leads the corporations to lobby for less stringent regulations (Ulph, 1997). Moreover, as a result, international competition is observed hurting domestic industries either through loss of market share or movement of those industries from developed

³ <http://www.hindustantimes.com/india-news/corporates-donated-rs-957-crore-to-national-parties-in-4-years-bjp-received-maximum-funding>

⁴ Lobbying and political contribution data obtained from the Center for Responsive Politics, <http://www.opensecrets.org/>.

countries with tough environmental standards to less developed countries with weaker environmental standards, i.e. a 'pollution haven' effect⁵ (Copeland and Taylor, 2004). In case of this possibility, Sheldon (2006) observes, the environmentalists worry that developed country governments either resist implementing tough environmental standards [a process Bagwell and Staiger (2001a) term 'regulatory chill'] or they reduce the stringency of existing environmental standards in a 'race to the bottom' (Bhagwati and Srinivasan, 1996; Anderson, 1998; Bagwell and Staiger, 2001a), which in turn can create a process of 'ecological dumping'⁶ where all governments relax their environmental policies (Rauscher, 1994; Ulph, 1997). Additionally, the global institutions, such as WTO⁷, also push for harmonization of environmental standards across countries (Bhagwati and Srinivasan, 1996; Bagwell and Staiger, 2001b).

Other scholars highlight the corporate power as influencing international institutions too. Essentially, the corporations and corporate advocacy groups lobby governments and international treaty processes (Newell and Paterson, 1998; Levy, 1997; Clapp, 2001; Rowlands, 2000). They also use their structural power, and threat of relocation, to encourage governments to loosen regulations (Clapp, 2002; Neumayer, 2001) or to not enforce those rules of books (encouraging a 'regulatory chill'), as well as to influence the discourse on "sustainable development" (Sklair, 2001; Levy and Newell, 2002; Levy and Egan, 1998). They also have enacted voluntary environmental and social codes of conduct, organized primarily through industry, such as ISO 14000, 'Responsible Care', and individual pledges of corporate social responsibility (Finger and Tamiotti, 1999; Clapp, 1998; Krut and Gleckman, 1998).

Some researchers witness that greater involvement of global corporations in international environmental governance cannot be considered either unequivocally positive or negative (Tienhaara, Orsini and Falkner, 2012). Because the corporations are a major provider of employment and economic growth, the national governments are more sensitive to their concerns than to NGOs or activists. As a result of their predominant role in research and development, global corporations are able not only to provide solutions to environmental problems, but also to define the boundaries of what policy options are considered technologically and economically feasible (Falkner, 2005; Beck, 2002). So, their investments in industrial infrastructure and technological innovation give them a powerful and indeed privileged position in global debates on how to bring about change toward greater environmental sustainability (Tienhaara, Orsini and Falkner, 2012).

Corporate Influence on Global Environmental Governance

According to Clapp (2003b), the lobbying domestic governments before they send delegations off to international

⁵ Copeland and Taylor (2004) and Taylor (2004) provide a very precise distinction between these concepts: the *pollution haven effect* occurs if net exports of dirty goods are deterred by tougher environmental regulations in the North, while the *pollution haven hypothesis* predicts pollution-intensive industries will relocate to the South as environmental regulation is made more stringent in the North.

⁶ Rauscher (1994) notes the popular definition of ecological dumping is one where environmental standards in one country are lower than another. He suggests a better definition is one where firms can sell on international markets at prices below the marginal social cost of production.

⁷ The WTO Committee on Trade and Environment is essentially a response to concerns about a 'race to the bottom' (Bagwell and Staiger, 2001b).

environmental negotiations have been a key strategy for corporate actors. This way they exert significant pressure over government actors (Susskind, 1992; Gleckman, 1995). It is believed that the corporations usually have pursued such strategy of lobbying domestically to neutralize the environmental concerns; this is still the effective strategy to influence the global environmental governance issues, such as climate change, biodiversity conservation, ozone depletion, toxic waste, etc. (see also Newell and Paterson, 1998; Levy, 1997; Clapp, 2001a). In the international forums, unarguably, the business advocacy groups and individual corporations lobby intensively in an attempt to influence global environmental negotiations. They take part in such forums as observers just like NGOs do (Clapp, 2003b). So, as they are organized and resourceful groups, they are effectively able to promote their interests in international forums. Examples of such advocacy groups which regularly attend environment treaty negotiations include the organizations such as International Chamber of Commerce (ICC), the World Business Council for Sustainable Development (WBCSD), Global Industry Coalition (GIC) on biotechnology, and Global Climate Coalition (GCC) on climate change (Clapp, 2003b). Depending on their interests the mega transnational corporations directly involve in global environmental negotiations. Monsanto, Syngenta, DuPont, Bayer, etc. are some examples of corporations which took part in negotiation sessions of Cartagena Protocol on Biosafety (Glover, 2003; Clapp, 2003a). Clapp (2003b) informs again that the corporations have been well represented in the meetings of Codex Alimentarius, the UN body regulating international food safety standards.

