COMMENT

THE MULTINATIONAL CORPORATION AND THE NATION STATE

While there have been commercial undertakings stretching across national boundaries since the thirteenth century with the trading firms based in Sienna having offices and representatives in many of the important cities of Europe,[1] it is largely after World War II and mainly since 1955 that groups of corporations, joined by a parent but including diverse nationalities, have assumed an important role in the national economic life of sovereign states. The development has in fact been so rapid that one writer could say that: '[t]he nation-state and the multinational company are the two dominant institutions in the world of the late twentieth century'.[2]

The larger corporations are in fact so large that they are on a par economically with a majority of the world's nation-states; a listing of countries and corporations according to gross national product and gross annual sales, respectively, affords a rough comparison of their relative economic strengths. It shows that the first 22 entries are nation states ranging from the U.S.A. to Argentina, while the 23rd entry is General Motors with gross annual sales of $24.3 billion; and of the top 100 entries in the merged list, 59 are nation-states, and 41 are multinational corporations.

But if the nation-state and the multinational corporation are comparable in economic significance and power, their interests are at times bound to diverge and conflict. The deepest divisions within global economics have been along national lines and planning within the nation-state is geographical in character, limited by its territorial confines; but such territorial limitations and the inevitable subsequent inter-territorial restrictions can serve only to hamper and blight the implementation of a truly global strategy which transcends national limitations and rivalries where the world itself is the basic economic unit. The essence of a trans-national society is that contact creates the community while the essence of the sovereign state is that independence forges the personality. So as the sovereign state expands functionally and the multinational corporation

[1] Hawrylyshyn, 'The Internationalization of Firms' (1971) 5 *Journal of World Trade Law* 72.

[2] Brown, 'A Readers Guide to Multinational Corporations' *Financial Review*, 1 August 1973.

expands geographically, there is bound to be a mounting struggle between these two institutional concepts.

For George Ball, the President of Lehman Bros International and Under Secretary of State in the Kennedy and Johnson administrations, the potential of the multinational corporation is enormous indeed.

> [I]ts implicit promise of enabling man, for the first time in history, to utilize the world's resources with a maximum of efficiency and minimum of waste, by deploying those resources freely throughout the world in accordance with principles of comparative advantage, measured by a single objective standard of profit.[3]

But he too recognizes the fundamental conflict between the multinational corporation's management and the governments of host countries, the thinking of the latter being defined by the national rather than the world economy. So nations are, he says,[4] enemies of their mobility and the ability to view the world economy from a single point of vantage, to deploy resources without regard to national origin in response to a common set of economic standards which is '[t]he peculiar genius of the multinational company'.

However, just as other conflicting ideas, such as the Catholic Church and nation-state in the middle ages, have struggled with each other for hegemony, so we can expect there to be struggle between the multinationals and nations while each needs what the other has to offer until either harmony is achieved or one overwhelms the other.

This comment will deal with some of the causes and effects of this conflict between the multinational and its host country and the relationship of the parent company and its home government. It will then investigate strategies open to the host government to resist its subsumation into a global network of mammoth corporations; and, finally, possibilities for bringing these supranational entities within an international legal framework.

NATIONAL LOYALTIES

Much of the rehtoric in this area sees the multinational corporations as a nework of economic institutions overlaying an altogether independent system of mutually exclusive political entities. But such a 'pure theory' of the interaction between the multinational corporation and the nation-state is belied by the fact that the overwhelming preponderance of the corporations are headed by a corporate parent of U.S. nationality and the parent will be principally owned by stockholders who are residents of the United States.

[3] Farrell *et al.*, 'Mounting Attacks on Multinational Corporations' (1973) *Business Lawyer* (Special Issue) 241, 284.
[4] *Ibid.* 285.

