CHAPTER IX

CONCLUSIONS AND RECOMMENDATIONS

The Issues

The era of transnational corporations is upon us. No one can wish them away. The transnational corporation is a product of the technological revolution of the 20th century. Backed by a combination of resources of enormous capital, sophisticated technology patented process, exclusive know-how, advanced skills of management and marketing, "these giant octopus corporations with multiple subsidiaries" as Judge Jessup calls them, have emerged as important actors in the international arena.

The largeness of the size of each of these transnational corporation and monopolistic and oligopolistic dominance they have acquired in the world market are such as to impart enormous economic power to each one of these groups. Their size and concentration of economic power are speedily and rapidly on the increase. The total investment stock of these corporations has increased from 158 billion dollars in 1971 to 259 billion dollars in 1975 and was estimated to cross 287 billion dollars in 1976. The


annual sales of many of these corporations have far exceeded the gross national product of many nation states as is shown in Appendix II to this thesis.

Most of these corporations, hail from United States of America but several developed countries like West Germany, Japan, UK and France are joining in the race. Direct foreign investment of these transnational corporations is more in the developed countries than in the developing countries though the impact of these investments in the political, economic, and socio-cultural fields is more noticeable in the developing countries than in the developed nations because of greater economic strength and matching bargaining power of these developed nations (who are themselves home countries for many of these corporations possess).

In recent years, the activities of these transnational corporations have shifted from the traditional extractive and manufacturing industries to other sectors such as banking, insurance and advertising and their activities have increasingly turned from commodities to technology. The international trading in technology amounted to more than 11,000 million dollars in 1975 and the most significant aspect of this is that a major portion of this is within transnational corporation system itself.

3 UN Doc. ibid., p. 70; see also Chapter I supra.
There is today an increasing internationalisation of production by a process of concentration of the factors of production in fewer and fewer hands such that by the end of the century it is estimated that "within a generation between 400 to 500 firms, would own about two-thirds of the fixed assets of the world". 4 This has engendered a feeling among many nations that power is shifting away from the nation state to international institutions, public and private. The objectives and interests of these corporations are dictated solely by profit maximisation and in the aggressive pursuit of their objectives, tensions and conflicts develop between them and nation states where they operate. The divergence in objectives between nation-states and multinational corporations, compounded by social and cultural factors often create tensions. Multinational corporations, through the variety of options available to them can encroach upon national sovereignty by undermining the ability of the nation states to promote their national and international objectives. The position today is that the sovereign states are suddenly "feeling naked" and concept such as national sovereignty appear wholly drained of meaning. 5

4 A. Barber, Emerging World Power - The World Corporation: War/Peace (New York, October 1968).

5 Raymond Vernon, Sovereignty at Bay (New York, 1971), n. 13.
The growing dominance of these corporations in the international arena has been causing an uneasy concern to the international community but it assumed a sharp focus with the exposure of the political interference by the ITT corporation of Chile resulting in the appointment of a Group of Eminent Persons under the Chairmanship of Governor L.K. Jha of India, by United Nations Economic and Social Council, to study the role of multinational corporation and their impact on the process of development, specially that of developing countries and also their implications for international relations; to formulate conclusions which may possibly be used by Governments in making their sovereign decisions regarding national policy in this respect and also, to submit recommendations for appropriate international action. The Group of Eminent Persons after a masterly survey of the problems, presented their Report in May 1974 to the Secretary General, UN, in which they pointed out the several areas where conflicts and tensions have developed as a result of the activities of the transnational corporations.

6 UN, ECOSOC Resolution 1721 (LIII) of July 1972.
7 UN Doc. ST/ESA/6, The Impact of Multinational Corporations on Development and on International Relations (New York, 1974).
8 See Annexure I for the Recommendations.
On the political front as pointed out in Chapter IV supra, their activities have ranged from open interference in the internal affairs of the host countries to covert and internal interference, such as attempting to influence Government policies through financial contribution to political parties and individuals and also by exerting pressure in support of or against the Governments of the host countries according to whether or not they receive especially favourable treatment. They sometimes act as instruments of foreign policy and by making requests to home countries to intercede with host countries with actions of a political or economic nature in support of their private interests, affect international relations.

