CHAPTER 2
THE DYNAMICS OF TRANSNATIONAL CORPORATIONS

The Law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.

Greene, Chief Justice1

In the 21st century, the Transnational Corporations (TNCs) has become more relevant even for a common man as they are active in most of the dynamic sectors of national economies. They have brought new jobs, technology and capital, and are also capable of exerting a positive influence in fostering development, by improving living conditions. Their impact is visible in all spheres of life i.e. social, cultural, economic, political and legal in all the States across the world. Even though their existence can be traced back to ancient civilization but for the present research work the researcher has only taken into consideration the TNCs post World War-II i.e. post 1955.

After 1955, the TNCs not only grew in size and power but also in number. They widened their scope and activities too. This sudden growth of the TNCs and their role at international as well as national level raised many critical concerns including foreign direct investment (FDI), legal rights and responsibilities on the part of TNCs, for the economist, the political scientists and the jurists. As a result, all of them started looking the TNCs from various angles and there emerged a striking difference when they are viewed by economist and the jurist.

In 2002, while drafting the Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights, the Working Group felt the need to define the term TNCs to understand the issues relating to jurisdiction, their scope, rights and obligations i.e. financial as well as other responsibilities.2 Moreover, when the imposition of moral or legal duties is attempted, the problem of definition becomes more critical. In view of all, the researcher feels that it become more important to understand the various terms which are often used as

synonymous of TNCs like Multinational Corporations (MNCs), Multinational Enterprises (MNEs), International Firm, and Global Firm.

The chapter explains the meaning and definition of the term TNCs and also elaborate the origin and development, i.e. how these corporations became a world power in themselves. The researcher further deals with the nature and theories of the TNCs and provides an illustrated version of the various arguments in favour of various theories. Keeping in view the impact of the TNCs in all the spheres of the life, an attempt is made to answer a moot question i.e. Are TNCs sovereign?

2.1 Transnational Corporations: Definition

It is pertinent to mention here that many expression like MNCs, Multinational Company, MNEs, International Firm, Global Firm, Transnational Company has been used in the international texts in various contexts. However, the legal literature is divided between two terms: ‘MNEs’ and ‘TNCs’. The UN Economic and Social Council have embraced the term ‘TNCs’ whereas the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO) continue to employ the term ‘MNEs’. In comparison with these two terms other terms are of recent origin and are also used with few exception regarding their explanation in domestic law, whereas MNEs and TNCs become a part of the international instruments adopted by various intergovernmental bodies like the UN, EU, ILO, etc. The present research work uses the term ‘TNCs’.

P. Muchlinski defines MNCs in simplest version as “an enterprise which owns or controls production or service facilities outside the country in which it is based.”

However, Underhill Higgott and Bieler use the term MNCs to describe the more “traditional horizontally organized company which replicates its activities within different regions of the global economy, in contrast to the traditional company which seeks to

---

3 The legal literature is divided between two terms: Transnational Corporations and Multinational Corporations. Even though both the terms convey same meaning and used interchangeably by common man still various thinkers as well as organisations used these terms in a very restricted meaning. Transnational Corporations means corporations having business operations in countries other than their country of incorporation, either directly or through subsidiaries or affiliates. Whereas a multinational corporation is an enterprise which owns or controls production or service facilities outside the country in which it is based. The UN Economic and Social Council have embraced the term ‘transnational corporation’. The OECD and the ILO on the other hand, continue to employ the term ‘multinational enterprise’. In this work, the researcher would like to use the term ‘Transnational Corporations’ while analyzing the various codes of conduct on corporations.

establish global operations, using an international division of labour with little regard for national boundaries."5 Recently, Richard T. De George defined, "Multinational corporations are corporations that have operations in more than one country (host countries) but are controlled by a headquarters in a home country."6

In India, the Foreign Contribution (Regulation) Act, 2010 defines the term MNC as:7

A Corporation incorporated in a foreign country or territory shall be deemed to be a multinational corporation of 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.

In 1975, Eugene V. Rostow and George W. Ball defined that “the term ‘multinational company’ is a curious misnomer. Like many other linguistic anomalies, however, it has become part of all modern languages.” They further added, typically, the modern multinational company is incorporated in one of the nations of Europe, one of the states of the United States, or in Japan, Taiwan, Hong Kong, or Canada. Today, Panama, Liberia, and Nassau are the legal domicile for a number of such companies, especially in shipping and insurance. In legal personality, therefore, the multinational company is not multinational at all. Its authority derives from the law of a single state, coupled with rights granted to it by the host nations in which it is permitted to carry on business.8

In 1970s, most of the economists preferred to use the term ‘enterprise’ than ‘corporation’, and stressed that the business structure they were investigating consisted not of one corporate entity but of a network of different entities. The term ‘multinational’ was also preferred over ‘transnational’ because they wished to focus on enterprises that had more than a casual presence outside their home country.9

In 1968, Raymond Vernon defined the term MNEs as “a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a

---

7 Section 2 (g)(iv) of the Foreign Contribution (Regulation) Act, 2010.
common management strategy." However, in 1970 Detlev F. Vagts criticized the definition as “a business concept, not a legal one.” He further explained “it includes foreign based as well as American firms, but excludes simple one-subsidiary enterprises, firms holding foreign shares for investment only, intergovernmental ventures and other structure of lesser size or complexity.”

From a business perspective a MNE is, as John Dunning defines, a business organization which “owns and controls income-generating assets in more than one country.” In other words, a MNE is a multinational actor which coordinates its activities in order to generate profits on an aggregate level. In economic terms, MNEs are the main agents of FDI global economy.

Even the OECD Guidelines for Multinational Enterprises, 1976 states that a precise definition of MNEs is not required for the purpose of the guidelines. However, it further states that:

> These usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.

The ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977 defines multinational enterprises includes:

> Enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based.

---

The ILO declaration further states that “this Declaration does not require a precise legal definition of multinational enterprises; [rather, the foregoing definition] is designed to facilitate the understanding of the Declaration and not to provide such a definition.” Rather, the term “multinational enterprise” is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.\(^\text{15}\)

Alejo J.G. Sison while distinguishing between an MNE and a TNC, defines an MNE as an entity ‘composed of free-standing units replicated in different countries,’ and a TNC as consisting of vertically integrated units that produce goods and provide services in more than one country. Additionally, the term ‘enterprise’ is generally viewed as more inclusive than the term ‘corporation,’ since for the most part ‘corporation’ refers only to businesses that possess a legal charter and state recognition and excludes unincorporated entities such as partnerships and joint enterprises.\(^\text{16}\)

The Draft UN \textit{Code of Conduct} on Transnational Corporations defines a transnational corporations as:\(^\text{17}\)

an enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.

The term ‘TNCs’ emphasizes the fact that there is usually a single legal corporation operating in more than one country, with a headquarters and a legal status incorporated in the national law of the home state. According to Rigaux: “The concept of

\(^{15}\) \textit{Ibid.} \\
Transnationality comes into its own when it is applied to an autonomous corporate system and, in this sense, the transnational corporation is one single corporation even if it is composed of corporations with separate identities under the corporation law of the State in which they operate.\textsuperscript{18}

The Sub-Commission Resolution on the Promotion on Protection of Human Rights constituted a Working Group to examine the working methods and activities of TNCs in order to ensure the protection of human rights, and considering the scope of the state’s obligation to regulate TNCs. As a result, the Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights was drafted in 2002 and adopted in 13 August 2003.\textsuperscript{19}

The main concern about drafting the Norms and to apply the same only to TNCs was due to an inadequate definition of TNC or MNE would allow businesses to use financial and other devices to conceal their transnational nature, and thus to avoid responsibility under the Norms. The Norms define the term ‘TNCs’ as:\textsuperscript{20}

\begin{quote}
\begin{quote}
an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.
\end{quote}
\end{quote}

The Norms, however, does not limit their application to TNCs but also include other business enterprises. The working group defines the phrase “other business enterprise” as:\textsuperscript{21}

\begin{quote}
\begin{quote}
[A]ny business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.
\end{quote}
\end{quote}

Thomas J. Donaldson also defined the TNCs as “A single company operating in two or more nations, with one part exerting at least partial control over the others. Yet

\textsuperscript{18} Andrew Clapham, Human Rights Obligations of Non-State Actors, 199 (2006).
while the transnational is trans-national by virtue of operating in many countries, and while in theory a transnational need not have a “home country” base (in contrast to a multinational corporation), it sometimes retains significant uni-nationality. Its upper management is usually dominated by nationals of a single country, its stock is usually owned largely by residents of a single country, and its charter emanates from a single country.”

According to the *Capston Encyclopaedia*, the TNC is a concept developed by Harvard Business School’s Christopher Bartlett and London Business School’s Sumantra Ghoshal. At the heart of their work during the late 1980s and early 1990s is the demise of the divisionalized corporation exemplified by Alfred P. Sloan’s General Motors. Whereas, Bartlett and Ghoshal identified four types or forms of firms and the multinational or multi-domestic as the first form of firm. Its strength lies in a high degree of local responsiveness. It is a decentralized federation of local firms (such as Unilever or Philips) linked together by a web of personal controls (often expatriates from the home country firm who occupy key positions abroad).

The second is the global firm, typified by US corporations such as Ford earlier in this century and Japanese enterprises such as Matsushita. Its strengths are scale efficiencies and cost advantages. Global-scale facilities, often centralized in the home country, produce standardized products, while overseas operations are considered as delivery pipelines to tap into global market opportunities. There is tight control of strategic decisions, resources and information by the global hub.

The international firm is the third type. Its competitive strength is its ability to transfer knowledge and expertise to overseas environments that are less advanced. It is a coordinated federation of local firms, controlled by sophisticated management systems and corporate staff. The attitude of the parent company tends to be parochial, fostered by the superior know-how at the centre.

Bartlett and Ghoshal argue that global competition is now forcing many of these firms to shift to a fourth model, which they call transnational. The transnational firm has to

---

24 Ibid.
25 Ibid.
combine local responsiveness with global efficiency and the ability to transfer know-how—better, cheaper, and faster.  

The World Investment Report 2011 provides that, “transnational corporations are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake. An equity capital stake of 10% or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as the threshold for the control of assets. A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is a resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise (an equity stake of 10% for an incorporated enterprise, or its equivalent for an unincorporated enterprise).”  

2.2 Origin and Development of Transnational Corporations  

2.2.1 From Family Traders to Merchants  

TNCs are a phenomenon of the 19th century. However, the evolution of TNCs can be traced back in ancient civilizations under different names and with different scope of their activities. In the beginning, the travelling merchants emerged and such travelling merchants were private individuals who traded across the frontiers of their lands in products produced by the skills and resources of the people of the home country. According to Moore and Lewis, international trade began to develop in the Near East around 3500 B.C. They identify the first trading firm ‘transnational’ appearing in the Old Assyrian kingdom shortly after 2000 B.C. Family-owned firms headquartered in the capital of Ashur opened branches in other political jurisdictions spread over what became the modern states of Syria and Iraq.

