OBLIGATION OF FOREIGN INVESTOR AS MULTINATIONAL CORPORATION

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Investor has rights as well as obligation when he makes investment in other country. There are many issues arise related to IIAs. Investor in the form of MNCs invests in other country. Sometimes investor behaves in irregular manner and become corrupted. There are many BITs providing the rights of investor and if their rights are infringed then grant the remedies to such investor. Most commonly rights like compensation in case of the expropriation of the investor, prohibition of discrimination between foreign investor and citizens of the host county, "Right to fair and equitable treatment", "Right to full protection and security" from host country.[1]Under BITs there is protection is given in respective countries. These countries also address obligation and duties on investor. Main purpose of BITs is to ensure the compliance of duties and obligation with the host state. There are different type of duties such as human rights, environment protection and labour standard.[2] After the World war II there was question arise if corporation as foreign investor enter in other countries and misbehave in such country then what rules and regulation administer and govern the behaviour of TNC s in host countries. However this problem is tackle by implementing UNCTC. These international agreements impose liability and obligation on MNC directly and indirectly.

In 1975, there are first IIAs to regulate the behaviour of foreign investor as MNCs is UNCTC on Transnational corporations. Main purpose of such code was to establish a multilateral framework to define the rights and duties of transnational corporation. This code also states the relation of host country and home country with each other. There was Resolution of UNESCO in 1974 and on the basis of this resolution UNCTC came into operation on November 1, 1975.

[1] Stephen E. Blythe, 'The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties' (2013) 47(2) The International Lawyer 273, 275 < https://www.jstor.org/stable/pdf/43923951.pdf?refreqid=search%3A56fab1b40da63b42e776b572dd494246 > Accessed March 9,2018

[2] Christophe Scherur , 'Investment and International Protection' University of Vienna < http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf > accessed March 9,2018

There is need to implement such code because TNCs have real impact on economy of host country and impact the international economic relations. TNCs have adopted different type of strategy for attaining profits and impact the development projects of governments of the host state. In 1975 there is first session of Commission on TNCs established preliminary program of work. It provides the highest priority of Code of conduct. Then again Commission on TNCs held in 1976 reaffirmed the program decided in first session. In this session there is also provided a list of objectives of UNCTC and state that main objective to establish UNCTC is to promote contribution of TNCs to national development goals and promote world economic growth.

In 1970 and 1980 there is much debate was held and focused on whether code of conduct to regulate the MNCs should be mandatory or voluntary. In 1988 CTC form a draft code of conduct for TNC and it make clear that there is disagreement between many states and CTC itself adopted an international agree code. With regard to the treatment of the TNCs, the UN draft code provided that "*States have the right to regulate the entry and establishment of transnational corporation including determining the role that such corporation may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors*."[3]After that developing countries put proposal of NIEO through UN conference on trade and development which is held in 1970. The main purpose of NIEO is to promote the interest of developing countries by assisting development, reduction of tariff and improving the terms of trade. The NIEO mostly focused on governed the transnational corporation. We can say that fundamental objective of the NIEO was transform the global economy, govern the transnational corporation and give benefit and integration toward the developing countries. In 1974 there was meeting held of UN General Assembly there was explicitly made reference that there is need to regulate TNC. In the same way "Charter of economic rights and duties of state" was adopted under NIEO. [4]

Next few years there are number of specific instruments especially "Tripartite Declaration of principles Concerning Multinational Enterprises and social policy" was negotiated and agreed

[3] Surya P Subedi, *International Investment Law Reconciling Policy and Principle* (2nd edn, Hart publishing Oxford and Portland Oregon 2012) p.27

