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JURISDICTION AND CONTROL OVER THE MULTINATIONAL ENTERPRISE: DE MAXIMIS NON CURAT LEX.

By J. Shand Watson*

The current flurry in the legal literature caused by multinational enterprises is yet another indication that the existing systems of control in the domestic and international spheres are either stretched to their limits or else completely inadequate to their assigned tasks. Most writers indicate that the multinational enterprise (MNE),¹ however defined, is a strong force for good or evil and, consequently, must be subject to some degree of control; yet when that conclusion is discussed, the schools of thought that emerge are as numerous as the commentators.² This article does not endeavor to provide answers to the current fetish, but is aimed rather at putting it in the context of the continuing problems of transnational and international law, namely, the lack of a valid and efficacious international jurisdiction and the inevitable friction resulting from overeager attempts by nation-states to solve the problem by means of extraterritorial enforcement of domestic norms of behavior.

At the outset as always, is the definitional problem, for an MNE may take many forms and its definition will depend heavily on the teleology of the discipline in which the definition is to be used. A legal definition here, as opposed to a managerial or economic one, is more difficult than usual to establish due to the fact that internationally at least the MNE is operating in a legal vacuum, being entirely dependent upon the corporation laws of the various countries within which it operates. Thus the legal system which ought to supply a definition cannot. On the other hand, if one looks to the domestic legal systems of the home and host countries, one will find that the divergencies between the meanings of the legal concepts used in each system alone would preclude any attempt at a detailed legal definition. Likewise, the legal apparatus available is of such scope that generalities are all that one may hope for; as an example, foreign investment may be conducted by means of everything from branches and wholly-owned

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¹ In view of the fact that most such bodies utilise in their strategy a large number of subsidiary corporations under central managerial control, it would be confusing to use the term "multinational corporation" to describe them. Hence the use of the term "multinational enterprise" (MNE).

subsidiaries to joint ventures and contractual relationships.\textsuperscript{3} In regard to the managerial concept of the MNE, there is a similar breadth available as shown by a comparison of Sperry Rand and IBM World Trade Corporation.\textsuperscript{4} The former has been organized into “internationally oriented product divisions”\textsuperscript{5} which tend to create relatively independent management of given products on a global scale, whereas the latter operates on the basis of complete product integration, distributing authority on strictly geographical lines. For such reasons, a fairly flexible and general definition is advisable, such as that suggested by the Canadian Gray Report:

\[\text{[T]he embodiment of foreign direct investment by a single business entity which straddles several economies (a minimum of four or five) and divides its global activities between different countries with a view to realising overall corporate objectives.}\textsuperscript{6}\]

To which one might add:

\[\text{Generally speaking, the MNE may adopt the most beneficial business form for transnational business operations, taking into account the relevant home country laws, host country laws, and international treaties.}\textsuperscript{7}\]

Should the reader feel predisposed towards more lengthy and exhaustive definitions from the economic, political, legal and managerial viewpoints, there is a wealth of such literature,\textsuperscript{8} though its utility is elusive.

\section{I. The Scope Of The Problem}

What concerns us most today about the MNEs is their power, actual and potential, to control the destinies of millions of people to a degree equal to and greater than the control historically exerted by national governments. In the past there has been a number of very powerful commercial enterprises but they were heavily reliant for their political and economic success on a single-nation state which almost used the corporation as a means of governing a colony while extracting raw materials. Examples of this would include the P&O Steam Packet Company, the British East India Company and the Hudson Bay Company. The MNE is, however, essentially untrammelled by service to a given state beyond the limited

\textsuperscript{3} The contractual approach is most often used in Europe, e.g., Unilever.
\textsuperscript{5} \textit{Id.} at 753.
\textsuperscript{7} Hadari, supra note 4, at 760.
\textsuperscript{8} See, e.g., Hadari, supra note 4, at 746-66; Aharoni, \textit{On the Definition of the Multinational Corporation}, 11 Q. REV. ECON. AND BUS. 27, 35 (1972), and sources cited therein.
duties imposed upon it by the corporation laws. Its policies are its own, and these may or may not coincide with the policies of the state of incorporation, siege social, or economic market. This is the new element introduced into the scene by the MNE—it is very powerful, it is politically uncontrolled, and it is not accountable to any system of review.

Regardless of how accurate a linear projection premised upon current growth rates may be, it is noteworthy that using such a method many have concluded that the global system in the future will be dominated by 300 giant enterprises. Hymer and Barber are in agreement on this point, with Barber going so far as to predict that by 1980 "three hundred . . . corporations will control 75 percent of the world's manufacturing assets." However, one does not need to engage in speculation about the future to perceive the power of the MNE. The giant, as the saying goes, is already in our midst. If one equates power with sheer size and wealth, then the MNE is already a force to be reckoned with. For example, Servan-Schreiber, who is probably the man most responsible for directing attention to the problems associated with the MNE, pointed out in 1968 that the third largest industrial power in the world after Russia and the United States is the American corporation in Europe. American direct foreign investment, which in 1946 totalled only $7.2 billion, burgeoned to $86 billion in 1971 and now exceeds $100 billion. This is a figure in excess of the combined direct foreign investment of the rest of the world. Not only are the generic sums vast, but the individual enterprises themselves produce some interesting statistics, such as the fact that General Motors' $25 billion annual sales figure is greater than the gross national product of 130 nations. Phillipps, based in the Netherlands, has affiliates in 68 countries, factories in 39, and employs more than a quarter of a million people, 167,000 of whom are employed outside of the home state. Ford, which employs 388,000 (150,000 outside of the United States), comprises a network of 60 corporations, 40 of which are based outside of the United States. Thirty-six percent of Fords' $8 billion in total assets is invested in 27 foreign countries.

The result of such wealth and power need not by any means be all bad,
but from the lawyer's perspective that possibility should not be rejected out of hand. The main difficulty lies in the fact that the nation-state, which is itself continually under attack for not serving the needs of the people it was designed to serve, is the traditional decision maker in the field of social, economic and fiscal policy; but it is now possible for the nation-state's decision making power to be overruled or negated by a corporate decision made in another country. Even though a host nation has at its command a whole battery of legal techniques for controlling foreign investment, it cannot control the more important corporate decisions, such as whether to remain in the market. The sudden withdrawal of foreign investment from a state can severely upset the balance of trade and the labor market. Since the MNE's identification of values is different from that of the nation-state's, such possibilities, and lesser variants, are continuous. In short, the legal systems within which the MNE is operating are not in any way coextensive with the enterprise. Thus any conclusion reached by any of the legal systems will be based on interests and information less broad than those deemed relevant by or applicable to the enterprise. The enterprise, on the other hand, will take into account in its decision making, factors which a host state would deem entirely irrelevant or even disastrous. It is this gap between the purposes and functional ambit of the two concepts that is causing all the trouble; agreement on the goals of the separate legal systems and of the multinationals is well nigh impossible. The corporation's desire to increase profits by means of manufacturing efficiency will clash with a government's desire to keep a plant open for maximum employment; the corporation's ability to sell a product to a customer will clash with the home government's desire to isolate that customer for political or strategic reasons; the corporation's desire to minimize taxes will meet with a government's desire to maximize them, and so forth. While the MNE has a fairly easily definable series of goals—maximizing profit and efficiency—the sovereign states are in a much more difficult position since internal politics, being the art of the possible, usually produce only transient compromises between values that are in conflict amongst themselves independent of the MNE. On this Vagts says:

What calculus could reduce to a single common mathematical denominator the interests (1) of the finance ministry in greater tax gathering from greater national income, (2) of the same agency in a better foreign exchange status, (3) of the ministry of defence in a stronger industrial base for the country's armaments, (4) of the ministry of foreign affairs in building closer ties with the country of the MNE's origin . . . and (5) the ministry of economic affairs in showing a high per capita GNP?16

Thus, it is difficult enough to elicit from one political system a decision on what is, all things considered, the best thing to do; but if one attempts

16. Id. at 757.
to cope with the vast differences in the political and economic philosophies of sovereign nations and their approaches to foreign investment, the problem of harmonization of MNE goals and state goals becomes impossible and thus useful legal control over MNEs becomes that much more out of reach. Not only is the MNE out of phase with sovereign states but it is also out of phase with international law. This is undoubtedly due to the fact that international law is the product of sovereign consent and agreement, both of which are lacking in this area—the latter for the above reasons and the former because the control of corporations has been until recently regarded as an exclusively domestic matter and thus not for international consideration. Consequently there is no customary international law of any substance on the topic of multinational corporations. This may or may not be regrettable but it is an undeniable fact. As the International Court of Justice wistfully remarked in the *Barcelona Traction* case:  

> Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystalized on the international plane.

Thus there is no mechanism for pressing upon corporations the consideration of world-wide problems that are beyond even the reach of the nation-states, and the result is that in many important spheres of activity, the MNE is subject to no external control in the traditional sense.

There are inherent problems in the operation of an MNE that might be regarded as a limitation of sorts. For example, the very size of the enterprise and the complexity of its managerial structure and lines of communication may make central control on the basis of all available data very difficult indeed. The vulnerability of these large organizations to bureaucratic myopia has been noted in passing by Professor Rubin. Citing the Peter Principle as the probable cause, he reminds us of the blunders that led to the collapse of the Pennsylvania Railroad and Intrabank. Such obvious situations as these might be few and far between, but the point may nevertheless be a valid one, namely that the MNE, while in its purely international affairs is beyond the reach of external controls, may well have an internal structure that suffers from the same lacuna. Another very important factor that might restrict their freedom to act is the interdependence of the various subsidiaries upon one another, especially when the industry concerned has a central manufacturing source for key components, as is the case in the electronics and motor industries. Here it is

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18. *Id.* at 34.
possible for the stoppage of a single assembly line in one country to have ramifications throughout the global operations of the parent enterprise. This has been the experience of the Ford Motor Company in the labyrinthine realms of British labor relations.20

Despite these problems, which inhere in all systems, the unusual power and potential for good or ill of the MNE remains the key issue. Before discussing the available means of controlling the MNE, it would be well to assess briefly the arguments that are made in attacking and defending the MNE's role in international affairs in order to be able to assess the desirability or lack of it for magisterial supervision.

Those who advocate the cause of the MNE frequently advance the idea of the world enterprise as a "good citizen" of every nation which enjoys its presence.21 The argument is that the corporation will realize that it is to its best advantage to adhere to the laws, customs and values of the state within which it operates. That may be so, but there are several problems with the argument. First the identification of the laws, customs and values of a nation is in the hands of an elite who may be less than objective in their deliberations. Secondly, even assuming the good faith of the governmental order, one continually finds examples of corporate conduct that is less than perfect. One need only mention the attempt by ITT to prevent the election of the late Salvador Allende as President of Chile;22 the allegations that oil companies in host nations drill wells to the wrong depths and bulldoze operational wells in order to cope with a predicted glut in world production and to improve their bargaining position with the host government;23 the payoffs to cabinet ministers to forestall an inconvenient change in a country's foreign investment law;24 and the recent publicity directed towards bribery of foreign officials by multinational oil companies.25 Whether such activities are atypical and rare, as the boardrooms of the world would have us believe, is very difficult to establish. The criminal law of the United States has carved within it exceptions to the general requirements of mens rea and actus reus designed in large part to circumvent the problems of proof and responsibility in dealing with the large corporation.26 Even if one were to accept that the incidents of bribery and

20. Id.
21. The "good citizen" concept as it relates to MNEs is discussed more fully in Rubin, The International Firm and the National Jurisdiction, The International Corporation, A Symposium 201-04 (C.P. Kindleberger ed. 1970).
22. Nehemkis, Supranational Control of the International Corporation: A Dissenting View, 10 Calif. W. L. Rev. 286, 299 (1974); R.J. Barnet and R.E. Muller, Global Reach 81-83 (1974); Rubin, supra note 19, at 484.
23. Rubin, supra note 19, at 480.
24. Barnet and Muller, supra note 22, at 187.
25. The Senate subcommittee chaired by Sen. Frank Church (D., Idaho) is providing further variations on alleged malpractice by the MNE's almost daily.
corruption recently made public were exceptional cases, this does not argue conclusively against some form of control. One could make the same argument against the law prohibiting treason.

As far as international problems are concerned, the "good citizen" approach seems to be completely lacking. This is not to criticize the decision makers of the MNEs, for it goes without saying that their goals need not relate in any way to the needs of the planet. For example, there is the ongoing problem of oil spillage and oil dumping at sea. There is no effective supranational authority to enforce environmental norms, and consequently it is in an area like this that one can see the social responsibility of the MNE in laboratory conditions. The Office of Technology Assessment for the Senate Commerce Committee has concluded that the tanker fleets of the world dump about one million tons of oil per annum into the oceans intentionally. A further 450,000 tons is unintentionally leaked into the sea.\textsuperscript{27} Using a linear projection, Jacques Cousteau has predicted that the oceans will be dead in 25 years.\textsuperscript{28} In response to such forebodings of doom, the stock response is that the spillage will not continue at its present rate and that there is no "proof" that harm is actually caused by such spillage. Yet even if Commander Cousteau is wrong by a factor of four, this does not substantially alter the picture, unless one is so utterly selfish and myopic as to judge environmental problems solely on the basis of one’s own lifespan. As regards the matter of proof, since there is reason to believe that the effect of oil on the surface of the oceans induces irreversible and potentially catastrophic changes in the food chain cycle,\textsuperscript{29} it would only be prudent, as any efficacious legal system would, to shift the burden of proof to the MNEs involved. Should the reader be in any doubt as to the inability of the multinational enterprise to conduct itself with integrity in the absence of effective supranational control, the author recommends Noel Mostert’s book \textit{Supership} as evidence to the contrary.\textsuperscript{30}