Between 1000 and 500 BC ancient Phoenician merchants, especially those located on the island of Tyre, which is located off the coast of today’s Lebanon, created firms

26 Ibid.  
which traded in silver from Spain, tin from Britain, ivory from Africa and textiles from all over the Mediterranean.29

The coming generation viewed the rise and fall of various empires and accordingly the trade routes opened and closed. The integration of world civilization was never a continuous process, but one in which there have been numerous shocks and discontinuities, as well as periodic backlashes. During 50 BC to AD 500, the Roman Empire controlled the Mediterranean region, which was linked by roads, harbors and a common currency.30 Before the beginning of the Christian era, in the eastern countries seafaring trade was flourishing with permanent establishments between India and Malaysia, India and Indonesia, and also between India and Rome. An early Jataka story tells of ships sailing from the port of Bhrgukachha to a place called “Baveru” which must be Babylon.31 “The Pali Questions of Milenda”, probably of the first century A.D. mentions the possibility of a merchant sailing to Alexandria, Burma, Malaya and perhaps to China. With the decline and fall of Rome, the trade with the West declined and the trade between India and China increased, particularly between South India and China.32 The ports of Tamralipta, Musiri, Korki and Kaveripattinam are well-known in ancient history as ports from which ‘Transnational’ trade operated.33

During the sixth century Islam spread outwards from Arabia to Asia, Africa and the Iberian peninsula. This provided a political and ideological basis for the growth of trading connections and flow of knowledge. Islamic cities in Spain, such as Cordoba, flourished as clusters of knowledge at a time when much of Europe was technologically stagnant. Whereas in the Middle Ages34 corporations existed largely as a means of regulating the affairs and establishing the legal entity of a group of individuals, such as a guild35, an ecclesiastical body, a university36, or a borough.37 In the eyes of the law, the

29 Geoffrey Jones, Multinationals and Global Capitalism - From the Nineteenth to the Twenty-first Century, 16 (2005).
30 Ibid.
31 A.L. Basham, The Wonder That was India, 7 (1954).
33 Supra note 31.
34 Middle ages period in European history traditionally dated from the fall of the Roman Empire to the dawn of the Renaissance. Whereas in Indian context the middle ages period dates from the 10-11th century to mid of 18th century.
35 Guilds flourished in Europe between the 11th and 16th century and were of two types: merchant guilds, including all the merchants of a particular town or city; and craft guilds, including all the craftsmen in a particular branch of industry (e.g., weavers, painters, goldsmiths).
property of the Church in each of its administrative areas was deemed to be vested in the
person of the responsible Bishop, as a “corporation sole.” Colleges and universities were
similarly established as perpetual corporate bodies pursuant to statute or decree, and
governed by designated groups of men, who were not liable for the debts or wrongs of the
corporate body save in exceptional circumstances.38

2.2.2 From Charter Companies to Transnational Corporations

During the fifteenth century Chinese ships reached the Arabian Gulf and east
Africa, but soon afterwards political developments shifted China in a more inward
direction.39 The Voyages of Discovery of Spanish and Portuguese explored to the New
World and Asia in the fifteenth and sixteenth centuries and saw transfers of technology -
and deadly diseases - on a new scale. Entire American civilizations, including the Aztecs
and the Incas, were destroyed by European armies and germs. At the end of the fifteenth
century Portuguese discovered the water route between Europe and Asia via the Cape of
Good Hope, transforming the possibilities for trade between the two continents.40

However, Eugene V. Rostow and George W. Ball did not agree with Moore and
Lewis; and Geoffrey Jones, wrote:41

The true ancestors of the modern multinational companies, however, are
not the churches, colleges and universities, guilds, or other Roman,
medieval, or post-medieval examples of the capacity of the law to create
“artificial persons,” but the great trading companies of the seventeenth
and eighteenth centuries – the East India Company, the Hudson Bay
Company, La Compagnie des Indes, the Company of Adventures of
London Trading into Africa, and their Spanish, Russian, Italian, and
German analogues. Many of these companies undertook to govern as well
as trade.

Although merchants were trading between different political sovereignties for
centuries, a strong case can be made that the use of the word ‘transnational’ is

36 University of Oxford was founded in the 12th century. In the Renaissance, Desiderius Erasmus and St.
Thomas more helped in enhancing its already considerable reputation. Whereas, in the United States,
Harvard University is the oldest private corporation which was set up in 1636. For details see: Infra
note 49, at 43.
38 Supra note 8, at 5.
39 Supra note 29, at 16.
40 Ibid.
41 Supra note 8, at 5.
anachronistic before the modern idea of the nation-state took hold. It was only after the industrial revolution that the corporation emerged as a legal and economic entity. The probable forerunner of the modern business corporation was the British joint-stock company and the Dutch East India Company. The latter, founded in 1602, is supposed to have been the first corporation established with a permanent capital stock.

As the process of European colonization also got underway from the 17th century, Danish East India Companies, the Hudson’s Bay Company, the Royal African Company, and similar firms were given monopoly of trading rights by their respective governments. They became large-scale business organizations some of which have been seen as ‘proto-multinationals’. The English, Dutch and other European East India companies had engaged in large-scale trading operations between India and Europe involving the exchange of bullion for spices, silk, and textiles, the latter reflecting India at that time as probably the largest textile industry in the world. By the 1790s British merchant houses in India began investing in indigo plantations, often persuading others to invest in their ventures but retaining the management of them.

By the 18th century, therefore, the ‘integration of civilizations’ had been in progress for millennia. Europe, Asia, Africa and the Americas were joined by strong trade links. With the industrial revolution and the expansion in the scale of enterprises, legal incorporation became a practical necessity for a number of reasons, and by 1800 in the United States the corporations had moved from being what Hurst labelled a “special privilege” to a “general utility”. The corporations started foreign direct investment in the exploitation of natural resources; service sectors like insurance, banking; in energy and transport utilities in the mid nineteenth century. At the same time, the British merchants in Calcutta, Bombay, and Madras spread eastwards and southwards along the Asian trade routes. In the eighteenth century British trade between China and Britain was confined to a

42 Political scientists traditionally identify the origin of the modern system of nation states to the Peace of Westphalia, which ended the Thirty Years War in Europe in 1648. For details see: Supra note 29, 16.
43 Supra note 36, at 22.
44 The Royal African Company, chartered in Britain in 1672 and dissolved in 1752, used to transport slaves to the West Indies. Between the 16th and the 19th centuries, at least 10 million Africans were transported to the Americas which resulted in an extraordinary expansion of capitalism in its size and geographical scope. For details see: Supra note 29, at 17.
45 Geoffrey Jones, Merchant to Multinationals: British Trading Companies in the Nineteenth and Twentieth Centuries, 29 (2000).
46 Supra note 29, at 18.
47 Supra note 36, at 22.
48 In the 1820s British-owned companies owned and controlled gold fields in Brazil.
single port - Canton - and was conducted by the East India Company on the British side and by an association of Chinese merchants on the Chinese side.49

In 1847, Mackinnon Mackenzie & Co. was established in Calcutta as a partnership between Scottish merchants from the town of Campbeltown in Kintyre. The firm began with a traditional business importing British textile and exporting local products such as tea, sugar, and rice. The most significant innovation of Mackinnon Mackenzie came in 1856 when the firm entered Indian coastal steam shipping by promoting a company to conduct regular sailings between Calcutta and the ports of neighbouring Burma.50

The earliest manufacturing transnationals appeared in the 1830s, when Swiss firms erected cotton textile factories in southern Germany. From the 1850s there were direct investments in railways: the Panama Railroad Company, a US-owned venture which built the first passable route across the Central American isthmus in 1851, has been described as the first truly large US direct foreign investment. Among the pioneer firms were Siemens and Halske, a German firm which pioneered the development of telegraph and cable equipment, which opened a factory in Russia in 1855, and Singer Sewing Machines51, a US firm which invented the world’s first commercially successful sewing machine, which opened a factory in Scotland in 1867. The late nineteenth century saw the spread of European-owned trading companies in many regions, as well as the foundation in 1876 of Mitsui Bussan, Japan’s first sogo shosha or general trading company.52

From the 1880s the numbers and scale of multinationals grew rapidly.53 They witnessed the rapid increase in international trade as they discovered and exploited natural resources and food supplies over much of the world. In 1912-13, Woodrow Wilson said:54

---

49 Supra note 45, at 31.
50 Ibid.
51 Christopher Tugendhat think that the Singer Sewing Corporations has the strongest claim to be regarded as the first transnational corporation “because it was the first company to manufacture and mass market a product basically in and under the same printed name all over the world”. For details see: Christopher Tugendhat, The Multinationals (1972). However, some others claim that William Lever of Britain founded the first real Transnational Firm when he established manufacturing and distributing agencies in many foreign countries controlled by a strong organization exhibiting the characteristics of a modern Transnational. Also See: Fortune, Vol. 38, 48 (February 1948).
53 There were many reasons for the emergence and growth of transnational’s in the late nineteenth century. There were very significant improvements in travel and communications, notably the spread of railways and of the telegraph, which made it feasible for managers to control assets in foreign countries. There were almost no restrictions in cross-border capital flows and a high degree of receptivity to foreign transnational’s. The spread of imperialism also reduced the risks of investing in the developing world.
There was a time when corporations played a minor part in our business affairs, but now they play the chief part, and most men are the servants of corporations.

By 1914 around one-third of total world foreign investment - $14,500 million - took the form of direct investment involving managerial control. Most of this sum was in natural resources and services, and was located in the developing world. Transnational manufacturing was overwhelmingly located in western Europe and the USA and Canada. The UK, which had been the world's largest economy until it was surpassed by the USA in the late 19th century, accounted for almost one-half of the total world stock of direct investment. The other important home economies were Germany, France and the Netherlands. As early as in 1902, a book by Mackenzie, The American Invaders, cried:

America has invaded Europe, not with armed men, but with manufactured goods. Its leaders have been captains of industry and skilled financiers whose conquests are having a profound effect on the lives of the masses from Madrid to St. Petersburg. Our aristocracy marry American wives, and their coachmen are giving place to American trained drivers of American-built automobiles . . . Our babies are fed on American foods and our dead are buried in American coffins.

During the 1930s, this process of growth through integration ground to a near standstill as the market slowed down. The most technologically advanced industries, such as chemical, rubber, electrical, and transportation, led the way into the second major growth stage: diversification. The impetus for this strategy of expansion was, again, the wish to stabilize and control the corporation's external economic environment. Integrated firms began to diversify after the 1920s so that by mid-century most key industries were dominated by a few giant firms administered in much the same way. After World War II, corporate leaders found it cheaper and faster to form mergers than to build new factories and develop new companies from scratch: mergers proved to be more efficient and less costly and often less risky. Since World War II mergers have accounted for almost all increases in the share of industrial assets held by large firms.

55 Supra note 52, at 3567.
57 Supra note 37, at 24.
2.2.3 Development of Transnational Corporations after World War II

In the 1940s, left wing writers like Trotskyite James Burnham argued that a new managerial ruling class has stealthily obliterated the difference between capitalism and socialism. In 1980s, corporate raiders also agreed with the same view. Different forms of company continued to sprout around the world with the slogan that ‘management not bankers not stockholders is the fundamental element in industry’. Hence whatever changes should come, whether industry is owned by capitalists, or by the state, or by the workers, it will always have to be managed. Management is the permanent function of business. As early as 1920, Company man’s character had been formed by two things: professional standards and corporate loyalty. In 1942, Peter Drucker argued that companies had a social dimension as well as an economic purpose. The importance of empowering workers became more important when Drucker identified a new class of ‘knowledge workers’ (as he dubbed them in 1959).