[4] Nils Gilman, 'The New International Economic order: A Reintroduction' (2015) Humanity < http://humanityjournal.org/issue6-1/the-new-international-economic-order-a-reintroduction/ > accessed March 9, 2018

upon in ILO. ILO is deals with labour problems and international labour standards. Since 1960 Labour representative and developing countries demand from ILO try to solve the issue of behaviour of MNEs and involve in creating the code of conduct which regulate the behaviour of MNEs.[5] In 1970 Developing Countries pressed an ILO conference to adopt the code of MNEs. The negotiation process started with "Tripartite Declaration of principles Concerning Multinational Enterprises and social policy". ILO Declaration finally taken on 16 November, 1977. The ILO gives restrictive definition of corporate social responsibility. [6]In 2010 ILO helpdesk for Business and International Labour Standards was established through which firms can take information relate to the international labour standards as well information contained in Tripartite Declaration. The Multinational National enterprises declaration provides guidance to multinational and national on social policy and sustainable workplace practices. Governments, employers and workers are adopted this declaration in around world. It was amended several times and recently in March 2017. Its principles are addressed to MNE and national enterprises, government of home and host countries and provide guidance to the employers and workers in the area of employment, training, condition of work and life .Guidance is referred to the principles contained in the international principle standards.[7]

There is declaration is agreed upon the "International Investment and Multinational enterprises" in the OECD. Work started to prepare the draft to regulate the MNEs under OECD since 1976. Finally OECD declaration involved quid pro – quo Guidelines for MNEs. However United Nation code of conduct obsolete in 1980.[8] There is "Committee on International Investment and Multinational Enterprises" of OECD which later arise as Capital Movement Committee. It has mandatory in this committee is that working party will monitor the implementation of guidelines for Multinational Enterprises. Although such Committee cannot take the cases or issues against the behaviour of individual enterprises but it give strength to implementation of the instrument and give clear meaning of the guidelines. Recently in 2013

[5] Christroph Screur, *International Investment Law* (Oxford University Press)

[6] International Labour Organisation Geneva 'Tripartite Declaration of Principles Concerning Multinational enterprises and Social Policy' (MNE declaration 5th edn, 2017) < http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf > accessed 11 March 2018

[7] International Labour Organisation 'Tripartite Declaration of Principles Concerning Multinational enterprises and Social Policy' (MNE declaration 5th edn, 2017) < http://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm> accessed 18 March 2018

[8] Kari Tapiola, "The Importance of standard and corporate Responsibilities – The Role of voluntary Corporate Code of Conduct " (1999) Conference held in Paris on role of international investment in Development , corporate Responsibilities and guidelines for Multinational Enterprises

Working party on Responsible Business conduct was established to assist and enhancing the effectiveness of guidelines. In UNCTAD there is agree and negotiated equitable principle and rules for the control of Restrictive Business Practices. In UNCTAD Developing countries try to control the business practices which are adopted by TNCs. They also try to control the abuse of dominant position by these companies. Developing countries think that these activities of the TNCs hinder the development of their country.[9] In this agreement there is definition of Restrictive business practice and enterprises are given. It is provided in its objective that the enterprises should not adopted restrictive business practice specified in the agreement. In 1979 there was establishment of National contract Points in specific countries to provide the solution on issue that arise from the no observance of guidelines in specific instances like OECD, UNCTC and ILO. It is another layer of international institution which deals with matter of TNCs. National Contract Points is guidelines implementation mechanism and it is handling of specific instances. It improves the linkage between National Contract Points and the "Committee on International Investment and Multinational Enterprises" The Review of 2011 provided that Interested Party can raise issued before the National Contracts points.

General obligation of foreign investor

Foreign Investors and Investment are subject to domestic law and enforce by the host state but there is weak governance and regulatory authorities of developing countries. Investor misconduct involves fraud, corruption or other activities which are designed to evade the domestic law. Media and NGO filed report the allegation of various types of abuses by the foreign investor like violation of human rights, labour standard, environment degradation, fraud and corruption.[10] ***Daimler v. Argentina***[11]In this case the tribunal said that there is direct right models of rights of investor upon human rights and it arise due to different obligation on an investor. [12] Investment treaties and customary international law recognized the assets of

[9] Karl P. Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations' (2015) 16 The journal of world investment & trade 11, 28

[10] Armad de Mestral and Celine Levesque , *Improving Investment Agreement* (1st edn , Rutledge Taylor & Franus group 2013)