With regard to another argument supportive of the positive role of the MNE, namely that such large corporations are innovative in technology and consequently a boon to mankind, one must of course agree. But this innovation in technology has been in response to its marketability and demand (pre-existing or created) and, consequently, it should come as no surprise that certain global problems might be ignored by a corporation simply because solving the problem will in no way benefit the corporation. In favor of the innovative role of the MNE one finds Vernon’s data that 187 multinational firms dedicated 2.48\% of their sales for research and development, while the average for all American manufacturing enterprises amounted to only 1.29\%.\textsuperscript{31} Against this proposition one may cite

\begin{itemize}
\item \textsuperscript{27} Manchester Guardian Weekly, Oct. 11, 1975, at 18, col. 3.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} N. Mostert, \textit{Supership} passim (1974).
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{31} R. Vernon, \textit{Sovereignty at Bay} 8-9 (1971).
\end{itemize}
Scherer’s findings in a study of the relationship between the size of a corporation and the number of patents issued to it wherein he found a negative correlation, as did Watson and Holman. A final point should be made in regard to the MNEs’ “good citizenship” at the global level. Berg, after analyzing the international food industry and its lack of concern with the problems of poverty and starvation, concluded that

for all the technical ingenuity that has gone into the development of new products, corporate technologists have not yet been able to come up with a food that can be sold commercially for a profit and still be priced low enough to reach and help the masses of people who need it most.

In short, there is no profit in poverty and starvation. If these problems are worthy of serious attention one cannot presume that MNEs will be responsive. They may indirectly benefit host nations by spreading technology, thus permitting them to find solutions to their local problems, but the effect may just as easily be to create a brain drain from the host country, leaving a reduced capability to indulge in creative, goal-oriented research. Other negative aspects of the exchange of technology might include the creation of pollution as an inevitable by-product, the subversion of the local culture, the creation of unattainable expectations (especially true in the communications industries) leading to possible civil strife, the increase in the technology of warfare, and the creation of a technology elite which widens the gap between rich and poor within the host nation.

More immediate than the above, in terms of cause and effect upon the nation-state, is the MNEs’ unparalleled ability to move funds quickly from one jurisdiction to another. Here the gap between the goals of the state and the goals of the enterprise would seem to be a permanent one. Since there are financial ties between the various legally distinct subsidiaries of an MNE, it is possible to transfer funds between the various parts of the enterprise almost as though there were no national jurisdictions at all. The parent headquarters with its resources and communications equipment can make a very informed guess as to which country is the best repository for the company’s money. The money may be moved to avoid an impending devaluation or to avoid higher taxes in many ways, but the most notorious is the manipulation of allocation of income by means of transfer pricing. This is a technique whereby money may be moved from one arm of the enterprise to another by means of setting a price, not on the basis


34. For an analysis of the relative merits of these arguments, see Pravitt, *The Multinational Enterprise and the Transfer of Technology*, in *The Multinational Enterprise* (J. Dunning ed. 1971).
of market demand but upon the basis of the goal to be attained by the transaction. Thus an MNE might attempt to maximize worldwide after-tax profits by means of transferring its goods at artificially high prices into subsidiaries that have relatively high taxes. It could be the case, as Hadari and Nehemkis suggest, that this type of operation is rare and its potential for abuse overrated, but without effective review and control it is not even possible to ascertain such basic facts. While the United States has adopted the "arm's length" standard for dealing with such operations, the majority of less developed nations, and probably even some of the more industrialized ones too, might not have the available manpower and capacity to follow suit effectively, thus losing an untold amount of revenue in the maze of multinational financial dealings. In view of the fact that "a [single] company with 24 subsidiaries has approximately 3,000 potential financial links," the possibility of a solitary nation coping alone with the problem is not very great.

In short, the entire problem of the MNE is almost impossible to discuss empirically or rationally even before one gets to the point of deciding upon the desirability of certain acts or activities at the national, regional or supranational level. For example, there seem to be many factors that could be seen as favorable to the MNEs' world role and just as many unfavorable. The obvious benefits are that MNEs improve the world's allocation of resources to the mutual benefit of parent, host and other countries. To this one might counter "[i]n terms of world economy, rationalization of production may be beneficial, as presumably is the expansion of world trade. . . . But is there a world economy?" If there is not, then the benefits perceived at the global level by economists may be achieved at the expense of losing potential benefits at the national level as perceived by the political systems there. Thus, unless there is a world economy, and it is perfectly apparent that there is not, then one cannot claim that global benefits are necessarily a positive contribution to the scene by the MNE. As far as benefit to the host country is concerned, the issue is likewise cloudy. For example, a domestic politician interested in his state's achieving a higher standard of living might wish to emphasize the positive aspects, namely, that the foreign presence may generate nationalism which is good for a state's economic progress and might even result in the creation of locally owned corporations aimed at competing with the outsider. On the other hand, it might reduce nationalism by showing the benefits of internationalism (a plus in the international arena) which might in turn lead to a better investment climate and increased foreign investment, all at the expense of a less efficient local industry and the host country's natural resources. On the issue of whether employment is created only in

35. Hadari, supra note 4, at 781; Nehemkis, supra note 22, at 803.
36. INT. REV. CODE OF 1954, §482.
the host country and not in the home country, as most believe, one can find evidence to the effect that the host country activity creates home country employment indirectly, and that the host country jobs would not have existed in the home country because of the vastly different economic climate there, and other factors such as a minimum wage level.\textsuperscript{39}

To a lawyer, this uncertainty emphatically indicates the need for a rational system of controls so that the benefits may be emphasized and the disadvantages ameliorated. The problem is made especially complex, however, since there are two major perspectives to be taken into account—the international and the domestic. One may be able to advance backward countries,\textsuperscript{40} raise the gross international product, create a new international philosophy and rationalize industry, all of which are acceptable to many as worthwhile achievements. But this may be done at the expense of individual economies that will respond with suitable restrictions, as they are entitled to do under current legal theory. The answer to the cost-benefit calculus is almost inevitably different depending upon which perspective one takes. Thus there is an inevitable, inescapable, tension between national jurisdictions and their solutions to the "threat" posed by MNEs and international solutions. The latter are necessarily less likely to succeed since consent is still the basis of international law,\textsuperscript{41} and their success thus depends upon the nation-states. For this reason it is clear that the future of the MNE is going to be controlled by the various states of the world acting more or less unilaterally to protect their perceptions of their best interests.\textsuperscript{42} Sovereignty is extremely unlikely to be surrendered to a supranational body that would have authority over anything as important to a state as its economic system which is nowadays almost co-extensive with national interests. In this context, one must accept the essential truth of Dean Acheson's remark that "[t]he survival of states is not a matter of law."\textsuperscript{43} We turn now to an assessment of the state-based and the international approaches to the control of the multinationals.