The economic effects of the activities of the transnational corporation are far more important for not only the countries where they operate but for the international community as a whole. The skill, the speed and ease with which they move enormous liquid funds from one country to another act as unsettling effect on the international monetary system. Secondly, the theories of inter-national trade have lost relevance because of the significant increase in intra-company transfers, growing practice of adoption of transfer-pricing and jumping trade and tariff barriers by locating production plants in various national jurisdictions but obeying the central command of corporate headquarters. Possession of and control over sophisticated technology have invested the corporations with superior
bargaining power enabling them to extract unconscionable price for the licencing or sale of such technology. Whereas the aforesaid problems are those of general concern to the international community as a whole. Home countries of these corporations are worried over the export of jobs increased unemployment, lowering the bargaining power of domestic labour, creating deficit in balance of payment by capital outflow, reduction in export earnings because of tendency to build plant abroad and loss of tax earnings by segregating profits to tax havens or retaining them in host countries with lower tax rates. The host countries on the other hand feel that they are being exploited by these transnational corporations, whose activities have not resulted in any significant economic development but in burdening the economy with huge deficits arising from reverse flow of profits, dividends, royalties and interest, excessive allocation of head office or research and development expenditure to the host country affiliate's account thereby reducing the taxable income, indulging or under-invoicing of exports or over invoicing imports, introduction of inappropriate technology, exploitation of undernourished or uneducated local labour and increasing the disparities of income and wealth. These have been discussed in detail in Chapter V(A) and the specific case of IBM's operations in India is examined in Chapter V(B).
Apart from the economic consequences, the impact of the operations of the transnational corporation on the socio-cultural aspects as pointed out in Chapter VI particularly in the developing countries has also been a matter of concern.

On the legal side, as explained in Chapter VII also, with the spread of transnational corporation, States in several jurisdictions have tended to bring these jurisdictions into conflict on matters like anti-trust, taxation and other regulatory measures such as foreign exchange regulation controls.

The conflicts of jurisdiction are nowhere sharper than in the case of nationalisation of the property and assets transnational corporation, and the compensation payable thereon. The judgment of the International Court of Justice in the Barcelona Traction Light and Power Company's case, has brought into relief the various conflicts that could arise and the inability of the present international legal system to solve them.

The foregoing is just a brief outline of several problems thrown up by the activities of transnational corporations, aggravated by the fact that unlike the Governments they are not directly accountable for their policies and actions to a broad based electorate nor unlike national firms they are subject to control and regulation by a single
authority which could aim at ensuring maximum degree of harmony between their operations and public interest. Since their activities are spread over the entire globe and they are dominant actors on the international stage, the question that arises is whether a set of institutions and devices could be worked out which would guide the transnational corporation exercise of power and introduce some form of accountability to the international community.

It has to be emphasized that the transnational corporations have distinct advantages which may help advance world development. Their ability to tap financial physical and human resources around the world and to combine them in economically feasible and commercially profitable activities, their capacity to develop new technology and skills and their productive and managerial ability to translate resources into specific outputs are beyond question. Therefore, the mechanism of accountability should not emerge as an instrument to suppression of this unique institution but should be such as would secure their maximum contribution to economic and social development with minimum social cost.

National regulations, as has been pointed out in Chapter VIII supra, and regional agreements, have attempted

to deal with many of the issues relating to foreign direct investment which is but one part of the "institution" of the transnational corporation which has a package of capital, technology, management and marketing skills. Further even as regards direct foreign investment, there has been no uniformity in the regulations passed by the various countries. The multiplicity of unrelated actions to contain the activities of the transnational corporations have remained ineffective and would remain so unless they are tackled realistically by all the nations getting together. If developed countries do not come for such a common agreed approach, at least developing nations, which today are the chief victims of the transnational corporations exploitation, should do so. It should not be forgotten that the operations of transnationals have been facilitated by the competition among the developing nations to attract the capital and technology of these international combines. This competition manifested itself in offering import and export incentives, subsidies, concessional tax treatment, facilities for repatriation of profits and dividends, of technical fees and fees for know-how and of interest and royalties. Added to this list is the exemptions offered to foreign technicians to help set up projects in developing countries by the transnational corporations. Therefore, at least as a first step, developing countries should adopt a uniform policy
in this regard by harmonizing their approach towards foreign ownership and management and control of processes of production. Once such a common front is adopted, there will be little scope for the transnationals to juggle economies of these countries by shifting capital and manufacturing operations from one country to another or gaining from transfer prices and draining the local economy by huge foreign remittances.

Recommendations: Solutions Examined

(1) Joint Ventures

Specifically, elimination or minimising the adverse impact of the activities of these transnational corporations could be examined from several angles. One method to combat the evil influence arising from the activities of the transnational corporations which are monopolistic in size and oligopolistic in operation, would be to reduce the power they have in decision-making by having joint-ventures with local state-owned or private-owned corporations. But such an approach has its limitations. In the first place, the amount of capital and expertise that may be forthcoming in a joint-venture arrangement will be lower than in wholly-owned subsidiaries. Again, in the case of joint ventures, the parent company
of the foreign partner would not take much interest in technology transfer, or in assigning of export markets to the jointly owned enterprise, because of fear of potential competition. Thirdly, absence of a unified control and supervision carries with it seeds of inefficiency and discord because of divided responsibility. As against these limitation one cannot lose sight of the challenge and opportunity to domestic capabilities and of the fact that participation in decision-making will encourage confidence in management of resources and promote capacity to acquire gradually full control from the foreign partners.