[11] (2015) ICSID Case no. ARB/05/01

[12] Dr Anastasios Gourgourinis, "The Nature of Investor's Rights under Investment Treaties: A Comment on Paparinskis' "Investment Treaty Arbitration and the (New) Law of State Responsibility" (2013) European journal of international law <https://www.ejiltalk.org/the-nature-of-investors-rights-under-investment-treaties-a-omment-on-paparinskis-investment-treaty-arbitration-and-the-new-law-of-state-responsibility/ > accessed March 9, 2018

MNC and recognize the obligation of MNCs towards the host states and communities of MNCs. MNCs have not legal personality in the international law therefore the MNCs are not well developed in these rules. There is absence of legal norm of obligation on multinational corporations is due to many reasons froe example there is recent origin of norms in area of the environment harm and violation of human right and corporate liability . International rules on bribery are slowly developed in world economy. Obligation of MNC[13] can be categorized into different parts which explained below:

1. Non-interference in politics of host state

2. Liability relating to Human rights

3. Obligation towards environment concerns

4. The obligation to promote economic development

In international instruments there is liability on the MNC largely affected. International instruments aborted that if there is rights of MNC then there are calling of voluntary code of conduct for MNC. Developing countries demand that there should be recognition of obligation of MNC. They suggested that international bodies and instruments study the conduct of such MNC in the developing countries. This issue of developing countries arise in 1970 and 1980s. UNCTC was attempting to establish a binding code of conduct for MNCs. The draft code of UNCTC contained the activities of harmful effect to host states. Main emphasis is on development concerns. Restrictive business practices and other like practices involvement of local political parties to favourable the foreign business and investor for the purpose of the attaining profit was considerable attention. The matter of avoidance bribery and corrupt practices, consumer protection and environment protection was specifically referred.

However efforts to draft a code were abandoned in 1980s. However in 1990 there is economic liberalism introduced in the world economy and tendency to make urgent for controlling the Multinational Corporation. Thereafter soft prescription introduced in this period such as recognition of law of non-interference in domestic politics abut no hard rules emerged except in the area of bribery. There was number of incident occurred which affect the foreign

[13] M.Sornarajah , *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) p. 144

investment on hot states. Worst incident is Bhopal leakage gas in India. In this case MNC belonging to union carbide of US and there was gas leaked from plant established by such company and led to major calamity. Many thousands of host state remained uncompensated. There were other incidents that involve environment degradation and violation of human rights which again focus attention on the issue obligation of MNC. However NGO play active role in concerned with matter of human rights, the environment and target the MNC.[14] General obligation[15] of foreign Investor can be explained in below :

Not engage in ethical conduct

Host country take action and measure against the investor if he is involve in the corruption, fraud, and misrepresentation and abuse the power. Such action and measure are legitimate. Host state may terminate the investment even tough termination is allowable if specified in its national law that in such unconscionable conduct of the investor that terminate the investment in host country. ***Plama Consortium Limited v. Republic of Bulgaria***[16] In this case Plama claimed an oil refinery in northern Bulgaria. This company represent to Bulgaria that it has consortium of major companies and this fact is not disclosed by the company to Bulgaria. But these companies withdrew later and Palma continue its business and does not disclose same fact that it has only one corporate cover for a private individual with limited financial resources. In this case tribunal held that Bulgaria does not give permission to the investment in consortium of major companies and investment was void ab initio. Therefore claim of Plama was rejected. However in first case of 2000 ***Metalcld v. Mexico***[17] there is allegation of corruption of investor came in this case and the tribunal does not address the issue. After that in 2005 ***Methanex v. United States Award***[18] the tribunal considered the allegation of corruption on investor. The tribunal held that if an allegation of corruption is not prove in the courts then tribunal take the consideration of such matter. **Inceysa v. EL Salvador**[19] In that case the investor Incesya gives false information regarding financial statement and forged documents

[14] Chester Brown and Kate Miles , *Evolution in Investment Treaty Law & Arbitration* (1st edn, Cambridge University Press 2011)

