CHAPTER II
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DEFINITION

The Issue of Defining Multinational Corporation

The working and impact of transnational corporations on various aspects and segments of the society, both national and international, inevitably leads to the question as to how adequate safeguards can be devised to minimize, if not eliminate, these undesirable effects, while at the same time taking care to harness the resources of these giant organizations for national development and international order. It was in this context that the World Bank Economic Survey in 1971, directed the attention of the world community "to the role of these multinational corporations which is sometimes viewed with awe since their size and power surpassed the host country's entire economy" and "to the need to formulate a positive policy and establish effective machinery for dealing with the issues raised by the activities of these corporations". 1

The fifty-sixth session of the International Labour Conference and the United Nations Conference on Trade and

1 Quoted in Economic and Social Council resolution 1721 (LIII); see UN Doc. ST/ECO/190, "Multinational Corporations in World Development", Annex I, p. 106.
Development, also stressed the need to take note of the activities of these corporations with a view to devising effective control. Accordingly, the Economic and Social Council of the United Nations, in its Resolution No. 1721 (LIII), requested the Secretary General to have a study made by a Group of Eminent Persons of the role of multinational corporations and their impact on the process of development, especially that of developing countries, and to formulate conclusions which may be useful to the national governments in making their independent decisions regarding national policy in this respect, and submit recommendations for appropriate international action. The Group of Eminent Persons, organized for this purpose by the Secretary General, made their report in 1973. As a consequence of their recommendations, a Commission on Transnational Corporations was established by Resolution 1913 (LVII) of the Economic and Social Council to deal with the full range of the issues regarding transnational corporations. One of the important issues in this connection related to formulating recommendations for a Code of Conduct dealing with transnational corporations.

Before a Code of Conduct is formulated, however, a preliminary question in this context is the identification

2 See UNCTAD resolution 73 (III), of 19 May 1972.
3 See Economic and Social Council resolution 1913 (LVII) of 5 December 1974, para 5 and para 6.
of the corporations to which, such a code, if formulated, would be applicable. This leads to a search for a definition of a transnational corporation. The Commission on Transnational Corporations has been wrestling with the subject and has so far been unable to arrive at an acceptable solution because of the bewildering difficulties that crop up when a commonly applicable definition is sought to be selected for the purpose of formulation of a definition. This, of course, should not deter attempts at arrive at some acceptable criteria, at least on an empirical basis, which would form the basis for purposes of identification of the corporations to be covered by a Code of Conduct, or by national regulations, or international agreements. Move in this direction has been made by Columbia and India by attempting a legislative definition of multinational corporations. In Columbia, the expression multinational enterprise is defined as a sub-regional multinational corporation, comprising a company established in one country with participation of at least two member countries each holding at least 15 per cent of the capital and a maximum 40 per cent foreign participation; the majority sub-regional holding may be reflected in the technical, financial, administrative, and commercial management of the enterprise.

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5 See UN Doc. ST/CCT/6, "National Legislation and Regulations Relating to Transnational Corporations", Table D.2, pp. 202-5. The definition appears to relate to corporations within the Andean Group under the Agreement of Cartagena, 1969.
In India, a specific definition of multinational corporations as such appears in Foreign Contribution Regulation Act, 1973:

Explanation:

For the purpose of this Act a corporation incorporated in a foreign country (of) territory shall be deemed to be a multinational corporation if such corporation:

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

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

Of the two definitions, the Indian definition is wider in its reach and goes farther than even the definition given by the Group of Eminent Persons, which said:

Multinational Corporations or Enterprises which own or control production or service facilities outside the countries in which they are based. Such enterprises are not always incorporated or private. They can also be cooperatives or State-owned entities. (6)

While the definition given by the Group of Eminent Persons is limited to ownership or control of production or service facilities, the Indian definition takes within its sweep a corporation incorporated outside India even where it carries on operations in two or more countries or territories.

6 UN Doc. E/5500/Rev.1; ST/ESA/6, "The Impact of Multinational Corporations on Development and International Relations", p. 25.
It is important to note that it is not necessary that the Corporation should carry on business operations or should have a subsidiary or a branch or place of business in India for the purpose of that Act.

The Foreign Contributions and Regulations Act, 1973, was enacted, inter alia, to prevent multinational corporations from corrupting public life in India by contributing to individuals, societies and parties, and has an important place in the legal arsenal developed in India to deal with the transnational corporations. Therefore, the definition attempted by the Indian Parliament is one which is of relevance in the context of formulating a legal definition for transnational corporations.