A classical case of corporate lobbying came into limelight in 2014 in Berlin. While reporting IPCC⁸ WG3 Briefing, Ahmed (2014) quoted Wasdell⁹ speaking that the draft of IPCC WG3 submitted by scientists contained a metrics projecting cumulative total anthropogenic carbon dioxide emissions, based on which a 'carbon budget' was estimated¹⁰ – the quantity of carbon that could be safely emitted without breaching the 2 degrees Celsius limit to avoid dangerous global warming. According to him, the final version approved by governments significantly amended the original metric to increase the amount of carbon that could still be emitted. Ahmed (2014) indicated that the corporate pressure from Saudi Arabia, China, Brazil and US was behind this episode. Another example of United States should be cited here to elaborate how the corporations could influence the State to take backseat in international environmental negotiations. The representatives of the first two biotech companies in the US, Monsanto and Calgene, asked for government regulations on biosafety to secure the market for genetically modified organisms (GMOs). The government's officials from the Reagan administration refused, arguing that the larger biotech companies only wanted regulation to exclude smaller competitors from the market (Andrée, 2005). Just after the elaboration of the text of Convention on Biological Diversity (CBD), in a private initiative, a working group of NGOs and pharmaceutical and

biotechnology firms – including Merck, Genentech, and World Resource Institute – was formed. This group carefully evaluated the treaty and eventually drew up an interpretative statement supportive of US accession. This made the Clinton administration accede to the treaty but it could not convince the senate to ratify the Convention (Raustiala, 1997).

In continuation of above, Tienhaara, Orsini and Falkner (2012) argue that the firms have the financial and material capacities to establish and maintain diverse alliances inside the business community (in international lobbying coalitions) as well as externally (with governments and global environmental institutions). For example, during the negotiations happening for Cartagena Protocol on Biosafety, the Global Industry Coalition had been very successful in networking with the main grain-exporting States, which had decided not to ratify the final agreement. Likewise, in the access and benefit-sharing (ABS) negotiations, several pharmaceutical companies have played actively in advising the Swiss and German governments for the elaboration of Bonn voluntary guidelines on the ABS issue. The Brazilian company Natura is also reported having developed strong links with the Brazilian government to push for the adoption of the Nagoya Protocol (Tienhaara, Orsini and Falkner, 2012).

The phenomenon of corporate lobbying and influence over the global environmental institutions can be confirmed by analyzing their participation in international forums. Lang (1999) studied in early 1990s that along with 104 governments 100 TNCs represented in global environmental meetings. Over a period of two years, 662 industry representatives took part in such meetings compared to 26 representatives of public interest groups (Lang, 1999). Nowadays, the presence and representation of these corporate players is more prominent and clearly visible. It was observed that the corporate actors were in full force at Rio Summit in 1992 as well as at World Summit on Sustainable Development (WSSD) in Johannesburg in 2002; industry groups now put enormous efforts into these large summits (Gleckman, 1995). On the contrary, the environmental advocacy groups or people's movements lack the resources to take part in such global forums.

Other than lobbying, the structural power of corporations tends to influence heavily the international environmental governance institutions, as observed by various scholars (Gill and Law, 1993; Sklair, 2001; Levy and Newell, 2002). Even the draft language of documents or laws and the new terminology are coerced by the corporate powers (Chatterjee and Finger, 1994; Sklair, 2001). The text that emanate in international deliberations is actually toned down giving relief to the corporations in terms of their liabilities of damaging the environment. According to Newell and Paterson (1998), merely the economic weight of the corporations can, surprisingly, influence the governance systems; in fact, many States and international governance structures make the policies that are acceptable to corporations in order to keep or attract investments. Sometimes, the States are increasingly being influenced by threat of relocation by corporations or ceased investment – as a result the 'regulatory chill' is imposed on States (see also Neumayer, 2001). However, often it is simply the fear of the States that firms may act if the environmental regulations tighten on the corporations.

⁸ Intergovernmental Panel on Climate Change (IPCC) Working Group (WG)

⁹ David Wasdell was an accredited reviewer for the IPCC's 2007 Fourth Assessment Report, and led the feedback dynamics in coupled complex global systems for the European Commission's Global System Dynamics and Policy (GSDP) network.

¹⁰ The total carbon budget according to this estimate was about 1,000 gigatonnes of carbon (GtC) – although over 531 GtC was emitted already by 2011, leaving 469 GtC left. Applying the "corrected non-linear function" reduces this available budget to just "280 GtC" – this figure does not account for the role of greenhouse gases other than CO₂, including the potential impact of thawing permafrost or methane hydrates (Ahmed, 2014).

