CHAPTER IV

LICENSED AND REGULATED

INTERNATIONAL LAW

According to the Charter of Economic Rights and Duties of States every state has the right:

(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities...

(b) To regulate and supervise the activities of transnational corporations within the national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.¹

In the International Development Strategy for the Second UN Development Decade, the UN General Assembly had earlier emphasised that foreign private investment in developing countries should be undertaken in a manner consistent with the development objectives and priorities established in their national plans.² In the International Development Strategy for the Third UN Development Decade, the General Assembly reiterated:

¹GA Res. 3281 (XXIX), Article 2, para 2.
"It is for the developing countries to set their own investment priorities and take appropriate decisions regarding admission of foreign investment and private capital in the light of these priorities."  

Industrial licensing and regulation, including import trade control is, therefore, entirely a matter of domestic legislation and there are no rules of international law controlling these matters. This is also true of exchange control. In Tabar Claim (No.3), where a US citizen was not permitted to transfer to the United States monies deposited in a Yugoslavian bank, the United States International Claims Commission held that international law and the usual commercial treaties were no bar to exchange restrictions. So long as the control measures were not discriminatory, no principle of international law was violated. The refusal to allowed transfer did not amount to 'nationalization' or 'other taking' of property or right in and with respect to property.  

In the UK also, in reply to a question on the release of locked funds in Israel belonging to British subjects, the Minister of State for Foreign Affairs stated, "This is a matter for a

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3 GA, Res. 35/56 (XXXV) of 5 Dec. 1980
4 ILR (1953), pp. 242-43.
foreign Government and we are not in a position to dictate to them what their currency regulations should be."

On the subject of restrictive business practices, however, there has been considerable discussion in international fora though no universally accepted principles of international law have yet emerged. The earlier attempts at controlling restrictive business practices across national frontiers, from Qualid's paper for the World Economic Conference sponsored by the League of Nations (1926), through the Havana Charter (1947), to the draft submitted by the ECOSOC inter-governmental committee, all failed because big "business interests, hiding behind the facade of national sovereignty, suppressed the efforts at international control" of restrictive business practices. In 1972 the UNCTAD set up an Ad Hoc Group of Experts to recommend appropriate remedial action on restrictive business practices. In its Fourth Session held in Nairobi in May 1976, the UNCTAD resolved that action should be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with

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5House of Commons Debates, vol.551, Col.1751, 25 April 1956

6William Qualid, "The Social Effects of International Industrial Agreements", OECF, 1926, p. 94.

7ECOSOC, Res. 375 (XIII) of Sept.1951.


9UNCTAD, Res. 73 (III) of 19 May 1972.
restrictive business practices. On the basis of the report of the Ad Hoc Group of Experts the UNCTAD decided that action be taken to elaborate a model law on restrictive business practices in order to assist developing countries in devising appropriate legislation. The UN Conference on Restrictive Business Practices evolved a draft set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The Draft was adopted by the General Assembly without a vote in 1980. According to this Draft restrictive business practices mean:

acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries or which through formal or informal, written or unwritten agreements or arrangements among enterprises have the same impact.


11. UNCTAD, Res. 96 (IV) of May 1976.


Section D also says:

Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate and in the event of proceedings under these laws should be subject to the competence of the courts and relevant administrative bodies therein.

On a consideration of the legal status of these Principles and Rules, Falk says:

... in view of the long history of concern which the international community has shown in this area, the existence of bilateral and multilateral treaties incorporating antitrust standards, the efforts of regional organizations to evolve standards and the fact that the Resolution was preceded by an international conference summoned by the United Nations would give great strength to the Resolution embodying the Principles and Rules to be regarded as a law creating Resolution of the General Assembly.15

The General Assembly resolution adopting the Principles and Rules itself, however, stated specifically that it would "take the form of recommendations". On balance it would seem better to go with Sornarajah in his

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conclusion, "It may be premature to conclude that there is in fact an international anti-trust law. But such a law is in formation". 16

The following paragraphs sum up the laws and policies of the South Asian countries:

INDIA

Industrial Policy and Licensing

Industrial Policy Resolutions of 1948 and 1956 and the Statements of Industrial Policy of 1977 and 198017 spell out the main planks of India's industrial policy. Industrialisation is considered as the *cine qua non* of economic progress.18 The basic aims are to accelerate the rate of economic growth, to speed up industrialisation and, in particular, to develop heavy industries and machine-making industries, so as to provide the economic foundations for increasing opportunities for gainful employment and improving living standards and


18 Para 4 of the *Statement of Industrial Policy* of July 1980.
working conditions for the mass of the people, while at the same time reducing the existing disparities of income and wealth. \textsuperscript{19} The Industrial Policy Resolution of 1956 divided industries into three categories having regard to the part which the state would play in each of them. \textsuperscript{20} The first category included 17 industries enumerated in Schedule 'A' \textsuperscript{21} to the Resolution. These were industries of basic and strategic importance or public utility services or industries which were essential and required investment on a scale which only the state could provide. The future development of these industries would be the exclusive responsibility of the state and all new units therein would be only in the Public Sector. The second category included 12 industries enumerated in Schedule 'B' to the Resolution. These were industries which could progressively be state-owned and in which the state would generally take the initiative

\textsuperscript{19} Industrial Policy Resolution, 1956, para 5.

\textsuperscript{20} India, Planning Commission, The Second Five Year Plan, (New Delhi, 1956), pp. 29-30.

\textsuperscript{21} See Appendix 'G'.

in establishing new undertakings, though private enterprise would also be expected to supplement the effort of the state. The third category comprised all other industries further development of which, in general, would be left to the initiative and enterprise of the Private Sector. The Resolution, however, clarified:

- Where there exist in the same industry both privately or publicly-owned units, it would continue to be the policy of the State to give fair and non-discriminatory treatment to both of them.

- The division of industries into separate categories does not imply that they are being placed in water-tight compartments. Inevitably, there will not only be an area of overlapping but also a great deal of dovetailing between industries in the private and public sectors.

Within this broad policy framework, foreign enterprises are treated at par with large indigenous industrial houses. The Government of India have drawn up a list of core industries\(^\text{22}\) open to the larger industrial\(^\text{23}\) houses and foreign concerns and a list of items reserved for production in the Small-scale

\(^{22}\text{Appendix (i) of Industrial Licensing Policy of February 1973 as revised in April 1982. See Appendix'H'.}\)

\(^{23}\text{Undertakings that by themselves or in interconnection with other undertakings have assets (in India) of not less than Rs. 200 million.}\)
The former list has been expanded considerably in April, 1982. The larger houses and foreign concerns can operate outside that list also if they undertake to export a major portion of their output.

The legislative framework for the implementation of this policy is provided by the Industries (Development

24 'Small-scale Sector' includes 'small-scale units', i.e. undertakings having investments in fixed assets in plant and machinery not exceeding Rs. 2 million and 'ancillaries', meaning undertakings having investments in fixed assets in plant and machinery not exceeding Rs. 2.5 million and engaged in the manufacture of parts, components and sub-assemblies, toolings or intermediates, or in the rendering of services and supplying 50% of their production or 100% of their services, as the case may be, to other units for production of other articles, (Government of India, Ministry of Industry, Notification No. 98 (M)/IDRA/29B/73/ 1 of 16 February 1973, as amended from time to time till Notification No. 594 (M) of 31 July 1980).

The list of items reserved for the Small-scale sector has been amplified from time to time; presently it includes over 850 items.

See, Economic Times, (New Delhi, 18 February 1983).


