THE CHALLENGES IN THE INTERNATIONAL CONTROL OF TRANSNATIONAL CORPORATIONS: THE LIMITATIONS OF INTERNATIONAL TREATIES, INTERNATIONAL GOVERNMENTAL AND NONGOVERNMENTAL ORGANIZATIONS, CODES OF CONDUCTS

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"The weaknesses and contradictions of legal and state regulation of capital are most apparent at the international level. These are to a great extent the result of, and reflect the weaknesses of, international popular movements..."

—Professor Sol Picciotto, 1988

I. INTRODUCTION

This paper attempts to figure out the most challenging perspectives for both international governmental and non-governmental control of the transnational corporations (hereinafter cited as TNCs) today.

The global emergence and widespread increase in transnational business activity has brought into question a host of legal and socio-economic problems hitherto undealt with in the arena of international law. The transnational corporation has grown rapidly over the last three decades and contrary to most popular thought constitutes not one sole entity but a body of separate companies operating in various forms as subsidiaries, joint ventures, cartels etc. in different parts of the world.

As a result of the piercing through of artificial nation state boundaries through the business activities of TNC’s there has arisen various problems of control and regulation of the conduct of the latter. Efforts at regulation and control have been conducted by international and regional government agencies such as the United Nations (U.N.), the European Economic Community (EEC), the Organisation of Economic Co-ordination and Development (OECD) as well as non-governmental organisations (NEO’s). The latter constitute moral pressure groups on an internationally co-ordinated basis.

This has increasingly led to what now constitutes the regulation of companies and private individuals an area traditionally held to be the purview of private international law. There is still however the utilization of treaties, codes of conduct, international administrative arrangements and Recommendations. Much of this steady growth of law has been described as transnational law, mainly affecting the conduct of the transnational corporations.


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II. THE SPREAD OF TNCS

TNC's are mainly the design of developed market economies:

"More than 10,000 enterprises control over 50,000 affiliates outside their home countries...... Approximately over 80 per cent of all Multinational Enterprises foreign affiliates and their international direct investment originate in five countries, the United States, followed by the United Kingdom, France, the Federal Republic of Germany and Switzerland. By including Japan and Canada one can account for about 90 per cent of the international activities of the Multinational Enterprises." 2

The spread of TNC's in developing market economies has been influenced and has been limited to certain industries, mainly of the extractive, mining and refining nature. Most developing market economies play the host country role while the developed countries play the host country role while the developed countries serve as both host and home country to the TNC's. Foreign Investment in the United States is particularly minimal mainly in the form of portfolio investment whereas 80 per cent of the American investment in Europe is in the form of direct investment.3

These definitive patterns to a large extent have determined the ideological and legal policy leanings in the international regulation of business on such issues as the transfer of technology, competition policy and international labour.

The TNC a product of the free market economy, seeks primarily an unrestricted, liberalised climate to embark on its policies and to ensure unlimited success. However TNC's have been put under close surveillance by host countries (both developed and developing economies) anxious to protect also, their own markets from any negative effects of TNC policy on their territories. This is a most typical response to the sheer size and power wielded by the TNC's in the world market. It is therefore this unveiled anxiety of unequal dependence by developing nations for


(註 三) See Fatemi Williams and De Saint Phalle, Multinational Corporations, p.206.
instance, which has led to the articulate their views and attempt to change the existing inbalances. As such national interest and the TNC interest do not always converge, these measures are only perceived by the TNC’s as attempts to hamper their economic goals.

III. THE CHALLENGES IN THE INTERNATIONAL LEGAL REGULATION

III.1 Treaties and Codes

On the whole most host country governments, whether from the developed or developing market economies, seek to control the negative effects of transnational investment flows in the area of taxation, restrictive business practices etc. There is also a growing awareness for participation on a more integrated and co-ordinated basis to ensure the existence of a stable climate for foreign investment. This has been the major work of treaties and codes of conduct.