Regulatory Chill¹¹

Under the State sovereignty principles, the States have right to regulate and it implies the freedom of States to enact legislative measures in a variety of fields within their own jurisdiction, as recognized in Article 2(1) and 2(7) of the UN Charter. The 'regulatory chill' is defined in relation to abstinence of States from enacting regulatory standards. 'Regulatory chill' has real consequences for the ability of countries to address environmental issues at the national level (Shoaf, 2013). If nations are handcuffed in their ability to address environmental concerns domestically, the ability of the international community to respond to global environmental governance issues is weakened in turn. 'Regulatory chill' could mean that a country's attempt to meet its duties under international environmental treaties (e.g. the Kyoto Protocol or Paris Agreement) would stand in direct conflict with required investor protections under a bilateral investment treaty (Shoaf, 2013). Other scholars relate 'regulatory chill' with a threat of arbitration or enactment of a higher standards and its ulterior derogation. In the arena of environment, Neumayer (2001) defines 'regulatory chill' as a situation where countries *fail to raise standards over time because of a feared capital flight*. Nordström and Vaughan (1999) outline a situation where new environmental regulations are defeated in the political arena on the grounds that they would harm national competitiveness. In her book 'The Expropriation of Environmental Governance', Tienhaara (2009) refers to 'pollution havens' and argues that the 'regulatory chill' hypothesis suggests that countries fear raising or implementing environmental standards because they believe that it may deter new investment or lead to industrial flight. Fear of capital flight and, thereby, maintaining status quo can be the two common but important elements of 'regulatory chill' (Shekhar, 2016). Considering these definitions, some common elements can be elucidated under the broader idea given by UNCTAD that the regulators' restraint to take certain regulatory actions boils down to the fear of arbitration under investor-State dispute mechanisms (Spears, 2010).

It is reported that over 3200 investor-State agreements are in place globally (UNCTAD, 2015). These treaties give sweeping powers to foreign investors, including the ability to file lawsuits directly against States in international tribunals in the case of alleged violations of the treaties' provisions. These international lawsuits usually circumvent local courts and, hence, States become ineffective in imposing any regulation on the corporations operating in their jurisdiction. AITEC and Partners (2015) have recently reported that thousands of trade and investment agreements signed between countries allow multinational companies to sue governments if the States change their policy. By the end of 2014, there were 608 of these investor lawsuits known to be taking place within international tribunals¹². No doubt, the costs of these suits weigh heavily on governments, in the form of hefty legal bills and weakened social and environmental regulations (AITEC and Partners, 2015). Interestingly, the cases are usually decided by a tribunal of 3 private lawyers, the arbitrators, who have a financial stake in the system and a number of conflicts of

interest (Eberhardt and Olivet, 2012). Surprisingly, the investors have triumphed in 60 per cent of investor-State cases where there has been an actual decision on the merits of the case (UNCTAD, 2015).

US-based oil and gas multinational Chevron, for example, is reported lobbying for "a world-class investment chapter" in TTIP¹³. The company has had several meetings behind closed doors with the EU's TTIP negotiators¹⁴. Chevron focused its entire response to the US government's TTIP consultation on investment protection¹⁵. Chevron is currently suing Ecuador to avoid having to pay US\$9.5 billion to clean up oil drilling related contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. The case has been lambasted as an "egregious misuse" of investment arbitration to evade justice (Public Citizen, 2013). In its contribution to the European Commission's consultation on investor rights in TTIP, Chevron has attacked proposals to reform the system to preserve countries' right to regulate¹⁶, and has even proposed to expand the corporate privileges granted in TTIP¹⁷.

Some governments are reported having realized the injustices of investment arbitration and are trying to get rid of the system. South Africa, Indonesia, Bolivia, Ecuador and Venezuela have terminated several bilateral investment treaties. India's new draft model investment treaty does the same¹⁸. In Europe, Italy has withdrawn from the Energy Charter Treaty (ECT). But, still many governments are determined to hand out even more dangerous legal weapons to corporations in the form of new and expanded trade deals (AITEC and Partners, 2015). More trade and investment deals are in the pipeline that would empower corporations to challenge strong government action on climate change or environment grounds. Amongst them are the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, and the Comprehensive Economic and Trade Agreement (CETA)¹⁹ between the EU and Canada. The CETA deal between the EU and Canada empowers foreign investors to bypass local courts and sue States directly in international tribunals when democratic decisions impact their expected

¹³ Transatlantic Trade and Investment Partnership (TTIP)

¹⁴ According to information released by the European Commission via the EU's access to documents rules, Chevron met EU negotiators to discuss TTIP at least four times: on 29 April 2014, 1 October 2014, 28 November 2014, and 4 March 2015, Information on file with *Corporate Europe Observatory* (CEO).

¹⁵ Chevron Corporation: Comments on Proposed Transatlantic Trade and Investment Partnership, 7 May 2013, <http://www.motherjones.com/documents/1237936-ttip-lobbybrief-chevron>

¹⁶ For example, Chevron proposed to extend TTIP's investor rights to the so-called pre-establishment phase of an investment. This would limit governments' policy space to regulate the entry of foreign investors and is typically not part of the investment treaties of EU member States. Chevron also proposed a so-called 'umbrella clause' for TTIP, which would bring all obligations a State assumed with regards to an investment under the TTIP 'umbrella' (like a contract with one investor), multiplying the risk of costly lawsuits (AITEC and Partners, 2015).