The Minimum export requirement is 60 per cent in respect of items not reserved for the Small-scale Sector and 75 per cent for those reserved. See Government of India, Press Note No. 11/15/80-LP of 21 April 1982.
and Regulation) Act, 1951 and the Registration and Licensing of Industrial Undertakings Rules, 1952. The Act applies to a wide range of industries grouped under 38 heads in the First Schedule thereof. Under this Act, it is necessary to obtain a licence\(^\text{27}\) for the following activities:

1. Establishing a new industrial undertaking.\(^\text{28}\)
2. Taking up the manufacture of a new article in an existing industrial undertaking.\(^\text{29}\)
3. Substantially expanding the capacity of an industrial undertaking in an existing line of manufacture.\(^\text{30}\)

\(^{27}\) A licence is a written permission from Government to an industrial undertaking to manufacture specified articles. It includes particulars of the industrial undertaking, its location, the articles to be manufactured, the maximum capacity and the period within which such licensed capacity should be established.

\(^{28}\) Sec. 11 of the Industries (Development and Regulations) Act, 1951.

\(^{29}\) Sec. 11A ibid.

\(^{30}\) An industrial undertaking can, however, increase the production of articles for which it is licensed to the extent of 5 per cent per annum up to a maximum of 25 percent in a five year period ending August 1985 without obtaining a substantial expansion licence if-
- a) no additional plant and machinery is installed,
- b) no additional expenditure in foreign exchange is involved,
- c) no additional demand for scarce raw materials is made, and
4. Carrying on the business of an existing industrial undertaking to which the licensing provisions of the Act did not originally apply on account of an exemption order issued by Government but became applicable on the cancellation of the exemption order and under certain other circumstances as provided in the Act. 31

5. Changing the location of an existing industrial undertaking. 31

The Act, however, empowers the Central Government to exempt any industrial undertaking or class of undertakings or any scheduled industry or class of scheduled industries from the operation of all or any of the provisions of the Act. 32 In exercise of these powers the Government have exempted the Small-scale Sector from the licensing provisions of the Act in general, and the larger undertakings in cases where the following conditions are satisfied. 33

1. The undertaking is not a foreign concern or an MRTP undertaking. 35

31 Sec. 13 ibid.

32 Sec. 29B ibid.

33 Government of India, Ministry of Industry, Notification No. 98 (E)/IDRA/29B/73/1 of 16 February 1973 as amended from time to time till Press Note No. 10/54/82 of 23 April 1983.

34 A foreign company, its branches or subsidiaries or a company in which more than 40% of the paid up equity is held directly by foreign companies, their branches or subsidiaries or by foreign national or non-resident Indians.

35 See p. 113 infra.
2. The proposed investment in fixed assets in land, buildings, plant and machinery for establishing a new undertaking or for effecting substantial expansion or for manufacture of new articles does not exceed ₹ 50 million. If the undertaking is an existing undertaking not already covered by registration, licence or permission under the Act, the proposed investment and the existing investment together should not result in the total investment exceeding ₹ 50 million.

3. The proposed investment does not require foreign exchange per year either for the import of raw materials (other than steel and aluminium) or for parts and components (after three years of coming into production), exceeding 15 per cent of the ex-factory value of the annual production or up to a ceiling of rupees four million for raw materials and parts and components, whichever is less.

4. The undertaking is not located in an urban area.

5. The item of manufacture is not reserved for the Small-scale Sector or the Public Sector or for industries subject to special regulation such as coal, vanaspati, processed foods, alcoholic drinks.

Apart from these general exemptions, re-endorsement of capacities on industrial licences has been allowed on 31 March, 1982 and 31 March, 1983 on the basis of the best production of last five years plus one third thereof. On endorsement of enhanced capacity 25 per cent excess production over such re-endorsed capacity

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36 This requirement may be relaxed in certain cases to synthesize the twin objectives of optimum utilization of installed capacity and preservation of the environment and the ecological balance of the country.
is allowed over and above the automatic growth mentioned in foot note 30.37

Foreign Investment

The Industrial Policy Resolution of 1948 recognized that participation of foreign capital and enterprise, particularly as regards industrial techniques and knowledge, would be of value to the rapid industrialisation of the country but pointed out that the conditions under which foreign concerns may participate in Indian industry should be carefully regulated in the national interest. The basic approach of the government toward private foreign capital was enunciated in the Statement of Policy on Foreign Capital made in the Parliament by the late Prime Minister, Jawaharlal Nehru, on 6 April 1949. This statement laid down the following principles:

- There would be no discrimination as between Indian and foreign enterprises; all would have to conform to the industrial policy requirements of the country and be governed by common regulations.

- There would be no restriction on the remittance of profits and repatriation of capital by foreign enterprises subject, of course, to the foreign exchange situation.

- If any foreign interests came to be compulsorily acquired, compensation

would be paid on a fair and equitable basis with reasonable facilities for remittance of the proceeds thereof.

The major interest in ownership and effective control of an undertaking should, as a rule, be in Indian hands.

There would be no objection to the employment of non-Indians in posts requiring technical skill and experience when Indians with requisite qualifications are not available but Indians should be trained and employed in managerial and technical posts as quickly as possible.

The First Five Year Plan (1951-56) elaborated this policy further in the following words:

In view of the fact that the investment of foreign capital necessitates the utilization of indigenous resources and also that the best use of foreign capital is as a catalytic agent for drawing forth large resources for domestic investments, it is desirable that such investment should be channelled into fields of high priority. The broad principle to be followed is that foreign investment should be permitted in spheres where new lines of production are to be developed, or where special types of experience and technical skills are required, or where the volume of domestic production is small in relation to demand, and there is no reasonable expectation that the indigenous industry can expand at a sufficiently rapid pace. The system of joint enterprises under which a number of foreign concerns have established new industries in the country in collaboration with Indian industrialists appears to be suitable for securing the employment of equity capital. Agreements for such joint participation between foreign and Indian concerns should be subject to approval of Government. 38

The Policy was reiterated in the Fourth Five Year Plan (1969-74) thus:

... care has to be taken to ensure that foreign collaboration is resorted to only for meeting a critical gap and does not inhibit the maximum utilization of domestic know-how and services. Thus, for example, foreign collaboration in the production of consumer goods whether they can be produced within the country or not, will not ordinarily be permitted except in the interest of larger exports... Import of foreign know-how, particularly in sophisticated industrial fields would continue to be required. 39

The approach of the government toward foreign capital is selective and based on national priorities. Import of capital and technology is permitted in sophisticated and high priority areas, in export oriented or import substitution industries, or for enabling indigenous industry to update existing technology to meet efficiently domestic requirements and/or to become competitive in the export market. Foreign shareholding is generally sought to be limited to 40 per cent. Import of technology is sought to be tailored to the changing needs of a developing economy. The approach is not, however, rigid; Government invited...

foreign companies to participate in oil exploration on a production sharing basis in certain on-shore as well as off-shore areas despite the fact that 'Mineral Oils' is an industry reserved for the Public Sector.\textsuperscript{40} They have also evolved a facility whereby Oil Exporting Developing Countries may hold equity in core industries, export oriented ventures or new hotels and hospitals up to 40 per cent in a portfolio manner i.e. not associated with technology.\textsuperscript{41}

The legislative framework for this policy is provided by the Foreign Exchange Regulation act, 1973. Under this Act, persons resident outside India (including Indian citizens), foreign citizens resident in India, and companies (other than banking companies) incorporated abroad or having a non-resident interest of more than 40 per cent as well as branches of such companies have to obtain permission of the Reserve Bank of India for the following activities.\textsuperscript{42}


\textsuperscript{42}Sec. 19 and 29 of the Foreign Exchange Regulation Act, 1973.
1. Carrying on in India, or the setting up of a branch or office or any other place of business in India, for the purpose of carrying on, any activity of a trading, commercial or industrial nature.