The areas of concern of individual codes of conduct and treaties are reflective of the host or home country’s economic policy and leanings. For example, at the European Economic Community level where countries may play either a host or home country role, proposal for action on TNC’s mainly cover the area of elimination of tax conflicts and the regulation of anti-trust behaviour while the developing countries on the other hand focus on the area of transfer of technology and a review of the patents system.

Essentially the question which arises is the effectiveness of these modes of regulation on the conduct of TNC’s and the role they have played thus far. Different problems arise in the international regulation of business, a basic problem is in achieving international co-operation and the much needed co-ordination of goals. A good example of the problem in this area is typified by the reluctance (and sometimes outright refusal) by developing countries to conclude some treaties. This is only a response to what is viewed as a lack of reciprocity of goals as most developing nations do not have substantial investment of the transnational nature in the developed market economies.
III.2 The Question of "Soft Law"

While Treaties once concluded are of a legally binding nature, most Codes constitute what is increasingly being referred to as soft law, this is because they are usually voluntary and non-legally binding. Furthermore, it becomes problematic when such provisions are not incorporated into existing national laws of states thereby giving rise to a situation in which international regulation is not in harmony with national law. This of course lowers the effectiveness of any internationally concluded arrangement. The latter factor also poses a situation whereby any resultant loopholes can be exploited by the transnational corporation.

The situation has been further compounded by the legislation of blocking statutes by states anxious to protect their markets form the harmful effects of TNC violations and corresponding action by nation states at the national level. However the unpredictability in international markets bred by this development and the negative impact on international investment, probably would prohibit further unilateral action and compel states to find an internationally or at least regional resolution of conflicts.

The TNC does not however appear to be at an undue advantage rather the uncertainty created by a lack of international codification on regulation would serve to advance the pursuit of their economic goals as they are not hampered by strict legislation. It is not surprising therefore to observe that TNC's are no aggressors for legally harmonised and binding regulation.

It is pertinent when dealing with the role of codes, treaties and governmental organisations to examine a cross section of the same in order to ascertain their scope of influence in the international regulation of business. Treaties and codes of conduct have been concluded on a bi-lateral regional and international basis. The Organisation of Economic Co-operation and Development (OECD) and the United Nations apparently will remain the principle international organisations in this field as their influence would appear to be more widespread and far reaching globally than most other organisations.

The OECD guidelines on International Investment and Multinational Enterprises were adopted in 1976 and are of a non-legally binding nature. It has often been
perceived by developing countries as a pre-emptive measure at any attempt to evolve conclusive and binding codification of regulation on TNC's. The guidelines have been directed in that area of transnational business activity concerning transfer pricing, tax evasion and avoidance and also restrictive business practices.

IV. DIFFERENT DIMENSIONS OF INTERNATIONAL CONTROL

IV.1 Tax Regulation

The practice of the adjustment of prices by TNC's in intra group trading has resulted in a situation where profits can be maximised in low tax areas which of course affects the taxation of profits in higher tax areas. The ability of the TNC to pull off this kind of arrangement can be attributed to the advantages derivative from its global and strategic stand point as well as its high level of effective intra-firm co-ordination. The last feature could be well borrowed in the field of international regulation.

The OECD Model Double Taxation Convention (Arts. 7 and 9 of 1977) is the basis of the double tax system. OECD countries however retain their existing and sometimes differing national tax laws. The double tax treaty system seeks to rectify any negative effects from the application of conflicting laws and thus provides an exchange of information between contracting member states. Article 9 (1)(b) states;

*Enterprises should upon request of the taxation authorities of the countries which they operate provide in accordance with the safeguards and relevant procedure of the national laws of these countries, the relevant information necessary to determine correctly the taxes to be assessed in connection with their operations including relevant information concerning their operations in other countries.*

This provision is directed at forestalling such activity as transfer pricing and to enforce the arms length standard based on a system of separate accounting which entails an individual treatment of subsidiary companies. This imposes a burden on state authorities to effectively examine and possibly rectify arms length accounts on an internationally agreed principle in order to avoid double taxation. However, the
double tax system is operated in different tax jurisdictions and therefore fails in its brave attempts to regulate tax on an international and comprehensive basis, the lack of reciprocity by developing nations also intensifies the problem and makes possible the existence of tax havens.