A list of every U.S. corporation owning and controlling producing facilities in half a dozen countries abroad would contain about 200 names; whereas such a list of European parent companies would be considerably shorter with only about 30 names. But, perhaps more importantly, even they all employ techniques of management and seem motivated in a way that appears distinctly 'American'. D. J. Baum,[5] in a discussion of J. Servan-Schreiber's book *The American Challenge,* says that Servan-Schreiber's solution or suggestion as to the American economic penetration of Europe, that is the promulgation of competitive European corporations, would equally lead to the loss of culture, identity, and of self determination, as would American dominance through global corporations because of their very nature.

Nor can this just be considered as a transitory phenomenon, for it is likely that U.S. companies will continue to be leaders in the proliferation of such groups for some time to come.[6] But whether the corporation is an American, Japanese or Australian one it will owe historical loyalties at least to a particular country, and host nations will identify it with that home country. Moreover the parent company, being incorporated in the country of the home government, will be subject not just to procedural requirements, which host governments would no doubt willingly concede to avoid considerable confusion, but also to pressures, legal and extra-legal, concerning national policies which could be transmitted internationally. For though each subsidiary may be legally a native within the country of its incorporation, tensions between that legal theory and the economic interdependence of the units of the multinational corporation keep developing.

A classic example was the conflict between Canada and the U.S. over trade with the Peoples' Republic of China. In 1964 Canada had gross international liabilities of $32.8 billion, of which $23.1 billion was owing to the U.S.A., much of which represented both ownership and control of Canadian industries by Americans; for example more than 60% of Canada's mining and smelting industry is owned by foreigners, mostly Americans. The U.S. *Trading with the Enemy Act* prohibited trade with the Peoples' Republic of China with a penalty of up to $10 million or ten years in gaol or both; and certain U.S. owned Canadian companies were ordered not to do business with China because the U.S. executives were held to be in control of the Canadian affiliate. Yet at the time Canada was promoting trade with China.

On that occasion the governments concluded a compromise whereby a procedure for intergovernmental consultation was established so that if it could be shown that the export in question was significant to the

[5] Baum, 'The Global Corporation: An American Challenge to the National State' (1969) *Louisiana Law Review* 410.

[6] Vernon, 'Multinational Enterprise and National Sovereignity' (1967) *Harvard Business Review* 158.

Canadian economy or that the order could only be filled by a firm whose parent was subject to U.S. control, then 'there is a strong disposition to look sympathetically upon the application unless it is of actual strategic significance'. Involving the same problem, in France the local subsidiary of Freuhauf was ordered by the parent not to supply trailers to a French automobile company for a contract with China. The problem there was overcome in the Courts by the ingenious appointment of an '*administrateur provisoire*' who could complete that contract.

In each case there was an assertion of extra-territorial jurisdiction by the home government because of the fact of the foreign investment, and because in each case the pressures were supported by sanctions they could be seen; that is, it was apparent that was why trading was stopped. But where the pressures are exerted or are felt extra-legally, without measurable legal sanctions being involved, then both their presence and effect are far more difficult to assess.

It would seem that some accurate impression of how and when such informal pressures are effective might be seen, though inversely, from the response of foreign companies in Canada to that government's declaration of 'some guiding principles of good corporate behaviour in Canada of foreign companies' I. A. Litvak and C. J. Maule, who have written extensively on the subject, reported that the impact in favour of Canada after that declaration depended on a number of factors, the two main variables being the corporate philosophy and the organizational relationship between the parent and subsidiary.[7] The former can vary generally between an export orientation, (apparent from centralized management and secondary importance only being given to extra-domestic business) an international orientation, (where there is financial control but a greater emphasis on international business in achieving the corporate objectives) and multinational orientation, (where there is no distinction between domestic and foreign business and where all activities are fully integrated into a global plan of action). The organizational relationship can similarly vary between the foreign business being a mere branch of the parent, a wholly owned subsidiary or partially owned, a joint venture or a mere contractual arrangement. Litvak and Maule concluded that the nearer to a multinational orientation and 'the greater the degree of participation, in management and equity, by the nationals of the host country, the more likely will the impact of the pressure favour the host country'.[8]

Because the multinational corporation is such a recent development, and because for many of them it is only a relatively short time since their

[7] Litvak and Maule, 'The Multinational Firm and Conflicting National Interests' (1969) 3 *Journal of World Trade Law* 309, 313. Also: 'The Multinational Corporation: Some Economic and Political-Legal Aspects' (1971) 5 *Journal of World Trade Law* and 'Foreign Investment: The Experience of Host Countries' (1970) *Praeger Special Studies* 10.