2. Acquiring either wholly or partly any business undertaking in India.

3. Purchasing shares of Indian companies or securities registered in India.

In 1973, Government framed guidelines under Section 29 of the Act to ensure broadbasing the ownership of existing foreign enterprises in India. The guidelines required that all branches of foreign companies (except Airlines and Shipping companies) should convert themselves into Indian companies and conform to the following principles:

- Manufacturing companies engaged in core industries or in industries requiring sophisticated technology or in predominantly export oriented industries (minimum exports being 60 per cent of total production) should increase Indian participation to:
  
  a. not less than 26 per cent if the specified activities account for not less than 75 per cent of total annual turnover, and
  
  b. not less than 49 per cent if the specified activities account for less than 75 per cent but not less than 60 per cent of total annual turnover or the exports account for more than 40 per cent of the total annual turnover.

- All other companies should bring down the foreign share-holding to 40 per cent.

Tea plantations were treated at par with companies
engaged in core industries. Airlines and shipping companies were dealt with on the basis of reciprocity. Companies not willing to abide by the above guidelines could wind up their business activities in India. 43

The dilution of foreign shareholding was to be brought about in the following manner:

- Primarily dilution had to be obtained by diminishing foreign shareholding; fresh capital would be allowed only where justified by an approved expansion or diversification project or established capital expenditure programme.

- First preference was for placement of shares on market for subscription by the public through a prospectus. Second was for issue to existing Indian shareholders on a 'rights' basis if the company was already widely held and a quoted company. (In such cases firm allotments to public financial institutions could also be made).

- Apart from these, firm allotments were permitted only in favour of employees and business associates within certain limits.

- Private transactions which would result in allotment of controlling interest or bulk

43 Guidelines placed on the Table of Parliament on 20 December 1973 as subsequently clarified and amplified by the Ministry of Finance. See Indian Investment Centre, Industrial Licensing and Foreign Collaboration, (New Delhi, 1976), pp 71-81 and 35 (i) to (iv).
shareholding to outsiders were not permitted. 44

In pursuance of these guidelines, 895 applications were received. All of them have since been decided. 45 Barring a very few companies (IBM, Coca Cola) all the foreign companies opted to work under the guidelines. Many of them (e.g. Indian Tobacco, Hindustan Lever, Brook Bond) found the escape routes of expansion and diversification useful to bring about the required dilution by raising fresh capital from Indian investors rather than by reducing foreign share-holding in absolute terms. Some like Colgate Palmolive found it profitable to reduce foreign share-holding to 40 per cent to get out of the strait-jacket of going into high technology or core area or export. Many (e.g., Lipton, Cheesborough Pond, Warren Tea, May and Baker) amended their Articles of Association or entered into perpetual legal agreements with their holding companies abroad 46 to retain management control in foreign hands despite majority Indian share-holding. 47


47 See India To-day (New Delhi), 15 August 1982.
The conditions for dilution of foreign equity are not enforced in 100 per cent Export Oriented Units, which are allowed foreign collaboration 'on merits of each case' even up to 100 per cent. In the Free Trade Zones, Kandla Free Trade Zone, and Santa Cruz Electronics Export Processing Zone, meant exclusively for exports, foreigners can set up wholly owned units.

Payment for technology and know-how can be made either in the form of annual royalty or as lump sum payment or both. The rate of royalty is normally limited to five per cent and for a period of five years. Higher rate and longer duration are considered where the technology involved is sophisticated or major part of the production is exported.

Foreign experts are allowed to be employed where necessary and they are allowed to repatriate a part of their earnings.

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50 For tax concessions, See Appendix I.
The number of foreign collaboration agreements approved has been going up in recent years; the total number to end of 1982 came to 7,272.\(^1\) The number of foreign collaborations approved in 1982 (540) was the highest ever, almost double the annual average of earlier years. The emphasis is, however, more on import of technology than on capital investment. Within the last ten years or so the proportion of collaborations involving foreign investment has come down from 19 per cent to 13 per cent. Out of 563 foreign collaboration agreements approved during the years 1969 to 1971 purely technical collaboration were 456, while out of 1144 agreements approved during the years 1976 to 1980, pure technical collaborations numbered 928.\(^2\)

**Capital Issues Control**

Control over Capital Issues is exercised in India under the Capital Issues (Control) Act, 1947,\(^3\) the rules made thereunder and the Capital Issues


(Exemption) Order, 1969, which are administered by the Controller of Capital Issues in the Ministry of Finance. The main object is regulation of investment in accordance with the objectives and priorities of planning.

Capital issues in the following cases require prior approval of the Central Government:

- Where the amount of capital to be raised in the market in a period of one year exceeds Rs. 5 million.
- Where shares are to be issued at a premium or discount.
- All bonus issues.
- All issues by MRTP companies.\(^5^4\)

The following are the more important criteria that need to be borne in mind:

**Debt**

- Debt/Equity ratio should be 2 : 1 \(^5^5\)
- Equity - preference ratio should be 3 : 1
- Promoters should subscribe the prescribed minimum, which is 15 per cent for an Issue upto Rs. 10 million, 12 1/2 per cent for an Issue upto Rs. 20 million and 10 per cent for an Issue exceeding Rs. 20 million.


\(^5^5\) Equity is deemed to include ordinary shares, share premium and preference shares not redeemable in under 12 years.

Debt includes all fixed interest bearing securities like debentures, loans except purely short term loans as well as preference shares redeemable in under 12 years.
- The rate of dividend on preferences shares should not exceed 11 per cent.\textsuperscript{56}

Issue of bonus shares should be in accordance with the following guidelines:

1. Bonus issue should be made only out of free reserves built out of genuine profits or share premium collected in cash; reserves created by revaluation of fixed assets are not permitted to be capitalised.

2. The residual reserves after the proposed capitalisation should be at least 40 per cent of the increased paid up capital.

3. Thirty per cent of the average profits before tax of the company for the previous three years should yield a 10 per cent rate of dividend on the expanded capital base of the company.

4. The company should not have defaulted in the payment of statutory dues of employees such as contributions to provident fund, gratuity, bonus.

5. Declaration of bonus issue in lieu of dividend is not allowed.

6. Bonus issues are not allowed unless all partly paid up shares, if any, are made fully paid up. The amount capitalised at any one time should not exceed the total paid up equity capital.

7. There should be a time-lag of at least 36 months between two successive announcements of bonus issues.\textsuperscript{57}

\textsuperscript{56}Clause 5 of the Capital Issues (Exemption) Order, 1969.