¹⁷ For example, Chevron opposed a general exception to achieve public policy objectives in the TTIP investment chapter (AITEC and Partners, 2015). The public contributions to the consultation can be accessed via the Commission's website: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=ISDS>

¹⁸ Before turning to investor-State arbitration based on India's model treaty, local remedies will have to be exhausted. South Africa also lawfully excludes recourse to international arbitration. Moreover, investors' protection has been aligned with the constitution – thus, giving foreign investors no greater rights than others (Bönnemann, 2015).

¹⁹ Public outcries may rise in near future both in Canada and European countries. Slomp (2017) informs that the European Union has ratified most of CETA's text, but individual States must each ratify the Investor-State Dispute Settlement (ISDS) measures of CETA. Many national governments now face a rapidly growing democratic movement that opposes the economic and social disempowerment of their communities that CETA entails. In Canada, some farmers will see immediate income pressures as CETA comes into effect; others will find out over time that their newly offered "market opportunity" really means producing and selling a bit more, but for a lower price (Slomp, 2017).

¹¹ Regulatory Chill is understood to be a restraint of states to enact certain regulatory or public policy measures as a result of arbitration, or a fear thereof, under investor-State dispute settlement (ISDS) provisions, thereby constraining the States' right to regulate.

¹² At the World Bank's International Centre for Settlement of Investment Disputes (ICSID)

profits (CEO, 2014). The Trans-Pacific Partnership (TPP), which was concluded by the US and 11 other countries from the Pacific Rim, does the same (Public Citizen, 2015).

In the same way, over a decade ago, the Forestry Law implemented by Indonesia banned open pit mining in protected forest areas but the regulation was implemented with exceptions which allowed many foreign investors to operate in protected forest areas after investors threatened to initiate arbitrations against Indonesia. Interestingly, acknowledging a legal threat by investors, then Environment State Minister said “*there were investment activities before the Forestry Act was effective. If shut down, investors demand compensation and Indonesia cannot pay*” (MAC, 2002). Additionally, the President of Constitutional Court of Indonesia sympathized with the ‘need of investment climate’ in Indonesia’s struggling economy at that time while deciding on a judicial review of the Forestry Law (MAC, 2002).

The effects of regulatory chill are far serious and grave. Regulatory chill can be said to occur when the threat of potential liability leads States to forego needed environmental or social legislation that might negatively affect the value of foreign investment (Shekhar, 2016). It can be said that there is an asymmetrical legal relationship between States and investors. While investors can submit claims in the ISDS regime, States cannot do because bilateral investment treaties (BITs) grant direct procedural and substantive rights to investors to hold States to account. Secondly, international investment agreements (IIAs) grew from private international law and the concepts used are those imported from it. Moreover, the fragmented nature of international investment law means that there is no consistent jurisprudence to rely upon (Shekhar, 2016). Mabey and McNally (1999) have described such effects through the principles of ‘industrial flight’ and ‘race-to-the-bottom’. According to them, these concepts mean that States prioritize foreign investment over protection of environment and thus undervalue the environment through changing existing law or non-enforcement of existing regulation. If the decisions of States go against the corporations, the investors tend to relocate operations to less developed countries with less stringent regulations and weak legal systems to benefit from them (‘pollution havens’ hypothesis). Usually, the States adopt ‘race-to-the-bottom’ in environmental standards (by chilling of the regulations), thus leading to environmental damage (Mabey and McNally, 1999).

Expropriation of Environmental Governance

Favouring the foreign direct investment (FDI), some scholars argue that foreign firms will use clean(er) technology and adopt country’s domestic standards or international best practices in their operations, and that positive spillovers to the domestic arena will result. Contrarily, others point out that while foreign companies may be familiar with high standards and have access to state-of-the-art technology, it is too optimistic to assume that they will automatically adopt best practices in their operations in every country. Furthermore, it has also been argued that even if foreign firms are relatively cleaner they are also generally larger than their domestic counterparts in developing countries, and thus have the potential to make greater adverse environmental impact (Tienhaara, 2009). It has been observed that investment protection may also affect the implementation of multilateral

environmental agreements, requiring governments to take measures that are least inconsistent with investment protection, perhaps at the expense of the efficiency and effectiveness of environmental regulation (Tienhaara, 2009). In a bid to clarify further, Tienhaara (2009) has enlightened how the international investment arbitration through bilateral investment treaties (BITs) expropriated the environmental governance. She argues that the existence of investment protection adds a new dimension to the *regulatory chill* hypothesis. The governments might use the existence of commitments to investment protection as an excuse or *political cover* for its failure to improve environmental regulation. In addition to influencing government behaviour, investment protection also has the potential to influence the decisions of domestic courts (*judicial chill*) (Tienhaara, 2009). So, the institution of investment protection will lead to a *decrease in the quantum, and/or the effectiveness, of environmental policy* in host States. The problem is that it may also deter policy development and court proceedings that are in the interests of the public good (Tienhaara, 2009).

