CHAPTER VIII
CHAPTER VIII

TAKING THE MULTINATIONALS

(A) Existing Regulations on Foreign Private Investment and the Need for a Code of Conduct

In the preceding chapters a broad analysis was attempted on the political, economic, social, cultural and environmental effects of the activities of the transnational corporations, besides a brief discussion upon aspects relating to labour, employment and industrial relations. In reality, the effects in any one sphere, namely, political or economic, or social, do not occur independent of the other spheres. Thus political intervention is not resorted to merely for the desire of overthrowing a Government for political purposes unless so directed by a deliberate home country's policy. Normally, political interference takes place with a view to gaining or retaining an economic advantage or preventing an economic damage. Likewise, a drive towards growth and profitability involves the social, cultural fields resulting in distortion of consumer tastes, or creating a special elite with corporate loyalties. Therefore, any control mechanism aiming to minimize or eliminate the adverse
effects of these activities cannot be directed solely to one aspect of the activities to the exclusion of others. Nor can this control mechanism be of a universally international character in a standardized form applicable to all transnational corporations irrespective of their size, character and importance to the political economies where they are operating and the needs and requirements of development of those countries. Further, no international action in a mandatorily legal form is feasible in the present international climate of sensitive nationalistic approaches to international problems, which assume an acute form where transfer of resources from the rich to the poor, from the developed to the underdeveloped, is involved. The realisation of these facts made the Group of Eminent Persons to frame their recommendations for actions at the national level, as well as the international level. ¹

In framing rules or a code of conduct for transnational corporations one reality that cannot and should not be ignored is that the transnational corporations have come to stay as world entities emphasizing the economic inter-dependence of the planet, and today they possess the tools necessary for advancing that development process. The declaration on international development and multinational

¹ See Annexure I.
corporations of the OECD draws attention to the fact that the transnational corporations could play an important role in the international investment process. This is echoed by the Pacific Basin Charter on International Investment.

In the Lome Convention, in Article 26 on Industrial Co-operation, one of the objectives stated is to encourage community firms to participate in the industrial development of the member-States.

The ANDean Foreign Investment Code (Decision 24) also emphasizes that foreign capital can make a considerable contribution in the economic development of Latin America provided it stimulates capital formation in the country where it is established.

If, in spite of this a number

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Note: The above document includes the Declaration, an annex entitled "Guidelines for Multinational Enterprises" and decisions of the Council on intergovernmental consultation procedures, national treatment and international investment incentives and disincentives.


4 ACP-EEC Convention of Lome, 23 February 1975, Article 26(g).

5 Commission of the Cartagena Agreement, Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licences and Royalties, para 2.
of distortions are seen in the effects of the activities of these corporations in the political, economic and social and cultural, and other fields, it only underscores the absence of any proper, effective and adequate rules and regulations concerning the conduct of these corporations. National regulations are there in the developed and developing countries dealing with foreign investments but no developed or developing country has as yet enacted a comprehensive code for dealing with the transnational corporations in a single comprehensive instrument. Various aspects of their activities are dealt with in fragmented pieces of legislation. For example, in India, the Companies' Act deals with the rules and regulations to be observed by foreign companies in regard to the complying with the provisions of that Act; 6 the Foreign Exchange Regulation Act is concerned with certain matters relating to equity and loan arrangements by foreign companies in India and use of foreign trade marks and patents; 7 the Foreign Money Contribution Act 8 prohibits contribution by foreign companies;

6 Section 591 of the **Companies Act, 1956** (1 of 1956).
8 Foreign Contribution (Regulation) Act, 1975.
the Industrial Development and Regulation Act$ lays down regulations for licensing for establishing a business in scheduled industries; the Control of Capital issues Act$ relates to the issue of capital and conversion of companies' shares into capital; the Monopolies and Restrictive Trade Practices Act$ details the regulations for curbing the concentration of economic power by industrial undertakings; the Patent and Designs Act$ provides for the registration of patents including patents of foreign companies; the Trade Mark and Merchandise Act deals with registration of Trade Marks; the Arbitration Act$ lays down the procedure relating to arbitration; and finally the Constitution of India. From this plethora of legislation, except FERA and the Foreign Contribution Act, all other Acts are common to both national and foreign enterprises

9 The Industries (Development and Regulation) Act, 1951 (65 of 1951).
14 The Arbitration Act (X of 1940).
and no single enactment deals with transnational corporations as such. Even the Foreign Exchange Regulation Act defines only a foreign company. 15 The Foreign Contribution Act alone has a definition for multinational corporations for the purpose of placing a ban on such corporations' financing persons, or individuals, or bodies, for prevention of

15 Foreign Company for the purpose of the Foreign Exchange Regulation Act, 1973 is referred to in section 23(1) and explanation thereunder as follows:

"...a company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent, or any branch of such company...."

'Explanations:

....

(b) "Company" means any body corporate and includes a firm or other associates of individuals;...."
The position is almost similar in most developing countries. The legislation dealing with foreign direct investment does not touch upon the activities of the transnational corporations. The statement annexed gives the pattern of foreign investment regulations in selected developing countries, as compiled by the Centre on

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16 A multi-national corporation for the purpose of the Foreign Contribution (Regulation) Act, 1975 has been referred to in Explanation under section 2(l) of the said Act, as follows:

"Explanation:

....a corporation incorporated in a foreign country or territory shall be deemed to be multi-national corporation if such corporation

(a) has a subsidiary or a branch or a place of business in two or more countries or territories; or

(b) carries on business or otherwise operates in two or more countries or territories."

Note: In fact, in India there is no uniform definition of the term 'foreign company'. Section 59 of the Companies Act, 1956 (1 of 1956) does not define a foreign company but refers to companies incorporated outside India having place of business in India, and even this definition is not applicable in the case of Foreign Exchange Regulation Act, 1973 (46 of 1973). For the purpose of the Income-tax Act of 1961, a foreign company is defined as not being a domestic company.
transnational corporations. 17 Even legislation relating to direct foreign investment is oriented towards offering investment incentives rather than placing restrictions. The only developed legal instrument on the subject can be traced to the Latin American countries, which have cut down the tax incentives and have laid down coherent regulatory mechanism relating to foreign enterprises operating within the sub-region in the ANDEAN Code. 18

Apart from the absence of any specific legislation on the activities of the transnational corporations, existence of un-coordinated enactments dealing with specific aspects of foreign investment, and the absence of adequate machinery to administer these enactments have tended to create a certain amount of uncertainty about the rights, duties, and obligations, of these corporations. They have also placed the Governments concerned in a weak position while taking a total view in regard to screening and admission of these corporations for entry into the economic process of the country. Likewise, there is no uniformity in the matter of submission of disputes arising from agreements with foreign enterprises. In some cases, the agreements refer to municipal law as the proper law and the domestic tribunals as the proper forum. In some other cases, the disputes are to be resolved in accordance with international law by a court outside the jurisdiction

17 See Annexure IX.
18 The Andean Foreign Investment Code.
of the home and the host countries. In some other cases, the disputes are to be resolved in accordance with the collaborator's law and in foreign courts.