One sign of the success of managerial capitalism is the way that it co-opted its state equivalent after 1945. During the World War - II, governments tightened their grip on business. War time governments everywhere ordered management and labour to collaborate in order to boost productivity and prevent the strikers that had marred the 1930s. This relationship continued after the war, though under different guises on each side of the Atlantic. In America, big government remained an important ally of big business like in the case of GM, Ford, etc. Between 1947 and 1968, the share of American corporate assets owned by the two hundred largest industrial companies rose steadily from 47.2 percent to 60.9 percent. The booming information technology sector produced several new firms (such as Xerox, Texas Instruments) but older ones (Motorola, GE, IBM, etc) hung around.

In this period firms became more bureaucratic and introspective. Decentralization became a job-creation machine for managers. The 1950s and 1960s was the heyday of Company Man or the Organization Man as he was then known. The other element that underlined the supremacy of managerial capitalism was that the most conspicuous private sector alternative to the multidivisional firm in the 1960s - the diversified conglomerate.

---

61 Supra note 59, at 110.
The 1960s conglomerates arose partly by gobbling up the divisions that other companies did not want, and partly through hostile takeovers, often using their own highly rated shares.\textsuperscript{62}

The emergence of the idea of the MNCs or TNCs or MNEs can be traced in 1960s. Credit may be given to Jean Jacques Servan-Schreiber, whose \textit{Le Defi Americain} of 1967 highlighted the institution. The work of Jean Jazques drawn the attention of the business, economics and legal researchers. The Harvard Business School was pioneer in funding such effort under the supervision of Professor Raymond Vernon. A group of authors of different discipline - including Vagts on the legal side tackled different aspects of multinationals.\textsuperscript{63}

By 1973, fifteen of the top two hundred American manufacturing companies were conglomerates. In 1982 and 1984, the governments privatized its share oil, gas telecom, steel, water, electricity. By 1992, two-thirds of state owned industries had been pushed into private sector. Privatization was followed by downsizing of the workforce. European government followed suit by introducing single market in 1992. By 1996, some eighteen thousand companies had been privatized. In 1996, with the Internet revolution gathering pace, John Perry Barlow, issued the following warning: “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. I ask you of the past to leave us alone, You are not welcome among us”\textsuperscript{64}. By 2001, there were around 65,000 TNCs in the world, roughly five times the number in 1975; around the globe they gathered together 850,000 foreign affiliates, employed 54 million people, and had revenues of $19 trillion. Thus, “multinationals tried hard to treat the world as a single market, embracing ugly names like transnational’s, internationals, and new age multinationals.”\textsuperscript{65}

2.3 Nature and Theories of Transnational Corporations

The Industry should regard themselves as trustees and servants of the poor.

Mahatma Gandhi, 17\textsuperscript{th} April 1931

\textsuperscript{62} \textit{Id.}, at 112.
\textsuperscript{63} \textit{Supra} note 9, at 796.
\textsuperscript{64} \textit{Supra} note 59, at 139.
\textsuperscript{65} \textit{Id.}, at 167.
The ontology of the corporation encompasses a number of theories regarding the nature and authority of corporations. Corporations have been described as a fictional or natural entity, as a corporate person, a nexus of contracts, an instrument created by State by granting concession to a company, and communitarie theory and few others theories are also prevalent like private property of the shareholders, an agent for the owners, a representative democracy, and even a religious entity. Each metaphor or theory regarding the nature of corporations has some merit, and multiple views can and do coexist.66

The recognition and treatment of corporations as “persons” and the idea that corporations can have both legal rights and duties, separate and apart from the rights and duties of their owners, directors, managers and employees, has been recognized in U.S. law since the early 1800s.67 So, the emergence of all these theories can be traced in the history of last 200 years in various writings of economists, jurists and decisions of the highest courts of the States. More interestingly even today each of these concepts of the corporations coexist simultaneously in case law and continue to influence courts in different State and different legal systems.68

The content and scope of the rights and duties of corporations have developed over the years in response to evolving theoretical understandings of the nature of the corporate persona. To some extent, the way in which one chooses theoretically to conceive the corporation “reflects one’s view of the role of corporations in society and, consequently, one’s normative view of the world.”69 In other words, one’s choice of the theory affects the content and scope of rights and duties assigned to the corporation. The following are the prominent theories which laid significant influence in the U.S.A. and U.K. law.70

2.3.1 Corporate Person Theory

The ‘corporate person’ theory views the corporation as a distinct bundle of rights and obligations. Under this view, which substitutes an artificial legal entity for the underlying individuals who act through the corporate form, the government’s power to

68 Supra note 66, at 134.
70 Supra note 67, at 541.
create corporations also implies and assumes pervasive government power to regulate corporations. This, in turn, provides a basis for denigrating the constitutional protection of corporate activities. The most famous expression of the corporate person theory is found in *Trustees of Dartmouth College v Woodward*, which invoked the Contract Clause to invalidate a New Hampshire statute that altered the terms of a British crown charter granted to Dartmouth College. The Court held that the charter was a contract, entitled like other contracts to protect from impairment by the state government. But the Court also characterized the charter-granting government (in this case, the Crown) as a party to this contract. Chief Justice Marshall described the corporation as:

an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

The description of the corporation as a ‘mere creature of law’ implies that government has created rights that cannot be created by private contract. Marshall’s inference was consistent with the practices of the time. During the early history of corporate law, those who wished to establish corporations applied to state legislatures for state charters that granted permission to incorporate. Special chartering, however, has long since been replaced by general incorporation, in which the state’s only involvement in creating the corporation is accepting for filing the articles of incorporation. As general incorporation became widely accepted, legal commentators and courts came to view individual contracting parties, rather than the state, as the creators of the corporate entity.

In 1896, the Supreme Court again declared, “[i]t is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States.”

---

72 17 US 518 (1819).
73 *Supra* note 71, at 97.
74 *Supra* note 72, at 636.
75 According to Larry, the end of special chartering did not, however, mean the end of the corporate person theory. In the first place, at least two important corporate features seem to be explained by state creation rather than private contract-limited tort liability and choice of law. For details see: *Supra* note 71, at 98.
76 *Gulf, Cal. & S.F. Ry. v. Ellis*, 165 U.S. 150, at 154 (1897).
If we consider corporation as a ‘mere creature of law’, then the researcher has
drawn a perspective that it is extension of the home state or rather it is more appropriate to
call it a creation of domestic law. This further widened the scope of state not only to
regulate the corporations as per domestic law but also to respect the international
commitments and instruments regarding promotion and protection of human rights of the
individuals which is a core area of research study.

2.3.2 Fictional or Artificial Entity Theory

This theory considers the corporation as a fictional or artificial entity, with powers
and duties granted by the state. This view, which dates to Coke and Blackstone, focuses
primarily upon the corporation’s relationship with the state and was dominating in the U.S.
from approximately 1780 until 1890, a period during which state control of corporations
was manifest by corporate charter limitations involving maximum duration, minimum
capitalization, and the requirement of single-purpose descriptions. When the corporation is
viewed as a fictional entity, the participation of individuals within the corporation is
virtually ignored, the corporation’s rights and duties are defined and limited to those
granted by the state, and its rights and duties will be different from, and in many cases
narrower than, those of natural persons. When the corporation is viewed as an artificial or
fictional entity, it would appear quite unlikely that a corporation would be viewed as a
holder of “human rights.”

2.3.3 Natural Entity Theory

This theory looks at the corporation as a natural entity, developed in the 1890s,
focuses not upon state dominance, but instead upon the importance of individual initiative
in the creation of a corporation. As States removed many of the restrictive provisions
governing corporations, the focal point became the relationship between management and
the owners of the business. When the corporations is viewed as a natural entity, it is much
more likely that the corporation will be seen as having rights and duties that are very
similar to those of human beings.

2.3.4 Contractual Theory

It was emerged in the 1930s and has become dominant, at least among U.S.
academics, since the early 1980s. One commentator has observed that “the debate over

77 Supra note 67, at 542.
78 Id., 542-43.
natural entity theory seemed to cease in the late 1930’s, although “corporate policy analysis and discussion continued to assume a natural entity paradigm until the 1980’s,” when the contractarian theory came to dominate. According to the contractual theory two or more parties come together to make a pact to carry on commercial activity and it is from this pact that the company is born. Bottomley labels this as the “aggregate” theory explaining various versions thus:

contract supplies the explanatory framework for both the judicial and the political status of the corporation. Internally the corporation is regarded as an association or aggregation of individuals; it comprises contractual relations between members inter se, and between members and management.

The logical outcome of the theoretical contractual base is to limit the social responsibility of the company and to create an entity remote from regulatory interference because any denial of the right to use the free enterprise tool which is available tends to interfere with this concept of the company. The theory is reflected in UK rules like the rule in *Foss v. Harbottle* which accepts that in most cases the majority decision of the contractors, taken according to the constitutional (contractual) rights of the shareholders’ represent the will of the corporation. This approach has roots in realist theory “according to which groups have natural moral and legal personality”. The theory sees companies as made up of natural persons, the majority of members representing the will of the corporation. The corporation is thus entitled to autonomy from the state as being “the natural expressions of desires of the corporators”. Consequently, corporations obtained their political and thus legal status independently from the state.

Because the corporation is not viewed as an entity in its own right, from an aggregationalist perspective one might argue that the corporation does not itself have rights and duties, since the enterprise is comprised of individuals, who themselves have disparate interests, rights and duties. The contractual theory rejects the corporate person theory as an accurate description of the current state of corporate law. Specifically, neither limited torts liability nor the special internal affairs rule for choice of law purposes,

---

79 Supra note 67, at 543.
81 (1843) 2 Hare 461.
indicates that corporations actually receive special privileges that justify treating corporations differently from other contracts.\(^83\) Whereas the decline of the natural entity view and the ascendance in U.S., especially among academics, of a contractarian perspective dominated by economic concerns about the efficiency of various agency relationships, may be an important part of the explanation why there has not been much discussion in the United States of corporations as possessors of “human right”.\(^84\)

### 2.3.5 The Communitaire Theories

This theory views the grant of company status not only as a concession by the state but as creating as an instrument for the state to utilise. It starts from a position diametrically opposed to the individualist contractual theories. This model was familiar in the former communist countries and in Fascist Italy. The standard of a corporation’s usefulness is not whether it creates individual wealth but whether it helps society gain a greater sense of the meaning of community by honouring individual dignity and promoting overall welfare. It has two consequences. The company has no strong commercial identity as it has become a political tool with diffused goals. Although the diffused goals will give it considerable social responsibility it will remove its commercial focus. The state merely uses the corporate tool to further its ends.\(^85\)

However, a modern version of this theory, known as ‘liberal corporatism’, may have value in determining governance structures. The basis of this theory is still a blurring of the line between the public role of the state and private market domains but emphasis is placed on creating a role within corporate governance for special interest groups within society which represent particular sectors (for example labour represented by Trade Union).\(^86\)