\textsuperscript{57}Guidelines for Bonus Issues of Shares" as revised on 18 August 1981, Economic Times, (New Delhi) 20 August 1981.
Capital Goods Control

Import Trade Control is exercised in India under the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order, 1955. The import control covers practically all articles including capital goods and these are included in Schedule I to the Imports (Control) Order. The import of scheduled items is prohibited except under and in accordance with a licence or a customs clearance permit issued under the said Order or an Open General Licence issued by the Central Government. The import licence for capital goods is issued after industrial licence has been obtained and foreign collaboration, if any, approved. The policy with regard to imports of machinery, components and industrial raw materials has been liberalised in recent years particularly in respect of 100 per cent Export Oriented Units, manufacturers, exporters and Export Houses. The 1983-84 Policy itself placed as many as 141 and 146 additional items of industrial raw materials and capital goods respectively on the Open General Licence while deleting only 20 and 14 items. In the Kandla Free Trade Zone and the Santa


59 See Arun Goyal, "Import Policy, Balancing Act", Economic and Political Weekly (Bombay) vol. 38, p.673.
Cruz Electronics Export Processing Zone all imports of capital goods, raw materials, components and spares are on the Open General Licence. The Import Policy and the Handbook of Import Export Procedures published every year under the authority of the Government of India give details of the policy and procedures in this regard as applicable for that year.

Company Law

The Companies Act, 1956, contains a chapter (Part XI) on foreign companies i.e. companies incorporated outside India but having a place of business in India. Within 30 days of setting up a place of business in India, these companies have to furnish the following particulars and returns to the Registrar of Companies:

1. A certified copy of the Charter, Statute, Memorandum and Articles
2. Full address of the registered or principal office
3. Particulars of directors and secretary
4. Particulars of persons resident in India authorised to accept service of notices or processes
5. Full address of principal office of business in India.

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61 Sec. 592-93 of the Companies Act, 1956.
They have also to file every year three copies of balance sheet and profit and loss account and an annual return in the form prescribed in "The Application of Section 159 to Foreign Companies Rules, 1975." This return has to give, inter alia, particulars of share-capital of members and debenture-holders, of indebtedness and of management. The Indian business of a foreign company is subject to the provisions of the Act relating to inspection of books of accounts, special audit or cost audit at the instance of Government, submission of information and explanations to the Registrar and investigation of affairs by Government. In the case of companies in which 50 per cent or more of share capital is held by Indians, other provisions of the Act may also be extended to their Indian business.

Monopolies and Restrictive Trade Practices

Article 39 of the Constitution of India contains a Directive Principle of State Policy to the effect that

62 Sec. 594 ibid.
63 Sec. 600 (3) (b) (i) ibid.
64 Sec. 600 (3) (b) (ii) ibid.
65 Sec. 591 (2) ibid.
66 Directive Principles of State Policy are principles contained in the Constitution of India which, though not enforceable by any court, are yet fundamental in the governance of the country with a duty imposed on the State to apply them in making laws.
ownership and control of the material resources of the community are so distributed as best to subserve the common good and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The Monopolies and Restrictive Trade Practices Act, 1969, has been enacted in pursuance of this Directive Principle. The Act seeks to check concentration of economic power, and to prohibit monopolistic and restrictive trade practices. The provisions relating to concentration of economic power apply to the following types of undertakings which are commonly referred to as MRTP undertakings:

1. An undertaking which by itself or together with its inter-connected undertakings owns assets of not less than Rs. 200 million in value.

2. A dominant undertaking, or interconnected undertakings constituting a dominant undertaking, which owns assets of not less than Rs. 10 million in value.

These undertakings are subject to the following constraints:

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67 A dominant undertaking means an undertaking which by itself or along with inter-connected undertakings produces, supplies, distributes or controls one-third or more of the total supply of goods or services of any description in the country (Sec. 2 (d) of the MRTP Act, 1969).

68 Sec. 20 ibid.
Every such undertaking has to get itself registered with the Central Government. 69

The establishment of a new undertaking which would become an interconnected undertaking of an undertaking of the first category needs prior permission of the Central Government. 70

An undertaking of either category, is prohibited from substantially expanding its activities by the issue of fresh capital or by the installation of new machinery or other equipment or in any other manner, 71 except with the approval of Central Government. Where, however, a substantial expansion licence is required under Sec. 13 (1)(d) of the Industries (Development and Regulation) Act, 1951 this approval under the MRTP act is not necessary, if the undertaking is not a dominant undertaking and the expansion relates to the production of the same or similar type of goods. 72

Any proposal for merger or amalgamation of an undertaking of the specified type with any other undertaking or the merger or amalgamation of any two or more undertakings which would result in the bringing into existence of an undertaking of the specified type requires the previous approval of the Central Government unless the two undertakings are not dominant undertakings, are already interconnected and produce the same goods. Similarly, the acquisition by an undertaking of the specified types of the whole or part of another undertaking by purchase, takeover or through intercorporate investment, 73 requires the previous approval of the Central Government. 74

69 Sec. 26 ibid.
70 Sec. 22 ibid.
71 It has been held that the words 'in any other manner' should be read ejusdem generis with the preceding words so that the expansion in any other manner should be through a method which is akin to or comparable with the issue of fresh capital or the installation of new machinery etc. (In re, Canara Bank, AIR 1973 Kerala 95).
72 Sec. 21 ibid.
73 Inter-corporate investment also requires separate approval under Sec. 372 of the Companies Act, 1956.
74 Sec. 23 of the MRTP Act, 1969.
The requirement of obtaining MNTP approval for setting up a new unit or for substantial expansion is relaxed for a period of five years from 1983 in respect of specified industries in the following groups provided the promoters bring in a contribution of 20 per cent of the project cost and a debt equity ratio of 2:1 is maintained. 75

- Pig Iron
- Alternate Energy Systems
- Electric Components and Equipments
- Industrial Machinery
- Machine Tools
- Inorganic Fertilizers
- Drugs/Drug Intermediaries
- News-print
- Portland Cement

The provisions regarding monopolistic trade practices apply only to monopolistic undertakings. 76 Being a monopolistic undertaking is not in itself, an offence; it is only when a monopolistic undertaking indulges in a monopolistic trade practice 77 and such monopolistic


76 A monopolistic undertaking is an undertaking, which together with one or two other undertakings produces supplies, distributes or controls not less than one-half of the total goods and services of any description in the country Sec. 2 (j) ibid.

77 A monopolistic trade practice means a trade practice which could have the effect of, maintaining prices at an unreasonable level by limiting, reducing or otherwise controlling production, supply or distribution of any goods or services, curbing competition or limiting technical development of capital investment to the common detriment, or allowing the quality of any goods or services to deterio rate Sec. 2 (i) ibid.
trade practice is against the public interest that the Central Government is empowered, after inquiry by the MRTP Commission, to pass such order as it thinks fit to remedy or prevent any mischief resulting from such trade practice.

The provisions regarding restrictive trade practices are of general application not limited to any particular types of undertakings. A 'restrictive trade practice' means a trade practice which could have the effect of preventing, distorting or restricting competition in any manner and, in particular, which tends to restrict the flow of capital or resources into the stream of production or which tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supply in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions. It has been held that the decision

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78 A permanent statutory body set up under Sec. 3 of the Act.
79 Sec. 31 ibid.
80 Sec. 2 (o) ibid.
whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will *per se* be a restrictive trade practice. Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual or probable effect. Applying these principles, the Supreme Court of India upheld the territorial and exclusive dealership restrictions imposed by a manufacturer of commercial vehicles on his dealers. It was held that in the diverse conditions of roads, population and demand in India, the restrictions really helped availability of vehicles in all parts of the country and expert after sales-service consistent with free competition. 31 Agreements containing certain categories of restrictive trade practices such as exclu-

31 *Telco v. Registrar of Restrictive Trade Agreements*, All 1977 30 973.
sive dealing agreements, tying arrangements, price fixing, price discrimination, resale price maintenance are required to be registered with the Registrar of Restrictive Trade Agreements appointed under Section 34 of the Act. Whether or not an agreement is registered, however, the MRTP Commission has an overriding authority to investigate and control a restrictive trade practice. The Commission can take cognizance of a trade practice either *suo moto*, based on its own knowledge or information, or on an application made to it by the Registrar or on a reference made to it by Government or upon the receipt of a complaint from any trade or consumers' association having a membership of not less than 25 persons or from 25 or more consumers. After investigation, if the Commission comes to the finding that there is a restrictive trade practice which, in its opinion, is prejudicial to the public interest, the Commission may make a cease and desist order, i.e., an order directing that the practice shall be discontinued or shall not be repeated and the agreement relating thereto.