In India, according to information furnished by 44 public undertakings to the Parliament Committee on Public Undertaking, in 19 out of 74 foreign collaboration agreements, the venue of arbitration has been outside the country. In another 19 cases, the law applicable for arbitration was the Indian Arbitration Act, while in 36 cases it was International Chamber of Commerce Regulations, and in 5 cases, according to the law of the collaborators' country. In view of the conflicting regulations it is necessary to explore, at least in a broad outline, in what manner the national regulations must be framed with a view to achieving the objectives of minimising the abuses and controlling the conduct of the transnational corporations to accord with the politico-economic goals of the society.

At the regional level, two significant developments have been made in regard to the formulation of norms for controlling the activities of the various enterprises, though even here there is no specific code or set of rules applicable solely to the transnational corporations. The

20 Ibid.
leading example of the regional attempt to have an agreement among member countries for limiting influence of foreign capital is that of the ANDEAN Foreign Investment Code (Decision 24) made under the Cartigina Agreement of 1966. Under this agreement, the member countries restricted the total foreign ownership in enterprises within the sub-region, and laid down a rule for majority participation by Latin American countries in any joint venture with foreigners. Rules have also been framed for repatriation of funds by foreign companies and for disinvestment of foreign companies where national skills and investment have developed. So far this is the only agreement on regional basis having a common code for the establishment and regulation of activities of foreign enterprises. There have been attempts for forming similar groupings, for example, by ASEAN (Association for South East Asian Nations) countries to achieve a common trade and investment policies, but no concrete result has emerged so far. The European Economic Community, established by the Treaty of Rome, is mainly directed towards the economic integration of the countries rather than deal with the problems of direct foreign investment within the Community. However, the European Economic Community made some useful attempts in

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21 Peru, Columbia, Bolivia, Ecuador and Venezuela (Chile withdrew from the 'Group' in October 1976).
evolving a European Common Law which may possibly, if successfully implemented, prove effective in harmonization of the company law regulations within the community. This may prove to be a precursor of an international company law applicable to international corporations which will be the real multinational corporations, owing allegiance to a world body and not to any single State. Among other regional agreements, entered into for establishing a Common Market or for forming free trade areas, may be mentioned the East African Community set up in 1967, to regulate the industrial and commercial relations among the three countries of the region providing, inter-alia, for a Common Commercial Law and for regionally owned corporations; and the Community and Common Market - CARICOM - established among 13 countries of the region in 1973, again aiming at creating a Common Market regime with provisions for a common approach towards fiscal incentives, a common law for trade marks, patents, restrictive business practices, and development of joint products. Even though these regional agreements could provide for specific rules for transnational corporations no formulation has as yet been attempted.

A specific formulation for transnational corporation on a regional basis is the well-known Organisation
for Economic Co-operation and Development (OECD) Guidelines, laying down specific guidelines for regulating the conduct of multinational corporations and the policies to be adopted by the member countries towards these corporations. These guidelines deal with most of the problems that arise from a study of the impact of the transnational corporations' activities. They suggest the general policies that should be adopted by the transnational corporations, such as, giving due consideration to the member countries' aims and priorities, favouring close co-operation with the local community, refraining from corrupt practices and abstaining from improper involvement in the local political activities. Specific provisions are also contained in these guidelines that the rules that should be observed in regard to restrictive trade practices, paying due regard to balance of payment and credit policies of the host countries, furnishing necessary information to the taxation authorities, refraining from making use of facilities like transfer pricing to lower tax liability, observing a progressive attitude towards employment and industrial relations, endeavouring to ensure that their activities fit into the scientific and technological capacities of the countries where they operate, and developing local scientific and technological capacities. Though not binding the only

22 OECD Declaration, n. 2.
instrument formulated so far, nevertheless represents a joint philosophy and a common approach on the part of the group of countries accounting for most international investments, it should, as the Secretary General, E. Lennep, said, have an influence even beyond the OECD areas. 23

At the international level, there has been as yet no international instrument dealing with the transnational corporations. The first effort in this direction started with the report from the Group of Eminent Persons - Impact of Multinational Corporations on Development and International Relations. However, attempts have been made at the international level, even prior to the resolutions of the Economic and Social Council at its fifty-seventh session, to deal with the subjects relating to activities of transnational corporations and private foreign investment. In 1948, the United Nations considered international investment and restrictive trade practices, as reflected in Articles 12 and 46-54 of the Havana Charter. 24 A convention relating to restrictive business practices was prepared and submitted to the Economic and Social Council in 1953, but it remained


24 see UN Doc. (sales no.) 1948 III D.4; "The United Nations Conference on Trade and Employment held at Havana from 21-24 March 1948: Final Act and Related Documents".
unconsidered. The principle of permanent national sovereignty over natural resources have been the subject matter of many General Assembly resolutions. 25

The United Nations Conference on Trade and Development has been conducting a series of studies in relation to some aspects of private foreign investment and activities of transnational corporations. The UNCTAD Conference at its second session in 1968, called for a work programme on restrictive business practices and for a study of the issues on flow of private capital to developing countries. The issue of transfer of technology to developing countries is also receiving special attention. Following General Assembly resolution 1713(xvi), and Economic and Social Council resolution 834(XXXIII), the Department of Economic and Social Affairs of the UN examined in 1961 various aspects of the problem, particularly with those concerned with patents and unpatented technology. In 1970, the UNCTAD initiated a programme of work for revision of international patent system and for framing a Code of Conduct for Transfer of Technology. The harmonization of tax problems by undertaking necessary studies on tax treaties has been carried out right from 1968 by an Expert Group, assisted by the UN Department of Economic and Social Affairs.