An example of such an effort of expropriation occurred in Canada. Following several years of citizen-led actions seeking reductions in pesticide use, a municipal byelaw was passed by Hudson²⁰, Québec in 1991 banning the cosmetic²¹ use of pesticides on private property. Remarkably, after the Hudson decision, dozens of Hudson-style byelaws were passed across Canada limiting the cosmetic use of pesticides (Christie, 2010). Ontario followed in 2008 with a more comprehensive province-wide cosmetic pesticide ban²² that prohibited the use and sale of hundreds of pesticide products while retaining the ability to use pesticides for, among other reasons, public health and agriculture protection (Cooper *et al.*, 2014). Soon after, Dow AgroSciences (Dow), a US-based chemical manufacturer, challenged the Québec Pesticides Management Code²³ arguing that Canada was in breach of the minimum standard of treatment and expropriation provisions of Chapter 11 of NAFTA²⁴. The provisions of Chapter 11 allow companies to sue countries if their expected returns on investment are reduced by government actions. However, the Dow case²⁵ was largely unsuccessful in influencing the Québec byelaw (Cooper *et al.*, 2014). But this case is worth mentioning from standpoint of understanding how the corporations attempt to drag the States into ‘regulatory chill’.

Corporate Takeover²⁶

What happens when the corporate groups or bodies penetrate the governance and government in such a way that they no longer need lobbying or ‘judicial chill’ in order to impose ‘regulatory chill’? In developing countries like India, Pakistan, Malaysia, Philippines, Bangladesh, etc., the heads or promoters of corporations have occupied positions in parliament, assemblies or other law-making bodies, and

²⁰ Though the Hudson byelaw was challenged in *Spraytech v. Hudson*, which culminated 10 years later in a landmark Supreme Court of Canada ruling upholding the byelaw [114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), {2001} 2 S.C.R.241 (Can.)].

²¹ Term “cosmetic” refers to pesticide use solely for the purpose of influencing the appearance of lawns or gardens. It is also referred to as non-essential or unnecessary use.

²² cf. Pesticides Act, R.S.O. 1990, c. P.11 (Can.).

²³ cf. Pesticides Act, R.S.Q., c. P-9.3, r. 1 (Can.).

²⁴ North American Free Trade Agreement

²⁵ This case was supposed to create a regulatory chill on further pesticide bans across Canada

²⁶ I conceptualize the ‘corporate takeover’ as the pervasiveness and penetration of corporate power directly or indirectly in governance structures and institutions, and as replacing considerably the State functions.

sponsored fully the election of ministers and public representatives (personal observations). In other words, a large majority of parliamentarians and other public representatives are also the owners/promoters/investors of national or multinational corporations. In a way, they have rather occupied half the space, directly or through sponsoring the elected representatives, of domestic policy or law-making institutions or of the law implementing organs e.g., ministries, departments, bureaus, boards, commissions, committees, etc. In such a situation, the 'regulatory chill' is no more needed generally. Instead, it is full 'corporate takeover' of the democratically elected governments and constituent governance structures and institutions. Under the corporate influence, the legislative and executive wings of State in developing countries have started overriding, evading or circumventing the judiciary wing too. Sometimes, an influence on judiciary ('judiciary chill') is also exerted with mixed success. Particularly, the ministries, departments or authorities having mandate of implementing stiff environmental regulations have started conditioning the environmental laws and policies, to large extent, so as to pave path for corporate benefits. Consequently, the agenda of environmental safeguarding has taken backseat abhorrently and economic domination is established. State appears in hurry for removing the hurdles of environmental regulations to enable bilateral investment treaties (BITs), foreign direct investment (FDI) and endogenous corporate giants (e.g., Adani, Vedanta, Reliance, Tata and other industrial groups in India) succeed over environmental safeguards.

Case of India

After coming into power in 2014, the present ruling government has begun to undo policies of fair land acquisition, undermine environmental protection and reverse the fight for tribal rights (Mohan, 2015). The finance, environment and rural development ministers, and Prime Minister himself, have called the safeguards protecting people's property, the environment and tribal rights as the "roadblocks" to economic growth²⁷. Rules that ensure corporate responsibility to people and the environment, in other words, are now largely being written off. Nearly 95 percent of projects proposed by private companies have received environmental clearances within one year (2014 to 2015) of the present government (Mohan, 2015). In August 2014, Prime Minister's cabinet set up a committee to review 6 key environmental and climate change laws²⁸. In only 3 months time, the committee recommended changes to laws on everything from water pollution and forest conservation, to coastal zone regulations and recycling electronic discards. "Once the recommendations were out, it was clear the committee was simply meant to remove human rights and green roadblocks for investment growth" (Mohan, 2015). The committee suggested a single-window clearance for all green permits, something corporations in India have long lobbied for. At large, the corporate takeover is in making, which means the laws and rules that aimed at safeguarding India's environment, forests, wildlife, and tribal rights are under fire.

