

INTERNATIONAL REGULATION OF THE MULTINATIONAL CORPORATION: A LOOK AT SOME RECENT PROPOSALS

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Articles Editor Note:

The Intergovernmental Commission on Transnational Corporations and an Information and Research Center on Transnational Corporations have been established since this article was written. However, further progress in the vital areas of definition of TNCs, formulation of codes of conduct, and organization and coordination of technical cooperation programs has been slow. This is mainly due to the differing positions of the developing and developed nations.

The main goal of the developing countries, expressed by the Group of 77, has been to formulate an obligatory code of conduct which would compel TNCs to work toward the achievement of the host countries' policy objectives. The Group of 77 considers the code of conduct the first priority of the Commission.

While recognizing the desirability of TNCs accountability to host governments, U.S. policy, and to an extent the policy of other developed nations, emphasizes a balanced approach to the problems TNC activities present. Any code which would be formulated should be voluntary and should govern the activities of national governments as well as those of TNCs. It is the U.S. position that the code must be preceded by and based on a careful and thorough examination of the issues such a code would address. In reiterating this position, Secretary of State Henry Kissinger in his statement before the U.S. Seventh Special Session on September 1, 1975, acknowledged the obligation of TNCs to obey local law and stated that TNCs should take into account public policies and developmental priorities of the host governments in carrying out their activities.

Debate on the activities of multinational corporations is being conducted in several other international fora. Along with other special committees, the U.N. Conference on Trade and Development (UNCTAD) has established a Committee on Transfer of Technology with two subordinate groups: a Group of Experts on a Code of Conduct on Transfer of Technology to prepare a draft code and a Group of Experts on Patent systems to consider possible revisions of the international patent system to make it more responsive to the needs of developing countries. The Organization for Economic Cooperation and Development (OECD) has made considerable progress in drafting voluntary guidelines for MNCs. It should be noted, however, that the interests of developing nations are not considered by the OECD to the extent they are considered by other international bodies.

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Other organizations considering various aspects of MNCs include the U.N. Commission on International Law (UNCITRAL), the International Labor Organization (ILO), the U.N. Industrial Development Organization (UNIDO), the World Intellectual Property Organization (WIPO), the Economic Commission for Latin America (ECLA), the Organization of American States (OAS), the Inter-American Foreign Ministers' Working Groups on Transnational Enterprises and Science and the Transfer of Technology and the European Economic Community (EEC).

The issues presented by the operation and activities of multinational corporations are complex and varied. Although the problems of orderly and responsive conduct on the part of both host national governments and the corporations are being attacked by several organizations and groups of experts, resolution of the conflicting ideas and positions is not foreseeable in the near future. Rather there will be a continuing debate concerning the activities of multinational corporations and their role in an ever-changing international economic order.

Introduction

The past few years have witnessed a flood of publications by writers of different persuasions on the activities of the multinational corporation (MNC).¹ Hardly does a month pass without another addition to this vast literature in the form of an article or a book.

More significantly however, interest in the affairs of MNCs is no longer confined to 'think-tanks' or academic libraries. A number of United Nations organizations as well as some regional institutions are presently engaged in the task of devising some method to control the multinational enterprise.²

1. Opinion is still divided among the writers regarding what to call the multinational corporation. Frequently used alternatives include, transnational, global, world or plurinational instead of the word, "multinational," whilst firm, enterprise company or business are common substitutes for the word, "corporation". Cf. Aharoni, *On The Definition of a Multinational Firm*, 11 Q. REV. BUS. & ECON. 27-37 (1972); Multinational Corporations in World Development, U.N. Doc. S/ECA/IGO, 118-21 (1973). For the purposes of this paper, the term, "multinational corporation" (MNC) is being adopted, not because of its accuracy but because it appears to have gained widest currency. Cf., e.g., *The Impact of Multinational Corporations on Development and on International Relations, The Report of the Group of Eminent Persons* (hereinafter cited as Report). U.N. Doc. E/5500/Rev. 1. S/ESA/6, n.2 at 25 (1974).

2. Interest of the United Nations in this field dates back to 1948, when the Organization facilitated the preparation of the abortive Havana Charter for an International Trade Organization, Articles 12 and 46-54 of which dealt with the question of international investment and restrictive business practices. See *Final Act of the U.N. Conference on Trade and Employment*, U.N. Doc. E/CONF. 2/78 (1948).