25 Resolutions No. 626(vii), 1803(xvii), 2138(xx), 2286(xxiii), 2692(xxv), 3016(xxvii), 3171(xxviii), 3175(xxviii).
In considering these problems, the related questions of transfer of pricing and tax evasion have also been examined. Following the adoption of resolution (UN Resolution No. 2918 (xxvii)), the United Nations Commission of International Trade and Law (UNCITRAL) has taken up the legal questions related to transnational corporations and international trade law. Up to now, however, no code has been prepared, possibly because UNCITRAL is waiting for the Commission on Transnational Corporations to formulate the proper code of conduct which would then be considered for purposes of framing the appropriate legal instrument. Furthermore, the regional studies have also been made though on a limited scale by the Economic and Social Commission for Asia and the Pacific, the Economic Commission for Latin America, Economic Commission for Africa on problems related to the impact of transnational corporations on their respective regions as a whole, and on certain countries or industries. The United Nations Industrial and Development Organization (UNIDO), and the International Labour Organization (ILO), have also been rendering technical cooperation to requisite governments in areas on the related subject. The Food and Agricultural Organization of the United Nations (FAO) has been collaborating with the transnational corporations and in addition carrying out specific programmes in which the transnational corporations
play a central role, such as the industrial co-operative
programme. The enumeration of these steps should not
minimize the importance of the General Agreement on Tariffs
and Trade (GATT), which has been performing an essential
role in international trade. The International Bank
for Reconstruction and Development provided to the members
of the World Bank, in 1965, an International Centre for
Settlement of Investment Disputes providing facilities for
conciliation and arbitration of any legal disputes arising
directly out of an investment between a contracting State
and a national of another State. If it is accepted by

26 The Industrial Co-operative Programme established in
1966 provides a direct link between the transnational
corporations operating in agriculture, forest and
fisheries, and FAO, every UN organization, and
governments; and thus is playing a very significant
role in putting across the view of the transnational
corporations to the various UN agencies and govern­
ments; and so it is vehicle of influence.

27 See UN Doc. E/5592, Activities of the United Nations
System closely related to the Subject of Transnational
Corporations (New York, 1974).

28 Also see, UN Doc. E/C. 10/18, Transnational
Corporations: Material Relevant to the Formu­
lration of a Code of Conduct (New York, 1977),
para 271, p. 79.
all members of the World Bank, it would be a significant advance in the settlement of disputes. 29

The foregoing is a brief survey of attempts at providing solutions for particular aspects of private foreign investment. All this may be of help in evolving a set of recommendations which may form the basis of a code of conduct to be formulated by the Economic and Social Council and also in reaching international agreements on specific issues. This task now stands assigned to the Commission on Transnational Corporations.

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See, for further discussion, Herbert Salzman, "Political Risks of Investment in Less Developed Countries", in G.W. Ball, ed., Global Companies (Prentice-Hall, New Jersey, 1975), pp. 95-96.

Note: According to Salzman, the World Bank could take at least two constructive steps to ameliorate the settlement process for investment disputes without necessarily compromising its role as a development institution. First, in specific instances of significant investment disputes, the Bank could appoint a panel of impartial and well regarded people not nationals of any countries involved in the dispute to establish the facts of the case. Second, an International Investment Insurance Agency, like national insurance programmes, would selectively encourage individual private investments, deemed to contribute to development, assist the settlement of investment disputes when they arise, and mitigate the effect of damages.
(B) **Nationality of the Transnational Corporations**

After surveying the existing instruments in the national, regional and international areas relating to various aspects of transnational corporations, it will be useful to discuss the approach that should be adopted to provide adequate control mechanism to achieve the purpose in view, viz. taming the multinationals. A preliminary issue, in this connection, is the determination of the 'nationality' of the transnational corporations.

Most of the corporations operating today are either uninational or binational. They are transnational because they carry on their activities beyond national borders. While formulating any rules of control or regulation, an identification of the nationality of the corporation is necessary because: (1) it is the home State of the corporation which can issue certain prescriptive rules governing the conduct of the corporation, and (2) more importantly, when questions of diplomatic protection to be accorded arise under international law, the right of diplomatic protection is given only to the home State in respect of its nationals by taking up the case of one
The Commission on Transnational Corporations, set up by the United Nations, is at present engaged in the formulation of a code of conduct applicable to transnational corporations. Enforcement of several important provisions of that code can only be effectively carried out by the national authorities by incorporating those provisions in their domestic laws. Transnational corporations are primarily subject to national laws and not to international laws, of which it is not a subject. Even if mandatory terms are used in an international convention, or any resolution passed by the General Assembly, saying that the transnational corporation shall or shall not do a specified act, the implication of such a provision is that all the member-States would take adequate action through their national laws for compliance by the transnational corporations.

30 **Note:** According to the Permanent Court of International Justice:

"...the rule of international law...is that in taking up the case of one of its nationals... a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection; and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged...."

Case of the Panevezys-Saldutiskis Ry., P.G.J.J., Series A/B, No. 76, 16 (1939).
corporations. Having regard to these factors, the question of nationality assumes importance and it is a pity that this question has not appeared as an issue in the discussions relating to the formulation of a code of conduct held so far by the Commission on Transnational Corporations. That the issue is not really academic, but is of vital importance not only for the preparation of a code but also for ensuring a proper climate of investment, has been well brought out by the reactions to the judgement of the International Court of Justice in the case of Barcelona Traction Light and Power Co., Ltd. 31 The facts of the case in brief are as follows.

The Barcelona Traction Company was a company incorporated in Canada. Through a number of operating, financing, and concession-holding subsidiary companies, it was engaged in creating and developing a large electric power production and distribution system in Spain, and three of these subsidiary companies were incorporated in Canada. The Barcelona Traction issued several series of bonds, mostly in sterling. These bonds, properly secured by trust deeds (through a company), were serviced by transfer to Barcelona Traction effected by the subsidiary companies operating in Spain. As the Spanish Civil War broke out by

31 Case Concerning the Barcelona Traction, Light and Power Company Ltd., I.C.J. Reports (Second Phase) 1970.
1936, the servicing of the Barcelona Traction bonds was stopped insofar as the authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was concerned, and the interest payments were never resumed. Subsequently, as the efforts were made to seek reopening of the transfer of foreign currency for the servicing of the sterling bonds, the Spanish Government took the position that the transfer could not be authorised unless it was shown (for, it had not been established) that the foreign currency was to be used to repay debts arising from genuine importation of foreign capital into Spain. In 1948, three Spanish holders of recently acquired sterling bonds of the company sought, in a Spanish provincial court, a decree of bankruptcy of the Company. The Court, while granting the decree, appointed a Commissioner in bankruptcy-issure of the Company and ordered seizure of its assets. As a result of certain subsequent Court proceedings, trustees in bankruptcy were elected and it was decided that new shares of the subsidiary companies should be created cancelling the shares located outside Spain.

By 1951 the trustees obtained a court authorization to sell the totality of the shares with all the rights attaching to them, representing the corporate capital of the subsidiary companies, in the form of newly created share certificates. The sale took place in 1952. Some time after the World
War I, a considerable proportion of the Barcelona Traction share had come to be held by Belgium nationals. Belgium, therefore, preferred claims on behalf of its nationals who were shareholders of the company. Belgium contended that action taken by Spain resulted in loss to Belgium nationals who were entitled to diplomatic protection. The Court rejected the claim and said that Belgium lacked "jus standi" to exercise diplomatic protection of shareholders in a Canadian Company with respect to measures taken against the Company by Spain. The Spanish preliminary objections, *inter alia*, were that the claim was inadmissible because Belgium lacked any *jus standi* to intervene or to make judicial claim on behalf of the Belgian interests in a Canadian Company, and that even if Belgium had the necessary *jus standi* the claim still remained inadmissible because local remedies in respect of the impugned acts had not been exhausted.