\textsuperscript{39} Stobaugh, \textit{U.S. Multinational Enterprises and the U.S. Economy}, 1 Studies on U.S. Foreign Investment, 1 (U.S. Dept. of Commerce 1972). Here it was concluded, on the basis of nine major foreign investments, that foreign investments created more jobs for U.S. workers than were eliminated.

\textsuperscript{40} This assumes that the Western industrial system constitutes an advance.


\textsuperscript{42} These perceptions will of course be inferred from factual data on MNEs that will not be complete due to the extent of the MNEs' activity outside of the jurisdiction of the host state. Consequently these perceptions may be incorrect.

Along the lines outlined above, it is often suggested that the only response to the problem of the multinational enterprise that should be made is to allow the nation-states themselves to continue to cope with the problems they perceive by means of their own legislation. This view has been put forward by many, among them Rubin and Vagts, and in many ways it is rational and workable. It is rational because the chances of supranational control are virtually nil, and it is workable because within their own individual spheres of jurisdiction, each state is fully competent legally. This full competence or sovereignty has not been undermined in the legal sense as many would have us believe. Without doubt there has been a considerable loss of the political and economic freedom enjoyed by some states due to the “creativity” and massive resources of the MNEs, but legally the power to act is unscathed and can only be lost with the consent of the state. It is of great importance to a useful discussion of the problem to make such a distinction and it is one which is all too seldom made by writers who confuse bargaining strength and political muscle with legal capacity. The legal capacity remains though the state may not make full use of it for other, extra-legal, reasons. Consequently, the states involved with MNEs have at their disposal the entire range of techniques that have been developed for controlling international trade and investment. If each state were to identify its own goals and legislate accordingly then, it is argued, there might appear a broadly acceptable system—if international laissez-faire is acceptable.

The home or host nation might encourage or discourage the operation of an enterprise by means of various devices of its own choosing such as: quotas on imports or exports (perhaps proportional to domestic production); limits on the exportation or repatriation of capital; encouragement of repatriation of profits, incentives and disincentives to invest abroad; enforcing vigorously or soft-pedalling diplomatic protection for foreign expropriation, nationalization, disinvestment; the manipulation of taxation of foreign income; customs duties on the importation of raw materials; restrictions on the amounts and forms of foreign borrowing; mandatory profit-sharing; or the direction of foreign investment into joint ventures. Another less sophisticated approach is the selective screening of foreign businesses which wish to enter the economy, as is done in Japan.

44. Rubin, supra note 21, at 179.
45. Vagts, supra note 14, at 786.
France and Canada. In terms of legislating in order to regain control of key industries and natural resources, Canada provides a most instructive example.\footnote{47}

Again, all of the above techniques, and many more, are within the reach of any sovereign state that wishes to attempt to extract the maximum benefit from the MNE at the least expense. Most nations do not indulge in the entire list of possibilities, but if they wished to they need look no further for hints on how to do it than the United States, which as world leader in free trade, is oddly enough a mine of information on methods of controlling, limiting or stopping such trade. For example, without any attempt at being exhaustive, there is the Export Control Act,\footnote{48} the Buy America Act,\footnote{49} the Trading and the Enemy Act,\footnote{50} the Sherman Act,\footnote{51} and a whole host of regulations on a variety of topics, often with extraterritorial effect. Indeed so thorough is the United States' approach to the control of the MNE that Professor Vagts\footnote{52} has suggested that if there is to be a rational attempt at dealing with the MNE, in the light of current realities, it is for the United States to control it,\footnote{53} and this responsibility must be squarely faced. While this might be a rational, and perhaps even a successful approach to the problem, it is unlikely to meet with the approval and consent of the other nations of the world who may be less than eager to adopt as theirs the conclusions of the United States government on: the global allocation of benefits and resources, the identification of goals, the means to be adopted, and the expenses that might reasonably be incurred in achieving these goals. Since most of the domestic political outcry in host states against the multinationals is due simply to the fact that they are controlled from the United States\footnote{54} and are seen as imperialistic threats to the host state's economy, culture and natural resources, the suggestion that the United States would perhaps be the best repository for magisterial control is a trifle unrealistic. But it is only fair to point out that this possible conflict of interest has occurred to Professor Vagts also, for he says:

This delicate feat will involve, first a willingness both to share and provide in a useful form the data which we are increasingly extracting from MNE's. It also will involve a willingness to explain to them the purposes and effects of our measures and to consider their views.\footnote{55}
Despite the feasibility of leaving the individual nation-states to regulate the multinationals within their own territory, an obvious problem arises when one again brings into play the fact that a multinational's goals, operations and effects are supranational and the territorial jurisdiction of a single state is not a fit base for controlling the entire entity. Thus this approach is severely limited in that it cannot guarantee the control necessary to ensure that the MNE is a global "good citizen" since its effectiveness has very real geographical boundaries. A state cannot be certain by any means that the judgments of its courts will be enforced abroad in the country where the financial seat of the enterprise is found. Nor does a state have within its grasp all of the information on the mechanics, resources and policies of an MNE that it might need in order to make effective policy decisions on how to regulate it. Furthermore, there is the inevitable problem that the activities of a foreign arm of an MNE, or of the global MNE itself, which are wholly beyond the traditional territorial jurisdiction, might either endanger national security or else have a real and substantial effect on the internal economic situation that is exactly opposite to governmental policy. The emerging answer to all of these questions is extraterritoriality.

Before commenting on the possible success of extraterritoriality as a means of economic problem solving, it would be well to indicate precisely how far along that path we have gone and how states have responded to it. The most notable example is of course the extraterritorial application of the United States' antitrust legislation dating from 1945. In that year the Alcoa case held with great clarity that "it is settled law . . . that any state may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the state reprehends." This, in turn, was modified slightly and ensonced in section 18 of the Second Restatement of the Foreign Relations Law of the United States which provides that

a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if . . . the effect within the territory is substantial, . . . it occurs as a direct and foreseeable result of the conduct outside the territory . . . and the rule is not inconsistent with the principles of justice generally recognised by states that have reasonably developed legal systems.