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83 Sec. 33 ibid.

84 Sec. 37 ibid.

85 Sec. 10 ibid.
shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order. The Act raises a presumption that a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied that it is protected by one or more of the 'gate-ways' (protection of public against injury, specific and substantial benefit to the public, etc), mentioned in Section 38 of the Act.

**Industrial Approval Procedure**

The industrial approval procedure has been considerably streamlined in recent years. An inter-ministerial committee of Secretaries, called the Project Approval Board (PAB) has been placed in overall charge of this work. The earlier Committees dealing with different aspects of industrial approval, such as Licensing Committee, Foreign Investment Board, Capital Goods Committee, Licensing-cum-MRTP Committee, all now function as Committees of the Project Approval Board. The Board is serviced by a unified agency, called the Secretariat, for Industrial Approvals, set up in the Ministry of Industry, Department of Industrial Development. The entrepreneur may submit a composite
application for industrial licence and, as may be required, for foreign collaboration approval and capital goods clearance to the Secretariat for Industrial Approvals for being placed before the appropriate Committees. Such composite applications are sought to be cleared within 60 days in the case of non-MRTP companies and within 90 days in the case of MRTP companies. These time limits were actually observed in 74 per cent and 78 per cent of cases during the years 1981 and 1982. ⁸⁶

Under the hundred per cent Export Oriented Units Scheme, 1981 a single point clearance with regard to industrial licensing, foreign collaboration, import of capital goods, raw materials, etc. is given by the Board of Approvals under the Chairmanship of Commerce Secretary. Under this Scheme 262 Units with a fixed investment of rupees 12382 million were approved to end of December 1982 of which 19 had gone into production to end of February 1983. ⁸⁷

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⁸⁷ The Units under this Scheme are eligible for concessions like duty free import of capital goods, raw materials and components and exemption from payment of excise duty. The limit of 40 per cent on foreign shareholding also does not apply to them. They have to execute a bond for ten years. In the case of fast changing technology the bond period is reduced to five years. They have to give a minimum value addition of 20 per cent.
PAKISTAN

Industrial Policy and Licensing

The Statement of Industrial Policy of 1948 reserved three groups of industries, viz. munitions, hydroelectric power and manufacture of transportation and telecommunication equipment, for state ownership and allowed full freedom to the private sector in all other fields. The Industrial Policy Resolution of 1959 reiterated that main reliance for industrial development would continue to be placed on the private sector. The Second Five Year Plan (1960-65) stated:

No doctrinaire assumptions underline the Plan and neither an exclusively capitalist nor an exclusively socialist economy is postulated. The approach throughout is pragmatic.

After the separation of Bangladesh in 1971, however, there was a turning point. The People's Party Government that took over in 1971 was committed to give a socialistic orientation to economic policies and a large number of industrial units were taken over by the

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89 B.M. Bhatia, Pakistan's Economic Development (New Delhi, 1979) p. 86
state during the early seventies under the Economic Reforms Order, 1972. The martial law regime that followed in 1977, again reversed the process; it expanded the role of the private sector and confined the public sector primarily to the completion of ongoing projects. The Transfer of Managed Establishments Order, 1978, empowered the government to offer the former owners of nationalized industries shares or proprietary interests in the acquired establishments and a process of disinvestment was taken up. A demarcation formula announced in December 1977 opened heavy and basic chemicals and cement industries for development by the private sector and indicated the extent of participation between the private sector and the public sector for other heavy and basic industries.

Strategic industries — railroads, airlines, atomic energy, telephone and telegraph services, arms and ammunition and domestic banking — were reserved to the state. In other basic and heavy industries the following were earmarked for the public sector:


93 n. 91, p. 38.
Rolling of mild steel sheets
Manufacture of basic metals and their alloys
High Speed engines of above 1600 r.p.m.
Cotton textile, cement, sugar and mining machinery
Railway rolling stock
Ship building
Power and distribution transformers above 33000 volts
Assembly and manufacture of tractors and vehicles
Manufacture of basic petrochemicals
Public utilities
All other industries were left open to the private enterprise.

In 1979, the industrial approval procedure was streamlined and simplified. Industrial units involving investments upto Rs. 20 million with imported machinery not exceeding Rs. 10 million do not require sanction from any government agency, except in the following industries:

Beverages
Cosmetics and toilet products
TV, radios, tape recorders, cassette and tapes
Motor cycles and scooters (two wheelers and three wheelers) assembly
Air conditioners and refrigerators
Plastic products made from poly styrene, poly ethylene, poly propylene and synthetic resins
Drugs and pharmaceuticals
Natural and synthetic rubber products excluding tyres and tubes
Paper sacks
Aluminium doors and window frames
Tin containers
Vegetable ghee and cooking oil.

94 n. 92 p. 19-20,
In all other cases, industrial units require industrial approval.

Foreign Investment

The Statement of Industrial Policy of 1948 welcomed foreign investment in all areas, except those reserved for the state. It stipulated, however, joint ownership with Pakistani nationals in all new foreign industrial undertakings. In 13 specified industries the share of Pakistani nationals had to be at least 51 per cent, while in other it could be as low as 30 per cent. In a supplementary statement issued in September 1948, however, it was clarified that if the "Government were satisfied that the required amount of indigenous capital is not forthcoming, the balance might, with their approval, be subscribed by foreign investors." The amended policy announced in November 1954 permitted foreign share holding up to 60 per cent of the total investment in approved industries. The Industrial Policy Resolution of 1959 stated that foreign capital would be encouraged to flow into the country and participate in the industrial development. The nationali-

95 n. 88, p. 14
96 Bhatia, n 89, p. 86.
zation policies of the early seventies did not affect the foreign enterprises. The Foreign Private Investment (Promotion and Protection) Ordinance, 1976, delineated the following types of industries for foreign private investment:

Any undertaking considered desirable by government that either does not exist in Pakistan or is not being carried on on a scale adequate to meet the country's economic or social needs

Investment that contributes to the development of capital, technology or managerial skills

Investment that leads to the discovery exploration or better utilization of natural resources

Investment that strengthens Pakistan's balance of payments position.

Investment that increases employment

Investment that in other ways contributes to the country's economic development.97

The current policy is to encourage foreign investment in industries requiring sophisticated technology, or those which are highly capital intensive, or in collaboration with public sector agencies for the establishment of heavy capital goods industries. There are no rigid equity holding limits but joint ventures are favoured. Hundred per cent foreign shareholding is

97 Sec. 3 of the Ordinance.
allowed in the Export Processing Zone. Foreign capital is barred only from areas reserved for the state.

All proposals for new foreign investments as well as those for expansion of existing ones require approval through the Investment Promotion Bureau.