Apart from these two legislative definitions, the other definitions adopted by international economists, international lawyers, and UN bodies are a mass of bewildering variety. Expressions like multinational company, multinational enterprise, transnational company, international firm, transnational firm, supra national firm, global corporation, global companies, cosmocorp have been used interchangeably and look like synonyms to describe the same entity. 7

One common concept, running through all the definitions is, the significant role played by these corporations

7 See: (a) n. 4, op. cit., and
in the internationalization of the world economy. If this central point is kept in view, the next step is to select from the available data the common characteristics of corporations which by their activities bring about the effects mentioned in the preceding chapter. These characteristics could be incorporated in definition applicable to all such corporations. It is here that a student of international law gets stuck, since, except for occasional glimpses of some sectoral activities of these corporations, no precise and even approximately correct data, is available. Non-disclosure of information by these corporations is regarded as a sacred right, and secrecy shrouds their activities. It was in this context that Raymond Vernon was forced to delimit his study to foreign companies controlling a large cluster of corporations of various nationalities with sales of 100 billion dollars or more, and he termed such a group as a 'multinational enterprise'. Largely influenced by this approach, the United Nations document on Multinational Corporations in World Development has also taken the size and concentration as the basic criteria for identification of multinational corporations, and has listed 650 industrial corporations with

sales exceeding 300 million dollars in each case. Like Raymond Vernon, Dunning also avoids the use of the expression 'corporation', possibly because of the legal implications of a word 'corporation' which is a distinct and separate juridical person, and introduces the concept international enterprise. He classifies them into four categories, namely, Multinational Producing Enterprise (MPE), Multinational Trading Enterprise (MTE), Multinational Owned Enterprise (MOE), and Multinational Controlled Enterprise (MCE). Dunning attaches importance only to the multinational production enterprises by studying them in three sub-divisions. The Government of Canada has fixed a minimum number of four or five countries across which a single business enterprise straddles, as the basic criterion for defining a multinational enterprise.

9 n. 7(b), pp. 6 and 127.


11 Note: The first two of which Dunning defines as cost-oriented and market-oriented vertical organisations, i.e. he describes those organizations which move across national frontiers - in one instance - to secure raw materials, and - in the other - to secure the ultimate market. The third sub-division is on horizontal basis, that is to say a particular process or product is replicated in various countries.
enterprise. The foreign content of ownership, as well as sales or profits, have been taken as the bases for identification of multinational corporation in some quarters. According to Business International, a firm becomes a multinational when foreign operations account for at least 35 per cent of its total sales and profits. MacDonald and Parker consider a firm to be multinational if 20 per cent of its assets are overseas.

The US Tariff Commission Report points out that an enterprise can qualify itself as a multinational if it has at least 25 per cent participation in the share of the foreign enterprise. But the US Department of Commerce data are based on equity holding as low as 10 per cent.

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12 See discussion in Foreign Direct Investment in Canada, Information (Canada: Ottawa, 1972), p. 51. (This report is popularly referred to as the "Gray Report").

Note: The 1973 "Guidelines" of the European Community also prefers the test of production facilities in at least two countries for qualifying to become Multinational Undertaking - see n. 4, p. 160.


David E. Lilienthal draws the parameter rather wide when he defines multinational corporations as corporations which have their home in one country but operate and live under the laws and customs of other countries as well. 16

The above definitions have as their bases the proportion of sales or ownership, and location of assets in more than one country. Some other definitions place emphasis on decision-making or control, rather than on ownership of assets. For example, the Committee on Banking and Currencies of the US House of Representatives considered ownership of 3 per cent or more as sufficient for effective control if the other shares were widely held. The International Monetary Fund considers ownership of 25 per cent of the voting stock as evidence of direct control. The control aspect is gaining importance because of the recent trends towards non-equity form of conducting business across national frontiers.

Perlmutter's definition, frequently referred to in treatises on transnational corporations, classifies the corporations on the basis of geographic orientation of activities. The three suggested classifications are: ethno-centric (home country oriented), polycentric (host country oriented), and geo-centric (world oriented). 17


This definition suffers from an over-simplification because the orientation test is not capable of application in the absence of data regarding the interests involved in corporate decision making.

All the above definitions take one factor, or combination of factors, suited to the model adopted for study. They are not comprehensive enough to cover all corporations, the activities of which have posed problems in the various national jurisdictions where they operate. The definition that is needed should be neither so wide as to include entities which play no part in this impact process, or to exclude entities which are actors in the areas considered.

From 'Multinational' to 'Transnational'

The word 'multinational corporation', from the legal point of view, is a misnomer because the enterprises we are studying are neither multinational in the true legal sense of the term, nor are they corporations. The word 'multus' in Greek means 'many' and the word 'natio' in Latin means 'people', 'nation'. Therefore, multinational would etymologically signify a person, or thing, pertaining to many nations. The word 'corporation' is normally used as signifying a company incorporated under a law as a separate juristic person with legal capacity to hold property, to sue
and be sued. In this view a parent company incorporated in one country, and its subsidiary incorporated as a separate company in another country or other countries, are distinct corporations and cannot be considered legally to form a single entity, unless specific legislative provision exists to deem it to be so. The expression 'multinational corporation' is thus not a legal expression but is used in accordance with common usage as reflected in the wording of the Economic and Social Council Resolution 1721 (LIII).