[8] *Ibid.*

business was conducted only in one country, it is sometimes predicted that the discarding of the coil of nationality is just part of their growing pains. But one can be legitimately dubious about forecasts of the speedy inevitability of the development of that kind of multinational or denational orientation. It is probable that in the foreseeable future some or many corporations might become less positive in their national identity just because of the extent of their national contacts and dealings; but people are still born and live in the context of the nation-state, reinforced by language, government *etc.* and the concept of denationalizing is therefore such that to see it as immediately or foreseeably attainable would be just romanticism. And even if it were realized, there would not therefore be the end of tension between the nation-state and the corporation; all that would happen is that the quality of the tension would change.

Given then the national aspect of the multinational corporation, perhaps even more insidious from the point of view of the host nation is the observation of G. Adler-Karlsson[9] that such formal claims of extra-territorial jurisdiction are an instrument of coercion that a government only applies where a conflict exists between the government and its subjects. Where there is no conflict, (and — if the interests of the U.S. government are as close to the interests of the business sector as such writers as Sweezy and Magdoff say[10] — otherwise would be the exception) then agreements, often informal and often secret, between the government and corporate parent will be sufficient with no need for extra-territorial claims. When the U.S. was organizing the boycott and isolation of Cuba it agreed with the oil companies that they should refuse to use any shipowner who allowed his ships to go to Cuba. As the oil companies are their greatest customers, most shipowners submitted.

As well as all this, the very fact of belonging to an interdependent economic framework will mean that no unit can be quite autonomous. Parent companies will normally lay restrictions on the trading behaviour of the subsidiaries; but such restrictions or rules will not always be transmitted by written commands from the parent companies head office. As R. Vernon says 'as a rule, discipline and co-ordination are maintained much more by common training and conditioning than by a stream of commands from the centre'.[11]

And the multinational corporation is a coherent organization with a narrow range of economic motivation, in sharp contrast to the nation-state which is bound to be a confusion of conflicting goals and malfunctioning bureaucracy. That kind of judgment may in fact be more

[9] Adler-Karlsson, 'International Economic Power' (1972) 6 *Journal of World Trade Law* 501.
[10] Sweezy and Magdoff, *Dynamics of U.S. Capitalism.*
[11] See Adler-Karlsson, *op. cit.* 517.

apparent than real with such things as the profit level analysis, trumpeted by George Ball being limited both in theory and practice.[11a] It may have more to do with the specialization, and so the easy identification, of the aims of one compared to the other; but even so the point seems tactically relevant here.

For countries which have grown to depend and rely on the multinationals within their boundaries, particularly underdeveloped nations relying on their extractive industries and a large company (such as Papua New Guinea could with Bougainville), then their national prosperity will be subject to the harmonization with these geocentric considerations. For the ways national policies may be subverted if the economic influence is significant and concerted enough are many.

SUBVERSION OF NATIONAL POLICIES

The monetary policy of the host government might be evaded through the access of the subsidiary to its own retained earnings and those of the parent and to those other sources open to the parent.

Also a nation's currency, as part of an internationally organized monetary system, can have speculative pressures accentuated against it simply by a multinational's management prudently moving funds from one country to another; and some corporations actively and aggressively seek such financial gains. Similarly a country's fiscal policy can be evaded.