One of the first notable reactions to the decision came from Dr. F.P. Feliciano in 1966 when he presented a paper to the Academy of International Law on Legal Problems of Private International Business Enterprises, after the First Phase Judgement was delivered in 1964. A strong note

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33 Case concerning The Barcelona Traction, Light and Power Company Ltd., *I.C.J. Reports* (First Phase) 1964.
of protest came as an editorial comment in the *American Journal of International Law*, 1971. By ruling that only the country of nationality of the Corporation itself, regardless of the nationality of the shareholders, had *jus standi* to prefer claims in respect of any international injury inflicted on the Corporation, the International Court, it was argued, ignored the reality of corporate investment in modern times. The modern day corporations have their headquarters in one jurisdiction with stockholders drawn from more than one country with operations carried on in a third country through a branch or subsidiary created under the laws of that State. The case of Nestles is a leading instance of this type of development. Contrary to the general impression that Nestles is a Swiss company, which it substantially is, but not legally, it is a company with its headquarters in Nassau, Bahamas, which is a tax haven. Though the bulk of the stock is held by the Swiss, Nestles is operating in most of the Third World countries and has subsidiaries in several of these countries.

On the basis of the decision in the case of Barcelona Traction, if there is a breach of obligation

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35 *ICJ Reports*, n. 31.
in international law in a country where Nestles is operating through a subsidiary and if the State of incorporation, namely, Bahamas, refuses to afford diplomatic protection, the Swiss Government, whose nationals are the real and substantial stock holders of Nestles, would be without competence to afford diplomatic protection unless it is proved that the injury has affected directly the rights of shareholders as such. 36 This may have the effect of deterring investment in third world countries, unless the risks are covered by an appropriate overseas investment insurance scheme.

There are broadly two standards of nationality of a corporation. The place of incorporation is the generally favoured test in the common law countries, while siege social is the accepted test in the civil law systems. 37 However there are cases where both the tests are required to be met. 38 The "control" test was used to determine the character of property during war but it is not established in international law as a general test of the nationality of the corporation. 39 However, control may constitute an

36 Ibid., pp. 32-33.
37 See Kronstein, "The Nationality of International Enterprises", 52 Columbia Law Review 983 (1952); and also Feliciano, n. 32, pp. 284-5.
38 ICJ Reports, n. 31, pp. 123-4.
39 See the observations of the PCLJ on the control test in Certain German Interests in Polish Upper Silesia, Series A, No. 7, p. 70.
essential link when there is joint nationality. In matters of taxation the test of control affords adequate ground for a country to regard the Company which exercises control and direction from within the territory of that country as resident in that country. 40

Another test of nationality discussed in international legal literature is the "genuine link" concept of nationality which owes its origin to the judgement in Nottbohm case. 41 The genuine link theory permits lifting of the corporate veil to find out the effective link between the corporations as an association of the stock holders and the nation-state. Judge Jessup, in his separate opinion in the Barcelona Traction case, held the view that the link concept represents a general principle of law and not merely an ad hoc rule for the decision of a particular case, and cited in this connection the applicability to the test of nationality of ships which fly flags of convenience. 42 Of the four tests, the control, and link tests have not, it is submitted, been developed into definite rules of international

40 See, for example, section 6(3) of the Income Tax Act 1961 (India); and Case Law of Wallace Brothers AIR 1948 P.C. 118.

41 ICI Reports 1955.

42 ICI Reports, n. 31, p. 187.
law relating to nationality and the link test was used by Judge Jessup only to pierce through the 'corporate veil' to afford locus standi to the Belgian shareholders of the Barcelona Traction Company. Thus tests of nationality narrow down only to "place of incorporation" or "siege social". The practice of states, as reflected in the bilateral treaties on Friendship, Commerce, and Navigation, is to regard as national companies, those which are incorporated in their States. The convention concerning recognition of the legal personality on foreign companies, associations and foundations, drafted by the Seventh Hague Conference on Private International Law in 1951, provides for recognition, as a matter of right, by each contracting state of the legal personality acquired by a company established under the law of another contracting state. This would seem to imply the acceptance of the principle of incorporation. The treaty establishing the European Economic Community (EEC) speaks of companies constituted in accordance with the law of a particular state. Judge Moore

43 See, for instance, the U.S. Treaty with Iran (1955) and also U.K.-Egypt Agreement of 1959.

Note: Feliciano (n. 32), on the other hand, points out that there are treaties where the rule of siege social has been adopted.


in his *Digest of International Law* 46 remarks that it is well settled that a government may intervene on behalf of a company incorporated under its laws. In such cases the act of incorporation is considered as clothing the artificial person thereby created the nationality of its creator without regard to the citizenship of the individuals by whom the securities of the company may be owned.

The incorporation theory has also been accepted by the International Court of Justice. For example, the Swiss claim to protect the interests of the Interhandel Company in the *Interhandel* case was on the basis that the company was a limited company, 47 incorporated in accordance with the Swiss law and this was not contested. This case, along with the *Barcelona Traction* case, has established the rule in favour of nationality on the basis of incorporation. However, it would be better to have the issue decided having regard to the realities of shareholders rights pointed out earlier.

46 *vol. 6, p. 641.*

(C) **Mechanism of Control of Transnational Corporations**

**Nature of Control**

As regards mechanism of control of transnational corporations, the following points need to be considered:

1. The nature of control that is envisaged; (ii) The entities that should be covered by that control; (iii) The subject matter to be covered under that control; and (iv) The means that must be adopted for the effective implementation of the control.

The first issue, namely the nature of the control, relates to the question whether the control should be of a legally binding nature or merely voluntary. The second question is, whether it should be formulated at the national level, or through a comprehensive code of conduct framed at the international level adopted by all the member countries of the United Nations under a convention or an international agreement. The nature of the control depends upon the purpose of the control. The purpose obviously is to regulate the conduct and behaviour of the transnationals with a view to ensuring for the international community and for the nation-state that their activities do not have negative effects, but are directed towards fundamental goals of
development and equity. This would necessarily imply regulations at the national level where the host and home countries would, in the exercise of their sovereign powers, enact prescriptive rules of conduct for these transnational corporations with appropriate sanctions in case of violation of the rules. If necessary, and only if necessary, limited incentives may also be designed to direct investments and other activities for exploitation and management of resources for which transnational corporations are particularly equipped and in areas where the host countries lack requisite capital, skills and technological know-how. Regional level regulations would also appear to be necessary, as remarked by the UN Department of Economic and Social Affairs. A regional group of nations have greater bargaining powers and can present a countervailing force to transnational corporations. Acting in concert, they can enhance the ability of the members of the region to regulate activities of transnational corporations, and state clearly the terms on which foreign capital or technology will be allowed entry. Such regional groupings may also eliminate to some extent competitive bidding for inviting transnationals by raising the incentives and benefits which, in the aggregate, cause greater harm to the nation states than the

benefits derived from the operations of the transnational corporations. Regional agreements on transnational corporations can also help, as the experiment of the EEC has shown, in minimising the jurisdictional conflicts by harmonisation of anti-trust, taxation, company law, and other related laws dealing with investment and commercial matters.