The requirement of a clearance of forest ministry for the big development projects has been waived. Changes in the pollution classification now allow mid-sized polluting industries to operate within 5 km of national parks and sanctuaries (instead of the 10-km restrictive limit ordered by the Supreme Court). Ban has been lifted from new industries in critically polluted industrial areas²⁹. Norms for coal tar processing, sand mining, paper pulp industries, etc. are eased. The amendment in National Green Tribunal Act is moved³⁰ to reduce the judicial tribunal to an administrative one. Headed by a retired Supreme Court judge or a high court chief justice, the National Green Tribunal (NGT) hears all first challenges to environmental and forest clearances. The present government has made 19 amendments³¹ to the new Land Acquisition Act of 2013. Some of them include dilution of the 'local consent' requirement for public-private-partnership projects, removal of the social impact assessment requirement, delinking compensation for land from market value, relaxing the time limit for completing acquisition, not returning unutilized lands to the original owners, giving states overriding discretionary powers, etc. And, the government has also approved field trials³² of 21 genetically modified (GM) crops including rice, wheat and maize. After making a series of changes to simplify green clearance rules in the last 3 years, the Prime Minister's Office now wants the environment ministry to further water down forest clearance rules. The Prime Minister's Office also wants the environment ministry to speed up clearance of pending cases and regularly follow up with state governments to push such projects (Aggarwal, 2017). Constant efforts are going on for about a decade to amend the Forest Rights Act 2006 to eliminate 'local people's consent' clause that is necessary for land acquisition in forest territories. Current government has almost changed this law to equip corporations acquire forest lands and lands of tribes. Adivasi Janajati Adhikar Mancha (AJAM) is reported quoting dilution of the 'consent' clause of Forest Rights Act (FRA) 2006. It implies that the local indigenous communities lose the right to veto the conversion of forests to other land uses. According to AJAM, the environment ministry has been "interfering and encroaching upon the affairs of Ministry of Tribal Affairs (MoTA) with the sole objective of denying and depriving the rights of adivasi³³ forest dwellers" (DTE, 2015).

Nevertheless, the process of undermining green concerns to facilitate unbridled growth has not been new in India. For last two decades, the corporate agenda of usurping the environmental resources is given priority over the environmental and people's concerns. In year 2013, the environment minister of previous regime (who was oil minister earlier) cleared more than 100 big-ticket projects during his short stint at the environment ministry³⁴. Now the present government has taken forward the economic agenda of corporations in a fashion that everything appears to go in hands of corporate powers, and almost all the effective environmental regulations would be strangled. Moreover, in a

²⁹ http://www.business-standard.com/article/economy-policy/dirty-clusters-to-grow-as-pollution-index-is-tweaked-114071801212_1.html

³⁰ http://www.business-standard.com/article/economy-policy/government-planning-to-clip-national-green-tribunal-s-wings-114080600015_1.html

³¹ <http://indianexpress.com/article/india/india-others/govt-seeks-to-make-it-easier-to-acquire-land/>

³² <http://www.dnaindia.com/india/report-21-new-varities-of-genetically-modified-crops-approved-for-field-trials-by-narendra-modi-government-2002487>

³³ Indigenous people

³⁴ <https://in.news.yahoo.com/no--veerappa-moily-didn-t-start-this-fire--he-s-just-feeding-it-050853605.html>

²⁷ <http://indianexpress.com/article/india/india-others/green-ministry-is-no-more-a-roadblock-prakash-javadekar/>

²⁸ <http://indianexpress.com/article/india/india-others/the-six-minds-that-will-look-fresh-at-environment-laws>

bid to further dilute the conventional bureaucracy hampering the takeover by the corporate sector recently the Office of Prime Minister of India released a directive to Department of Personnel & Training (DoPT) to prepare draft modalities for selecting corporate managers into the middle rungs of ministries³⁵. This lateral entry of corporate representatives into the civil services of the country might have some advantages to bring in efficiency, however, it will enable the corporate occupy more space in the State machinery.

Basically, the State has been increasingly getting fade and market-run-governance is taking over literally in all avenues of domestic governance systems. The fundamental shift is viewed in political establishments and electoral processes. The might of corporate sponsorship was distinctly visible in parliamentary elections of 2014 when the present government came in power with full corporate sponsorship. Thus, as a result of deep penetration of corporate roots, the full 'corporate takeover' of environmental and social standards as well as governance structures and institutions appears inevitable in India.