Perhaps the best example here is the oil companies[12] in view of their involvement in the complete process from oil exploration to petrol chemicals. Because of their ability and freedom to use internal transfer prices in the absence of true 'arms length' prices and to allocate costs between international affiliates, the oil company has ample opportunity to generate accounting profits in those phases of its world wide operations which benefit from the lowest effective tax rates. The sale of products by simple transfer of title without any physical movement to subsidiaries located in tax havens is perhaps an extreme example. If the income earned abroad is domestically taxable though (as in Australia and the U.S.) with foreign tax credits deductible from domestic tax liability, then if the former exceed the latter, there is an incentive to show profits where taxes are lowest.

It was reported in *Fortune* of December 1970 that neither Esso nor Shell paid taxes on sales of over $200 million in Sweden because of the high cost of crude oil which the companies buy from themselves. According to Senator E. Kennedy, I T T — the eighth largest American company — paid no Federal American tax in 1971.

[11a] See Vagts, 'The Multinational Enterprise' (1970) 83 *Harvard Law Review* 739, 755-6. and see also *supra* n. 3.

[12] Evan, 'The Multinational Oil Company and the Nation State' (1970) 4 *Journal of World Trade Law* 666.

Another 'version' of the same principle of using the diversity of nations for their own benefit as evidenced by the tax haven is the dirt haven. W. Kennett reports[13] that a number of Japanese multinationals have recently set up factories in East Africa because there are no pollution laws there.

A country's balance of payments can be affected by that same pricing flexibility and by other tactics such as dividend repatriation, royalty payments, licence fees and fees for management contracts. Repatriation of earnings and dividends is particularly likely to enflame the host country, because of their sheer size, the speed with which it can be achieved and, due to the integration internationally of the firm, the difficulty in detecting or preventing it. Until 1962 the U.S. government was unconcerned with such repatriation but with their adverse balance of payments the policy was reversed.

It was estimated by George Ball[14] that about $6 billion each year was added postively to the U.S. balance of payments from overseas investments.

Attempts to correct an adverse balance of payments position through devaluation can be undermined by the multinational corporation because the internationally integrated firm will be settled in its direction of trade between its affiliates in different countries.

Also the more internationally integrated the company's structure might be, that is its greater tendency to ignore national frontiers, the more likely it is to respond to change by closing down in one place and expanding elsewhere. But withdrawal of investment will be of enormous concern to host governments usually because of the size of the operation and the apparent impersonality of the decision. During the Ford strike in the U.K., the Prime Minister, Mr. Wilson, warned by Henry Ford, warned workers that if they didn't return to work Ford might switch production and future expansion to Germany. Ford has recently set up a huge operation in trade-unionless, low wage, Spain.

Unions will be forced to internationalize too,[14a] and some already keep a careful eye on production transfers within a corporation from a country of dear labour to one of cheap labour and there have been suggestions for wage negotiations on an international level. When a Ford subsidiary in Venezuela dismissed certain employees for attempting to organize the plant, union action in Detroit had them reinstated.

It is also a likely fear of countries that in order to preserve the security of their investments, these 'visitors' will inevitably embroil themselves in the domestic political scene, usually to support the more conservative side. The attempt to assess the strength of economic nationalism in Australia

[13] Kennett, 'Sovereignty and Multinational Corporation' (1971) *Fabian Tract* 409.
[14] Farrell *et al.*, *op. cit.* 283.
[14a] See generally Whitty 'Trade Unions and Multinational Corporations' (1971) *Fabian Tract* 409.

prior to the last elecion by the Center for Strategic and International Studies of Georgetown University[14b] is perhaps indicative of that inevitable concern. Strategies could vary; support for political parties is perhaps the most obvious example.

The fears of host countries in accepting foreign investment will include all these things — basically that the utilization of their resources will be at their expense rather than for their benefit. They will fear that they will become dependent on foreign sources for technology for defence and that it might not be reliable; they will fear that the country's loyalties will be split; and they will resent their resources being exploited by others just because the others have a capital surplus. It is at heart a fear of loss of sovereignty and nationality.