The "multinational corporations" are, in a majority of cases, unincorporated or incorporated in any one of the countries, such as United States, the UK, Germany, Canada, or Panama, and clothed with the rights and obligations under the law of incorporation along with rights, if any, granted to them within the countries in which they are permitted to operate. Thus, even though General Motors may straddle the entire world and have factories in many countries forming separate corporations or companies, it still is regarded as an American company with subsidiaries, branches or agencies operating throughout the world. Such companies are multinational in their operations but not in their incorporation.

There are other corporations which are bi-national, such as Agfa-Gevaert (incorporated in both Belgium and FDR

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18 n. 7(b), p. 4.
Germany), Royal Dutch (registered and incorporated both in Netherlands and the UK), Unilever - similarly so registered in Netherlands and the UK. These corporations, owing allegiance to two national jurisdictions are bi-national corporations and are not multinational corporations.

There is a third category where companies are created under a national law but their formation is agreed to by a treaty concluded by States. An example of this type of corporation is the SAARLOR formed as a result of treaty between France and Germany in 1956. This company was registered with identical Articles of Association in both France and Germany and was governed by the provisions of the French and the German Group of Laws which incorporate some of the provisions of the Franco-German Treaty. This is no different from Royal Dutch-Shell. Therefore, wherever a corporation is not immune from the laws of a local sovereign in respect of its birth and its activities, its home State and nationality can be traced to that sovereign whose laws govern its existence, notwithstanding any treaty or convention that might have brought it into being.

Judged by these standards the Bank for International Settlements formed as a result of an international convention

of January 1930, signed by Germany, Belgium, France, the
UK, Italy, Japan and Switzerland with headquarters in
Switzerland, appears to be a truly international company
because it is immune from Swiss legislation, and is found
by its own character the terms of which may be contrary
to Swiss Law.

Besides these categories, there are corporations
which are created, organized, and live under and by inter-
national law which are truly international juridic
entities, not owing allegiance to any system of law. Such
are the International Company of Reconstruction and Development,
International Banks Corporation, Inter-American Development
Bank, the European Investment Bank, and the Asian Development
Bank. In the event of their emerging as true international
corporations, free from national controls operating under
international authority, they will be precursors of true
international corporations.

The above discussion would keep out of the realm
of multinationality or internationality all the corporations
or enterprises that are operating across national frontiers.
If this is borne in mind, the only expression that can truly
apply to these corporations is that they are transnational
corporations. This is the expression used in the 'Charter
of Economic Rights and Duties of States' in The General Assembly
Resolution of 12 December.

20 Ibid.
(Article 2), and in Resolution 1913 (LVII) of the Economic and Social Council establishing the Commission on Transnational Corporations. In fact, even the Group of Eminent Persons have in their report stated that the word 'transnational corporation' would better convey the notion that these firms operate from their home basis across national frontiers. This expression is now followed by the United Nations Economic and Social Council and accordingly the word 'transnational corporations' is a more suitable term than 'multinational corporations' to define the activities of these enterprises.

The next question is whether the expression 'transnational corporations' should be applied to only private bodies or public corporations, or should cover State-owned enterprises as well. Some delegates who took part in the discussions of the Report of the Group of Eminent Persons at the fifty-seventh session of the Economic and Social Council 1974, thought that the State-owned enterprises should be excluded as not being geared to profit-making, and that the term transnational corporations should refer to only private enterprises. The definition given by the UN Group

21 General Assembly resolution 3231(XXIX) of 12 December 1974.

22 n. 4, p. 159.

of Eminent Persons clearly stipulates that these multinational enterprises are not always incorporated or private—they can also be co-operatives and state-owned entities. In this context and in the context of the increasing state enterprises participating in the world of commerce (even Burmah Petroleum and Ashok Layland of UK are state-owned enterprises), it would not be appropriate to exclude a state enterprise from the definition and from any regulation that may be formulated nationally, or by international connections. There is no significant difference between the behavioural pattern of state-owned enterprises and that of the other enterprises. However, it may be recognized that a state-owned enterprise will not so readily precipitate an international crisis as a private corporation is prone to. This may only mean that there could be a legitimate demand for differentiation in the formulation of regulations in a Code of Conduct while dealing with state-owned enterprises. But to exclude them from the definition would be to exclude a considerable area of commercial activities.

To sum up, the task of precisely defining a transnational corporation bristles with difficulties. But unless a proper definition is framed, the application of

24 n. 4.
regulations for their conduct will give rise to controversies. A definition which is neither too wide nor too narrow, but which admits of sub-classifications, may be preferred. Such a definition may be one adopted by the Group of Eminent Persons, but amended to include operations as well besides ownership or control of production or service facilities outside the country where they are based.