In 1953, ECOSOC considered a draft convention on restrictive business practices. See 16 U.N. ECOSOC Supp. 11, annex 11 (1953). Mention must also be made of the General Assembly Resolutions of 1952, concerning the permanent sovereignty of States over their natural resources and the resolutions adopted at the different sessions of UNCTAD. A list of recently adopted resolutions of U.N. bodies on MNCs can be found in *Multinational Corporations in World Development*, supra n.1, (annex 1) 106-17.

The interest of the U.N. in MNC's culminated on 28 July 1972, when ECOSOC unanimously adopted a resolution requesting the Secretary-General to appoint a "group of eminent persons to study the role of multinational corporations and their impact on the process of development, especially that of developing countries, and also their implications for international relations; to formulate conclusions which may possibly be used by governments in making their foreign decisions regarding national policy in this respect and to submit recommendations for appropriate international action." See 53 U.N.

For a review of the attempts of regional bodies, e.g., The Andean Common Market and the EEC, see S. Rubin, *Developments in the Law and Institutions of International Economic Relations*, 68 Am. J. INT'L L. 475 (1974).

Nevertheless, it is regrettable that the majority of writers on this subject are highly reluctant to admit that most of the controversy now surrounding the MNC is essentially a part of a much more fundamental issue—the desire of the greater part of the world to create a new international economic order.

The developing countries (and some developed ones too) have seen that though all states may be theoretically equal, some are definitely more equal than others. They have also realized that this inequality is not unfrequently brought about and sustained by the activities of MNCs in the territories of these countries. It is the disillusionment with concepts of formal justice such as sovereign equality and mutual cooperation that has made the cry of these countries for international distributive justice louder in recent years.

The aim of this paper is to examine some of the recommendations that have been made by different writers and study groups to regulate the MNC and to suggest that, contrary to widely-held opinion, the problems posed by MNCs are not unique *per se* and could therefore be adequately remedied by utilizing a well-tried instrument of intergovernmental relations—the international treaty—if all states were resolved to curb the excesses of the MNC.

CHAPTER ONE

The Nature of the Problem

Both its critics and protagonists are agreed on one major point. The MNC has become a most important actor in contemporary international relations.³ In fact some scholars have gone as far as to declare that it was high time the world dispensed with the nation-state system and usher in an era of transnational world government by “cosmocorps.”⁴ Events have proved, however, that it is no longer nation-state sovereignty that is at bay, but the multinational corporation itself.

In the words of Professor Seymour Rubin, “[T]he multinational enterprise is under assault, in the host nation and at home. At both ends, measures which limit its freedom of action and which deprive it of many benefits which it has come to regard as traditional and have enacted . . . [a]n institution which finds itself assailed at home and abroad by governments which seem both desirous and capable of acting may well wonder whether it has the nation-state by the throat, or whether the contrary is more accurate.”⁵

3. See, e.g., BARNET & MILLER, *GLOBAL REACH* 13-21 (1974); BROWN, *WORLD WITHOUT BORDERS* 210 (1972); Diebold, *Multinational Corporations: Why be Scared of Them*, in *A REORDERED WORLD* 137 (R. Cooper, ed. 1973); Hymer, *The Multinational Corporation and the Law of Uneven Development in ECONOMIC & WORLD ORDER FROM THE 1970's TO THE 1990's* at 114 (J. Bhagwati, ed. 1972); *TRANSNATIONAL RELATIONS AND WORLD POLITICS*, Introduction, at x & xxvi (R. Keohan and J. Nye, eds. 1971) and VERNON, *SOVEREIGNTY AT BAY* 3, 5 (1971).

4. George Ball, former U.S. Under-Secretary of State and the acknowledged originator of the term “cosmocorp” has been a consistent advocate of this view. Cf. *Cosmocorp: The Importance of Being Stateless* in *WORLD BUSINESS* 337 (C. Brown, ed. 1970); *Citizenship and the Multinational Corporation* 41 *SOCIAL RESEARCH* 657-72 (1974); *Multinational Corporations on Nation-States* 5 *ATL. COMM. Q.* 247-53 (1967). Professor Miller also declared with the fullest confidence that, “*The nation-state is obsolescent as a form of social order.*” (emphasis supplied), and envisaged, the imminent attainment of “corporativism”, a world government by supercorporations, executives of which would be at home anywhere in the world. Cf. Miller, *The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power*, 6 *J. INT'L L. & ECON.* 236-46 (1972). See also KINDLEBERGER, *AMERICAN BUSINESS ABROAD* 207-208 (1969).