At the international level, there can be, as is being attempted now, a general code of conduct for the transnational corporations dealing with those aspects not covered by the regulatory measures undertaken at the national or regional level. They may also make it binding for the member-states to take appropriate legal steps in the overall scheme of exercising control.

It is suggested that the control norms at the international level should not be just moral instruments or mere 'guidelines', as suggested by the developed countries on this and the related issues of transfer of technology, but binding instruments of agreement creating legal rights and obligations. We shall discuss the modalities of control a bit later.

The second issue in this respect relates to the question whether controls envisaged should apply only to

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private transnational corporations, or corporations engaged in commercial and trading, or service activities regardless of the type of the ownership, whether it is a state-owned enterprise or a co-operative. Another question that arises is regarding delimitation of the sectors or size of the transnational corporations to be covered by regulations, i.e. whether they would apply to all transnational corporations regardless of size and nature of activities.

The controls, it is submitted, should not be confined only to private transnational corporations. The methods of trade, and commercial approach and attitudes, adopted by enterprises, whether they are state-owned or privately owned, engaged in international investment and commerce, do not substantially differ. Investment in, or technical collaboration with a foreign country, are undertaken either for profit or for obtaining political or economic advantages. Therefore, it is incorrect to imagine that an investment or collaboration emanating from a State agency, such as one of the East European countries, is of philanthropic character, it has no other motives except to help recipient Government to build up its economy. All of these are strictly business agreements whose motive is none other than profit or other political and economic influence from it. India has had collaboration agreements with East European countries, and as we have already seen
in Chapter III, if Western countries take out their profits, dividends and royalties, the USSR takes out almost the same amount under different nomenclature, viz. technical fees and fees for know-how. The Indian Drugs and Pharmaceutical Limited (IDPL) which is one of the public sector undertakings having collaboration with USSR, has experienced almost the same kind of difficulties as other public sector undertakings in regard to collaboration agreement with other countries.

The presence of foreign government agency through a commercial enterprise, is capable of the same political interference as has been found in the case of private corporations. In fact, the situation may be worse here

Note: (a) IDPL's complaints against USSR was that the performance guarantee offered was for 18 months from the date of receipt of last component, regardless of actual commissioning of the complete plant. IDPL felt that performance guarantee should be for 12 months from the actual commissioning. Secondly, the difficulties were experienced in transporting the plant as far as to include expenses/claims for losses or shortages since the suppliers did not agree to have a class of liquidated damages - the safeguard - against late delivery in India.

(b) The various aspects and approach of local laws and regulations practised by SNAM a subsidiary of ENI Group (ENIT Nationale Indrocarbury) of Italy, have been brought out by the Public Accounts Committee (India, Sixth Lok Sabha) in their 23th Report and also by a special committee (Pipe Line Enquiry Commission - headed by J. Tukru).
because an independent corporation could resist moves of the home Government to use it as a tool of its foreign policy. But there is no barrier of such resistance when the Government agency itself is operating within a foreign jurisdiction. It is, therefore, submitted that any regulation in relation to transnational corporations should apply regardless of ownership. This is also the view of Group of Eminent Persons when they included in their definition "not only private corporations but also co-operatives and state-owned enterprise."  

As regards sectors of operation, it is true that there are different types of enterprises, some operating in extractive industries, some in power generation, and some in manufacturing or service sector. Whatever be the nature of the operations, the character of the impact, as examined in the previous chapter, remains the same; only the degree and stage of the impact differ. For example, in extracting industry engaged in mining operations, the adverse impact of economic consequences to the host country is felt at later stages of exploitation not at the initial stage when it may seem to be working to the advantage of the host Government. But in the case of activities in the electronic communication industry and food processing industry, operating with aggressive speed, the impact is

51 See Chapter II.
felt much earlier. Further, in these days of technological innovation, it is easily possible for an industry to change over from one sector to another its production and investment resources. For example, the Union Carbide which started as a dry battery cell manufacturer, is now engaged in a totally unrelated activity as manufacturers of pesticides, marine fishing, and export of garments. Indian Tobacco, which started as a manufacturer of cigarettes, has fanned out into hotel industry. It is, therefore, submitted that the regulations for their control should cover all transnational corporations, whatever type of activities they are engaged in.

Another related question is, whether any regulation that is framed should cover both host and home countries in their dealings with the transnational corporations. This aspect was emphasised in the areas of concern submitted by the developed countries to the Commission on Transnational Corporations. In considering this question, it must be

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52 **Note:** Union Carbide's recent Annual Report announces:

"To-day, as Union Carbide India Ltd., we are a multi-product organisation with multi-faceted activities. From pesticides to plastics; from zinc rolling to reclaiming sewage water, to manufacturing the well known 'Eveready' group of products - and more."

53 This, of course, does not apply to corporations formed under international agreements and outside regulatory controls of States."
borne in mind that transnational corporations are entities qualitatively different from nation-states as participants in international relations. In legal theory these corporations owe their creation to a national law and operate under laws of the country where they carry on their activities. They are just nationals of a state and are not subjects of international law, whereas States are sovereign entities, subjects and matters of international law. Therefore, there is no question of equating nation States and transnational corporations in a single regulatory code of conduct, either at the regional or international level. This does not, however, mean that an international code of conduct may not call upon the members countries to adopt a particular policy towards transnational corporations. But such policies can only be by way of acceptance of a convention by the Governments at the international level through the process of multilateral agreements.

The third issue relates to the question whether regulations should be general or specific, dealing with particular activities of the transnational corporations as have been observed to be of concern to the nation-state and international community. It is as regards the coverage of the subjects that difficulties are bound to be encountered. The approach to this problem could be either to draw up a code of behaviour in a very general way, dealing
exhaustively with the transnational corporations’ obligations to show obedience to local laws, abstention from corrupt practices, non-interference in the political field, and adherence to social goals and objectives of nation states; or to deal specifically with the several problems the international community and the various nation-state had to face in the political, economic, socio-cultural, and other fields, and formulate norms for proper conduct and behaviour in these specific fields.