Regardless of the fact that it was not "settled law" in 1945 that a state could impose such liabilities for any conduct, and regardless of the fact that the last requirement of section 18, if taken seriously, might negate the validity of the entire section, this rule has been consistently adopted with

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56. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).
minor variations. The problem with *Alcoa* and section 18 is quite simply that it is almost limitless in terms of the behavior that it encompasses; even the limitation "substantial" in section 18 is aimed not at behavior in the foreign country but at the effect within the United States. Much of the blame for this can be traced back to the fact that the "settled law" in *Alcoa* was an international rule laid down in a case involving tangible harm at a time when the possible extension of the rule to its present wide limits was almost certainly unforeseeable due to the smaller volume of international trade and the lack of a significant MNE problem. It is just as unwise to take a rule from the past and inject it into the present without further consideration in international law as it is in domestic law. Indeed it is much more so due to the fact that the jurisprudence of the World Court is progressing in a piecemeal manner. There being very few cases, there are no areas with highly developed sets of rules which have suitable exceptions and definitions for all eventualities. This problem was foreseen in the drafting of the Statute of the International Court of Justice which clearly abolishes the simplistic Western-based notion of stare decisis: "The decision of the Court has no binding force except between the parties and in respect of that particular case."58 Despite this, the "rule" of the *Case of the S.S. LOTUS*59 has become part of the law of the United States.

The *Case of the S.S. LOTUS* involved the application of the objective territorial principle in the context of a collision at sea. The effects of this event which provided the basis for jurisdiction were both tangible and limited to a finite set of facts. *Alcoa* and its progeny, on the other hand, use that approach where the effects are not tangible and may indeed be entirely conceptual; nor do they have inherent limits like those in the *S.S. LOTUS* case. Furthermore the *Case of the S.S. LOTUS* involved a determination of concurrent jurisdiction on the high seas, a *res nullius*, rather than competing claims within the territory of another interested state, as is the case in *Alcoa* situations. This extraterritorial jurisdiction has been subject to much criticism, with its critics maintaining that it flies in the face of sovereignty, reciprocity and the equality of states, and that it has shown itself to be unworkable in practice.

The futility of the approach was made manifest in the *ICI-Dupont-BNS* cases in the 1950's.60 There the English Courts predictably refused to enforce an order issued by the District Court for the Southern District of New York that a British company should grant exclusive patent licences to another British company. Later in *United States v. Watchmakers of Switzerland Information Centre*,61 the same court issued an order attempting to regulate concerted anticompetitive conduct taking place inside

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Switzerland entirely in conformity with Swiss law. This order was rejected by the Swiss government in no uncertain manner. In that case the objective approach was reiterated:

[A] United States Court may exercise its jurisdiction as to acts and contracts, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.52

The United States courts, as the courts of any other country in the world, may do so, but the more important question is whether anything happens as a result. Such failures inevitably raise questions as to the accuracy of Learned Hand’s conclusion that what he was embarking upon was indeed “settled law.”

It should be noted here that this new approach to jurisdiction, which cannot be said to be the subject of any permissive rule of international law, has been adopted elsewhere and every day looks less and less like an aberration. For example, the Commission of the European Economic Community in 1969 fined British and Swiss corporations (both then outside of the EEC) for price fixing activities which affected trade within the Common Market. It held that “the rules of competition of the treaty . . . are applicable to all restrictions of competition that produce within the Common Market effects to which Article 85, paragraph 1, applies.”53 Later, in a similar vein, the corporate veil was lifted in the Commercial Solvents case54 in order to establish that an Italian corporation, l’Instituto Chemioterapico Italiano, was controlled by a United States corporation, Commercial Solvents. On the basis of that control (which incidentally seems to have been more financial than real) the Commission concluded that “there is no ground for distinguishing between the will and the acts of the Commercial Solvents Corp. and those of Instituto Chemioterapico.”55 Consequently the entire entity, and not just that branch of it which operated within the EEC, was fined for abuse of dominant market position in violation of article 86 of the Treaty of Rome.56

While the possible jurisdictional conflicts with regard to the extraterritorial enforcement of antitrust laws are potentially negotiable,57 there do

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52. Id. at 45.
55. Id. at D57.
56. For a full analysis and proposals concerning the increasing use of the technique of veil lifting in the EEC, see Griffin, The Power of Host Countries Over the Multinational: Lifting the Veil in the EEC and the U.S., 6 L. AND POL. INT’L BUS. 375 (1974). It should be noted that this technique results in the same enforcement problems in many cases as does extraterritoriality.
57. For example, the Antitrust Notification and Consultative Procedure between the United States and Canada (Nov. 3, 1969), reproduced in 8 INT’L LEG. MAT’L 1305 (1969). This agreement provides that each country in enforcing its antitrust laws will consult with the
remain substantial areas in the international trade activities of the multinationals which are likely to conflict with high-priority policies of a state. In areas such as this the possibility of successful negotiation, which was never very high, evaporates completely. As with the abortive attempts at antitrust enforcement above, the United States has attempted to enforce such domestic norms extraterritorially. As with the antitrust cases, the degree of success is minimal. One might be moved to argue that although enforcement is not in fact possible, there is still a salutary effect in the attempt, but this is to confuse legal mechanisms with extra-legal mechanisms; law with politics. In any event there seems to be no effective counter to the possibility of legislation appearing in potential target states forbidding compliance with foreign court judgments that might adversely effect the policies adopted by the target state government. 68

Perhaps the most famous example of extraterritoriality outside of the antitrust area involving state interests that are potentially of a very high order is the Fruehauf-France case. 69 Here a French corporation, which was two-thirds owned by a United States corporation, contracted with another French corporation, Berliet, to sell equipment designed to be put on trucks destined for the Peoples Republic of China. In response to this, the U.S. Treasury Department, charged with the administration of the Trading with the Enemy Act, ordered the parent corporation not to execute the contract as it violated U.S. law. The parent company attempted to comply, but the directors of the French corporation sued the U.S. corporation in France. The upshot of this was that the French court appointed a temporary administrator to enable the contract to be executed. The Treasury Department, on seeing the complete inability of the American corporation to control the events in France, rescinded its order.

The above case is interesting for many reasons. It shows that there is more than a grain of truth in the nationalistic accusations in host countries that U.S.-based MNEs are being used as tools for the exportation of U.S. values and policies, and that the "problem" of the MNE is, in some cases, to be found not in the corporation, but in the government of the incorporating state. It shows that the "problem" of the MNE in current world trade is a two-way street in that while the MNE causes many problems for states, it is possible for the reverse to be true with an impossible strain being put on an entity spanning competing jurisdictions which apply mutually inconsistent norms. But most of all, for our present purposes, it shows yet again that the extraterritorial application of its norms by a state is not the answer to the problems presented by the MNEs since there is an inevitable reliance on the host state's being willing to respond positively other when its interests are potentially affected. The effectiveness of this procedure is curtailed somewhat by the United States' insistence on the right to unilateral action.