Delaware Chancellor William T. Allen has described another school of thought about the nature of corporations as the “social entity conception”. The social entity theory posits that successful corporations have a moral imperative, not only to make money for their shareholders, but also to improve the general welfare of society in some significant way. Arguably, it is a corporation’s ability to enhance society’s welfare that makes it so successful, whether it is providing lower cost goods to families with limited disposable

\(^{83}\) Supra note 71, at 100.  
\(^{84}\) Supra note 67, at 544.  
\(^{85}\) Supra note 82, at 225-26.  
\(^{86}\) Ibid.
incomes or creating ways for communities with similar interests to communicate with each other. The social entity theory is compatible with the legal entity approach because, under this theory, the corporation is ‘capable of bearing legal and moral obligations’.87

2.3.6 The Concession Theories

Concession theory in its simplest form views the existence and operation of the company as a concession by the state which grants the ability to trade using the corporate tool, particularly where it operates with limited liability. The contrast between this theory and communitarian notions is that concession theorists accept only that the state has a role to play in ensuring that corporate governance structure are fair and democratic, they would oppose the notion that the company should realign its aims to reflect social aspirations of the state. Hobbes classified as ‘bodies politic’ those organisations which have been granted corporate personality by ‘writ or letters from the sovereign’.88

Some commentators have gone so far as to analogize the corporation to a religious entity. Professor Douglas Litowitz argued in a recent article that the corporation is “fundamentally a religious and mythological entity” and “a secular god”. He argues that we worship business leaders and that the Model Business Corporation Act’s definition of a corporation, which uses the term “corporation,” is not unlike God’s statement to Moses, “I am who I am.” Further, he argues, a mythology has developed concerning corporations that can assist in resolving issues of corporate law.89 Professor Litowitz states:90

The pressing issues of corporate law [such as] whether a corporation should resemble a functioning democracy, whether it has duties to a community, whether it should be allowed to move offshore, whether it has a race or gender, whether it has rights to free speech, [and] whether it must favour shareholders over employees . . . [are] questions about the meaning of the modern corporation.

One way to answer these fundamental questions, Litowitz argues, is to view the corporation as a “modern deity.”91

87 Supra note 66, at 136.
88 Supra note 82, at 227.
90 Id., 536.
91 Ibid.
Even though, Litowitz placed the corporations at the highest level that too beyond the human control by calling them ‘modern deity’ but in reality while carrying out their business activities, mostly TNCs not only violates the local laws, i.e. labour laws, land laws, tort law, criminal laws rights of the individuals and so on; and the international law, i.e., international human rights law, international environmental laws, international criminal law but also follow corrupt practices to achieve their financial gains. When in the last two decades, some voluntary organizations tried to drag these so called modern deity for violations of the rights of the individuals, an issue came up regarding of the nationality of TNCs. Further, to evade litigation or to get a favourable decision from a particular legal system of the host state the TNCs raise issues relating to the jurisdiction by taking a defence of its transnational character. Even though the concept of ‘nationality’ has nothing much to contribute in such circumstances but its theoretical relevancy cannot be ignored.

2.4 Nationality of Transnational Corporations

The term ‘nationality’ or nation is derived from the Latin word ‘Natus’ which means born. Nationality or nation, therefore, in its derivative sense means a group of people belonging to the same racial stock. The term was used in this sense by the German philosophers. In the words of Gilchrist, “a nationality may be defined as a spiritual sentiment or principle arising among a number of people usually of the same race, residents on the same territory, sharing a common language, the same religion, similar history or traditions, common interests with common political associations and common ideals of political unity”.

According to David Miller, “Nationality is a subjective phenomenon, constituted by the shared beliefs of a set of peoples: a belief that each belongs together with the rest; that this association is neither transitory nor merely instrumental but stems from a long history of living together which (it is hoped or expected) will continue into the future; that the community is marked off from other communities by its members distinctive characteristics; and that each member recognizes a loyalty to the community, expressed in a willingness to sacrifice personal gain to advance its interests.”


Keeping in view the above discussed definition, the researcher is of the view that there is no objective criteria such as language, race or religion are adequate to mark all national distinctions, even though these criteria may enter into particular national identities. Accordingly the conception of nationality seems to be erroneous. Moreover, there is not even a single nation or nationality in the world whose people belong to the same racial stock also support this argument.

The way TNCs are defined, one way to look at their nationality is that the position is same or rather more typical because of many practicalities in their formation and activities, like the headquarters may be in one state, and the legal incorporation in another state, the shareholders mostly from a third state, and the operations in a fourth state and the workers are from a fifth state and those affected by the operations from yet another set of states.94

Moreover, Andrew has also observed that “the nationality of incorporation may no longer be the sole determinant for deciding issues of jurisdiction.”95 For example, the nationality of the company is not deemed relevant in the context of the EU law concerning criminal jurisdiction in the field of corruption, because jurisdiction is assumed where the legal person has its head office in the Member State. One view is that if the law allowed to convict the natural person who was in a position of control in the corporation (whatever the nationality of the corporation), the nationality of the corporation is irrelevant. In the context of the OAS Corruption Convention the jurisdiction is based on domicile and the Model legislation states that “the intention of the Convention seems to be to include all entities that perform their principal activities in a permanent manner within the territory of the country, whether or not they are of an economic or commercial nature”.96

---

96 The Inter-American Model legislation on illicit enrichment and transnational bribery (OEA/Ser. Q CJI/doc. 70/98 rev. 2), adopted on 22nd August 1998 by the Inter-American Juridical Committee, includes the following paragraphs under ‘III Observations for the use of the legislator [A1]. The term “domiciled” may require adaptation to the legislation or legal terminology of the legislating country (e.g., companies “that have established domicile in the country”, “that are incorporated under the laws of the country”, or “whose head offices or senior management are in the country”). The juridical arrangements of some States include the concept of the nationality of corporate legal entities, while others use the term “national company”. In this case also, the intention of the Convention seems to be to include all entities that perform their principal activities in a permanent manner within the territory of the country, whether or not they are of an economic or commercial nature”. For details see: Id., at 179.
At the same time, nationality of TNCs in international law cannot be simply determined through a reference back to national law. First, because national law does not usually concern itself with formally conferring nationality on companies; no passports are issued, no entry visas are considered, there is no question of voting in national elections. Second, because one State cannot simply dictate to other States that its determination has to be recognized by another State or by an international tribunal. According to Brownie ‘legal experience suggests that a doctrine of real or genuine link has been adopted, and as a matter of principle, the consideration advanced in the Nottebohm case apply to corporations’. In the context of determining an individual’s nationality for the purposes of a claim of state responsibility on behalf of that individual the International Court of Justice held in Nottebohm that.

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

Andrew Clapham suggested that in most circumstances the rule is that nationality flows from the place of incorporation and the seat of management; this will be the obvious starting point. But there may be situations where it will be appropriate to fix nationality based on a more genuine connection. This could be the case where a company was incorporated in one State in order to avoid coming within a criminal jurisdiction which followed the nationality of the legal person. At this point we are closer to the concerns which influenced the International Court of Justice in the Nottebohm case and we can remind ourselves of Brownlie’s conjecture that: “It would seem that the process whereby an individual embarks on a voluntary naturalization and the incorporation of a company in the country of choice are significantly similar.” Where these processes are designed to avoid corporate responsibilities imposed under international criminal law it would seem that the international law should use its ‘reserve power’.

---

98 ICJ Rep. (1955) 23. Also see: Supra note 95, at 181.
99 Supra note 97, at 490-91.
100 Ibid.
As Watts and Jennings observes that: ‘The concept of nationality in relation to companies does not have the legislative basis in national laws which exists in the case of individuals, and is thus much more open to a pragmatic assessment on the basis of the extent of a company’s attachment to a state’. They go on to explain that ‘for purposes of laws restricting trading with the enemy, many states attribute enemy character to a company even if is not incorporated under the laws of the enemy state, as where a company incorporated in a non-enemy state is controlled by enemy nationals’. The emergence of the concept of control here is perhaps more appropriate than the conditions we found in the context of state responsibility. This is because national law often demands criminal intent in the controlling mind of the natural person. It therefore seems correct to suggest that: where nationality is a pre-requisite for jurisdiction, and the controlling mind is of a different nationality than that of the State of incorporation, then the nationality of the controlling mind could also be relevant for the purposes of ensuring jurisdiction.

Besides the definition, nature and nationality, the researcher also take into consideration certain important issues which needs to be discussed here without which the role of TNCs in the present globalized world can’t be highlighted. With the passage of time, TNCs opted different policies for different States to run their business smoothly. While doing so, there scope enlarged so much so that they become service provider in almost all the areas besides selling goods. As a result, many issues were raised by the economist, law makers, and political scientists and among them, an attempt is made to address, precisely three question are: are TNCs sovereign, relationship between TNCs and States, and their role in the era of globalization.

2.5 Transnational Corporations and Issues of Sovereignty

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. ... [transnational] corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregate in a few hands and the Republic is destroyed. (emphasis added)

Concentration of economic power in all embracing corporations... represents private enterprise become a kind of private government which is a power unto itself - a regimentation of other people's money and other people's lives.

Franklin D. Roosevelt, June 27, 1936

Ever since Raymond Vernon published his groundbreaking analysis Sovereignty at Bay in 1971, with a feeling that sovereign States were feeling naked, discussions concerning the power of TNCs have been connected closely to the concept of sovereignty of nation-states. In 1975, he further wrote that “the Multinational Enterprise is likely to survive on the perception of many countries that the suppression of these enterprises would be costly to the national interest”. Twenty years later Vernon warned against using book titles that carry only half the message.

The researcher observed, indeed, both the supporters and the critics of the thesis of contested national sovereignty still regularly quote Vernon’s work. However, they often refer solely to its title rather than the content of the book. The controversy - and a great deal of the misunderstandings connected to it - do not even revolve around whether transnational’s really gained power while nation - states lost some of theirs, but rather around different understandings of the notion of sovereignty. Keeping in view the impact of globalization on all institutions of every society, it becomes necessary to clear the misunderstanding and to know the true position of the transnational in the context of sovereignty.

Since Aristotle, the term ‘sovereignty’ has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word. Bodin and Hobbes shaped the term to serve their perception of an urgent need for internal order. According to Rousseau, sovereignty

---

rests in a united people rationally considering and deciding its own fate. John Stuart Mill defined sovereignty more esoterically as the “supreme controlling power”.

Adam Smith in The Wealth of Nations defined a state by its obligations to society, and specially identified three such obligations of the sovereign. These obligations are “protecting the society from the violence and invasion of other independent societies,” the “administration of justice,” and the duty of “erecting and maintaining those public institutions and public works, which though they may be in the highest degree advantageous to a great society, are however, of such a nature, that the profit could never repay the expense to any individual or small number of individuals.”

However, in modern international law, what counts is the sovereignty of the people and not a metaphysical abstraction called the State. International law still protects sovereignty, but - not surprisingly - it is the people’s sovereignty rather than the sovereign’s sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its “invasion” of the sovereign’s domaine reserve. The U.N. Charter replicates the “domestic jurisdiction - international concern” dichotomy, but no serious scholar still supports the contention that internal human rights are “essentially within the domestic jurisdiction of any State” and hence insulated from international law. Allison D. Garrett observed:

In the past two hundred years, sovereignty devolved from the monarch to the people in many countries; in our lifetimes, it has devolved in several significant ways from the people to the corporation. We are witnesses to the erosion of traditional Westphalian concepts of sovereignty, where the chess game of international politics is played out by nation-states, each governing a certain geographic area and group of people. Eulogies for the nation-state often cite globalization as the cause of death.