There could also be another approach combining both, viz. framing a set of directive principles at the international level (an instance of this has already been provided in the Resolution of General Assembly relating to the Charter of Economic Rights and Duties of a State), and taking specific steps by entering into agreements among states on specific issues, and further take at the national level appropriate legal and administrative steps for enforcement.

The last question pertains to re-examination of the particular legal forms the control and enforcement mechanism should take. In considering the methods or forms of control at the international level, it may be recalled that the various forms and instruments used in the United Nations practice are treaties, conventions, protocols, agreements, declarations and resolutions. An international
treaty binds all the member countries, signatories to the treaty, and breach of an obligation under the treaty would amount to a breach of international law providing adequate ground for seeking a redress at the proper international forum. The prospects of reaching such an international treaty depends upon the similarity in approach in assessing costs and benefits by states. Today, the world stands divided between the developed and developing states, each group with interests that conflict with those of the other. This is well illustrated in the approach to the Draft Code on Transfer of Technology and restrictive business practices, and also in the areas of concern presented by the Group of 77, the Group B and the Latin countries, to the Commission on transnational corporations. An alternative may be to have a multilateral convention. In this kind of convention, the member countries would undertake to give effect to the provisions of convention in the domestic laws leaving the manner of implementation through the domestic law to the discretion of the Governments.

A 'declaration' does not have the legal status of an international agreement so long as the participants have not specifically undertaken obligations under it. However, the adoption of a declaration by various nations in respect of a particular matter represents the consensus
of those nations, and raises expectation for the fulfilment thereof and accordingly gives to this instrument a certain authority. An instance of this declaration is the one passed as the Final Act of the Conference on Security and Co-operation in Europe known as Helsinki Convention 1975. OECD guidelines for multinational enterprises are issued in the form of declarations by the Government of OECD countries members.

A resolution or recommendation can be adopted by an organ of an international organisation, e.g. the General Assembly of the United Nations. At present, resolutions do not have the formal binding force of an international agreement, though some international jurists regard them as creative of anormative rules of a 'quasi-legislative' character.


Note: (a) Resolutions of the General Assembly do provide positive evidence of the belief of States concerning the existence or otherwise of certain rules of law. These expressions of political and juridical conscience of nations, or at least of their majority, have a force which is much more than recommendatory. In fact, the characterization of a norm as formally binding is not very significantly connected with its functional operation and acceptance as law.
The views of the United Nations on the legal effect of declaration and resolution have been expressed as follows:

In United Nations practice, a declaration is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal. Apart from the distinction just indicated, there is probably no difference between a recommendation or a declaration in United Nations practice as far as legal principle is concerned. A declaration or a recommendation is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a Treaty or Convention is binding upon the parties to it, purely by the device of terming it a declaration rather than a recommendation. However, in view of the greater solemnity and significance of a declaration, it may be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States. (55)


(b) The General Assembly is in a position to participate in the essence of the legislative process at work in rudimentary form in international society. This role of the Assembly in this respect is characterized by Falk as 'quasi-legislative'.

From the foregoing, it may be seen that a code of conduct drawn up for transnational corporation at the international level cannot as such have binding effect. It will be of the same character as the guidelines for multinationals issued by the OECD. However, if such codes are adopted in a multilateral convention or conventions or international agreements, compliance can be secured by reference to the agreement, and implementative action through local domestic laws.

These general principles should deal with the following points and stated as 'Directive Principles':

(i) Transnational corporations should respect the national laws, policies and economic and social objectives of the host countries, abide by undertakings given to Government of that country, and should not call upon hom country to interfere in cases where lawful action is taken against a transnational corporation for violation or breach of the laws of the host country;

(ii) Just as a State has permanent sovereignty over its natural resources, it should also be declared that the state has a right to regulate and exercise authority over transnational corporations operating within its jurisdiction. This is only a reassertion of the well-known domestic jurisdiction
principle and reiterated in Article 2(2)(b) of the Charter of Economic Rights and Duties of State.

(iii) The transnational corporations' activities should be such as to advance domestic effort and supplement it by contributing positively to the economic and social development of plans of the host country. International investors should give prime emphasis to activities that provide long term needs of the host countries.

(iv) The principle of respect for human rights and fundamental freedoms should be honoured by transnational corporations. This principle is necessary to prevent transnational corporations directly or indirectly assisting racist regimes who are guilty of violation of UN mandates against practice of apartheid.

(v) Transnational corporations should adhere to the social-cultural objectives and values of the countries where they operate. The different ways in which social-cultural values of a country are distorted have been discussed at some length in Chapter 6. It is, therefore, necessary that respect for and protection of the values should be a matter to be ensured at the international community level.

56 Resolution no. 3231 (XXIX) of 12 December 1974.
(vi) Transnational corporation should not indulge in corrupt practices including bribery or payment of money to parties and individuals under the dubious name of political contribution or 'donations'. It may be mentioned here that there is already an \textit{ad hoc} inter-Governmental working group set up by the Economic and Social Council looking into this problem, \textsuperscript{57} when it reaches an agreement on definition of corrupt practice and the manner of imposing sanctions against these corrupt practices, the question has to be considered whether there could be a separate code of conduct for dealing with corrupt practices as such or recommendations of that \textit{ad hoc} group could be incorporated in the general principles referred to here. \textsuperscript{58}

(vii) Transnational corporations shall not interfere in the internal affairs of a host state. This principle is also incorporated in Article 2(2)(b) of Charter of Economic Rights and Duties of a State and it should be re-emphasised in the separate code to be drawn up for transnational corporations at the international level.

\textsuperscript{57} See General Assembly Resolution 3514 (XXX) of 15 December 1975, and resolution 2041 (LXI) of 11 August 1976.

\textsuperscript{58} Ibid.
(viii) Transnational corporations should refrain from taking steps which would cause instability in the economies of the various nations on account of sudden short-term movement of funds. Long-term capital flows must be such as to increase the availability of needed foreign exchange and repatriation of returns through profits, dividends and royalties should be regulated so as not to cause balance of payments difficulties.

(ix) Transnational corporations should not indulge in restrictive trade practices which would have adverse effects on the world trade and prevent countries from getting their due shares of the export trade and export earnings.

(x) Transnational corporations should aid in transfer of appropriate technology to the various nations at reasonable prices, having relation to the actual cost referable to the type of technology transferred to the region, and assist in establishing local research and development performances for improving upon or modification of the technology to suit the host countries needs.