68. See proposed Canadian legislation to this end in Note, supra note 6, at 300-02.
to the request or order of the home state, and an almost equally inevitable unwillingness to do so. One state has to give in. Calling this "mutual deference" is only a euphemism for that fact. In a system of sovereign, legally equal states, extraterritoriality means only one thing—friction. The mere fact that we have not yet seen a full blown contretemps in the few years in which this approach has been tried does not mean that conflict is avoidable or unlikely. It does not prove that it can all be worked out somehow.

The friction and unworkability of the above approach may yet in the eyes of some commentators bring about some type of progress. Indeed, some optimists have seen in this unworkability the seeds of a new approach to the allocation of competing jurisdiction in the economic area. Rubin, for example, maintains that this friction leads to steps being taken on the part of governments to reach accommodation and agreement.\(^7\) As examples, he cites the good offices of the Restrictive Business Practices Committee of the OECD and the United States-Canadian consultative procedure. He goes on to say that

\[\text{[o]ne may argue that as multinationalism increases, as technology is licensed across national frontiers, the chances of conflict on policies toward restrictive business practices will increase. My own evaluation is that national policies in this area are being increasingly harmonized.}\]  

Even if his evaluation were correct, this would still not fill the gap left by the lack of an effective supranational jurisdiction. It fails to do so because it relies upon states being willing to negotiate and consult which is in turn dependent upon extra-legal factors. For example, the substance of disputes involved in extraterritorial enforcement attempts such as antitrust, licensing, securities regulation and so forth, may be from the political viewpoint unimportant and negotiable. On the other hand they may not, in which case the standoff between the competing norms becomes subject to extra-legal considerations. Harmonization is a fine theory when things are going well, but law is put to the test when things are not going well.

Even between two countries with the closest cultural and economic ties like the United States and Canada, one cannot be assured of harmony in such a politically low-key issue as antitrust enforcement. There the United States reserved the right to act unilaterally subsequent to negotiations\(^7\) and Canada is in the process of legislating to protect itself from United States intervention via extraterritoriality.\(^7\) It takes little imagination to guess how successful the accommodation and harmonization approach is likely to be in connection with countries that are less close on issues that have a higher political content.

70. Rubin, \textit{ supra} note 2, at 14.
71. \textit{Id}.
73. \textit{See} proposed Canadian legislation to this end in \textit{Note}, \textit{supra} note 6, at 300-02.
In regard to Rubin's view that the substantive laws of the various nations are approaching harmony imperceptibly, one can only respond that on the basis of available information this does not appear to be the case. Even in the EEC, the much vaunted avatar of mutual self-interest and shared goals, an attempt to produce a regional company law has met with little success. Likewise, the fact that such culturally similar countries as the United States, Canada, Britain, France and Germany have produced legal systems capable of producing inconsistent, even diametrically opposed norms, tends to detract from the harmonization thesis. Furthermore, there is always the possibility that the dissimilarity of substantive rules may serve a symbolic role as representing national identity, a factor which always figures largely when MNEs are involved. If this is the case, then lack of harmony is almost guaranteed.

In relation to the Fruehauf case, Rubin says that it is "not a precursor of important difficulties for the transnational march of business" because "[a]gainst the total volume of trade handled by multinational enterprises, that part which could be affected by restraints policies, no matter how Draconic, is tiny." This is simply to say that because the substantive law is either unenforceable or unenforced, there is really no problem, hence harmony. One cannot substitute optimism for practicality.

An interesting parallel development has been the Canadian response to the possibility of large-scale oil pollution in her northern waters. The Canadian Parliament adopted the Arctic Waters Pollution Prevention Act in 1970 at a time when it was thought that oil from Alaska's north slope would be brought to the eastern seaboard by means of a northwest passage. The legislation is quite blunt in its effect. It extends Canadian control over shipping to 100 nautical miles, well beyond what might be claimed on a contiguous or archipelagic basis. This control includes the right to refuse entry to shipping and the right to destroy or remove ships in distress which are polluting the sea. This is of course a unilateral approach to an international problem, conceptually similar to the variants of extraterritoriality practiced in the U.S. and in the EEC. A similar extension into the high seas has been made by most of the nations of South America for the same basic reason—conservation. But this approach is somewhat different from the Alcoa type of extraterritoriality in that it does not directly challenge the sovereignty of another state on its home soil. Here the conflict of jurisdiction is between the claiming state and, in theory, all other states since the high seas are supposedly not subject to expropriation. Thus, the likelihood of friction should be much less since one is essentially substituting control for no control at all. Lest there be

74. See Angelo, supra note 54, at 557.
75. Rubin, supra note 2, at 16.
76. Id. at 16-17.
any doubt as to the consistency of the position taken by the United States with regard to extraterritoriality (and consistency is one of the primary attributes of legality), one need only read the United States' response to the Canadian legislation and to that same government's recently expanded fisheries closing lines:

The United States deeply regrets this action. The United States regards this unilateral act as totally without foundation in international law. The United States firmly opposes such unilateral extensions of jurisdiction and believes that outstanding issues concerning the oceans can only be resolved by effective international action.79

This indicates quite clearly that the extraterritorial approach to global problems is based on politics and not on law. Such being the case, it cannot serve as a useful agent for controlling the multinational enterprise or any other global problem. It is subject to ad hoc considerations which deny it the generality of application that is necessary for a legal approach to any problem.

We now turn to what the United States referred to above as "effective international action," for if it is true that the larger problems caused by the MNE are beyond the reach of the individual states affected, then one must look to supranational and international mechanisms for effective control. It is readily conceded that a great deal of regulation is possible at the national level, but this is directed solely at national problems.

In approaching the international side of the problem posed by the MNEs, one has to be constantly on the lookout for the line of argument that we can achieve world peace by way of world trade. This simplistic argument seems to appear almost everywhere in various guises.80 It is notable in that it locates the cart well in advance of the horse. The fact of the matter is that we have world trade as a result of world peace, not the other way around. World trade is not determinative of whether we have world peace. Should there be any doubt about this, one should consider the fact that in the years preceding World War I

most of the great powers of the world were also great traders; economically they were closely tied together. In the years preceding World War I, for example, Germany was Britain's second-best customer, both as a source of imports and as a market for exports. Measured in terms of their own economics, the two greatest powers in the world today trade little with each other or with the rest of the world.81

80. For a messianic view of MNEs, see Hopkins, Money, Monopoly and the Contemporary World Order, 2 DENVER J. INT'L L. AND POL. 63 (1972), and Salter, Dynamics of the Multi-National Enterprise: Exemplar for World Government?, 8 INT'L LAWYER 11 (1974).
Waltz goes on to point out that only true interdependence can raise the threshold at which nations might be tempted to resort to force. Trade per se, which includes trade in luxuries and non-essentials, is thus much too broad a category on which to place one's hopes for the future. Finally, even the argument that trade between states in necessary commodities will lead to world peace is suspect since it assumes that the nations of the world act rationally.