Environmental Liability or Accountability Regime

Assuming the 'corporate takeover' is not universal phenomenon and the 'regulatory chill' or 'race to the bottom' has been existing in majority of nations, the corporations should be held responsible and accountable for the environmental and social externalities. Essentially, the States' territorial sovereignty is also believed to impede the potential for international environmental law to focus corporate responsibility and consequent liability for environmental damage (Francioni, 1991), as required by the polluters-pay principle³⁶. While the principle of State responsibility and liability for environmental damage is undeniable, a settled international legal regime is yet to emerge (Ong, 2001). Though corporations have "greened" themselves in the course of the past decades by claiming to be environmentally and socially responsible via a number of voluntary corporate-based initiatives, and even by claiming to promote sustainable development in the South, they were, according to Miller (1995), in need of being closely watched (Clapp, 2005).

Corporate Social Responsibility

Banking upon a long history of global governance of corporate sector and State-corporate relationships, the principles of corporate social responsibility (CSR) have emerged to motivate the commercial companies to contribute for social good. However, in the root is the unholy track record of corporations (MNCs or domestic) of exploiting environmental resources and human capital, without sharing burden of externalities of production, transport, etc. The proponents of the CSR approach argue that it encourages corporations to act in ways that are both environmentally and socially sound, in large part because adhering to CSR principles makes "good business sense" (Holme and Watts, 2000).

³⁵ <http://www.thehandsindia.com/posts/index/Civil-Services/2017-07-26/Need-for-lateral-entry-into-Civil-Services/314670>

³⁶ On the discrepancy which arises between an unadulterated application of the polluter-pays principle which requires that liability be visited upon the actual individual polluter, as opposed to the vicarious attribution of such liability upon the state where this individual is located due to the concept of state sovereignty and hence responsibility for actions which are clearly located within its territory and control (Boyle, 1991).

Under pressure of global institutions, and resultant State compulsions, the CSR has largely been perceived by corporate as liability, not usually as philanthropy (even corporate philanthropy too is more an image management exercise). Yet, the corporate sector is in double advantage by performing CSR. For example, in India, majority of large corporations have created its own foundations or charity groups. Whatever the commercial taxes they are supposed to pay to the government, they deposit in its own offshoot foundations (having registration under tax relief clauses). Enormous amounts are saved by this tactic. From the collected money in the foundation, some charity works (of that only small proportion is serious work) are undertaken in the jurisdiction areas where the company operates. Despite this, why does the CSR not generally support the human rights and environmental movements? It may be the reason that human right or environmental assertion emanates from the actions of the same corporate when it violates the basic rights and exploits the resources on which people's existence depends. Hence, the CSR is believed to trying instead to manage such assertion.

Some CSR initiatives address the internal corporate environmental governance by way of adopting voluntary guidelines or codes of conduct or environmental standards. A key study by UNCTAD found that the most influential motivating factor for TNCs to develop corporate environmental policies was government-based laws and regulations (UNCTAD, 1993). Because TNCs wish to avoid being held legally or financially liable for damages linked to their operations, they tend to be motivated to act by regulations which set out sanctions for breaches of the law (Clapp, 2005). Given that laws and regulations are such strong motivators for firms to clean up their practices, many see that stronger State-based regulations are extremely important, and that an externally negotiated global set of rules is vital for improving environmental practices of TNCs, particularly those operating in developing countries where regulations tend to be weaker and/or harder to enforce (Clapp, 2005).

Newell (2005) argues that CSR debates continue to neglect questions with regard to the accountability of companies to the communities in which they invest. According to him, the liberal notions of CSR place great emphasis on voluntary, partnership and market based approaches to tackling social and environmental problems and managing conflict. While the rise of voluntary standards and codes of conduct in the North and the growing popularity of various forms of 'civil regulation' has improved the responsiveness of corporations to social and environmental issues, there are doubts about their transferability or relevance in many southern settings (Newell, 2005). This is particularly so when viewed from the perspective of communities pursuing corporate accountability in the absence of government pressure for company reform.

Global Instruments

The UN Global Compact (GC) asks corporations to promise to become responsible corporate citizens, and asks them to adhere to ten specific principles covering social, environmental and human rights, and to incorporate these principles into their mission statements as well as their actual operations³⁷. In the area of the environment, corporations are asked to support the precautionary approach, to undertake initiatives to promote

³⁷ UN Global Compact website: www.globalcompact.org

environmental responsibility, and to develop and diffuse environmentally friendly technologies (UN, undated). The Global Compact is still voluntary, solicits industry input, and does not call for accountability on the part of firms. Rather, it promotes corporate responsibility instead of strict accountability. For these reasons, it has been widely criticized by NGOs as being inadequate to elicit sufficient change in business practices. Critics see the GC as representing “. . . a smuggling of a business agenda into the United Nations” (Bruno and Karliner, 2002a).