HOST STRATEGIES

So far then we have seen the implications of investment by a multinational corporation for a host country both in terms of its relation to the supra national corporation and to the national government of the corporation. What is to be investigated now are possible strategies for the host or prospective host governments to ensure that they retain broad control of the activities within their borders or at least that those activities will not be employed contrary to their evident national interests. This will also be relevant (because of that national identity of the multinational corporations that we have seen) to the political relations between the capital importing and capital supplying countries; for the host will have to weigh its strategies in relation to that as well.

It has not been discussed so far in this comment as to why in fact host nations either want or allow the multinational corporation of such antagonistic potential to enter. But despite often serious misgivings, the ability to mobilize capital and technology from outside the country and the ability to offer access to established export markets overseas are enormous attractions to capital — and technology — deficient nations. For because they seek an outlet for their accumulated capital the corporations will be attracted to those very areas not so much where the initial investment/profitability ratio will be high, but where the capital employment will be high and so where they might expect long term rich profits, that is where the market can be developed. How then might host governments reconcile their desires to derive the benefits from the corporations with their fears of its power and control?

One way would be to require detailed disclosure by the corporation as to its local operation. In that way it might be hoped that anti-national trends or policies would be avoided because of the 'watch-dog' idea or would be able to be controlled and re-directed; and so the local operation

[14b] See (1972) *Dissent* No. 29.

of the multinational operating under laws designed for relatively small indigenous organizations might thus be shed of its local housing and truly revealed. But the kind of information might be quite artificial and unreal away from its international context and the suspicion would always exist that its accuracy would be slanted because of the very ease of such things as artificial transfer prices.

Regulative control has proved largely inappropriate because of the elasticity needed to deal with the variety of the conflicts of interest likely to arise. So even France, which has tried more vigorously than any other nation to place foreign investment under scrutiny and control, has published no authoritative guidelines; Japan lists only certain industries subject to greater or less restraint. Australia prevents takeovers by foreign companies or subsidiaries if they are found to be upon investigation contrary 'to the national interest', and nothing more specific than that.[14c] Once the investment is established its continued secure flourishing will tend to mean that the control becomes more formal; but because the size and adaptability of the multinational will produce challenges a formalized legal system would be hard put to answer every time, it must still largely be *ad hoc*.

Prior direct and extensive negotiation between the sovereign state and private corporation may be the best course. Each can thereby articulate their wishes and fears and, by agreement, work out their differences. Future bargaining power may thereby be substantially diminished but it will only stand and provide protection as long as it is seen as equitable or essential by each party; so if the corporation were to use its skills and experience to outdo naive and divided governments, the agreement would be likely to soon collapse.

Many host governments now play the bargaining game with increasing sophistication, using their strengths to their best advantage. The oil producing nations for example no longer are lorded over to the greater profitability of Standard Oil *et al.* but are active in attaining benefits to their best advantage. The oil industry may be in many ways a unique example, but the observations of H. Z. Evan[15] as to the course of its development would seem relevant to the whole area of multinational corporations.

> [T]he antagonistic forces in the system cannot be defined in the rigid and somewhat simplistic terms of "exploitation of natural resources in underdeveloped countries by foreign monopolists, or collusion between powerful governments and their multinational companies."

Each actor in the system, he says, is likely to align at various points with any other, with undeveloped countries with reserves dependent on

[14c] Companies (Foreign Takeovers) Act 1972; s. 14(1).
[15] Evan, 'The Multinational Oil Company and the Nation State' (1970) 4 *Journal of World Trade Law* 666, 682.

the income, developed countries dependent on the energy and the multinational oil companies. There is a 'growing collective interdependence' of the actors 'despite a lessening dependence on any individual actor'.

In this area of negotiation and agreement, and especially because of the national identification of the multinational corporations that we have seen, an interesting device designed to try to exclude the corporation's home government from any possible dispute is the Calvo Clause. The idea is that as part of such an agreement the alien company will agree to waive its right of diplomatic protection and to resort for redress of any grievances exclusively to the local judicial remedies. D. Shea in his book[15a] says that only with the recognition of the status of the individual in international law could it operate to bar the interposition of the home government, because only then would the individual have in international law a right which might be waived.