5. Rubin, *supra* note 2, at 486. Cf. Behrman, *The Multinational Enterprise: Its Initiatives and Governmental Reactions*, 6 *J. INT'L L. & ECON.* 222-26 (1972); Salter, *The Dynamics of the Multinational Enterprise: Example for World Government*, 8 *INT'L LAWYER* 11-19 (1974).

At a time when unanimity is lacking among both scholars and states regarding the definition, concept and history of the MNC,⁶ it is highly preposterous to suggest that nation-states should sign themselves out of existence in favor of some nebulous 'international' corporate body. By whatever names MNCs are called, the fact remains that these companies "do not manifest any supranational solidarity but are merely an extension, at international level, of activities whose ideological conception and political, economic and financial backing are to be found in a country that is often easy enough to identify."⁷

Without doubt, MNCs are playing an increasing role in international affairs, which has both good and bad implications and results. However, it is an open secret that the so-called "multinational corporations" are multinational only in name. In attempting to escape regulation by local states or to deemphasize their "foreigners" and thereby induce a favorable (or avoid a negative) reaction among the indigenous population of the countries where their subsidiaries are located, these entities enjoy describing themselves as international or 'transnational' organizations. As such, they do not depend on any particular states because they possess a global perspective in their business operations, as opposed to a state's parochialism. Although different tests, including the "seat of control", "genuine link", and "location of offices" principles have been utilized in determining the nationality of a MNC, from a strictly legal point of view, the MNC can be defined as an enterprise, incorporated under the laws of a particular country, undertaking business activities beyond the borders of that particular country.⁸

Though some writers have contended that relations between MNCs and their home governments are at arm's length,⁹ one can safely agree that "the external relations of the modern state is either conducted by the corporations, for them or

6. Thus, Professor Behrman has distinguished between the classical company, international holding company and the multinational enterprise, in tracing the history of the MNC.

The classical companies are those like the Hudson Bay Company or the United Africa Company, whose interest lay primarily in seeking raw materials for the use of "home" countries. The international holding companies process goods, in the main, for the "host" countries' markets. The distinguishing factors of the MNC are centralized control by the parent company, possession of a common strategy for the entire enterprise and integration of the operations of affiliates with each other and the parent.

Consequently, foreign corporations operating in developing nations cannot be described as MNCs but as classical or international holding companies. See Behrman, *supra* note 5, at 217. But cf. Hawrylyshyn, *The Internalization of Firms*, 5 J. WORLD TRADE L. 72-74 (1972).

In view of the conflicting opinions as to what constitutes a MNC, it has been suggested that the best thing to do is to say of the MNC what Mr. Justice Stewart of the U.S. Supreme Court said of pornography—one may not be too sure what it is, but one surely knows it when one sees it! Cf. Rubin, *Corporations and Society: The Remedy of Federal and International Corporation*, 23 AM. U.L. REV. 281 (1973) and Vagts, *The Global Corporation and International Law*, 6 J. INT'L L. & ECON. 248 (1972).

7. Kahn, *International Companies* 3 J. WORLD TRADE L. 520 (1969).

8. Granted that the practice of states and the International Court of Justice in determining the nationality of MNCs is conflicting, application of any of the different tests of nationality, e.g., place of incorporation, nationality of shareholders or location of headquarters, would reveal most clearly that the vast majority of MNCs are United States juridical persons. For more on this, see Fatouros, *The Computer and the Mudhut: Notes on Multinational Enterprises in Developing Countries*, 10 COLUM. J. TRANSNAT'L L. 328-332 (1971); Modelski, *The Corporation in World Society*, 22 YEARBOOK OF WORLD AFFAIRS 68, 73-74 (1968); Vagts, *supra* note 6, at 250; Wells, *The Multinational Business Enterprise; What Kind of International Organization*, TRANSNATIONAL RELATIONS AND WORLD POLITICS 100.

On the role of U.S. nationals at top level management positions of MNCs, see Simonds, *Multinationals? Well, Not Quite*, 1 COLUM. J. WORLD BUS. 115 (1968) and VERNON, *supra* note 3, at —.