(xi) Transnational corporation should give opportunity for the locals to have a meaningful role to play in the management of the affairs of the corporation with
adequate delegation of powers of decisions. Training facilities should also be provided to the staff to improve their skills and in acquisition of expertise in the processes covered by technical know-how. The corporations should also give adequate notice to Government agency and employees before altering plans of production and take steps to rehabilitate such of the labour displaced. They should also permit formation of unions on a corporate-wise basis, and offer adequate information to the unions regarding the commercial activities and the financial resources of the corporation.

In addition, there could be a separate international agreements in special areas of conflicts. Such agreements may be required in harmonisation of anti-trust laws, laws relating to intellectual property (e.g. laws relating to protection of patents) on corporate taxation with a view to avoiding multiple jurisdiction and laws relating to restrictive business practices (other than anti-trust legislation) such agreements would prevent the transnationals from taking advantage of loopholes arising from differences in the form and extent of the various national legislations.

A third step relates to disclosure of information by the transnational corporation of their global activities.
The existing handicaps in evolving a code of conduct at the international level or in effectively securing compliance or even for revising or reviewing it in the absence of a international standard of accounting. Proposals for standardisation of accounts have been attempted at the professional level by accounting practitioners, the most noteworthy attempt being the exposure drafts issued by the International Accounting Standard Committee. But the Commission on Transnational Corporations had set up a Group of Experts whose report was submitted in July 1977 to the Secretary General of the UN. The main recommendations of the Group was that there should be a general purpose report containing financial and non-financial information, to meet the needs of not only shareholders but any other interested parties. In addition, special purpose reports should contain departed or specialized information, which the transnational corporations may be reluctant to reveal in a general report but which should be made available to Government agencies. As has been indicated by the Secretary General, the establishment of an international standard of accounting requires international agreement among


60 UN Doc. ibid., pp. 9-11.
Governments under which each Government would undertake necessary legislative or other action making it mandatory for the transnational corporations to present such standardised Disclosure Reports.

Likewise, the developed countries also can have different regional groupings based on integral shared interests. The kind of problems that can be successfully tackled in a regional agreement may be modelled on the Cartegna Agreement establishing the Andean sub-regional group. 61

Article 3 of this agreement lays down, inter alia, the following measures to attain objectives of balanced and harmonious development of the Member Countries: (a) Harmonization of economic and social policies and coordination of national laws on pertinent matters; (b) joint programming, intensification of the sub-regional development and implementation of sectoral programme of industrial development; and (c) channelling of resources from within and from outside the sub-region to provide the financing of the investments that are required in the process of integration.

Articles 27 and 28 of the Agreement are relevant for our purpose. Under Article 27, a common code on the

treatment to be accorded to foreign capital and, among other things, trade-marks, patents, licenses and royalties has been drawn up, known as the ANDEAN Foreign Investment Code. Article 23 also stipulates a uniform code for multinational enterprise.

The ANDEAN Code is important from the point of view of controls laid down for minimising the ill effects of foreign capital. Under this code foreign investors must first submit an application to the competent national authority for evaluation and authorization of investment.

The application given in Annexure I to the agreement desires relevant information on details of the investment, including financial resources in foreign exchange or credit physical or tangible resources in the form of industrial plant and machinery and whether the marking is new or reconditioned; technological resources such as trade marks industrial designs, and technical know-how.

Under Article 3 of the Code, Member countries shall not authorize any direct foreign investment in activities which they consider are adequately covered by existing enterprises. Nor are any acquisition of local business permitted except where the local enterprise is in imminent bankruptcy. Adequate provisions and regulations are also

there to see that the fulfilment of the commitments for national participation in the enterprises' technical, administrative, financial and commercial management, and in its capital, take place and also to obtain information on the pricing system of the intermediate products that may be furnished by suppliers of foreign technology. The Code also provides for an important item of control, viz. centralization of statistical accounting, information and supervisory records connected with direct foreign investments. The foreign concerns are debarred from borrowing long term credit from the local market within the sub-region and inter-affiliate borrowing should not be more than three points the rate of first class securities and foreign credits contracted by an enterprise should be previously authorised and registered.

Under Article 19 contracts on importation of technology must contain clauses on identification of the terms of transfer of technology, contractual value of each of the concerned in the transfer and determination of the time period involved.

It is submitted that this ANDean Code may be taken up as a model for regional approach. Once an

64 Ibid. (Article 6(e)), p. 387.
65 Ibid. (Articles 14 to 16), pp. 387-8.
agreement on these lines is reached ability of a nation state comprising the region for effective bargaining with transnational corporations will increase and transnational corporations also will not try to play one state against another.

At the national level several issues have to be dealt with in appropriate national regulations. They relate to (i) in the political arena, prevention and sanctions against covert or overt interference in internal affairs as provided in India in Foreign Contribution (Regulation) Act, 1975. (ii) In economic sphere, (a) the conditions under which, and the sectors in which foreign investment and technology can be allowed; as contained in the Industrial Policy Statement of the Government of India and Foreign Exchange Regulations Act, 1973; (b) the regulations of operations within the economy after entry of the MNC. Such regulations relate, inter alia, to establishment of production capacities and expansion thereof, remittance of profits, compulsory exports and 'arms-length' prices, claim of admissible expenses for taxation, employment of locals, and environment safeguards. 66 At the social and cultural areas, natural

66 Note: To tackle the problems of transfer pricing, a provision such as found in Section 482 of the US Internal Revenue Code 1954, may be made. Under the
regulations should provide for reduction of inequalities in salary structures to executives, and limited contacts with officials having decision making powers, except for redressal of grievances. Dependence on technology and systems that

US Code, three methods adopted are:

(i) the comparable uncontrolled price method; or

(ii) re-sale price method; or

(iii) cost plus method.

The first consists in comparing the controlled price as between two entities of the same group with the open market price of goods of like kind and quality. The resale price is the price fetched on resale of the product by the entity within the group to purchasers outside the group. For example, if 'A' transfers a product to 'B' and 'B' sells it in a free market for Rs. 100, and if the appropriate mark-up is Rs. 20, 'A's sale price to 'B' is deemed to Rs. 80/- whatever be the invoice price. The third method, cost plus method is the one which is more practical and less controversial. However, there is a difficulty even here in determining the cost owing to the absence of standard accounting practices. The problem of standard accounting has now been taken up by the Group of Experts on International Standards of Accounting and Reporting of the Centre on Transnational Corporations and it is hoped that within a few months a standard formula will be arrived at which will help advance a solution in this regard.
can only be obtained at a high cost from a foreign country and not suited for local conditions should be eliminated. Consumer councils could be strengthened and the high pressure advertisements exaggerating the qualities of a foreign product should be banned.

All the measures suggested above could be brought in a single code specifically dealing with transnational corporations which could provide an effective machinery for effective implementation of these provisions, with adequate safeguards against abuse of power by providing for review and appellate tribunals.