But as with all possible elements of the negotiations between the state and the corporation, as negotiations between two oligopolists, any terms of such agreements, will be, says Vagts,[16] indeterminate, providing no 'right' solution, subject to recriminations and post admission wrangles.

Other options open to the nation-state include such things as the creation or support for companies with a local allegiance of a size comparable to other multinationals. The option is only open to developed countries such as Japan, Western Europe and to a much lesser extent Australia. But this is liable to backfire; in Europe conditions established to help promote such companies through mergers between different countries have been seized upon by the American based multinationals who have exploited them more fully. Also, this tactic doesn't really grapple with the problem of the multinational corporation itself as an anti-national being.

Support for smaller existing companies to match by partnership the strength of the multinational is also a possibility. Tax incentives, grants, supply of technology, limits on local finance availability to foreign companies (which since the limits by the U.S. on capital outflow is especially relevant) — all these can be employed.

As we have already seen,[17] in their study of Canadian based subsidiaries and the responses to that government's guidelines for foreign corporate behaviour, Litvak and Maule concluded that the impact depended on whether the subsidiary's importance was seen by the home company only in relation to its domestic importance or not, and on the degree of local participation. This is also suggested by the facts surrounding the *Freuhauf* case.[18] There the local directors resisted the order from the

[15a] Shea, *The Calvo Clause* (1955).
[16] Vagts, *op. cit.* 781.
[17] *Supra* n. 8.
[18] *Supra* n. 4.

parent company not to supply the French car company with the trailers and trays for export to China, and it was they who brought the action which resulted in the appointment of the *administrateur provisoire*.

Therefore the host government could simply refuse to allow the incorporation of local (subsidiary) companies unless it provided for, say, local directors approved by a relevant authority without holdings in the company, or extensive participation in management. Participation in the company's equity will be largely meaningless, especially if the 'participation' is in the equity of the parent company, without that participation in management because all it will amount to, to a greater or lesser degree, will be extra-national control of the national capital. Similarly it must be real management participation and not mere local employment, for that will just put those elements of the native populace thus employed into a possible situation of conflict of interest.

Of course the managements of the multinationals are bound to see such ideas of local participation (George Ball[19] calls it 'that new gimmick participation') fundamentally negatively and with anathema. For international integration, the idea of the world as the basic economic unit, does not go with local partners who may want to export to markets which the company's overall strategy would reserve for others or, most obviously, who would want to maintain operations the multinational might want to close. They can institute distressing legislation, ask uncomfortable questions and drag in the local government.

So on the whole the multinationals will try to avoid joint ventures or will try to back out of those already formed by buying out public minority shareholders or selling their own interests. From the 187 multinationals in the Harvard Study cited by Vagts,[20] 1812 joint manufacturing ventures had been founded and of those 464 had subsequently been taken over entirely.

All these tactics, by the multinational to inveigle its way into a domestic economy with as little friction as possible and by the nation-state to maintain its sovereignty while gaining the proffered advantages, must inevitably hobble the multinational's effective operation and its efficiencies. This corporate diplomacy George Ball correctly derides as 'a euphemism for protective colouring'[21] and it would seem to me that one is constantly brought back to the fundamental conflict and collision between the aims, the visions and the idea itself of the multinational corporation and of the nation - state. Anthony Sampson in his book[22] *The Sovereign State of ITT* says that the actions of the company suggest that to its $812,000-a-year boss, Harold Geneen, government's are 'nuisances to be circumvented or

[19] Farrell *et al., op. cit.* 284.
[20] *Ibid.* 285.
[21] *Supra* n. 5.
[22] *Supra* n. 3.

overcome'. One is drawn to the conclusion that it is being simply naive to regard ITT's attempt to enlist CIA support to block President Allende's election as *just* an aberration; but that extensive economic penetration in a country by an inherently anti-national institution is bound to produce such ramifications in all the other spheres of the nation-state.