[15] Vicente Yu and Fiona Marshal*, Investors' Obligations and Host State Policy Space (*This paper is provided as part of a series as background documents for the 2nd Annual Forum for Developing Country Investment Negotiators, held in Marrakech, Morocco, 2–4 November 2008. The event was organized by the International Institute for Sustainable Development)

[16] (2008) ICSID case no ARB/ 03/24

[17] (2000) ICSID case no ARB(AF)/97/1

[18] (2005) UNICTRAL final award is given on the determination of jurisdiction of the tribunal

[19] (2006) ICSID case no .ARB/03/26

to the El Salvador authorities. Investor claimed that they entitled o to operate motor vehicle inspection facilities throughout the country because El Salvador breach the terms of contract. The tribunal held that investor committed fraud. The tribunal relied on the BIT provision and said the investment must be accordance with national policy and law of host state but investment by investor is conducted through fraudulent means that why investor is not entitle to claim which he claim from El Salvador.

Obligation to disclose information

Azinian v. Mexico[20] In this NAFTA case the investors of USA carry out the business of waste collection in the Mexican city. Investors take the concession from the Mexican government. They take concession on the basis that they use business plan and strategy that they had much experience in waste disposal business. They made statements that they invested capital to dispose the waste collection. In actual they had no experience only one investor had experience all of them. Even they have no resources and capital coming from third parties. Third party withdrew from the project of USA investor and they did not disclose such fact to the Mexican government authorities. The tribunal held that Investors of USA disclose the information and behave in unconscionable manner so the termination of investment in Mexico City is justifiable. The tribunal also said that investor in host country must act with the transparency during dealing with such country. ***Genin v. Estonia***[21] In this case and investor of US did not disclose to the Estonia bank that he was shareholder of the foreign parent company which was investing in Estonia bank. The tribunal held that investor failed to disclose the beneficial ownership to the bank which entitled bank to revoke the license of investor.

Obligation to make risk assessment

The investor has duty to make reasonable risk assessment before the investing in Host country. There are many risks involved in other country if investor invests in these countries and faced by such investor. Therefore it will be good if the investor assess their risk investing in other countries. International Investment agreement like BITs and MITs are not insurance policies if there is bad business in the other country. Investor inherent risk in major investment project and it led to develop investment insurance scheme. The first of insurance programme is started

[20] (1999) ICSID case no. ARB(AF)/97/2
[21] (2001)ICSID case no. ARB/99/2

in 1950. US started OPIC in 1977. In early in 1971 AIG started London. In the same manner in 1985 MIGA started. Main purpose of such national programmes are to promote the national economy. Protection is also given to national companies and investor. It covers risks are usually expropriation, non-cover ability of currency and political violence.[22] Duty of risk assessment can be seen in two forms like

(a)Investor have duty to undertake proper feasibility study

Waste Management v. Mexico [23] In this case investor claimed that Mexican authorities wrongfully expropriate the concession of waste disposal business in Mexico. Mexican Municipal authorities failed to meet the financial obligation and investment fail.The tribunal held that *"In the Tribunal's view it is not the function of the international law of expropriation…to eliminate the normal commercial risks of the foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance."* ***Biwater Gauff Ltd.v.Tanzania*** [24]In this case the investor alleged that Tanzania government had wrongfully expropriated contract to manage and operate the various area of Dar es Salaam drinking water supply. The tribunal found that before eleven months of execution of contract Biwater sought an interim tariff review and it duty on the investor serious problems will be encountered from the first say of contract.