Royalty payments are normally sought to be limited to between 1 and 1.5 per cent of ex-factory sales and to periods not exceeding 5 to 10 years. In cases involving sophisticated technology, royalty payments upto 2 to 5 per cent of net sales may be allowed. The Regulation of Mines, Oilfields and Mineral Development Act, 1976 allows royalty at 12 1/2 per cent of well head value to encourage private foreign investment in oil exploration. Technical fees are allowed normally upto 3 per cent on resulting sales for five years; lump sum payments spread over a number of years may be easier.

Exchange Control

The exchange control introduced in undivided India in 1939 and extended to the sterling area in 1947 is continued under the Foreign Exchange Regulation Act, 1947 and the Foreign Exchange Rules, 1982.

98 Export Processing Zone set up at Karachi under the Export Processing Zones Authority Ordinance, 1980.

made thereunder. The Act is administered by the State Bank of Pakistan. All transactions involving foreign exchange require clearance from the Bank.\textsuperscript{100} Borrowing from abroad requires specific prior approval. Remittances on account of transfers of capital, profits, dividends, interest are freely allowed. Remittance of technical fees and royalties is prohibited in projects in which foreign shareholding exceeds 50 per cent but, in practice, exceptions are made.

**Capital Issues Control**

Capital Issues control is exercised under the Capital Issues Act, 1947. The Act is administered by the Controller of Capital Issues in the Ministry of Finance. All capital issues except those by public companies up to 5,000,000 require the approval of the Controller.

**Capital Goods Control**

Control of import of capital goods is administered by the Controller of Imports and Exports under the Import and Export (Control) Act, 1947, the Import Trade

Control Order 1976-77 and the Import Policy issued by Government every year. Goods are freely importable under two lists, the Free List containing items of industrial raw materials, machinery and spares mostly on the Open General Licence and the Tied List containing items tied to specified sources. The 1982-83 Import Policy further liberalised imports of capital goods; 90 more items of raw materials and capital goods were added to the Free List.101 Industrial plant and equipment costing upto 10 million rupees may be freely imported against cash. Export oriented units may import machinery and equipment out of their foreign earnings.102

Monopolies and Restrictive Trade Practices

The Monopolies and Restrictive Trade Practices Ordinance, 1970, is designed to counter the concentration of economic power and restrictive trade practices. The Act is administered by the Monopoly Control Authority set up in 1972.

102 *n, 99, p.29*
Monopolistic power is defined as the ability of one or more sellers in a market to set non-competitive prices or restrict output without losing a substantial share of sales, or the ability to exclude others from the market. The following must be registered with the Monopoly Control Authority:

1. Any firm that produces, distributes, sells or supplies a third or more of goods or services in a province.
2. Two or more related enterprises in the same line of business producing, distributing, selling or supplying 20 per cent or more of goods or services in a province.
3. Any firm (not owned by a public company) whose assets are of the order of Rs. 30 million or more.
4. Any concern fixing minimum resale prices with distribution rights for more than one company in any province.
5. Financial undertakings associated with the above.
6. Mergers and acquisitions resulting in the above conditions and restrictive sales and licensing agreements.

Price fixing among competitors and market sharing are forbidden. Price fixing agreements between suppliers and dealers of products and services are illegal. Sales or distribution agreements that prohibit dealers from supplying other goods or that limit those through whom the distributor may sell such goods must be registered. Companies that establish resale price minimums for
their goods with retailers and whole-salers must register. Suppliers and dealers may not fix unreasonable resale prices. The Monopoly Control Authority will order discontinuation of such practices.

**Company Law**

The Companies' Act, 1913, as adapted under the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 contains no provisions discriminating against foreign investors. Companies incorporated outside Pakistan must, within one month of setting up business in Pakistan, file with the Registrar:

- A copy of the charter or constitution of the company
- Full address of its principal or registered office
- A list of directors and manager
- Names and addresses of persons authorized to accept notice on behalf of the company
- Address of the principal place of business in Pakistan.

These companies have also to file three copies of balance sheets with the Registrar.

**Industrial Approval Procedure**

Applications for industrial approval have to be made to the Investment Promotion Bureau which is serviced

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103 *Ibid., p. 12*


105 Sec. 277 of the Companies Act, 1913.
by the Ministry of Industries and Natural Resources. The Bureau screens the applications and sends its recommendations to the Central Investment Promotion Committee. Final confirmation rests with a Cabinet Committee. After industrial approval has been obtained clearance from Capital Issues, Capital Goods angle are, more or less, automatic.

SRI LANKA

Industrial Policy

In the first few years after independence Sri Lanka followed a policy of *laissez-faire* though the State had to take initiatives in setting up industries because of lack of response from the private sector. In mid fifties the 'commanding heights of economy' in relation to the manufacturing sector were reserved for the public sector. Government defined areas of public investment. Basic heavy industries like iron and steel, chemicals, cement, fertilizers, textiles and sugar were reserved for the state, while light consumer goods manufacturing was left to the private

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The Ten-Year Plan launched in 1956 aimed at bringing about a socialistic pattern of society; it reserved large and medium scale industries exclusively for the state sector. This policy was generally continued till 1977 with marginal changes. In 1977 sweeping changes were made in the industrial and investment policies designed to reduce state control, encourage private investment and enterprise and allow market forces to have more influence on the economy. All state monopolies for the import of yarn, textiles, oil, fertilizer, milk, medicines, tractors, etc. were abolished. State control on industry was reduced to the minimum and the approval procedure was simplified. In the words of the Minister of Finance and Planning, the new strategy was directed towards transforming the economy 'cribed, cabin'd, and confined' by controls more controls, and still more controls into a market-oriented one.

108 Satchi Ponnambalam, Dependent Capitalism in Crisis, (New Delhi, 1981), p. 33
109 Ibid., pp. 38, 41
110 Ibid p. 148
Foreign private investment is encouraged in industries with large technology gaps, big export potential, high proportion of local inputs and large employment generation potential. The government have established a large Free Trade Zone on the outskirts of Colombo under the administration of a statutory body, the Greater Colombo Economic Commission (GC&EC) set up under the GC&EC Law (No. 4) of 1978. The Act empowers the Commission to enter into agreements granting exemption from any law (Inland Revenue Act, Customs Ordinance, Exchange Control Act, etc.) or modifying the application of any such law.112

All investment proposals in GC&EC area must be cleared from all angles by the GC&EC as a single agency. Outside GC&EC area such proposals have to be approved by the Foreign Investment Approval Committee.

Foreign Investment

In October, 1958, the Government issued a policy statement welcoming foreign private capital where 'local capital has not already effectively established itself or is not likely to do so in the near future; where there is collaboration with local private enterprise or where foreign private enterprise undertakes the manufacture of products for export.'113 In 1972, the government issued a White Paper recognizing the important role oficha Ponnambalam, n. 108, p. 34.

112 Sec. 17 of the GC&EC Law, 1978.
113 Satchi Ponnambalam, n. 108, p. 34.
private foreign capital in economic development. The new policy of 1977 brought about significant changes. For enterprises in the GCSC area, there are no limits on equity holdings of foreign investors. Outside the GCSC area foreign private investment is normally required to take the form of a joint venture with minority share-holding i.e., at least 51 per cent with Sri Lanka partners. Departures from this general rule are made in certain cases. Foreign shareholding may go up to 70 per cent in the case of 5-star luxury hotels of over 200 rooms and 60 per cent in the case of construction projects undertaken for the Mahaweli Project. On the other hand, where there is no significant transfer of technology foreign share-holding is limited to 25 per cent.  