The existence of commercial secrecy laws in countries like Switzerland and the so-called tax haven countries to a large extent reduces the level of mutual assistance on disclosure and exchange of information. Quite a number of countries have evolved arrangements supplemental to Treaty provisions to prevent abuses of bank secrecy legislation. This of course raises questions of extraterritoriality and the giving into effect of foreign orders and requirements for information.

National courts are sometimes empowered to give judicial assistance in civil and criminal cases in response to requests for information from foreign judicial bodies. However, since most proceedings are generally on an administrative basis, there is a limit to the use of judicial assistance. The Hague Convention on the taking of evidence abroad can sometimes be utilised in litigation. Bi-lateral Arrangements with countries with bank secrecy laws is also not uncommon. An example is Agreement xvi of the Swiss Bankers Association and the Securities and Exchange Commission of the United States. However, such agreements do not constitute binding legislation and could be superceded by national law.

IV. 2 Competition Regulation

The regulation of competition within the TNC's is co-ordinated within the OECD by its Recommendation on Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade and within the EEC by the Treaty of Rome. The implementation of competition or antitrust regulation is faced with basically the same problems affecting taxation. There is the question of extraterritoriality coupled also with that of blocking statutes as well as the non legally binding nature of most regulation in this area.4

(注四) The guidelines are non-legally binding and their effectiveness depends first of all on the political bacc king they have received from governments which take the form of joint recommendations that reflect governments firm expectation of certain behaviour by transnational corporations.
Probably the most successful co-ordination on a regional basis is the EEC competition policy which has now evolved a considerable level of case law. Articles 85 to 90 of the Treaty of Rome is directly applicable in member state countries and should be incorporated into existing national law. The enforcement of the policy is overseen by the European Commission and it is no defence in the evasion of jurisdiction that proceedings of a foreign parent company and its subsidiary is an exercise of inadmissible extraterritorial application of European Competiton Law. The Commission has recorded a degree of success in its application of competition policy through the imposition of heavy penalties.

IV.3 *International Labour Regulation*

The internationalization of trade unionism and labour organisation has been characterised by some major features—the most important being the inability of workers to organise effectively on an international level as a result of political factionalisation and other sectoral interests. This has reduced the effectiveness of international unionism and at its best it serves as a co-ordinator for the collection of information. The evolution of international labour codes and regulation without corresponding integration at the national level makes the role of labour regulation on such fundamental issues as the freedom to organise and the existence of collective bargaining, almost meaningless in certain countries. Statutory limits exist on the organisation of solidarity action as for example can be seen in developing countries with quasi democracies or even in Great Britain with the golden formula principle. The inability of workers to organise is sometimes capitalised upon by TNC’s who exploit these conditions especially in countries where there is a dire need for international investment.

Different sectoral codes have emerged in the area of international regulation of labour, these include the International Labour Regulation Tripartite Declaration concerning multinational enterprises and social policy and the OECD guidelines for Multinational Enterprises 1976 and the European Economic Community Proposed Directives on Procedures for Informing and Consulting Employees.

The OECD guidelines although not legally binding and restricted both in policy impact and geographical area has achieved a measure of success in its implementa-
tion. Even though it has been described as “soft law” many TNC’s in an effort to protect their corporate images at the international level adhere to the principles of the code. It must be noted however that like any other voluntary code, its impact will remain substantially reduced without any governmental backing on enforcement.