9. Cf., e.g., Vernon, *Apparatchiks and Entrepreneurs: U.S.-Soviet Economic Relations* 52 FOREIGN AFFAIRS 25 (1974). But cf. Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 L. & POL. INT'L BUS. 11 (1971); Wells, *supra* note 8, at 112.

both."¹⁰ If this is so, it stands to reason that the brave new world without borders, fervently advocated by protagonists of multinational world government, represents nothing but yet another camouflage for the continued economic, and hence political hegemony of a few states in the world.

The MNC has proved to be a major institutional mechanism for the international exchange and transfer of economic and human resource and technical know-how among several countries but it can hardly be denied that the geographical distribution of the controlling parent organizations of MNCs is an eloquent testimony to, and is closely related with, the present unequal pattern of distribution of the world's wealth.

It is becoming recognized more frequently that "a stable international economic system must be evolved on different terms than before, and an international law designed to foster security in transnational business must be adapted to the new circumstances."¹¹

Commenting on the spread of MNCs, Professor Behrman stated, "It (the MNC) was not formed directly out of an inter-governmental agreement as most other international institutions have been, yet it is the direct result of governmental policies . . . first, the erection of barriers to trade, second, the reduction of those barriers, and third, the rapid economic growth in the markets of advanced countries. . . ."¹²

Thus, the Frankenstein monster of the MNC, though it does not owe its creation directly to states, has been a constant source of conflict between states. To quote another writer, "while the home country regulates the head and shoulders of the multinational corporation, various other countries regulate its limbs and other extremities. The breast of the beast however can be beyond the reach of national sovereignty."¹³

On the other hand, the home state wishes to regulate the activities of affiliates of its multinationals, especially in such matters as anti-trust, taxation and export control, while, on the other hand, the host states, apprehensive of a significant part of their economy being owned, managed and directed from abroad and for outside interests, become highly reluctant to allow the intraterritorial application of the home state's laws to activities within their territories.¹⁴ In the

10. Miller, *supra* note 4, at 249; cf. Behrman, *supra* note 5, at 225 ("The multinational enterprise is the channel for the "illegitimate" extension of the power of the parent (U.S.) government into the host country,); Dehner, *Multinational Enterprise and Racial Non-Discrimination: U.S. Enforcement of a International Human Right*, 15 HARV. INT'L L.J. 77 n.31 (1974).

11. S. Miller *Access to Do Business Across International Boundaries*, 42 TUL. L. REV. 795 (1968). Cf. Kahn, *supra* note 7, at 520: "The international company is only justified when its objects are pursued with a solidarity that transcends nationalism and can only find expression of eliminating its subjection to the law of a single national State. . . . Even if these companies conform more readily to informational strictures than those whose boundaries are more limited, the interests they defend, no matter how respectable, are national interests, not the interests of the international community."

12. Behrman, *supra* note 5, at 215.

13. Barnes, *MULTILAW*, 23 AM. U.L. REV. 313, 332 (1973).

14. Thus, the U.S. has had conflicts with Canada, Great Britain, France and Switzerland over the extraterritorial application of U.S. laws. See, e.g. Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans*, 83 HARV. L. REV. 579-601 (1970); Torem & Craig, *Control of Foreign Investment in France*, 66 MICH. L. REV. 705 n.136 (1968); Litvok and Maule, *The Multinational Corporation: Some Economic and Political-Legal Implications*, 5 J. WORLD TRADE L., 637 (1971). In this article the author states: "The application of the U.S. Foreign Assets Control Law and regulations to United States parent companies with subsidiaries in Canada is regarded by many Canadians as a prime example of U.S. extraterritorial violation of Canadian sovereignty." See also

middle of this maze of frequently conflicting laws stands the MNC, condemned to bear the brunt of all the laws, wherever and whenever it fails to convince a country to see things in a light favorable to the MNC. A case in point is the multiple taxation of MNCs. In some instances, MNCs have been subjected to double or greater taxation of the profits accruing from the operations of their various subsidiaries.¹⁵

It has been widely recognized that "The lack of harmonization of policies among countries in monetary or tax fields, for example, allows MNCs on occasion to utilize their transnational viability to circumvent national policies or render them ineffective."¹⁶

Among devices used by MNCs to sidestep governmental policies are export market allocation, price discrimination, the infamous transfer pricing, the placing of stringent conditions on the transfer of technology and patents and the establishment of numerous cartels to reduce competition.