Royalty payments, technical service fees and management fees are allowed on case by case basis depending on the net benefit expected to accrue to the country. Employment of foreign personnel is also


allowed depending on the specific requirements of each project and such foreign personnel are permitted to remit upto two thirds of their earnings abroad.\textsuperscript{116}

\textbf{Exchange Control and Capital Goods Control}

The new policy of 1977 included unification of the exchange rate, relaxation of exchange control, and liberalisation of import trade control.

Repatriation of capital and remittance abroad of savings of foreign personnel require only formal clearance from the foreign exchange angle from the State Bank of Sri Lanka; remittance of profits and dividends does not require even such clearance.

Capital goods items like machinery, equipment and spares upto Rs. 7,00,000 are free of import licensing. Imports over and above this need import licence which is liberally granted. In the GCEC area all imports, exports, share and dividend transfers are exempt from import control and exchange control procedures.

\textbf{Approval Procedure}

In the GCEC area, the Commission is a single agency empowered to give a total clearance to an invest-

\begin{footnote}{\textsuperscript{116} Indian Institute of Foreign Trade, \textit{Import Export Structure and Trade Expansion in South Asia}, (New Delhi, 1982), pp. 104, A69, A70, A81.\end{footnote}
ment proposal. Outside the GCWC area total project clearance is given by the Foreign Investment Advisory Committee which is serviced by the International Economic Cooperation Division of the Ministry of Finance and Planning and which is responsible for co-ordinating all activities relating to foreign private capital in Sri Lanka outside the GCWC area.\textsuperscript{117}

To end of November 1982, the GCWC had approved 169 investment proposals with a total investment of Rs. 6,294 million and a foreign investment of Rs. 4,115 million. Agreements had been signed in 88 cases involving a total investment of Rs. 3,335 million and a foreign investment of Rs. 2,415 million. Fifty one Units had gone into production. During the same period the Foreign Investment Approval Committee had approved of 558 investment proposals with a total investment of Rs. 15,706 million and a foreign investment of Rs. 10,156 million.\textsuperscript{118}

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\textsuperscript{118}Central Bank of Ceylon, \textit{Bulletin}, (December 1982), Tables 62 and 63.
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Industrial Policy

In the first few years after liberation Bangladesh adopted a policy of almost total state control of industry. All abandoned industries having a fixed asset value of 1.5 million takas or more were taken over and all major industries including banking, insurance, jute, cotton as well as other basic and heavy industries were nationalized. In 1972 certain ceilings were imposed on private investment; new investment was to be allowed only in units with assets not exceeding 2.5 million takas, which could then grow up to only 3.5 million takas through re-investment of profits.

The industrial policy of 1974 reserved important industries specified in 18 sectors for the state and raised the ceiling for private investment to 30 million takas.

The change of government in 1975 saw a total reversal of policy. Industries reserved for the public sector were thrown open to joint participation between public and private enterprise with majority public share-holding.\textsuperscript{119} The ceiling on private investment

was raised from 30 million takas to 100 million takas. The new policy provided also for dis-investment of most of the industrial units nationalised in 1972.\textsuperscript{120}

The Two-Year Plan launched in 1978 aimed, inter alia, at stimulating the private sector, particularly in export and agro-based industries.\textsuperscript{121} The industries were placed in three groups - a Reserved List containing seven sectors exclusively reserved for the public sector, a Concurrent List, containing ten sectors where private sector was permitted in collaboration with the public sector; and an Investment Schedule containing 194 types of industries under 14 broad groups open entirely to the private sector.\textsuperscript{122} The ceiling on private investment was totally waived.

In June, 1972, Government announced a new industrial policy. According to this policy, the role of

\textsuperscript{120}By December 1976, 506 Units had been handed over to buyers or returned to previous owners. See, Shimajuddin Ahmed, Bureaucratic Elites, Bangladesh and Pakistan, (Dacca, 1980), p. 184.


\textsuperscript{122}Indian Institute of Foreign Trade, Import Export Structure and Trade Expansion in South Asia, (New Delhi, 1982), p. 6.
public sector is confined to basic, heavy and strategic industries. The Reserved List is cut down to six sectors: arms and ammunitions, atomic energy, air transport, telecommunications, generation and distribution of electricity and mechanised forest extraction. The Concurrent List is enlarged to the following thirteen sectors and both public sector corporations and the private sector are permitted to set up industries in this list.

1. Jute Industry
2. Cotton textiles
3. Sugar
4. Paper and Newsprint
5. Iron and Steel (excluding re-rolling mills)
6. Ship building and heavy engineering
7. Heavy electrical industries
8. Mineral oil and gas
9. Cement
10. Petrochemicals
11. Heavy and basic chemicals and basic pharmaceuticals
12. Shipping
13. Appliances and equipment for telecommunication services.

All other sectors of industry fall in the Investment Schedule open entirely to the private sector.

The new policy has also expanded the list of free sectors where no formal permission is required to set up industry if the entrepreneur can import machinery under suppliers' credit on acceptable terms by adding 19 more sub-sectors. Normally investment proposals over
40 million takas or those with imported raw materials' content of over 20 per cent require prior approval.\textsuperscript{123}

**Foreign Investment**

According to the industrial policy statement of 1972, foreign direct investment was allowed only in collaboration with the public sector corporations with a minority shareholding of 49 per cent or below. No specific fields of activity were, however, excluded from such foreign participation and public enterprises were also permitted to enter into management contracts with foreign investors. In the revised industrial policy of 1974 private foreign investment was allowed in joint ventures with domestic private investors mainly, but not exclusively, in projects where there were technological and managerial gaps.\textsuperscript{124} After the change over of government in 1975, the Member in-charge of Planning on the President's Council of Advisers stated that the government policy was to extend all possible assistance and incentives to foreign investors with a view to attracting foreign investment.\textsuperscript{125} According to the Foreign Private Investment (Promotion and Protection) Act, 1980, \textsuperscript{123}Government of Bangladesh, *New Industrial Policy* (Dhaka, June, 1982).

\textsuperscript{124}Nurul Islam, n. 119, pp.222-23.

\textsuperscript{125}Bangladesh Observer, (Dhaka) 27 November 1976.
participation of foreign capital may be sanctioned for the setting up of any industrial undertaking:

a) which does not exist in Bangladesh and the establishment whereof is, in the opinion of government, desirable;

b) which is not being carried on in Bangladesh on a scale adequate to the economic and social needs of the country;

c) which is likely to contribute to 
   i) the development of capital, technical and management resources of Bangladesh or
   ii) the discovery, mobilization or better utilization of the national resources, or
   iii) the strengthening of the balance of payments position of Bangladesh, or
   iv) the increasing of employment opportunities in Bangladesh, or
   (v) the economic development of the country in any other manner. 126

In the Export Processing Zone, Chittagong, hundred per cent foreign owned units are allowed. Between July 1982 and February 1983, the government approved of 3 foreign investment proposals involving outlay of 811 million takas. 127

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126 Sec. 3 of the act.
Foreign collaboration proposals require government approval on the same lines as the licensing of domestic industries.

Exchange Control and Capital Goods

The country is divided into Developed and Less Developed areas. In Less Developed area no import licence is required for import of capital machinery and spares.

All post tax dividends, approved royalties and technical fees and 50 per cent of savings of foreign nationals (subject to a maximum of £300 per month) are allowed to be remitted abroad.

Capital Issues

Issue of capital or raising of loans against assets requires formal approval of the Controller of Capital Issues in the Ministry of Finance.

Company Law

Companies Act 1913 mentioned under Pakistan is in force in Bangladesh.