In the BRITISH AMERICAN TOABCCO (BATCO) CASE which centred around the closure of a Netherlands subsidiary it was established that the guidelines make no attempt to restrict the basic freedom of investors to disinvest. The 1977 Review Report by the CIME however pointed out that the guidelines establish a number of obligations to respect the host country’s interest. In particular it stated that company should consider the degree of integration of its subsidiary into the economic context of the host country. This position suggests that multilateral regulation on transnational investment could extend to control over disinvestment.

The guidelines would therefore appear to constitute moral pressure influencing the existing attitudes in the international business community and gradually could become applicable as binding rules of conduct. The existence of an able governmental machinery is essential in enforcing claims---an area where the developing and “weaker” states are at a disadvantage. The International Labour Standards Code developed by the ILO notes that no TNC would be under any moral obligation to observe any code of conduct which probably is of no effect in the host country. Host country governments must be therefore willing to show that international standards are the rule in indigenous companies as well. The ILO also observes that some policies and conventions, though not formally ratified, still serve as the useful guidelines for the interpretation and development of national laws and policies. The code which has been described as an “international employment code”, seeks to ensure that a favourable environment exist for the generation of employment, fair and equitable conditions of work in the implementation of TNC market strategies. The ILO and OECD codes are significantly interrelated and at times appear to overlap. The 1979 OECD Review states that where the principles of the ILO Declaration refer to the behaviour expected from enterprises they parallel the OECD guidelines.

(註 五) The prime policy impact is highly selective focusing above all on the area of employment and industrial relations...”, See Robinson, J., Multinationals and Political Control, p.153.

(註 六) See also the Badger Case, R. Blapain., Kluwer, Denveater 1977 in Robinson J., op. cit.
and do not conflict them.

The EEC proposed Directives and Procedures for Informing Employees of undertakings with complex structures in particular transnationals otherwise known as the Vredeling Directive was initiated in furtherance of the harmonisation of business and corporate principles of member states. A directive is not legislation per se rather it is an order issued by the council to member states requiring that they bring their national laws into conformity with the directive. The basis for the directive is premised on the fact that;

"multinationals tend to keep their employees inadequately informed and consulted on a broad range of policies which affect their interests, this assumption is that arms length decision making from headquarters which may in another country or outside the community altogether give some management the opportunity to run their businesses with fewer obligations to win the consent of their employees."  

"Profiting from the legal fiction that local subsidiaries are operating as independent units, multinationals can accommodate without any great difficulties the requirements of worker information as fixed by national law since the key decision making and information centre is located elsewhere namely at the headquarters. The Vredeling Directive seeks to destroy this legal fiction."  

The directives have however not been so warmly received by the TNC’s on the basis that management would be left in a highly vulnerable position and complex commercial and financial decisions would also be at risk. Article 7 which defines secret information in this context is couched in very general terms and it is not clear to what extent confidentiality of information would be protected. Nevertheless the Directives have been expected to ameliorate serious problems arising from closures and subsequent unemployment. Whether this in fact be the case or if it will in reduce the value of the European market to potential investors will ultimately be seen.

(註 八) Robinson J., op. cit. p.60.
(註 九) Fisher Turner., Regulating The Multinational Enterprise, p.41.
(註一〇) The directives have been adopted but with most of the crucial provisions relating to the protection of the worker through disclosure of certain information omitted.
IV.4 Patent Regulation

Another area of concern in the regulation of TNC’s has been the question of the transfer of technology. The international co-ordination of the patent system is primarily the function of the Paris Convention for the Protection of Industrial Property adopted in 1883 with several subsequent revisions the latest being that of Stockholm in 1967. The World Intellectual Property Union ensures administrative co-operation among intergovernmental unions. Developing country members constitute a majority within the union their number is however smaller than developing country members which remain outside the union—a total of sixty two.11 A majority of the latter have nonetheless incorporated into their national laws, vital parts of the convention.