(ii) **Consortium Approach**

A second method to minimise foreign interferences in internal matters and minimising foreign influence in political and economic decisions is the consortium approach, where the host country does not permit access to economic process of the country except to a consortium of foreign companies belonging to several countries. This would undoubtedly mitigate political effects. But if the consortium is essentially of the same type of companies, though belonging to different nationalities, the economic dominance will continue to be the same, if not worse, in view of the aggregate influence such a consortium may bring. Such a consortium is no better than a merger.
or amalgamation and would have all the evil effects resulting from sapping local initiative and wiping out competition as any other corporate merger would have.

(iii) **De-packaging**

A third solution would be to negotiate with a transnational corporation not for the whole package but on item by item basis, i.e. de-packaging arrangements. Under this de-packaging arrangement, each item of the transnational corporation's operative apparatus is purchased or licenced by separate negotiations and by calling for international bidding, if necessary. This "de-packaging" scheme is theoretically attractive but practically difficult to apply for the reason that in these days of high technology monopoly, there is really no competition available and the costs for each element of package are found in the aggregate to be more than the cost involved in allowing the profits and dividends to be earned in commercial operations by the transnational corporations. India's experience with a few such de-packaging arrangements have not been particularly happy.

(iv) **Co-production**

Another solution could be adoption of "co-production" arrangements that has been the pattern of
industrial co-operation between the Socialist European States and the Western nations. The essence of this arrangement consists in both the partners supplying each other with parts and components to be incorporated in a joint final product that is marketed by both the parties in their respective markets. Another variant of the industrial co-operation arrangement is that one of the parties agrees to buy back the products of manufacture in payment for supply of machinery, plant, patents and designs. This has the obvious advantage of minimising foreign exchange outflow but the inherent risk is that the prices determined for the buy-back product will be unduly low and the foreign party may benefit from reselling the product for a high margin, and the domestic partner will be tied down to this unrealistic price for a long period.

(v) Structural Reorganization

Structural reorganization of transnational corporations could also be examined. D.F. Vagts for example suggests break-up of giant corporations under an international version of anti-trust laws. Apart from the theoretical and practical difficulties of this suggestion

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the success achieved by anti-trust measures taken by the United States of America has not been such as to induce enthusiasm for adoption of these measures, as Mr. Vagts has himself pointed out. Further, the EEC and Japan have actively encouraged integration and merger of companies and there is far more concentration of business in a few hands now than ever before. Moreover, no home country would so easily permit its national-transnationals to be weakened by an international anti-trust measures.

There could be restructuring of corporate management by appointing nationals of the countries, where the corporation is having its activities, on the Board of Management and also giving responsible decision-making powers at lower levels to such nationals. Theoretically, this is a good proposal. But it should be remembered that a corporation-culture-oriented employee, whatever be his nationality, would tend to place his loyalty to the corporation more than to his nation.

A far more radical approach could be to have an international corporation under a treaty owing allegiance to no state jurisdiction. Such a corporation would have no nationality, no seat, domicile, or residences in the sense of municipal law, and would be governed by international law. The status of such an international corporation in municipal law in the member (i.e. signatory
to the treaty) or non-member States would be determined in accordance with the general rule of the conflict of laws, i.e. by the personal law of the corporation which here would be determined in accordance with the general rule of the conflict of laws, i.e. by the personal law of the corporation which here would be the public international law. But an international corporation chartered under an international treaty or even under an international company law would require elaborate machinery for supervision and control and would involve conflicts as to the choice of and installation of production plants, acquisition of raw materials and marketing of products.

Considering the difficulties in attempt to set up an international sea-lad authority not met with success, proposal for a treaty on international corporations or for drawing up an international company law would be dim indeed.

**International Control Agency**

In such circumstances, a possible solution that appears feasible is to have an International Control Agency for TNCs which may be established as an agency of the United Nations by a convention with a separate charter, in the same manner as the ILO or FAO have been established with similar legal status. This control
agency should be the machinery for implementing the 
code of conduct and suggested in Chapter VII *supra*. 
The principal task of this agency should be (i) to collect 
relevant data about the operation of transnational 
corporations including in particular, their financial 
transactions, production processes and techniques, 
marketing strategies and employment policies; (ii) to 
scrutinise and register all agreements and contracts which 
these corporations enter into with institutions or other 
parties in host states, including Government agencies; 
(iii) to maintain a resources bank on technology by 
obtaining from the transnational corporations the relevant 
know-how and secret processes and beside these technologies 
to the nation states needing them at reasonable prices; 
(iv) to monitor the activities of transnational corporations 
by obtaining periodical reports from them and suggesting 
modifications and even punitive action wherever the policies 
and practices are found to be against the directive 
principles of International Code of Conduct referred to in 
Chapter VIII; (v) to help the nation states in increasing 
their bargaining power with the transnational corporations 
by giving them adequate information regarding the particular 
investment proposed, and guiding them in drawing up 
instruments of contracts with effective safeguards for 
national interests; and (vi) to arrange for periodic
review or revision of the code of conduct in the light of experience gathered.