(b)Bear the risk to choose investment

There is investor has to bear the risk to choose the investment in other countries like when investor make investment in high- risk high- return location. Investor has to bear the risk when host country has unstable economic, social and political which investor has knowledge of such situation. ***Ukraine v Ukraine***[25]In this case the tribunal noted that "*The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to other investment opportunities in more developed countries. The Claimant thus*

[22] Rudolf Dolzer and Christoph Schreur, *Principle of international investment law* (2nd edn, Oxford University Press 2012)
[23] (2000) ICSID case no. ARB(AF)/98/2
[24] (2008) ICSID case no ARB/05/22
[25] (2003) ICSID case no .ARB/00/9

invested in the Ukraine on notice of both prospects and potential pitfalls... the Claimant had undoubtedly experienced frustration and delay caused by bureaucratic incompetence and recalcitrance in various forms. But equally, the Claimant had managed to secure a 49-year leasehold over prime commercial property in the centre of Kyiv without having participated in a competitive tender and without having made any substantial payment to the Ukrainian authorities" In this case investor attracted to make investment in Ukraine due to earning high rate of return investing capital. Thus claimant invests in Ukraine. But he experienced frustration and there is much delay caused by Ukraine authorities in various forms.

Obligation to manage Reasonable standard

If an investor has suffered loss due to its bad management then the obligation arise on an investor to manage the investment to a reasonable standard loss. Investor should not take advantage of measures taken by the host state and such losses also not recoverable under the BIT. There are different types of element requires to manage the investment to a reasonable standard by an investor.

- Ensure of economic viability

The first element requires that the obligation of an investor is manage the investment in such way that ensures economic viability. ***Noble Ventures Inc. v. Romania***[26]In this case an investor is claimed he invested in Romania of privatization of iron and steel works. Subsequently he faced serious financial difficulties. Noble claimed that the host state failed to reconstruction the steel work existing debts and legal proceeding to reorganize the company and therefore it undermine the investment. The tribunal held that investor has fails to payment of loan and refused to invest any of its funds to reconstruct the company which result bad financial condition of the company. The tribunal also held that host state carries legal proceeding to reorganise the company is not in arbitrary and discriminatory manner and it does not undermine the privatization agreement of the investor. The claim was dismissed. In ***Biwater Gauff Ltd. v. Tanzania*** the tribunal held that "*As a result of the poor bid, coupled with numerous management and implementation difficulties, [Biwater and its subsidiary City Water] did not generate the income which had been foreseen, and accordingly the project quickly encountered*

[26] (2005) ICSID case no. ARB/01/11

substantial difficulties…The position was soon reached where it was clear that City Water simply could not continue without a fundamental renegotiation of the Lease Contract.‖ 30thorities.Whilst the tribunal in Biwater held that certain aspects of Tanzania's later conduct were in breach of its obligations under the BIT, it dismissed Biwater's claim for damages in its entirety, holding that none of Tanzania's conduct had caused Biwater no loss – its investment was by then already worthless."[27]

- Aware of the regulatory environment of host state

Another element to maintain the investment or reasonable standard is to investor that he must aware of the regulatory environment of the host state in which he is make an investment and also foresee the changes in regulation which directly changed the regulatory environment of the host state. ***Methanex v. United States***[28] In this case there is Canadian manufacturer of methanol in USA and he claimed that the California legislation breach the provision of NAFTA by banning the production of fuel containing methanol .However tribunal dismissed the claim and held that *"Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons."*It was also considered that host state California had no make commitments regarding Methanex to change its regulatory framework. If host state does not give commitments prior to the investment then investor has to bear the loss and risk of enacted change in regulatory framework.

- Obligation to comply with laws of state

Third element of obligate the investment to reasonable standard is that investor has to comply with regulation and laws of the host state. If investor has fails to comply with regulation of host state then host state may exclude investment of investor in his state under provision of BITs. In ***Maffezini v. Spain*** [29]In this case Argentine make investment in Spain of chemical plant and

[27] (2008) ICSID case no. ARB/05/22, Para 786.
[28] (2005) Final award on jurisdiction and merits
[29] (2000) ICSID Case No ARB/97/7

he fails to carry out the environment impact assessment as required by Spanish law. The tribunal held that investor has no breach of provision of BIT because he stooped the work when he failed to comply with environment impact assessment.

- **Take professional advice**

Another obligation on the investor is to take advice of professional person while make an investment in host state. In case of ***Feldman v. Mexico*** [30] In this case the tribunal held that it has duty on investor as tax payer to obtain advice from the professional regarding tax liability in the host state. Investor as tax payer has to comply the requirements and need of tax law of host state. But however if the advice is given by the professional person is incorrect and there is no misrepresentation by the host state then investor has to bear the loss as a result from the bad advice.