Developing countries have been in the forefront for a review of the existing system on the grounds that technology transfer is made available to them on conditions which are often inequitable and onerous. The convention’s principle of national treatment hardly seems equitable when regard is had to the fact that there are very few patent holders in the developing countries holding patents abroad. Patent holders in the less developed countries are often individuals, while the TNC’s are the major foreign holders of patents. Some developed countries have made up for the deficiencies in the regulatory system by enacting new patent legislation which include stricter provisions for compulsory licensing, a limitation of the duration of a patent grant for specific products or processes and revocation as a remedy for non-use of patents. In practice, however, the weaker position of less developed countries have again made it difficult to influence the present terms of internationally concluded treaties regulating this area.

V. THE CHALLENGES FOR NON-GOVERNMENTAL ORGANIZATIONS

Lastly, Non-Governmental Organisations (NGO’s) in the form of international pressure groups, consumer associations, public interest groups and religious organisations...
tions have become an important factor in the control of international standards of products manufactured by TNC's. NGO's have also been in the forefront for sanctions directed against certain TNC's in politically based actions.

NGO's are increasingly grouping on a more co-ordinated and effective basis and have been able to exert some moral and political pressure on TNC's. This has sometimes proved quite effective in changing TNC behaviour in certain situations as the latter appear anxious to protect their public image. This was the kind of background which paved the way for the eventual initiation of the World Health Organisation's International Code of Marketing for Breast Milk Substitutes in 1981. Efforts to give the code a legally binding status have however been thwarted. Furthermore, the existence of reservations held by some developed market economy governments has lowered the impact and otherwise effectiveness of the code. Codes of this nature require strong governmental backing without which implementation and monitoring would be highly difficult.

The abuse of drug practices by TNC's especially in the third world has been brought to light through information obtained by the effort of NGO's. Many TNC's do not adhere to the very general terms of the code that regulates this area--the International Federation of Pharmaceutical Manufacturers Associations Code of Practice. The latter states that all the products made by the industry "should have full regard to the needs of public health." The absence of any comprehensive drugs policy on the international level makes it paramount that countries, especially the developing market economies, initiate a national drugs policy consistent with the health needs of their individual countries. As a result of the lack of regulation in this area, TNC's are able to market drugs at a very high cost in some countries reflecting an underlying arms length strategy of supplying raw materials at a very high cost to local subsidiaries. A World Band Study on pharmaceutical production in Bangladesh estimated that considerable savings could be made if the cheapest reliable sources of raw materials were used and if local production were undertaken.

The unregulated drug market in many countries has enabled TNC's to use and abuse misleading advertising. This is very common in third world countries with harmful products such as tobacco. National control in the form of warnings to health are nearly always absent. TNC's have exhibited a reluctance to co-operate in the regulation of industry in this area, on an international basis, as this would not
serve their economic interests. There is also a need for international environmental 
co-operation and home governments of TNC's are expected to ensure that their cor-
porations do not cause environmental harm abroad. The likelihood of significant 
unilateral action on the part of home governments to extend their environmental 
regulation abroad is rather low. The use of unilateral action offers little hope in 
this area without complimenting co-ordination on an international basis.

VI. CONCLUDING REMARKS

In conclusion it has been observed that there has been a greater increase in 
international regulation and control of TNC's. This must be complimented with 
effective co-ordination between governments to ensure the harmonisation of interna-
tional regulation with national legislation. Developing countries must in particular 
develop their national laws in order to put themselves in a better bargaining position 
when dealing with TNC's and should press for mandatory and compulsory action on 
the international level.

Furthermore, in addition to the need of co-ordination of law and state on the 
international level, the non-governmental regulation of TNC's also faces the most 
challenging perspective for the building of a new internationalism. In order to 
change the overall structure of power in a global capitalist society, it seems that this 
new internationalism which can combine the strengths of class politics and popular 
social movements becomes the main task for the next decades.

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