This looks a formidable list. But if it is remembered that the Commission on Transnational Corporations set up under ECOSOC Resolution 1908 (LVII) of August 1974, have been directed to attempt some of the tasks listed above, the proposal is not utopian. The Commission on Transnational Corporations is today a merely advisory body with a membership of 43 states with no powers to call upon the transnational corporations to furnish even statistical data and serves as a debating club rather than as a Regulatory Agency. Perhaps the Commission and the Information and Research Centre can together be the nucleus of such an agency with a special legal status, armed with powers to enforce its directions and obtain compliance from the hitherto uncontrolled commercial giants.

Steps Preliminary to the Establishment of Control Agency

Before such an International Control Agency is established, it is necessary in the first place, to have an agreement among the various nations both developed and developing for a code of conduct for the transnational corporation on the lines suggested in Chapter VIII, and this code should be implemented by appropriate legal
instrument in national laws and/or multilateral treaties. Secondly, serious attempt should be made towards harmonisation of anti-trust and other related laws with a view to avoiding legal conflicts arising from extra-territoriality. More importantly, there should be an international agreement for a uniform application of regulations relating to restrictive trade practices adopted by various transnational corporations. Considerable advance has been made in this regard by the UNCTAD. Up to now the formulation of a model law for developing countries and multilaterally accepted principles on restrictive business practices has eluded the grasp of international experts. Thirdly, there is an urgent need for an international code of conduct for transfer of technology giving right to developing nations to obtain at reasonable cost, technology appropriate for their economic development with the right to full use without further payment on any improvements made thereon. Here again, efforts to evolve such a code have been undertaken by the UNCTAD, which has before it separate drafts submitted by the developing nations (Group 77) and the industrialised

nations (Group B). Till an agreement is reached at the international level, it is difficult to build plans upon unrealised hopes.

On the taxation side, the transnational corporations have thrown up problems far beyond those encountered so far by tax administrators of the world. Till now, double taxation was considered an impediment to international investment and all efforts have been directed towards formulation of steps for avoidance of double taxation for affording relief unilaterally. The Group of Experts who have been asked to explore the elements of a draft treaty on avoidance of the double taxation have been dealing with only taxation in two jurisdictions on the same slice of income. 13

Transnational corporations tunnelling their


Note: The UN Reports contain, in addition to the guidelines for Tax Treaties between Developed and Developing countries, full coverage of the background discussions and summaries of the issues involved; and, therefore, these reports offer very considerable guidance to countries desirous of negotiating tax contd...
incomes through several jurisdictions raise problems of multiple taxation and any tax treaty or agreement to be entered into in relation to transnational corporation should tackle the issues of multiple taxation and not merely double taxation. This would mean an agreement to have uniform principles of "resident", computation of income and allow all expenses, and equitable principles of allocation of income tax for among the various jurisdictions where the corporation affiliates operate.

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Treaties. In 1977 the OECD published its revised Model Double Taxation Convention on 'Income' and on 'Capital' (OECD Model) which represents a revision of the OECD Draft Convention (1963). The UN Group has also considered the OECD 1977 changes and adopted most of them.

14 Note:

(a) The OECD Model rests essentially on two propositions:

(i) The country of resident will eliminate double taxation through a foreign tax credit mechanism or through exemption for foreign income from tax; and

(ii) in turn, the country of source will considerably reduce both the scope of its jurisdiction to tax at source and the rates of tax where jurisdiction is retained.

The developing countries did not, however, accept the second proposition because of their reluctance to reduce or yield taxation at the source to the extent involved in the OECD model.

Thus the problems posed by transnational corporations cannot be resolved by one package solution containing answers to all the issues, but have to go through the rather painful process of getting an international agreement on as many issues as is possible to disentangle from the knotted areas of concern thrown up by the developing and developed nations. This added to national and regional efforts would afford the necessary strength to the institutional agency envisaged in para-supra. Such a co-ordinated effort in international and national arena would help tame the commercial Goliaths, and would be a distinct contribution of the development of international law, which will be the basis of a new world order.

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