Non-interference in politics of host state

There is obligation on MNC not to interfere in domestic politics of the host country. Domestic politics of the host country favourable to foreign business and encourage MNCs to retain power and obtain the benefit such foreign business. Many international instruments like BIT and IIA prohibit the interference of MNC in the politics of host state. Such non-interference is also contained in soft law prescription. Political government of MNCs favour the MNC and policies and goals of Home state. Multinational corporation are established in mainly areas of Mining sector and claims are made in this sector is through violence which results civil war. When civil war flares up in the world then there is violation of humanitarian law. As result of all this there is allegation on Multinational Corporation of violation of human rights of the host state. Victims of this calamity bring claims in the home state of the multinational corporation.

Liability relating to Human Rights

It is an obligation on MNC not to violate the human rights of the people of the host state. Obligation also arise is that MNC not support the regime which abuse the human rights of the host state. MNC should not adopt those activities which benefit the foreign investor and abuse the human rights of the host state. There must be labour standard to handle the situation and ready supply of cheap labour to the MNC. International organization should draft the

[30] (2002) ICSID case no. ARB (AF)/99/1

instruments that providing the safeguards to protection of workers from the abuse by MNCs.[31] There are strategies and pressure of political and government of the host state that there should be law if there is violation of human rights and environment standard by MNC. In US there was an old statue namely Alien Tort Claims Act which state act held tort in international law and US courts have jurisdiction to try the case. US court hears the case if the human rights violation by the MNC. A series of cases and litigation is resulted out this statute. In case ***Doe v. Uncoal***[32] there is class action suit is filed against the Unocal, US Multinational Corporation, Burmese Military agents had committed torture, forced labour and killing of people. Such MNC of US constructing gas pipeline for the Burmese government. However Burmese government plead sovereign immunity and able to succeed attain such immunity. Liability came on MNC being participant in alleged activity.

Obligation towards environment norms

In case of environment if foreign investment engaged in environment pollution in the host state then interference of host state on the basis of fair and equitable treatment is justified or not. It is answer that if it is necessary to be in fairs then it was justified by conduct of foreign investor. There will be no contract between foreign investor with the host country to exclude the liability on environment harm to the host country. There is necessity that investor of home country ensures to the host country that MNC compliance with standard of host state as well as International standard and norms for the protection of environment. A duty arises on the investor before the making investment in host state. If technology is used in host state it should be correct use of the technology and should not harm to the host state. In other words we can say that liability arise on the home state to ensure compliance with international standard because it has power to ensure compliance. Home state of MNC has power to control MNCs. There is also duty on all state to compliance with international standards & customary international law relating to environment protection.

Obligation to promote economic development

International instrument state that investment in state promotes the economic development. BITs and regional treaties make statement if investor inflow in the state then economic

[31] John H.Jackson, *Human Rights in International Investment Law and Arbitration* (Oxford University Press Report 2015)
[32] 95 F.3d 932 (9th Cir. 2002)

development takes place. It is implied that if MNCs invest in host state it should promote the economic development and not behave in such way that hinder the development of the host state. If they hinder the development then no protection is given to the investment. On part of home state there is an obligation that corporate national of home state should not act in manner as affect the economic development of host state. MNC should avoidance restrictive business practices and corrupt practices. In case of ***Patrick Mitchell v. Congo*** the same view is supported in this case in which arbitration make the award that investment treaties protect only such investment of foreign investor which promote the economic development of the investor state. There is statement make in all preambles of International treaties MNC should act in host state in such way that promote the economic development of host state. Another group of Arbitral award state that most of IIL & BIT contain a provision of protected foreign investment but it is subject to condition that it should conform to the laws and regulation which are based on human rights and environment. It means that if MNC violate human rights and degrade the environment then they will lose the protection. If there is not express reference to law and obligation then investor violate the human rights and environment degradation.