The need for a viable system of international control over the MNE has already been alluded to. It arises because the MNE simply does not fit into the current legal pastiche of sovereign states. The MNE has goals with global effects based on a global calculus. It can play off one state against another, circumvent local laws and ignore any relevant rules of international law (which is still firmly based on the nation-state). It can wreak havoc on the economics of small states and undermine the policies of large states. The role of the MNE in global pollution is clear and its ethics frequently questionable. Yet, as has been pointed out by Barnes, citing the Gray Report, "[b]ilateral and multilateral efforts 'have not been particularly far-reaching and conflicts over extraterritoriality and economic activity are likely to grow.'"82 The reasons for this pessimistic outlook are clear enough. The various nations of the world have varying and conflicting interests which make agreement at all but the most superficial level highly unlikely. A home state’s interests are necessarily different from a host state’s. A less developed country seeks benefits that differ from those sought by a developing country and both of these differ from the benefits sought by a highly industrialized nation. Socialist economies see problems in a manner in which capitalist ones do not. Nationalistic responses to foreign investment can preclude a rational program of sharing benefits and negotiating. The list is almost indefinite. In light of this, truly effective supranational control by way of custom, treaty or international organization must be accepted as being a long way off.

Despite the above, there have been some suggestions put forward by commentators which entail a certain amount of international co-operation. While the writer feels that they are all subject to the above problems, they are nonetheless worth a brief analysis.

The most idealistic proposal is that of George W. Ball.83 His proposal envisions a multilateral treaty setting up an international companies law administered by a supranational authority. While few would deny the desirability of such a program, there can be no doubt that the attempt would fail victim to the old rule of multilateral treaties, namely that the instrument is either too superficial to cope with the problem or too detailed to be adopted.

This problem of achieving agreement is not seen as being particularly

insurmountable by Goldberg and Kindleberger⁴⁴ who propose a GATT for investment. On the question of agreement they say:

The ensuing actions [of MNEs] are regarded as detrimental by at least one of the parties involved, and are perceived as conflicts of government policies even though they stem from private corporate decisions. Fortunately, the conflicts are serious in only those handful of areas which we have discussed: taxation, antitrust policy, foreign exchange and export controls and securities regulation. Because these conflicts are universally accepted as posing a problem for solution, the authors are optimistic that meaningful progress towards multiparty disputes can be made in the near future.⁴⁵

The authors go on to suggest that success might be possible by way of a general agreement for the international corporation “similar to the General Agreement on Tariffs and Trade,”⁴⁶ but nowhere do they explain why the structural similarity to GATT is more likely to bring about agreement, except for the hope that “[i]f it succeeded in acquiring a reputation for thorough analysis and impartiality, the agency would in due course be able to have its decisions accepted voluntarily by participants.”⁴⁷ In any event, their basic assumption that the universal acceptance of a problem as such will lead to its solution must be gauged against the continuing inability of the United Nations to agree on a definition of aggression, and the inability of the members of that Organization to act responsibly in their efforts to achieve a semblance of world order without resort to force. Finally, “Professor Kindleberger concedes that the Afro-Asian countries and Latin America will not participate in a supranational body. . . . He therefore advocates an international authority whose writ will run only among the industrialised countries—where it is least needed.”⁴⁸

The natural response of the international lawyer when faced with global problems that are not solvable in the foreseeable future has been of late to investigate whether a regional approach might be more successful. Here we are at an advantage since there have been two clear attempts at coping with some of the problems of the MNE at a regional level—the EEC’s proposed European Company⁴⁹ and the Andean Foreign Investment Code.⁵⁰ These two regional responses provide a close look at the feasibility of agreement between nations which have much in common.

As a result of the failure to achieve harmonization of national company law and agreement on specific corporate problems, the French Government took the initiative of proposing to the EEC Council in 1965 that a study

⁴⁵. Id. at 321-22.
⁴⁶. Id.
⁴⁷. Id. at 323.
⁴⁸. Nehemkis, supra note 22, at 320.
⁴⁹. 2 CCH COMM. MKT. REP. ¶9025 (1965).
⁵⁰. 11 INT’L LEG. MAT’LS 126 (1972).
be undertaken with a view to setting up a European Commercial Company.\textsuperscript{91} The result has shown all but the most avid regionalist that even among economically interdependent nations with great cultural and legal similarity, agreement is still tantalizingly out of reach. As one informed writer put it, "[v]irtually every important aspect of the proposal has been the subject of difference,"\textsuperscript{92} including such topics as: the method of establishing the company, the substantive antitrust rules to be applied, the allocation of taxes, the question of "access" to the European Company (i.e., what factors should determine whether an entity would qualify), labor representation, and corporate disclosure laws. Ironically, while the MNE was the cause of the attempt, at unification it is in the eyes of some, also the cause of the failure of the attempt. On this Hadari states:

Many of the problems underlying the European company proposal are directly attributable to the emergence of the MNE. The focus of the proposal on the economic realities of modern commercial business, with its disregard of the nation state corporate form, is a particularly noteworthy development.\textsuperscript{93}

The Andean Foreign Investment Code (AFIC) in theory goes much further than the EEC's response to the problems created by MNEs. It was initiated as a regional policy in 1969 and approved by the six members of the Andean Subregional Group\textsuperscript{94} in 1970. The approach taken in it is to set up a timetable for disinvestment of foreign owned operations and to limit the entry of new foreign investments.\textsuperscript{95} Since the countries to which it applies all seem to have much in common and are geographically grouped together (the two main conditions of regionalism), one might expect a modicum of success. Again that has not been the case, and again the reason is that individual nation-states differ as to their needs no matter

\begin{itemize}
\item \textsuperscript{92} Angelo, \textit{supra} note 54, at 557.
\item \textsuperscript{93} Hadari, \textit{supra} note 4, at 801-02.
\item \textsuperscript{94} Bolivia, Chile, Columbia, Ecuador, Peru and Venezuela.
\item \textsuperscript{95} The Code's provisions are usefully summarized by Oliver who states that it (I) classifies equity (or ownership) investment in accordance with its degree of foreignness; (II) imposes prior restraints upon the entry of new direct foreign investments; (III) requires disinvestment by existing foreign elements down to minority levels, on pain of denial of the benefits of free movement of goods and services within a common market; (IV) closes certain sectors to foreign investment; (V) regulates repatriation of invested capital and the remittance of profits; (VI) limits the present opportunities of technology owner-transferors through patents, trademarks and know-how to benefit collaterally from their industrial property rights; (VII) makes or anticipates some important changes in corporation and tax law. Oliver, \textit{The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment}, 66 \textit{Am. J. Int'l L.} 763, 767-68 (1972).
\end{itemize}
how similar they may appear to be on the surface.