Than in 1975, Theodore D. Weinshall argued that the dominant fact is that the Multinational Corporations are taking over some of the basic roles hitherto traditionally regarded as the province of the nation states. He further summed up some other

---

107 Supra note 66, at 139.
108 Id., at 140.
109 Supra note 106, at 252.
110 Id., at 243.
111 Supra note 66, at 130.
implications such as the Corporations constitute barrier to war/armed conflicts because due to their operations in several countries they can ill afford to lose their assets, customer markets, manpower, supplier and capital sources during war. The TNCs move technology, capital, know-how and more advanced standards of living from the developed to the developing areas of the world, helping bridge existing economic gaps. They carry with them the most advanced managerial concepts and techniques. They induce less advanced nation states, through their mere presence, to change their cultural environments.\textsuperscript{112}

At the same, i.e., in 1975, the Supreme Court of India in the case of \textit{Sukhdev Singh} Case, Mathew, J. adopted the modern concept of state while quoting Mac Iver:\textsuperscript{113}

The Concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation:

If we clearly grasp the character of the State as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service.

In 1984, Peter French in \textit{Collective and Corporate Responsibility}, argued that the changing nature of postmodern politics and the socioeconomic influence of large corporations often make them more important than states when it comes to impacting day-to-day life: corporate entities “define and maintain human existence within the industrialized world.” He further argues that moral claims and responsibilities are as legitimate with regard to corporations as they are with regard to individuals and governments.\textsuperscript{114}

The post cold war period has seen the changes in the nature of power which expanded the role played by the TNCs at global level. In 1990, Joseph S. Nye claimed that major state powers are shifting the way in which they protect their national interests from “hard” power means to “soft” power means. Hard power consists of military force and other sanctions that can compel compliance by another state. Soft power consists of culture, ideology, and institutions that can set agendas, set the terms for international

\textsuperscript{113} \textit{Sukhdev Singh v. Bhagatram}, (1975) 1 SCC 421 at 449.
debates, and induce other nations to “want what we want”. TNCs represent, for Nye, a key element of soft power. In 1992, Lester Thurow further supported Nye’s argument by stating that “the omnipresent nature of MNCs in the post World War II system is largely explained by their ability to satisfy deep human needs”.

In 1990s, the concept of organizational or corporate citizenship originated. As a result, the importance of national borders decreased and individual started identifying themselves more closely with their employer than with their country of birth. One scholar noted that there now exists “a new breed of men and women for whom religion, culture, and ethnic nationality are marginal elements in a working identity”. Large corporations like Coca-Cola, McDonald’s and Wal-Mart, Shell export their corporate cultures and instill their cultural values in the local executive talent when they establish operations abroad. Whereas the States left it to the individuals to inherit the cultural values from the family and community and most of the time do not interfere expect for the protection of cultural rights of the citizens.

Another important characteristic of citizenship is having a right of suffrage. As the global business population becomes more transient, some of the nation-States has responded accordingly. In the European Union, for example, suffrage is based on residence rather than citizenship. Residents, regardless of citizenship, have the right to vote and to stand for political office. As a result, the franchise rights of corporate shareholders become ever more important as the corporations in which they have purchased shares become more powerful actors on the global stage.

Economic power is another aspect controlled by the TNCs. Even though today’s corporations may never gain the measure of power held by the earliest companies during their peak like the East India Company had an army of 200,000 people, but the largest corporations still economically dwarf many developing nations. The largest corporations have annual revenues that are multiples of the gross domestic products of many nations. However, despite the fact the TNCs are economically powerful than most of the State, some authors have downplayed the importance of this growth. John Micklethwait and

115 Id., at 373-74.
117 Supra note 66, at 144.
118 Treaty on European Union, Title II, Art. 86 (Maastricht Theory), February 07, 1992 and Article 8b of Title II of the Maastricht Treaty.
Adrian Wooldridge note that the “wealth is not the same as power.” According to them, “government may still exercise their power to curtail the power of these large multinational corporations, as the Department of Justice did by filing an antitrust suit against Microsoft”. \(^\text{119}\)

TNCs engage in foreign relations in a variety of ways like the nation-states. They engage in diplomacy, establish outposts in other countries, engage in trade negotiations and often serve as proxies for their home country’s government. Under the agency theory of corporations, the CEO and other senior executive often meet with trade ministers and head of states. In fact, the home governments of TNCs also use them as diplomatic tools. Governments sometimes request that the corporations conduct business in a certain way or in a certain place to facilitate foreign relations. In this way, the States are also shifting a number of its functions to these Corporations which results in allowing the States to distance themselves from treaty obligations. \(^\text{120}\) However, at the same we cannot ignore that the TNCs also use the influence of their government whenever they need them for their benefits. Recently, after the decision of the Supreme Court of India on 2G Spectrum space allocation in which the court cancelled all the licences issued in 2008, to save the interests of the global telecom giant Telenor’s investments in India the Norwegian IT Minister Rigmor Aasurd met Indian IT Minister Mr Kapil Sibal on 07 February 2012 in New Delhi. \(^\text{121}\)

Another domain of the State is to administer justice by enacting laws, and establishing a police forces and by setting up courts to assure compliance with those laws. Nowadays, the Corporations have gradually supplanted court system in several respects. They use arbitration and mediation clause in contracts that require parties to place their disputes before third parties rather than the court system. The use of arbitration “is a factor in transforming private contract practices into authoritative law for the business community.” A recent article by Larry Cata Backer explores Wal-Mart’s role as a global legislator. \(^\text{122}\) In a similar vein, the easy transfer of global capital across national boundaries

\(^{119}\) Supra note 59 at 176.


\(^{121}\) The Hindu, 15, (February 08, 2012).

has facilitated the international development of a body of business law known as the *lex mercatoria*.\textsuperscript{123}

Citizens have traditionally looked up to the government to provide utilities, roads, bridges, airports, telecommunications, clean drinking water, and sewage treatment. Historically, however, corporations have played an important role for providing such services as well. One scholar has noted that:\textsuperscript{124}

> Although many corporate charters granted after 1800 for canals, turnpikes, and banks went to private business entrepreneurs, these corporations did not operate as private businesses in the same sense as unincorporated businesses.

The corporations can provide social service using various legal structures and arrangements with the local government. Especially, many developing countries including India, now look to these corporations to provide basic infrastructure or utility services, such as highways, railways, water, sanitation, electricity, gas and telecommunications. Even most of the developed states like U.S.A. has also used corporations to assist in disaster relief and international public relations. For example, after the 2005 earthquake in Pakistan, several American CEOs assisted the U.S. government in raising funds for earthquake relief.\textsuperscript{125}

In a study, Florian argued from a more advanced perspective and tried to prove how the TNCs have successfully created “a veil of legitimacy around the exercise of their power” and with the help of that how they are factually “govern[ing] people, market and governments”.\textsuperscript{126} To prove how TNCs are governing people he quoted various works like in 1949, Peter F. Drucker claimed that corporate control over access to a society’s productive organization touches the very livelihood of people.\textsuperscript{127} In 1995 Charles Reich argued that ‘private economic government has become even more significant in the lives of people than their public government. In 1998, for Charles Derber, these systems of internal and at time rigid or even oppressive rules and laws turn the corporations into

\textsuperscript{125} Supra note 66, at 162-63.
something like “a nation with a nation”. In 2002, Derber further comments that the largest 200 corporations on the planet, “corporatize all aspects of life in every nation” and make corporate ascendancy emerge as the universal order of the post-communist world.

According to Florian, today corporations’ influence over society is even greater than in the golden age of the late 19th century. He quoted Micklethwait and Wooldridge to support his argument:

Nowadays, the influence of this unsettling organization is even more pervasive. Hegel predicted that the basic unit of modern society would be the state, Marx that it would be the commune, Lenin and Hitler that it would be the political party. Before that, a succession of saints and sages claimed the same for the parish church, the feudal manor, and the monarchy. The big contention of this small book is that they have all been proved wrong. The most important organization in the world is the company: the basis of the prosperity of the West and the best hope for the future of the rest of the world. Indeed, for most of us, the company’s only real rival for our time and energy is the one that is taken for granted - the family.

Secondly, the TNCs are also “governing markets” with the help of networking strategies through which they are controlling global markets by controlling the production, the rules, the intensity and the scope of competition, information, knowledge and a large part of the cutting-edge technologies and in this way they are impacting on the countries’ wealth, welfare, development and progress.

Lastly, Florian made an attempt to prove how the TNCs are governing governments or in other words who is sovereign - State or Corporations? He argues that globalization has not only “eroded the powers of nation-states” but it has also “reshaped and reconfigured” it. Firstly, the global structure of transnational corporations’ production processes, combined with the increasing dependence of states on their performance, enhances their ability to curb counter veiling power of governments in three dimensions:

130 Supra note 126, at 220.
131 Id., at 225 - 26.
(a) it provides them with various possibilities to evade taxes and national regulations;\(^\text{132}\) (b) it allows them to press for favourable conditions by confronting governments with the so-called exit threat;\(^\text{133}\) and (c) it gives them the opportunity to play off different governments against each other in order to enhance their own position.\(^\text{134}\)

Secondly, the takeover by the New Right in the late 1970s and the early 1980s and the consequent spread of neoliberal policies across the world heralded massive privatizations of public domains. Initially, transport, telecommunications, and energy sectors, among others, were sold off to private investors; and after the massive sell out of public assets in these infrastructure sectors, the second wave of privatizations now targets the most sensitive domains remaining under public control, that is, the domains that secure the core of human wellbeing, such as social welfare and security, health services, education, housing, and even water supply.\(^\text{135}\)

Lastly, the countervailing power posed by governments is not eroding only through TNCs evading their tax or regulatory authority or through privatization of traditional public sectors; political processes too have become more susceptible to corporate lobbying and more dependent on their financial contributions to campaigns, candidates, or political parties. By feeding the political carousel with the funds needed, large corporations become

\(^\text{132}\) Off shore tax havens such as the Cayman Islands or Bermuda offer a wide variety of instruments and services that facilitate tax flight. In 1999 Rupert Murdoch’s News Corporation maintained 60 of its 800 subsidiaries in such off shore tax havens. Earning $2.1 billion in profits in the United Kingdom between 1988 and 1999, News Corporation did not pay a cent of net taxes in the United Kingdom and paid only 6 percent worldwide. See: Id., at 231-32. Interestingly, OECD in the year 1998 issued a report called, “Harmful Tax Competition: An Emerging Global Issue”. The report advocated doing away with tax heavens and offshore financial canters like the Cayman Island and threatened to place these on a ‘black list’ and impose sanctions against them. OECD’s blacklist was avoided by Cayman Island in May 2000 by committing itself to a string of reforms to improve transparency, remove discriminatory practices and began to information with OECD. The Supreme Court of India recently observed that “insufficient legislation in the countries where they [tax heavens] operate give opportunities for money laundering, tax evasion etc, and, hence, it is imperative that the Indian Parliament would address all these issues with utmost urgency.” See: Vodafone International Holdings B V vs. Union of India, civil appeal no 733 of 2012, decided on 20.01.2012, Para 53. After few days [in India] the director of CBI while investigating the 2G, CWG scams said “Indians were the largest depositors in banks abroad with an estimated $ 500 billion of illegal money stashed by them in tax havens including those in Mauritius, Switzerland, Liechtenstein and British Virgin Islands.” Neither the government nor CBI disclosed names of the depositors but it is difficult to accept that the Indian TNCs do not have any share of this pie. See: The Tribune, Chandigarh, 18 (February 14, 2012).