Governments are not the only entities which are affected by the machinations of the MNC. Labor interests, for instance, are concerned about the effect overseas activities of MNCs would have on local employment, workers' welfare and the bargaining power of trade unions. Consumers too are worried about the appropriateness, quality and the price of goods produced by MNCs. Perhaps the greatest worry of all concerned, however, stems from the fact that some MNCs have been known to have instigated and actively collaborated in the overthrow of governments which pursued policies detrimental to their interests.¹⁷

As it has been clearly pointed out, "Governments are not yet ready to give up the sovereignty implied in permitting the multinational enterprise to make basic decisions concerning international economic integration . . . not only because of its lack of a clear responsibility to society, national or international."¹⁸

The main issue, therefore, is control and not ownership as was once

Litvok and Maule, *Conflict Resolution and Extra-Territoriality*, 13 J. CONFLICT RESOLUTION 305-19 (1969). British courts have refused to give effect to U.S. court decisions. The ICI-DuPont cases have become classics in this regard. *U.S. v. I.C.I. Ltd.*, 105 F. Supp. 215, 220 (S.D.N.Y. 1952); *British Nylon Spinners, Ltd. v. I.C.I., Ltd.*, (1953) Ch. 19 (1952) 2 All E.R. 780, *id.*, ch. 37 (1954), (1954) 3 All E.R. 88. Cf. STEINER & VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 944-55 (1968). For a review of some 16 cases in which U.S. demands that overseas subsidiaries not export to China or Cuba led to conflicts with different states, see BEHRMAN, *NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE* Ch. 7 (1970). Cf. Berman and Carson, *U.S. Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791, 867-76 (1967); Lee and McCobb, *U.S. Embargo on China, 1949-1970: Legal Status and Future Prospects*, 4 N.Y.U. J. INT'L & POL. 3-25 (1971). U.S. anti-trust laws have also proved controversial in this extraterritorial implementation. The Netherlands, for example, had to enact a law prohibiting deliberate compliance with foreign antitrust rulings. Cf. Vagts, *supra* note 7, at 225. *But cf. id.* at 256: "The United States has recognized repeatedly that, when its mandate encounters a contradictory compulsion from a foreign state, its rule based on nationality or control must necessarily give way." For recent attempts at settling these conflicts, see Vernon, *supra* note 4, at 278.

15. Considerable progress has been made by countries to reduce incidents of overlapping tax claims through the inclusion of numerous bilateral tax treaties. See, e.g., The Conventions on Double Taxation concluded by the U.S. with Finland and Trinidad and Tobago in 1970, T.I.A.S. No. 7042.

16. Report, *supra* note 1, at 30.

17. For an account of the involvement of the United Fruit Company in the overthrow of Guatemala's government in 1954, see HOROWITZ, *FROM YALTA TO VIETNAM*, Ch. 10 (1967).

The latest example of "destabilization" of elected government is the much publicized intervention of the ITT in the domestic affairs of Chile leading to the fall of Dr. Salvador Allende's government, after the last President had begun implementing plans to turn Chile into a socialist state. See Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93rd Cong., 1st Sess., *International Telephone and Telegraph Corporation and Chile, 1970-1971* (Comm. Print 1973).

18. Behrman, *supra* note 6, at 226.

thought.¹⁹ It is already not in vogue to argue that because the size of the turnover of MNCs surpasses the GNP of many host nations, especially developing countries, they are consequently more powerful than these states. In fact, most of the representatives of MNCs who gave testimony before the Group of Eminent Persons went to great lengths to prove the contrary.²⁰ What they failed to state, however, is that although the MNC operates at the mercy of the host state and consequently does not have power over it, nevertheless, the MNC possesses immense power *under* that government, since it could help or harm the local economy by its business decisions. Needless to say, the MNC can wield considerable power against that government by threatening to move its operations to more desirable, less expensive (cost-wise) and generally more "liberal" countries, whenever it feels the host government is asserting its authority too rigorously.

Therefore, in view of the structure of the MNC, any attempts by one country to bring it to heel or channel its growth to suit that country's own interest could be highly frustrating and would amount to little more than a stab at the local tentacles of a global octopus. This highlights the importance of control and explains why several suggestions have been made to contain the MNC at the international level. Before a review of some of the proposals, however, it is necessary to examine the place of the MNC in international law.

Status of MNCs Under International Law

One of the most controversial aspects of MNCs is their status in international law. Early writings on the subject were concerned mainly with intergovernmental companies such as the Scandinavian Air Service (SAS) or the International Finance Corporation (IFC).²¹ By definition, however, these were international corporations established by governments, which clearly distinguishes them from the subject of the present study.