Approval Procedure

Under the new policy of June 1982 the approval procedure has been streamlined with time limits for clearance of proposals.
Investment proposals of over 40 million takas or raw materials import content of over 20 per cent, as well as those involving foreign investment have to be made to the Department of Industries for consideration by the Investment Board of which the Minister of Industries is the Chairman. The Board can clear proposals up to 100 million takas of capital investment; proposals beyond that limit are sent with the Board's recommendations, to the Executive Committee of the National Economic Council for approval.

CONCLUSIONS

This brief analysis brings out a rather complex situation in the matter of industrial policies followed in these countries. State capitalism has often been an act of faith as with the M.E.P. (Mahajana Eksath Peramuna) Government in Sri Lanka in the mid-fifties, the Peoples' Party Government in Pakistan in the early seventeens, the Awami League Government in Bangladesh after liberation and the Congress Government in India to a greater or lesser degree all through. State capitalism has often been equated with socialism or socialistic pattern of society. What makes the situation complex is that such professions have been more in the nature of political
slogans not always fully coterminous with the actual policies and practices which have tended to be affected more and more by economic pragmatism. While the latter has contributed, particularly in the last few years, to a considerable amount of liberalization of industrial policies and the multitude of controls built around them, the former has made it necessary that the framework of controls is generally not removed altogether, even where the controls are reduced to mere irritants without serving any useful purpose.

The analysis clearly brings out that there is a growing tendency in these countries to liberalize policies relating to ownership of industry, industrial licensing, import trade control, etc. Attempts have also been made to streamline the approval procedures so as to ensure that the investor is not made to run from pillar to post, nor made to wait for indefinite periods of time. Yet the overall framework of control regulations, in India particularly, remains frightening which is enough to turn away a foreign investor at the very threshold without making any attempt to see and understand the exemptions that have been made and that have, in effect, eroded the control mechanism of its
substance. To give a specific example, the Government of India has been re-endorsing licensed capacities on the basis of best production of a certain number of years almost automatically, while continuing to swear by the existing industrial licensing procedure.

In Pakistan, Sri Lanka and Bangladesh there have been frequent changes of Government resulting in equally total changes of industrial policy. In India, on the other hand, but for a short break, the same party has been in power all along. In the matter of industrial licensing and regulation this fact seems to have become a source of weakness rather than strength. The Government's political and ideological commitment to the original policy framework of 1948 and 1956 is so strong that even while following a highly pragmatic policy in the last few years in all aspects of industrial regulation it has not found it possible to take full advantage of such liberalism. Nor has it been found expedient to sell these new policies boldly. In fact, the presentation has generally been apologetic in an attempt to make out that the changes made are only verbal or minor and the original policy framework is intact. As Pradhan points out, the share of public enterprise in

GDP in India and Korea is almost the same, i.e., around 9 per cent, yet one is avowedly socialist and the other avowedly capitalist. It is the public affirmations that create the image of investment climate which matters more to the foreign investor rather than the real content of state practice which can be found out only on a close analysis.

The approach of these countries to foreign capital has also not been inimical, particularly in recent years. All of them have welcomed foreign capital, especially in export-oriented and high technology areas. They have gone out of their way in offering concessions through legislation as well as in state practice. Yet, here again certain centrals designed more in fulfilment of ideological or political commitments have tended to put off the foreign investor at the very threshold. All these countries have shown some sort of preference for joint ventures or for foreign equity holdings being kept within certain limits. Unlike commercial loans, the direct investment of foreign private capital involves no fixed interest.

liability or debt amortization or risk of exchange fluctuations; it also brings in technological and managerial skills on easier terms. It is also fairly well known that the size of foreign equity holding is no more relevant to the factum of management control, it can, as well, be secured through a variety of devices with but little equity holding. Raymond Vernon stressed the point that, "any one of the activities associated with foreign direct investment could conceivably be performed by means other than the direct investment route." Yet these countries continue to place restrictions on direct foreign investment even while going in for expensive commercial bank loans. The FERA guidelines in India constitute a typical example. It has been brought out that in their actual implementation these guidelines have neither brought about any sizeable reduction of foreign holding in absolute terms nor, necessarily, transferred management control to Indian hands. These have also not resulted in reducing the outflow of investment incomes; if anything, these have only grown further. The guidelines seem to

130 Raymond Vernon. The Economic and Political Consequences of Multinational Enterprise: An Anthology (Boston, 1972), p. 44.

be only an irritant serving political or ideological expediency.

All that is not to say that the transnational corporations, which constitute an important vehicle of direct foreign investment, do not deserve the criticism that has been levelled against them. Their practices, like transfer pricing, tax avoidance, over-invoicing, pay offs and even political subversion are well documented for any serious denial. The role of the International Telegraph and Telephone Corporation in the overthrow of the Allende regime in Chile still continues to spread shock waves of fear in many a country in the developing world. It is also true that the transnationals, by and large, go into high profit areas like luxury consumer goods and help poor countries build what has been called 'glass curtain economies.' These factors fully justify the building up of appropriate systems to monitor and control the activities of these corporations. But they do not make out a case

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131 Economies which give access to a small fraction of the population to all sorts of luxury goods while bulk of the population with no purchasing power merely watch the consumption patterns of the privileged few. See, Gautam Mathur, "Planning for a Mixed Economy", State Enterprise, vol. I (Oct. - Dec. 1978), p. 344.
for either a total abolition of the transnational corporations or elimination of direct foreign investment with its attendant advantages. The United Nations Commission on Transnational Corporations has been grappling with the formulation of a Code of Conduct for TNCS. It is, however, inconceivable in the present world situation that such a Code, even if formulated in the near future, could constitute a set of binding rules of conduct. In one of its recent Reports the Public Accounts Committee of the Indian Parliament pointed out with reference to this proposed Code.

While the Committee welcome this development, they would like to emphasize that no such Code can be a substitute for our own effort. It is important that compliance with our laws, rules and procedures by these foreign companies is ensured by our own enforcement agencies and the laws, rules and procedures themselves are constantly reviewed and kept in tune with our pronounced policies and national objectives.132

In the specific case of malpractices, like over invoicing, transfer pricing, tax avoidances noticed by the Public Accounts Committee in India, as mentioned


133 India, Lok Sabha Secretariat, Twenty-Eight Report of the Public Accounts Committee (Seventh Lok Sabha), (New Delhi, 1981), p. 33.
elsewhere in this study, it has been found that the fundamental problem is one of gathering adequate information in respect of the operations of the transnational corporations. The malpractices can be checked if proper information systems are built and invoked with a degree of standardization of the accounting forms and returns to be filled by these corporations with various agencies administering national laws. From that point of view it will be highly useful if these countries could take up some sort of regional initiative to supplement the efforts of the UN Commission and the UN Information and Research Centre on TNCs. A Regional Tax Centre for these countries has been suggested later on in this Study. Since information gathering is very closely linked with tax administration this particular task of collection and exchange of information on the operations of TNCs could as well be entrusted to the Regional Tax Centre. This will help the countries in this region in better administration of their industrial as well as fiscal policies while at the same time removing some of the unnecessary irritants in their overall policy framework.
One more point that deserves mention is the case by case approach often adopted in these countries. Even while liberalising industrial policies in recent years exemptions or concessions have, in many cases, been sought to be made in individual cases on their merits. This case by case approach, apart from creating a lot of administrative work and bureaucratic red-tape creates also a psychology of fear and suspicion. It is suggested, therefore, that a conscious attempt should be made to administer industrial policies more and more by general pre-planned policies and less and less by case by case determinations.

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