India, of late, has tightened its regulations relating to entry and operations of transnational corporations. The national legislations covering the area have already been referred to above. The principal piece of national legislation is the Foreign Exchange Regulation Act (FERA) of 1973. Its main provisions of control are discussed in the following paragraphs.

The Act forbids foreign companies from doing any of the following without the prior general or special permission of the Reserve Bank of India:

(A) (i) To carry on any activity of trading, commercial or of industrial nature in India; (Vide Section 29(1)(a).

(ii) To establish a branch, office or place of business in India; (Vide Section 29(1)(a).
(B) (1) To purchase shares in India of any company \(\text{vide Section } 29(1)(b)\)

(ii) To acquire the whole or any part of any undertaking in India engaged in trade, commerce or industry \(\text{vide Section } 29(1)(b)\)

(C) To act or accept appointment as an agent in India of any person or company in the trading or commercial transactions thereof; \(\text{vide Section } 28(1)(a)\)

(D) To act or accept appointment as technical or management advisers in India of any person or company; \(\text{vide Section } 28(1)(b)\)

(E) To permit any trade-mark to which it is entitled to use, to be used by any such person or company for any direct or indirect consideration; \(\text{vide Section } 29(1)(c)\)

(F) To acquire, hold, transfer or dispose of immovable property;

(G) To borrow monies or accept deposits.

No MNC can engage in any activity in India without the permission of the Reserve Bank of India. Thus, the investment behaviour of the MNCs can be brought in consonance with the governmental policy.

For the purposes of Section 28 of FERA 'agent' includes any person or company (including its branch) who or which buys goods with a view to sell such goods before any processing thereof. The crucial word in the definition of 'agent' is 'processing'. The 'processing' has been defined to mean:
any art or process for producing, preparing or making an article by subjecting any material to manual, mechanical, chemical, electrical or any other like operation but does not include any process incidental or ancillary to the completion of a manufactured product such as dividing, pressing, compressing, packing or the adoption of any such treatment as is necessary to render such product marketable to the consumer.

Section 23(1)(c) places restrictions on the right of all the foreign companies and the Indian companies who are more than 40% foreign owned and who are entitled to use any trade-mark to assign it to any person or company (which includes forms and other association of individuals).

The trade marks are generally registered in the names of parent companies and the affiliates are allowed the use of trade-mark under licenses from the parent company against some consideration. Therefore, the subsidiaries of the MNCs cannot use the trade-mark of the parent company without the permission of the Reserve Bank of India, because the parent company cannot allow the use of its mark to any company in India. However, the MNCs, which operate through branches would not be affected, as a branch is the organic part of the parent company and no question of allowing the use of the trade-mark to any other person is involved.

A trade-mark has potentially permanent life like patents which are only for a limited duration. The trade-marks
are mostly used in conjunction with advertising to establish product differentiation and build-up consumers preference for particular products which may or may not be based on real differences in use. There is no transfer of technology or real value involved in trade-mark licences.

A foreign trade-mark with a well established name could facilitate entry into market and could also facilitate export of goods bearing such a trade-mark. However, once a firm used a trade-mark of a MNCs and built up goodwill upon the use of this trade-mark, it would be extremely difficult for it to use another trade-mark. Realising this, the Government of India had decided to restrict the use of foreign trade marks within the country which serves two purposes:
(i) It avoids an unnecessary drain on the resources of the country in the form of charges for the use of trade-mark;
and (ii) the competitor units who are not using foreign trade-marks can develop in a proper market. It is the policy of the Government not to allow the use of foreign trade-marks for the sale of goods in internal market, but foreign trade-marks may be used for export sales.

FERA 1973, has placed restrictions on MNCs with regard to acquisition, holding and sales of immovable property. Under Section 31 of FERA 1973, no MNC can, except with the previous general or special permission of the Reserve Bank of India, acquire or hold or transfer or dispose
of by sales, mortgage, lease, gift, settlement or otherwise any immovable property situated in India. \( \text{Section 31(1) of FERA 1973} \)

The provisions of Section 26(7)(ii) prohibits MNCs to borrow or to accept a deposit of money from any person resident in India except with the previous general or special permission of the Reserve Bank of India.

Section 76 of the FERA 1973, enacts factors to be taken into account by the Central Government and the Reserve Bank while giving or granting permissions or licences under the Act.

It is submitted that the Foreign Exchange Regulation Act is hardly the place for dealing with ownership pattern of enterprises. Section 29 of the Foreign Exchange Regulation Act of 1973 and Guidelines issued thereunder by the Government of India lay down for the dilution of equity to be held by foreign interest to 40/51 to 74% of the total paid up capital on specified criteria. The manner of enforcement of the equity dilution provisions is left to the Reserve Bank of India which can withhold remittances and profits and dividends unless its directives

are complied with. This hardly is a satisfactory procedure. Withholding remittances does not amount to forfeiture. It only adds to the value of the shares and ultimately the share values get strengthened in the capital market and the beneficiary are the foreign company and foreign shareholders.

Secondly, there is no provision for review or appeal, if, for sufficient cause directives of the Reserve Bank of India are not capable of being complied with.

Thirdly, it could lead to discriminatory practices by allowing one company to retain the same capital by permitting enlargement of capital base by fresh issue or issue of bonus shares so as to make existing share capital conform to the percentage. There is thus no disinvestment but only greater extension of business with more profits accruing on the foreign holding.

With even a minimum 40%, the management decisions are still with that single bloc, because of the wide disposal of balance equity among a large section of public. Even where financial institutions, like the Life Insurance

68 Section 26 of the FERA 1973.

69 Note: For example, in order to reduce the foreign shareholding in Colgate Palmolive (India) to 40 per cent in line with FERA guidelines, Colgate Palmolive Company (USA) has been allowed to enter the capital market with an offer for sale of 1,179,000 equity shares of Rs. 10 each at a premium of Rs. 15 per share. /Eastern Economist (New Delhi), 27 October 1973/
Corporation of India or Unit Trust of India, are equity holders their influence on decisions will be minimal in view of the possibility of the foreign shareholders representative on the Board striking a bargain with other members of the Management Board, or even threatening to withhold import of needed know-how on spares.

Ceilings on head office expenditure, royalties and technical fees are laid down in the Income-tax Act but not in the Foreign Exchange Regulation Act. The Income-tax Act cannot prevent remittances of higher amount than the ceiling laid down since legally the Act deals only with the amounts claimed. There is no prohibition against making the payments.

If industrial capacity is exceeded and the market glutted with a product which has been licenced to be produced up to a ceiling, there is no provision anywhere in the India law for taking action. The profits made on the excess production can legally be repatriated.

It is because of these deficiencies that, in an otherwise well defined regulatory piece of enactment, the need for a single comprehensive transnational corporations (Regulation) enactment could be explored.