The challenge thus presented to the nation - state is not one just to protect sovereignty for sovereignty's sake, for that would be pointless. One can easily agree with D. J. Baum's conclusion[22a] that the multinational corporation will force the clarification of goals for the exercise of power, but one must ask whether that force for clarification or delineation of goals will mean better goals? Is George Ball's 'single objective standard of profit'[23] likely to mean that?

REASSERTIONS

At this stage it is perhaps appropriate to suggest ways that a nation may reassert its sovereignty after it has been extensively penetrated by the multinationals. In a way of course, all the tactics for the host government outlined above are assertions of sovereignty, but what I am concerned with here are the means of taking over the foreign concerns.

Nationalization or expropriation is perhaps the most obvious and the most dramatic way. It is a time honoured tactic of socialist/nationalist governments coming to power either through insurrection or election. For example, President Allende nationalized the copper mines on which his country's prosperity depends; Colonel Gadaffi will soon have compulsorily acquired 51% equity in the oil companies operating in Libya; in Peru in 1969 when a military based regime seized power, it took over the local subsidiary of Standard Oil (N.J.) which had through a continued tax wrangle made itself the direct target of Peruvian nationalism. The learning on nationalization is enormous[24] and in a constant state of flux with such questions as when it can be justified or if it need be, or the amount or the necessity of compensation required being much debated. Perhaps the most important consideration though in terms of the international position of the state, especially in view of the nationality of the multinationals, are the possible repercussions economically and politically. As Ralph Nader caustically put it to a United Nations investigating panel very recently; '[Y]ears ago, when a country admitted the United Fruit Company, it also bought the Marines. Now when it accepts American investment it gets the State Department or the CIA'.[25]

[23] For an exhaustive and exhausting view see Weston, 'International Law and the Deprivation of Foreign Wealth' Parts I & II (1958) 54 *Virginia Law Review* 1069, 1265.

[24] See Doman, 'New Developments in the Field of Nationalization' (1970) 3 *New York University Journal of International Law and Politics* 306.

[25] *Herald*, 13 September 1973.

Another possibility, linked with that (and especially so in view of compensation requirements) is the idea of 'buying back' the country. This does not have to mean that one goes about it rather like buying a car, purchasing the whole thing for a set price; and that approach for such a country as Australia would, in view of the enormity of the investment, be simply impractical. The Canadian government has established the Canadian Development Corporation which has very lately[26] made a bid for a controlling interest in Texasgulf, an American based company with extensive mining concerns in Canada. It employs very few Canadians and its corporate philosophy is largely ethnocentric, that is, parent-country orientated. What makes it very relevant for Australia are the peculiar similarities between Canada and Australia, the recent establishment of the Australian Industry Development Corporation and the fact that Texasgulf has some large interests in Australia.

What I want now to do very briefly is to suggest a few ways, after the *Barcelona Traction* case,[26a] how international law might come to accommodate or integrate such a supra national concept as the multinational corporation has or will become.

Under such discussions as that of Greig,[27] the multinational corporation would seem to be at least an appropriate sort of entity to be acknowledged as having international personality. It has the power of independent action on the international plane and indeed can and does negotiate, face-to-face, with states. In view of that the observation of Lord McNair[28] that international law does not apply to such agreements because the relationship is not one between states would seem very like the shutting of the proverbial barn door. Yet Brennan and Holder observe that they are yet to be accommodated in legal theory 'which still equates them with individuals'.[29] That inability to handle the multinationals is also reflected in the *Barcelona Traction* case where the International Court of Justice refused to recognize any state except that of incorporation, despite by far the most extensive interests in the company being held in another state, as being the appropriate state to bring an action on behalf of aggrieved shareholders. For true multinationalism would seem to demand that any state with sufficient genuine contact with the corporation should have such a right.

[26] *Time*, 6 August 1973.