\(^\text{133}\) In 1996, for example, Fidelity Corporation threatened the state of Massachusetts with moving substantial parts of its operations to New Hampshire and Rhode Island if it did not get the very generous tax breaks it had hoped for. The threat was sufficient to make Massachusetts capitulate and comply with the requirements of the corporation. See: Supra note 126, at 232.

\(^\text{134}\) In 2001 no fewer than 250 different Europe an locations competed for a new production site of BMW, which ultimately was built in Leipzig, Germany. See: Id., at 234.

\(^\text{135}\) Id., at 237.
the lifeline of political candidates and parties and turn democratic processes into a function of corporate interests. A look at the statistics suffices to realize the extent of corporate influence over our allegedly democratic political processes. In 2005 the European Parliament’s website reportedly listed 5039 accredited lobbyists working for large corporations. However, Corporate Europe Observatory estimates a total of over 15000 European Union lobbyists.\textsuperscript{136}

Besides the above mentioned, the TNCs are also engaged in the economic rule making for itself, creating voluntary standards in order to regulate the social and environmental side effects of their business activities and to make policy for the same. In brief, since the world War II, the institutions including financial which were build for reconstruction or even to regulate transnational corporations are also working in favour of TNCs. Peter Sutherland, the former director general of the WTO, observed that the WTO represents “a forum for the development of economic policy in the interest of corporations all over the world,” and for this, he states, “the WTO functions reasonably well”.\textsuperscript{137} In 1997, for example, the Indian government had to overrule the upper house of Parliament in order to pass a bill that would ensure compliance with the WTO’s TRIPs rules. The reason that the WTO stepped in was a projected loss in the range of $500 million for U.S. companies. The mere threat of WTO sanctions led the Indian government to back down and to circumvent the regular democratic process in order to enforce priority of corporate interests over national democratic decisions.\textsuperscript{138}

In short, no doubt that TNCs have become key players in shaping the international legislative and political environment. They overpower people, markets, governments, and international institutions and thus operate in positions of increasing political authority. To large extent the finding are true and most of the small States are not in a position to oppose the corporations due to many reasons mainly economical, technological etc. It is more appropriate to say that the TNCs are working as quasi-government rather than as sovereign. Because, even after entering into every aspect of individuals life, they are more concerned about the profit making rather than ruling as a government. It is evident from

\textsuperscript{136} \textit{Id.}, at 240 - 41.


\textsuperscript{138} \textit{Supra} note 126, at 249.
the fact that after the end of colonialism, there is no quoted instance where any of the TNCs had either tried to capture state power or to purchase the State as a whole.\textsuperscript{139}

The researcher observed that in India, which is the largest democracy, the influence of the TNCs cannot be denied either in individuals life or in the functioning of the government. Recent example of 2G Spectrum scam can easily support this argument. However, new issues relating to the functioning of the TNCs raised by Intergovernmental Organizations like UN, EU and NGOs relating to protection and respect for human rights by TNCs while carrying out their business activities and emergence of the concepts like Corporate Social Responsibility, Human Rights entrepreneurialism defends that TNCs can be considered as quasi-governmental institutions rather than sovereigns.

2.6 Relationship between Transnational Corporations and States

The whole debate regarding the sovereign status of the TNCs at least reflects one thing very clearly that the role of the TNCs has always been very significant in all spheres of the functioning of the State’s. The activities of the TNCs are directly related with the fiscal issues, which further laid impact not only on the government but also on the people residing in a particular State. In the era of globalization, when most of the States can’t afford to live in isolation by avoiding the TNCs, the relationship between TNCs and States becomes more relevant and meaningful.\textsuperscript{140}

In an attempt to characterize the relationship between TNC and government, the economists drew on the great historical paradigms: liberalism, neo-mercantilism and neo-imperialism. The liberal tradition condoned government intervention only to enhance competition and correct for market failures; it tended to be agnostic about the nationality of firms and the source of capital or technology (or products) and was inclined to pursue cooperative economic solutions that promoted global welfare. The neo-mercantilist tradition showed a way of meeting national needs, stressed the need to avoid dependence on outsiders and was prone to seek relative advantage over other nations. The neo-imperialist tradition exhibited a propensity for direct public sector participation in economic activity, displayed a concern about class as well as national roots of ownership, and sought to prevent an exploitative distribution of benefits within, as well as among,
nations. The tension between these three intellectual traditions has persisted throughout the attempts to conceptualize TNC-government relationship.\textsuperscript{141}

In 1971, Vernon argued that TNCs are able to conduct their operations with a scope and flexibility which sometimes renders governmental efforts to control them impotent. Further Vernon predicted, multilateral efforts in which home and host states pooled their own sovereignty might be needed to restore public accountability on the part of TNCs. In 1993, Jean-Jacques Servan-Schreiber looked at the same phenomenon as Vernon, i.e., the growing presence and expanding power of transnational investors and drew conclusion that in part resembled Vernon’s. However, there was a subtle difference between the Vernon and the Servan-Schreiber perspective. Whereas Vernon hinted that TNCs might be becoming more a-national (“stateless”) in their perspective, Servan-Schreiber revived the neo-mercantilistic postulation that home-country needs better than foreigners.\textsuperscript{142}

In 1993, Osvaldo Sunkel, like Fernando Henrique Cardoso and other third world writers, introduced a neo-imperialist critique (using the term \textit{dependencia}\textsuperscript{143}) in to the conceptualization of TNC-government relations in the developing countries. Development and underdevelopment, he concluded in his statement of the \textit{dependencia} view, “are simultaneous processes: the two faces of the historical evolution of the capitalist system.” A reaction to the uncontrolled spread of TNCs in the third world was politically inevitable. Sunkel further observed that “What we are seeing is the assertion of the national interest of our countries in their international economic relations. The aim is greater autonomy, in order to achieve development without \textit{dependencia} and without marginalization.”\textsuperscript{144}

\textsuperscript{142} Ibid.
\textsuperscript{143} The aim of the \textit{dependencia theory} was to provide a theoretical explanation for underdevelopment and to develop strategies on how this underdevelopment could be overcome. Underdevelopment was linked to foreign trade and international relations. Contrary to new growth theories, which were dominant in the field of economics and which argued that underdevelopment is a consequence of endogenous entailed deficits to modernize, \textit{dependencia theory} focused on exogenously caused reasons of underdevelopment. Critics of \textit{dependencia theory} stress that a major deficit of the theory is its generalization of the postulated relationship between the centre and the periphery since advocates of this theory claim that all negative effects that hamper development account for all countries of the periphery regardless of the state of development and the geographical location or other equally relevant factors. For details see: Raphael Schaub, “Transnational Corporations and Economic Development in Developing Countries” 12, 13, 17 (April 2004). \textless http://www.pik-potsdam.de/members/edenh/theses/masterschaub.pdf\textgreater Accessed on September 10, 2013.
\textsuperscript{144} Supra note 141, at 420.
The deviation from the neoclassical model of perfect competition is particularly pronounced in the activities of TNCs in developing countries. There has consequently been an ongoing tension between the idea of allowing markets to work without government interference and the requirement for public sector intervention to prevent distortion and exploitation. In a setting of highly imperfect competition, Edith Penrose first proposed that, to understand TNC-government relations in the third world, one needed a framework of bilateral monopoly, with the firm controlling sector-specific capabilities and the host country controlling the conditions of access. Using the same bilateral monopoly model, Kindleberger countered that TNCs are entitled to the scarcity value of their activities. According to him, there was no justifiable way to claim exploitation as long as TNCs were only appropriating the scarcity value of their services.145

Later on Vernon suggested that it is necessary to move beyond the static conceptualizations of Penrose and Kindleberger. Vernon argued that what gives dynamism to the bargaining process is the evolution of risk and uncertainty over the life of a TNC investment. This produces a dynamic phenomenon which Vernon called the “obsolescing bargain” later called the “bargaining school”. This model was tested and it shown that tax rate rose from 38 percent to 68 percent in copper cases and 50 percent to 92 percent in petroleum cases. But the cases studies revealed unanticipated difficulties as governments in the third world sought majority ownership of the project, or moved all the way to nationalization. So, the obsolescing bargain model offered the beginnings of a theory of economic nationalism based on rational self-interest.146

The relationship between TNCs and governments in manufacturing sector become much more complex, with the success of the obsolescing bargain depending upon the diverse characteristics of the project itself. India’s initial attempts to control foreign TNCs by demanding joint ownership did not prove efficient, nor did subsequent efforts to build a national champion computer company by excluding foreign competition. Ultimately, however, a host strategy which allowed indigenous computer companies to shop around among alternative foreign suppliers as they expanded their own operations, both lowered the cost per bit of memory and shortened the time lag between the introduction of innovation outside the country and the adoption of the innovation internally. Grieco

145 Id., at 420-21.
146 Id., at 421-22.
concluded from the Indian experience that third world policies that take advantage of competition among foreign TNCs can strengthen the bargaining position of the host country even in industries in which TNC domination of technology might otherwise be decisive.\footnote{Id., at 422-25.}

Moving from the developing countries to the developed countries, neo-mercantilism takes the place of the neo-imperialist (or dependencia) paradigm as the counterpoise to liberalism in the debates about appropriate policies towards TNCs. In contrast to the neo-imperialist preoccupation with exploitation on the part of TNCs which benefits the ruling classes in both home and host countries, neo-mercantilism adopts the more state-centric view that a developed nation must nurture its own firms as a means of enhancing the home country’s power and autonomy. In contrast to the liberal impulse to encourage transborder flows of capital and management (as well as goods and services) to maximize economic efficiency and economic welfare, the neo-mercantilism impulse focuses on preserving control over vital sectors of the country’s economy in national hands and launching national champion firms to serve home-country interests with a vigilant eye to the relative power among states.\footnote{Id., at 425-26.}

Independence of the overseas colonies of the major European countries tried to establish a pattern in the regulatory forms of TNCs. Two of the most important political and economic implications of this proposed pattern were: firstly, the political influence of the colonial powers over the independent countries diminished and secondly, most of the newly independent countries considered the foreign TNCs as the extended part of the colonial imperialism, though not through the colonial administrators. Therefore, with the sovereign power and separate identity in the United Nations Organizations (UNO), these new countries\footnote{This new group of countries also got supports from the then communist block and thereby, the issues of their developmental goals got the top most priority in the UNO’s social and economic agenda.} formed ‘Group of 77’- a new international pressure group and earned voting majority in the UNO. One of the important objectives of this group of countries was to come out from the influence of the colonial countries’ owned TNCs. Thus, the concept of the “New International Economic Order” (NIEO) emerged.\footnote{The bases of NIEO were ‘equity, sovereign equality, interdependence, common interest and cooperation among all countries…to eliminate the widening gap between the developed and developing countries’ (Preamble of the Declaration on the Establishment of a New International Economic Order, 1974).} The purpose of