Another international instrument to hold the corporations responsible had come in the form of the OECD Guidelines for Multinational Enterprises, which were first established in 1976. The guidelines have been revised periodically, with a chapter on environmental protection added in 1991 and updated in 2000 (Clapp, 2005). These guidelines are meant to strengthen existing measures taken by firms, such as CSR initiatives; they also go a bit further in that they promote improved environmental performance rather than just improved management. Still, some environmental groups have criticized the guidelines for being weak (FOE Netherlands, 2002). A principal critique is that the voluntary nature of the guidelines means that no legal obligations are placed on TNCs. Recent years have seen a growing push among environmental and other NGOs for the adoption of a legally binding instrument at the global level to regulate TNC activities with a view to ensuring good social and environmental performance (Clapp, 2005). The idea of a *global framework treaty on corporate accountability* was floated by several groups in the run-up to the World Summit on Sustainable Development (WSSD), including Friends of the Earth International, Greenpeace, the World Development Movement, Christian Aid, and the Alliance for a Corporate-Free UN (CEO, 2001).

Evolution of Corporate Environmental Accountability Regime

The Friends of the Earth International (FOEI) has put forward a detailed proposal for a legally binding instrument for corporate accountability (FOE International, 2001; Phillips, 2002; Bruno and Karliner, 2002b). This proposal calls for the following:

- Legal rights for citizens to hold corporations accountable to the broader public and the environment, rather than the present framework where corporations are only legally accountable to shareholders.
- A requirement for corporations to fully report their social and environmental impacts and for effective prior consultation with affected communities before embarking on activities which might have social and environmental implications.
- The extension of corporations' liability to their directors when there is a breach of national environmental or social laws, and an extension of liability to directors and corporations for breaches of international laws and agreements.
- Rights of redress for citizens should be given priority.
- Community rights to control and access to resources need to be the first.
- Minimum environmental, social, labor and human rights standards are required.

- Corporations that breach these new duties would be subject to certain sanctions, such as fines and suspension of stock exchange listings.

Greenpeace International also introduced its “Bhopal Principles on Corporate Accountability” in 2002. The Bhopal Principles are like the FOE International's proposal, and include measures to ensure that corporations follow key principles of the Rio Declaration, including those on liability, double standards, the precautionary principle and the polluter pays principle (Clapp, 2005). It also calls for extension of corporate liability beyond the home country of the corporations, including responsibility for cleanup and restoration in the case of environmental damage (Greenpeace International, 2002). It is not surprising that industry is firmly opposed to the ‘idea of a legally binding treaty on corporate accountability’, especially one that places such a strong emphasis on the need to extend corporate liability for any damages caused by their operations (Clapp, 2005). Since, it is chiefly the push from civil society and environmental groups, the States may not respond enthusiastically on this particular item. However, the voices of dissent would tend to press the regime further for its cognizance in global forums.

Likewise, Belal, Cooper and Khan (2015) have studied the contexts of a weak regulatory regime in Bangladesh and have revealed that widespread corruption, retracted role of government and the proximity of business leaders to the corridors of power, it is less likely that the State will be able to protect the common interests of victims of environmental externalities. They argue that under the circumstances of inequality of power, the standard accountability mechanisms are unlikely to be feasible, because of corporate reluctance to take responsibility for the environmental impact of their activities. Others still argue that self-regulations are not going to work much and longer. As some are suggesting mandatory corporate reporting in enhancing corporate accountability (Malarvizhi and Yadav, 2008), the evolution of corporate accountability regime has long way to go.

CONCLUSION

Depending on the socio-economic and regulatory evolution of different countries, the nature, shape and implications of regulatory chill emerge in distinct fashion. Political and economic processes also vary country to country. With this logical end, the determination of the shape and effects of regulatory chill as well as race-to-the-bottom is essential, more in context of subsequent aspects of corporate takeover. Notably, the pervasiveness of the corporate control in most parts of the world is disturbing when we look back at the declining size, space and existence of States' governing or regulating structures. If the ‘corporate takeover’ phenomenon continues, the States must have to think about the sovereignty and regulatory autonomy. In case of perfect corporate takeover of the State, what will happen to State sovereignty or regulatory autonomy? Else, the sovereignty as a concept would need to be revised or jeopardized, though the State sovereignty over key livelihood resources of people should also be questionable. While exploring the dichotomy or nexus of corporate-State relations, the environmental governance and regulatory interconnections need to be examined further in global and national contexts. Civil society's action or disability, in turn, is an interesting dimension to understand in this regard.

Next questions are even more pertinent. When (softer) concept of corporate social responsibility or voluntary corporate self-regulation is just inadequate, may the 'corporate environmental accountability regime' emerge with its proposed tenets? Shall the already weak States would buy the regime and enforce domestically? How will the global environmental governance institutions react or act to overall failure of States in fixing the corporate hegemony? Or, have the international environmental governance institutions evolved innovations or strategies to tackle the growing corporate power and weakening States? If not so, with the weak States the international governance institutions may also be affected remarkably. Lastly, what will be the future shape of domestic environmental governance in event of perfect corporate takeover? Such burgeoning questions need to be addressed and investigated with utmost necessity in forthcoming discourses encompassing national and international environmental governance.

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