The result has been that only Peru and Venezuela have implemented most of the AFIC's provisions. The other four countries have failed to live up to the flexible standards in varying degrees. The Code contains loopholes and exceptions, and the end result has been variations between the national legislation implementing its provisions and the Code itself.\textsuperscript{96} Not only has the resulting treatment not been uniform but there is no supranational authority to correct any such problems as have arisen. In an excellent study of the AFIC, Fouts\textsuperscript{97} points out that Columbia and Chile have been guilty of delaying its implementation, the former by two and a half years due to a constitutional problem. Chile actually enacted legislation after the fall of the Allende regime which completely ignored the Code, and this led to a resolution being passed by the other five members to the effect that the Chilean decrees were in violation of the Code.\textsuperscript{98} Bolivia and Ecuador, the most undeveloped of the six, have failed to live up to the very gradual implementation procedure drafted for them on the ground that they would not be able to attract any new investment. Indeed, Fouts concludes that they are just not enforcing it.\textsuperscript{99} Her conclusion on the implementation of the Code itself is no less encouraging:

The regional policy on foreign investment called for in the Agreement of Cartagena in 1969 has been, in practice, less a regional policy than a set of standards which individual Andean Group countries have sought to apply or modify in a manner consistent with what they judged to be their own national priorities in the area of foreign investment.\textsuperscript{100}

Finally, a brief word should be given on the role of customary international law and the position recently taken by the International Court of Justice in \textit{Barcelona Traction}.\textsuperscript{101} Barcelona Traction was a Canadian corporation with Spanish and Canadian subsidiaries. After World War I, 88\% of the company's net value was owed to Belgian interests. In 1948 the Spanish courts declared the company bankrupt and ordered the seizure and sale of its Spanish assets. Canada, the nation of incorporation, gave up diplomatic representation of the company in the 1950's. Belgium, whose nationals suffered the most financial loss, sued Spain. Spain argued that Belgium had no standing to sue. The court sustained Spain's objection.

This case is of great interest because it provided an opportunity for the ICJ to adopt a creative role in the supervision of MNEs by emphasizing not the traditional element of nationality as a basis for suit, but a more

\begin{itemize}
  \item \textsuperscript{96} For a summary of these variations, see Oliver, \textit{supra} note 95, at 766 n.14.
  \item \textsuperscript{97} Fouts, \textit{The Andean Foreign Investment Code}, 10 \textit{Texas Int'l. L.J.} 537 (1975).
  \item \textsuperscript{98} \textit{Id.} at 549.
  \item \textsuperscript{99} \textit{Id.} at 541-43.
  \item \textsuperscript{100} \textit{Id.} at 559.
  \item \textsuperscript{101} \textit{Barcelona Traction, Light & Power Co. (Belgium v. Spain)}, [1970] I.C.J. 3.
\end{itemize}
dynamic assessment of the realities of the situation. Opting for the former, the court stated:

Evidence that damage was suffered does not ipso facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation.102

The adoption of such a strict approach, denying to the Belgian shareholders any remedy in international law, has been subject to severe criticism by the more unreflective writers in the field.103 But the court was really unable to do anything else for several reasons. First among these is the fact that the ICJ is very limited in its jurisdiction, relying on the consent of both parties before it can become operational.104 Consequently, if the court were to indulge in judicial law-making to the extent that a domestic tribunal might, it would simply lose customers since uncertainty of result would adversely affect the decision to submit to the court's jurisdiction. The court cannot indulge in a freewheeling, teleological approach to the world's problems without jeopardizing its own effectiveness. Secondly, the protection of shareholders' interests at the international level would raise more questions than it would answer.

The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.105

Finally, there is the problem earlier alluded to, namely that there simply is not a developing customary international law in the area of economic and corporate regulation. That being the case, it would be not only unwise, but impossible for the World Court to embark upon the route of international supervision. If there is no substantial agreement on the international standard concerning expropriation, then there is no chance of agreement on diplomatic representation of shareholder's rights. The World Court has a very difficult role to play in developing areas of law. By its restraint in this case it is removing itself from a very contentious area, thus protecting its primary asset—its neutrality. It is to be commended in the long run for doing so, even though the immediate result might be interpreted as unfortunate.

102. Id. at 36.
104. Statute of the International Court of Justice, art. 36.
III. Conclusion

It is becoming clear that the economy of a nation is so central a part of that amorphous concept, “sovereignty,” that useful international regulatory activity in the economic and corporate fields is extremely unlikely. The problem is not so much caused by the existence of the multinational enterprises, as by the existence of the nation-state, a unit that is inevitably smaller in scope than most of the pressing problems it has to deal with. While the multinational enterprise is just one more example of the nation-state’s inability to control the larger issues facing us, it also has the effect of increasing nationalism by way of a xenophobic response to the foreign origins of the enterprise. This means that rather than undermining sovereignty, as many believe, the MNE often has the effect of strengthening it.

We have seen that a nation may exert considerable control over an MNE either as host or home state but that this control is limited to the territorial jurisdiction. Consequently, it is often the case that the decision-making apparatus which the state wishes to influence is beyond its reach. As a response to this problem some states have adopted an extraterritorial philosophy. This has met with little or no success and what success there might be is a product of political co-operation and not of legal validity. Extraterritoriality is unlikely to solve the larger problems presented by the MNE simply because it relies for its effectiveness upon co-operation from the target state, something that in most situations is scarcely likely.

Regional responses, while initially more encouraging, have been reduced to argument about the substantive law to be applied or else have been inconsistently applied, again because of differences in the perceived needs of individual states. While it may be too early to dismiss the European effort towards a supranational company law, one would be wise to ask whether any resulting agreement could survive a marked change in the economic or political balance in Europe.

International law has an even more insignificant role to play since the differences between states at the international level are even greater than those at the regional level. For a single legal system to straddle these differences, yet still be specific enough to exert enough control to direct behavior towards global goals, is not possible. In regard to emerging areas of law where custom figures largely as a source, the International Court of Justice perceived that it could not adopt a prescriptive stance and must instead adopt a descriptive one. Since the nation-states of the world have not behaved with any unanimity, the court adopted a positivistic and predictable position. It could not do otherwise. The result is that the sovereign units of the world must reach agreement by themselves.

Thus the larger objectives and effects of which the MNE is capable are

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really beyond the reach of all but the legal systems of individual states. This is not a satisfactory conclusion but any other answer would require a considerable surrender of economic sovereignty by the nation-states and this they are not likely to do in the foreseeable future. Consequently a regime of legal laissez-faire is all that one can put forward as a means of controlling the multinational enterprise in its global activities. De maximis non curat lex.