\phantom{49}
NIEO was to develop a suitable trade environment. But in the development process of that environment, TNCs were not included at all, rather, through NIEO, developing countries declared that they must be entitled to regulate and supervise the TNCs operating in their territories.\textsuperscript{151}

One could divide the relations between TNCs and Governments of host countries since 1945 in three eras: era of confrontation between Governments and TNCs from mid 1960 to 1979; era of negotiation between TNCs and governments in 1980s; and emergence of liberalisation, privatization and globalization which encouraged inflow of foreign direct investment to promote development goals since 1990s.\textsuperscript{152}

In the first era of confrontation, a selected group of Governments of third world adopted a number of expropriation acts which amounts to nearly two thirds of all acts of expropriation to seize foreign direct investment (FDI). In 1985, Kobrin studied the demonstration effect on expropriation in connection with the old industry. He identified 28 government as mass expropriators because they nationalized FDI in all major sectors of the economy. Those sectors included banking, natural resources (agriculture, petroleum and mining), service (insurance, utilities, transportation, communication and trade) and manufacturing. From 1967 to 1975, the Indian parliament passed 6 expropriation acts under the leadership of Indira Gandhi.\textsuperscript{153}

For example, between 1974 and 1976, the Indian government fully took over the three foreign oil companies, Esso, Burmah-Shell and Caltex, all wholly owned subsidiaries of the largest oil TNCs, commonly known as the Oil Majors. The interesting thing about these takeovers has been the willingness with which the oil companies complied with the government’s plans, a willingness quite contrary to what would normally have been expected from the Oil Majors, since in earlier periods these companies had put up stiff resistance to governmental ‘interference’ and consistently fought against attempts to break their monopoly over the Indian petroleum industry.\textsuperscript{154}

\textsuperscript{151} Article 4(e) of the Declaration on the Establishment of a New International Economic Order, 1974.
\textsuperscript{153} \textit{Id.}, at 71.
\textsuperscript{154} Saumitra Chaudhury, “Nationalisation of Oil Companies in India”, Economic and Political Weekly, Vol. 12, No. 10, 437 & 439 - 444 (March 5, 1977). Coal mines were nationalized in early seventies in view of the then existing dissatisfactory mining conditions e.g. slaughter mining, violation of mine safety laws, industrial unrest, failure to make investments in mine-development, reluctance to mechanise etc. and in order to meet the long range coal requirements of the country. The private coal
Charles Kennedy observed that one or more of three condition were present which resulted into mass expropriation: (1) firms domiciled in the former colony held the largest percentage of total or industrial FDI; (2) foreigners owned politically sensitive and strategic natural-resource industries that generated large volumes of foreign exchange for the Government; (3) revolutionary leaders were severing a range of geopolitical, military and economic relationships that had developed between deposed monarchs and a decadent West, particularly the United States.\textsuperscript{155}

In the era of negotiation, the number of expropriation acts declined dramatically in 1980s due to changes in external dependency relationships. A study by Michael Minor speculated that the dramatic decline in expropriation activity can be explained by two factors: a drop in commodity prices increased the need for capital in developing countries; and, the government realised that they can gain greater economic benefits from TNCs without resorting to expropriation. In large part, developing countries became less dependent on external factors because their internal capabilities and resources increased.\textsuperscript{156}

In 1992, Charles Kennedy argued that the explanation by Minor are not entirely convincing and a resurgence of expropriation could be expected to occur, since an increased need for external capital could trigger a radical response within developing countries if TNCs, both industrial and financial, are perceived as being responsible for the capital shortage and any resulting economic hardship. However, the third era of liberalisation, privatization and globalisation has proved that nothing of that short happened and rather the developing opened their gates for more inflow of foreign direct investment to achieve their goals of development in all spheres.\textsuperscript{157}

Given that investment is one of key to economic growth, governments are motivated to seek as many sources of new investment as possible. Small wonder that so many have been putting out the welcome mat to TNCs and fattening the incentive packages on offer to bias firms’ location decisions. Within Europe, there are constant contests both among nations and among regions within nations to attract mobile wealth-creating capital. More generally, there has been a general liberalization of investment has accelerated. Of 82 policy changes adopted by 35 countries during 1991, 80 reduced mines of the country were nationalized in two phases during 1971-1973. For further details see: <http://coal.nic.in/legislation.htm> Accessed on June 17, 2010.

\textsuperscript{155} Supra note 152, at 76.

\textsuperscript{156} Id., at 68-70.

\textsuperscript{157} Ibid.
restrictions on foreign investors. Furthermore, 64 bilateral investment treaties for the promotion and protection of FDI were signed during the first 18 months of the 1990s, compared with 199 such treaties signed during the 1980s. Privatization and deregulation of communications, as well as of financial markets, have also helped extend the sense of greater mobility of critical resources.\textsuperscript{158}

In the third era of globalization, the developing countries ensured that the TNCs-government relationship laid down a positive impact on development. The Encarnation-Wells survey of almost 200 projects in some 30 countries over more than a decade is particularly useful. They find that in between 55 and 75 per cent of the cases examined, TNC operations had a clearly beneficial impact on growth and development. Equally significant, however, is the observer discovery that between 25 and 45 percent has a demonstrably negative impact on the host societies.\textsuperscript{159}

Through the liberal approach, non country actors as TNCs have become the agents of change and governance. Changes in the global production and the rise of economic liberalism-financial trade and FDI liberalisation - have been argued to place TNCs in a different type of bargaining relationships. Whilst the economic and structural power of TNCs has been difficult to determine precisely, it has rapidly increased in the last decades. TNCs play an increasing role in the redistribution of resources as a result of privatization in different countries of the world, of TNCs capacity to create employment in developing countries, of their role in labour management relations since they employ around 10 percent of the population in developed countries and 21 million in developing ones and of the fiscal weight in economies. Moreover, TNCs have doubled in number, operating in practically all economies, dramatically enhanced their revenues and increased their share of global trade to a third of global exports while representing a quarter of all FDI. Intra-firm trade, though hard to measure, as well as cross-border inter-firm agreements has also increased precipitously, creating a new division of labour.\textsuperscript{160}

Consequently, the relationships between countries and TNCs are not a zero-sum game; the increasing power of TNCs does not mean the inevitable decline of the power of


\textsuperscript{159} \textit{Supra} note 141, at 434.

\textsuperscript{160} Mia Mahmudur Rahim, “Who’s Who: Transnational Corporations and Nation State Interface over the Theoretical Shift into Their Relationship”, \textit{African Journal of Political Science and International Relations}, Vol. 4, No. 6, 195-200 at 196-97 (June 2010).
countries. Owing to the multiple sources of power, there is now a deepened interaction between countries and TNCs. Countries have to negotiate with TNCs creating a type of ‘triangular diplomacy’. Moreover, countries and TNCs power often vary over time, issues and cases. Hence, the researcher is of the view that the country-TNC relationship is a complex one that has indeterminate results. This complex relationship becomes very complex when the countries are divided into many groups with different interests. United Nations initiative to prepare a code of conduct for TNCs would be a glaring example in this regard.

2.7 Transnational Corporations and Globalization

Globalization is one of the dominant trends of recent times. This term is generally used to highlight different patterns of developments like: the growth of political and economic interdependence at the world level; the erosion of space and local time as structures of economic life; and the homogenization of social life - especially at the elite level - through universal standards, products, and culture. The academicians often used the ancient Buddhist parable of the six blind scholars and their encounter with the elephant to define the nature of globalization. Globalization can be defined as a set of processes leading to the integration of intermediate, factor, and product markets across geographical boundaries.

Globalization have diminished distances and travel expanded through jet transport; communications have accelerated and multiplied through new information technology, satellite networks, and the worldwide web, revolutionizing the transfer of knowledge as well as of capital; geographical and cultural differences are being shared and becoming domesticated and commonplace; and through satellite video-links events and happenings in every quarter of the world are becoming instantly experienced first-hand worldwide as they occur, often enabling distant spectators to become participants. Here, however, the

162 Since the blind scholars did not know what the elephant looked like and had never even heard its name, they resolved to obtain a mental picture, and thus the knowledge they desired, by touching the animal. Feeling its trunk, one blind man argued that elephant was likely a lively snake. Another man, rubbing along its enormous leg, likened the animal to a rough column of massive proportions. The third person took hold of its tail and insisted that the elephant resembled a large, flexible brush. The fourth man felt its sharp tusks and declared it to be like a great spear. The fifth man examined its waving ear and was convinced that the animal was some sort of fan. Occupying the space between the elephant’s front and hind legs, the sixth blind scholar groped in vain for a part of the elephant. Consequently, he accused his colleagues of making up fantastic stories about non-existing things, asserting that there were no such beasts as ‘elephants’ at all.
focus is exclusively on economic globalization and the role of TNCs and their impact on human rights. Jagdish Bhagwati defined economic globalization that it "constitutes integration of national economies into the international economy through trade, direct foreign investment (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology."\(^{164}\)

Steiner observed that “Since the end of the cold war . . . business are now playing a role in economic development once reserved to states,” a role which “has both stemmed from and strengthened the contemporary process of globalization with its stress on developing market economies, deregulating business activities, privatizing state enterprises, lowering national barriers, and expanding world trade and investment”.\(^{165}\) Since 1960 there has been a proliferation of TNCs. TNCS grew from 3,500 in 1960 to 60,000 in 1999. The aggregate stock of FDI worldwide increased in tandem from $66 billion in 1960 to over $4,000 billion in 1999, as compared with only $14 billion in 1914.\(^{166}\) The number of TNCs and their activities increased many folds in the last two decades.

While rejecting extreme accounts of economic globalization, the political economist Robert Gillpin nonetheless concedes that the growing power of TNCs has profoundly altered the structure and functioning of the global economy.\(^{167}\)

These giant firms and their global strategies have become major determinants of trade flows and of the location of industries and other economic activities around the world. Most investment is in capital-intensive and technology-intensive sectors. These firms have become central in the expansion of technology flows to both industrialized and industrializing economies. As a consequences, multinational firms have become extremely important in determining the economic, political, and social welfare of many nations. Controlling much of the world’s investment capital, technology, and access to global markets, such firms have become major players not only in international economic, but political affairs as well.