[26a] *Barcelona Traction Light & Power Co. (Belgium v. Spain)* (1970) I.C.J. Rep 4. The Barcelona Traction, Light and Power Company was incorporated in Canada and formed for the purpose of developing an electric power production and distribution system in Catalonia, Spain. The Belgium Government contended that the company's share capital came to be held for the most part by Belgian individuals or corporate bodies.

[27] Greig, *International Law* (1970) 73-4.

[28] McNair, 'General Principles of Law Recognized by Civilized Nations' (1957) 3 *British Year Book of International Law* 1, 15.

[29] Brennan and Holder, *International Legal System* (1972) 296.

The International Court indeed seems the correct and proper agency to be entrusted with jurisdiction in disputes between the nation-state and the transnational whole,[30] in keeping with the extra-municipal nature of the matter and of the corporation itself. So it seems desirable to entertain a recognition of their status as persons at international law. That this is not without precedent is clear from such examples as the *North American Dredging Company* case[31] where the international commission there did acknowledge such a status, though limited they thought. But of course 'institutionalized' international law has not at present developed sufficiently to be able to effectively accommodate such problems within its jurisdiction. Nations are not likely to abdicate their control or their efforts to control to an apparent lame duck; it would seem to be too much like a surrender.

That kind of approach must also involve, as the other side of the coin to its internationalizing, the denationalizing (in part at least) of the corporation. George Ball suggests[32] this too, but for him so that they can be freed from national strictures rather than subjected to international control. He suggests a multilateral treaty rather like an international company's law defining limits he suggests on 'the restrictions that signatory states might be permitted to impose on companies that choose to establish themselves under its sanction'. Initially it should be limited to a small circle of industrialized nations, rather like The General Agreement on Trade and Tariffs. The disaffection the underdeveloped countries feel with The General Agreement on Trade and Tariffs would seem bound to be repeated, but no doubt on a much broader scale involving perhaps all countries except, at least, the U.S.A. and perhaps Japan and Western Europe.

But there are, as we have already seen, great distances to be traversed before the automatic assumption of a nationality might not be held and the corporation could be seen as a neutral specialized agency free from the incubus of home country ties, a truly non-national autonomous entity.[33]

The United Nations would seem to be an appropriate forum in which principles for control might be formulated and under the aegis of which a supervisory agency might be placed. The open hearings by a 20 man panel appointed to study the impact of multinational corporations which began on September 11, 1973 might be seen as the beginning of such a movement. The study was requested by the United Nations Economic and Social Council after Chile complained of ITT's attempts to prevent

[30] Control of the domestic subsidiaries to be effective will similarly demand reforms of the municipal law: see the proposals of Schmitthoff, 'Multinationals in Court' (1972) *Journal of Business Law* 103, 110-1.
[31] Shea, *op. cit.* 283.
[32] Farrell *et al.*, *op. cit.* 286-8.
[33] See also Vagts, *op. cit.* 787-8.

the election of Salvador Allende, and it began ironically enough on the day he died.

But the diversity of the United Nations and its lack of common ground would seem to preclude any hope of anything of real value eventuating. It seems destined to continue for some time to bear witness to the lack of a common conscience of nations rather than its articulation. Therefore it would seem that it will have to be through inter-governmental agreement that the capital importing countries will be able to bring the multinational corporations within a framework of control. The agreements could involve either or both of two approaches. They could, firstly, be with the home country of the multinational under which that country could undertake to aggressively assert its responsibility and influence; in that way it might be hoped to turn to their advantage rather than their disadvantage the potential for extra-territorial jurisdictional claims by the home country. It must be doubtful however whether any country would trust or could rely on that because home governments so often identify their interests so closely with their multinationals.

The second approach and the one that seems to have more possibility would be regional groupings of nations agreeing to deal concertedly with the multinationals. Within the nations, then, there would be no scope for playing one off against another to gain agreement essentially on the corporations terms while they all could share the advantages of the multinational's capital and know-how. At the same time such groupings could exert more impressive pressure globally that these advantages might be better employed to the cause of equitable development.

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