Moral attitudes and reactions to globalization vary widely, even extremely, and there is no sign of the stream of literature on both its negative and positive consequences dwindling. The critiques of economic globalization can be identified into two main groups. First, there is a multitude of hard-core protesters who have deep-seated antipathy to globalization, capitalist and more particularly anti-corporations mind-set. Their views are interlinked because ‘globalization is seen as the extension of capitalism throughout the world, whereas (transnational) corporations are seen as the B-52s of capitalism and its global reach.’ Second, there are the critics of globalization whose discontents translate into the arguments that economic globalisation is the cause of several social ills, such as poverty in poor countries and deterioration of the environment world-wide.168

The study by Stiglitz, a committed opponent, surveys the perceived disadvantages of globalization and argues that, among other ills, it worsens poverty, extends or entrenches the use of child labour, worsens the plight of women in developing countries, erodes democracy, imperils local cultures, and despoils the environment. Other charges are that increased TNC mobility around the world is leading to a lack of commitment by businesses to local societies which results in insecurity in labour markets, and has the destabilizing effect of encouraging social disengagement which is manifested in family and personal rootlessness, short-term perspectives, and a taste for novelty and trivialities. In addition it is claimed that global markets and global branding manipulate market choices, erode local individualist choices, and impoverish cultures by homogenizing them.169

The opponents further argues that TNCs must necessarily be bad in a global economy because global integration without globally shared regulations must surely amount to an advantageous playing field for transnationals. These corporations would then be able to seek profits by searching for the most likely locations to exploit workers and nations, thereby putting intolerable pressure on their home states to abandon their gains in social legislation. This is what is known as a race to the bottom. The opponents further observed that to attract TNCs the poor countries compete among themselves by giving generous concession in taxes, rent free use of public land and wind up net losers and even the TNCs openly affirms the view that competition among the countries to attract them is a

168 Supra note 164, at 4.
phenomenon that increase their share of the total economic gain flowing from investment in the poor countries.170

Jagdish Bhagwati argued in favour of globalisation that often the concession reduce rather than eliminate altogether the burden of the corporate taxes to be paid. Other benefits such as employment of underemployment and unemployed labor and the occasional diffusion of technical know-how and better management practices would remain, of course, to enhance the total benefits from inward direct investments. He further wrote that, a number of empirical studies find that the TNCs pay what economists call a “wage premium”, i.e., an average wage that exceeds the going rate, mostly up to 10 percent and exceeding in some cases depending upon the TNC. In most of the cases the TNCs are paying higher than those available in alternative jobs as far as ‘labor rights’ are concerned mostly because in poor countries laws are not burdensome. The problem arises when the TNCs hire the service of sub-contractors who supply parts to the TNCs. These sub-contractors are mostly local entrepreneurs and it is possible from time to time that they violate labour legislations. In that case the TNCs defends themselves saying that the problem lies with lack of effective enforcement in the host country, and the TNCs cannot be held liable for the same.171

Similar strong argumentation is provided by Philippe Legrain in a detailed rebuttal of the charges against globalization, which begins by observing that “it has become a convenient scapegoat for all manner of real and perceived ills that have little or nothing to do with it.”172 Likewise, the British Labour Party Member of Parliament, C. Short has argued that what has made for the greatest progress in combating global poverty has been “the opening up of markets, facilitating the investment of multinational companies and production of manufactured goods, clothing, toys and now even services such as call centres, based in the poorest countries and serving our desires and consumption patterns.” In brief, she maintained, “the engine of economic growth necessary to reduce poverty, on a large scale, has been investment generated by the increasingly integrated global economy”.173 Jonathan Fried observed: “I believe that this globalization of economic

170 Supra note 164, at 22.
171 Id., at 172.
173 Supra note 165, at 164.
activity . . . has indisputably been good for the international community, good for people, and consistent with the goals set for economic cooperation by the United States.”

The growth of globalization has also had its impact on human rights, expanding their area of relevance also to a notably global scale. The effects of globalization on human rights are complex, bewildering and paradoxical. Yet, as Yash Ghai notes “the regimes of rights provides the nearest thing to a coherent challenge to economic globalization. It emphasizes the importance of human dignity, the right to work in just conditions and in return for fair wages, the right to welfare, the care of children; the equality of women, the respect for the cultural and economic rights of indigenous peoples, the protection of environment, the exercise of popular sovereignty through democratic constitutional orders, and the accountability of holders of power . . .. while aiming to distribute . . . on a more equitable principle…”

In the assessment of Professor Henkin, [G]iant companies have become largely independent of states, of the states that created them, of the states in which they operate. Some of them are replacing, or at least jostling, the states themselves in the state system. As the supremacy of many states declines and that of the corporations rises, the capacity of the latter to violate the rights of people, or to create conditions in which rights become harder to exercise or project, has increased tremendously. The involvement of TNCs in human rights violations and generating environmental hazards is well documented. The activities of Union Carbide Corporation and Enron Corporation of India, Unocal Corporation in Myanmar, Nike and Reebok in Asia, Shell Oil Company in Nigeria, Texaco in Ecuador, and Freeport-McMoRa in Indonesia, to name a few are living testimonies of the above referred violations.

Since, 1995 the impact of TNCs in the notion of globalization can also be easily found in setting international rules in their favour. The TNCs, through their interest driven lobbying, helped set rules in the world trading, intellectual property and other regimes that are occasionally proved harmful to the interests of poor countries. A prime example of such harmful lobbying by TNCs has involved the covering of patent protection by

pharmaceutical and software companies under the WTO regime as TRIPS. Getting intellectual property protection into the WTO means that these lobbies can use trade sanctions to maximise the profits. With the help of TRIPS rule, the harmful impact caused by the pharmaceutical firms is evident in poor countries, as the TNCs are producing life saving drugs at a marginal costs and then charging whatever poor markets can bear by denying the access to generic drugs produced in developing countries.177

A very recent international protest movement known as the Occupy movement that seeks to make the economic structure and power relations in contemporary society more fair and to reduce the TNC influence on government and the way it affects the democracy is latest example of negative impact of TNCs in the era of globalisation. Even though in this world wide protest movement, different local groups have different foci, but among the prime concerns is the claim that big corporations and the global financial system control the world in an unstable way that benefits only few and is undermining democracy.178 The OWS protests are against social and economic inequality, greed, corruption and the undue influence of corporations on government - particularly from the financial services sector. Their slogan, We are the 99%, addresses the growing income inequality and wealth distribution in the U.S. between the wealthiest 1% and the rest of the population. To bring change OWS engages in “direct action” instead of petitioning authorities.179

In the early 1990s, the Indian government adopted new economy policy based on the principle of liberalization. Unfortunately, the government did not consistently ensure that the realization of human rights, especially for the poor populace, remained an important variable at the time of law making or policy formulation. It can judged from the fact that the government proposed amendments in laws related to foreign investment, trade union, contract labor, factories, industrial disputes, and monopolistic practices, have negative impacts on human rights, especially the human rights of labourers and women

177 Ibid.
178 The first Occupy protest to receive wide coverage was Occupy Wall Street in New York City's Zuccotti Park, which began on September 17, 2011. By October 9, Occupy protests had taken place or were ongoing in over 95 cities across 82 countries, and over 600 communities in the United States. For details see: <http://en.wikipedia.org/wiki/Occupy_movement> Accessed on March 16, 2012.
179 Occupy Wall Street was initiated by the Canadian activist group Adbusters, and partly inspired by the Arab Spring, especially Cairo's Tahrir Square protests, and the Spanish Indignants. Adbusters proposed a peaceful occupation of Wall Street to protest corporate influence on democracy, the lack of legal consequences for those who brought about the global crisis of monetary insolvency, and an increasing disparity in wealth. For details see: <http://en.wikipedia.org/wiki/Occupy_Wall_Street> Accessed on March 16, 2012.
workers. The government has shown undue leniency, and thus sent a wrong signal, to foreign corporations regarding their human rights responsibility by not vigorously pursuing the extradition of Warren Anderson, the ex-CEO of UCC, against whom criminal proceedings are pending before a court in relation to the Bhopal gas tragedy. And even the worst the government did was, when it was alleged by an NGO that the soft drinks manufactured by Pepsi and Coca-Cola contained toxic pesticides, the government swiftly banned their sale within Parliament but left the health of ordinary consumers at the mercy of corporate misinformation.180

The Indian judiciary, which is known for judicial activism and especially in protecting the fundamental rights of the people by giving a much wider interpretation to the provisions of the Constitutions, adopted all together different approach when it comes to violation of human rights by the TNCs. In the wake of liberalization, even though the Court made some bold observations but neither held the corporations liable directly nor considered them as agency of state which resulted into a condition where an individual could not invoke enforcement of the fundamental rights against the corporations. Making the situation worse, in the Bhopal gas tragedy case, when the Court directed that “… if the settlement fund is found to be insufficient, the deficiency is to be made good by the Union of India as indicated in paragraphs 198”.

In a more recent judgement which is delivered on 20 January 2012 in Vodafone case in which amount included was Rs 11,000 crore, the Supreme Court once again interpreted the provision of law which favoured the corporation and will have a profound influence on Indian tax jurisprudence. The question being asked in legal interpretation is, if two equally valid but conflicting legal interpretations are possible, why not adopt the one that could help the government earn the requisite tax revenues rather than the one that has the potential to weaken governance and leave the citizens to the mercy of market forces.181

Globalization has not only created more opportunities for environmental pollution but has also enabled the export of hazardous waste and contaminated materials to developing countries, including India. The Corporations not only polluting environment but went to the extent that they have even robbed the people from having ‘water’ from the

natural resources. For example, the Coca-Cola plant in Plachimada, Kerala faces continued protests and potential closure for being the source of environmental contamination and unreasonable extraction of groundwater. In another example, three case studies from the state of Chhattisgarh indicate how the “commodification” of water endangers the livelihood of many people who depend heavily on rivers and other common natural water sources.182

On 30th August, 2013 the government of India has notified new law relating to companies i.e., the Companies Act, 2013. In the new Act, the legislation has incorporated the concept of Corporate Social Responsibility183 in a more concrete manner by including the activities which the companies are suppose to undertake like eradication extreme hunger and poverty; promote education, gender equality; ensure environmental sustainability and so on. The government of India has also introduced “National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011” which include nine core principles with guidelines and strategy for their effective implementation. Interestingly, these guidelines are designed to be used by all businesses including TNCs. It is difficult to predict how well the government will be able to monitor the strategy changes it want to bring with the help of these new voluntary guidelines.184

A recent decision of the Controller-General of Patents, Designs and Trade Marks of India, regarding granting of compulsory licence can be quoted as an appreciable example of new approach of the Indian authorities which compels the corporations to act in more responsible way towards the people of this country. It can also act as a guide to the authorities of the developing and least developed countries to interpret the international treaty in true manner and not to allow the pharmaceutical companies to make profit at the cost of lives of poor people in these countries. The Controller granted a compulsory licence to Natco Pharam for manufacturing of the drug Sorafenib Tosylate (Naxaver) to treat liver and kidney cancer, the patent for which is held by the German TNC Bayer, while exercising its power under Section 84 of the Indian Patent Act, 1970. The licence is granted on the test of reasonable price in a country with a weak social health

183 Section 135 of the Companies Act, 2013.
insurance infrastructure. At present a month’s treatment regime of 120 tablets costs Rs. 2.84 lakh, but manufacture under compulsory licensing will slash it to Rs. 8880. The Indian applicant has been granted the licence till the expiry of the patent in 2021.185

The above referred cases of Bhopal Gas Disaster, Vodafone tax related issues, Coca-Plant in Plachimada, Commodification of water in Chattisgarh are few examples which highlights the impact of TNCs and an emerging powerful role of TNCs where state including government, legislature and judiciary sometimes seems to be weaker in front of TNCs. However, the positive steps like enactment of a new Companies Act, 2013 in which corporate social responsibility is an integral part, compulsory licensing of drugs on grounds of reasonable pricing shows that there is also a constant pressure on government to balance human rights in this corporate world of TNCs.