As Professor Vagts has noted, "International law thus far has had little impact on individual national arrangements. What case law exists (concerning MNCs) has revolved around the question of assigning a nationality to a corporation for purposes of deciding what country is entitled to prosecute an international claim on its behalf."²²

This should not come as a surprise, since, as stated earlier, there is nothing intrinsically novel about the MNC that necessitates the according to it of a new status in international law. It remains, essentially, a national company which happens to do business (manufacturing or trading) abroad. Its distinction of

19. Many writers who had earlier suggested the creation of joint ventures as a possible solution to the problem of the MNC, have not seen that joint ventures might in fact be counter productive and might harm, rather than help, the interest of developing countries. *Cf.*, e.g., GARLAND, *DOING BUSINESS IN AND WITH BRAZIL* 36 (1972); BEHRMAN, *DECISION CRITERIA FOR FOREIGN INVESTMENT IN LATIN AMERICA* 1, 2 & 62 (1974).

20. Thus, Irving S. Shapiro, Vice-Chairman of DuPont stated: "They (MNCs) are non-sovereign and not laws into themselves . . . they are subject to the control of nation-states . . . even in the case of smaller nations, governmental power to control is enormous, ranging from the subtleties of taxation to expropriation." *Cf. Summary of the Hearings Before the Group of Environment Persons* (hereinafter cited as *Hearings*). U.N. DOC. ST/ESA/15, at 122.

21. *See, e.g.*, Goldman, *The Law of International Companies*, 90 *JOURNAL DE DROIT INTERNATIONAL* 320-89 (1963); Lador-Lederer, *The International Corporation—Its Status in International Law*, 1 *ISRAELI L. REV.* 593-615 (1966); Kahn, *International Companies—A Study of Companies Having International Legal Status*, 3 *J. WORLD TRADE L.* 498-521 (1969).

22. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 *HARV. L. REV.* 743 (1970).

possessing an integrated system, whereby certain aspects of production can be delegated to affiliates located abroad while insuring that such components come together at some point in time, is irrelevant from the standpoint of international law.

True, "[t]he names and activities of such corporations as Ford, Fiat or Volkswagen, or Boeing, Shell or I.B.M. (may) already command greater familiarity than those say of Lesotho, Afganistan or Ecuador."²³ Nevertheless, MNCs are neither states nor international organizations and *ipso facto* cannot be subjects of international law.²⁴

By exercising its corporate rights in a foreign state, a multinational corporation thereby submits itself to local jurisdiction. The foreign state is obliged to grant no more than the treatment customarily accorded an alien under general international law.²⁵ If, however, such a corporation started business in the host state within the framework of an existent MFN treaty or a treaty of trade, commerce and navigation, it might have claim to any special rights authorized therein. It is also within the realm of possibility that the MNC and the host state will exercise whatever leverage each has to gain entry requirements favorable to their individual interests.

In determining the status of MNCs under international law therefore, the main question remains that of nationality, a question that has been very confusing and unstable²⁶ but is of extreme importance to the multinational corporation. Regardless of any legal forms that the MNC might adopt, e.g. acquisition of a "charter of convenience" through incorporation and location of the parent corporation in what Ralph Nader characteristically named "global Delawares" (i.e., Panama, Bermuda, Liechtenstein, etc.),²⁷ the real state of origin (in most cases, the United States) would, in times of danger, tend to come to the rescue of the MNC since both MNCs and their home governments have identical interests, *i.e.*, maximum security for the national investments abroad made largely through and by MNCs. Thus, the MNC often tolerates interference by its home state in its corporate affairs as the price it must pay for protection by the home state in cases of trouble abroad.²⁸

23. Modelski, *supra* note 9, at 72.

24. It is interesting to note that the argument of some writers in support of the according of subjectivity to individuals under international law is closely related to their larger quest for a transnational, world government (by MNC's). For a good analysis of this school, see Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, 2 ANNALES D'ETUDES INTERNATIONALES 97, 102-104 (1971).

25. HACKWORTH, DIGEST OF INTERNATIONAL LAW 710 (1942).

26. *See id.* at n.9. For example, a look at the practice of both the Permanent Court of International Justice (P.C.I.J.) and the International Court of Justice (I.C.J.) would show that quite different tests have been applied, at different times, to establish nationality of corporations. Thus, the seat of control principle was adopted in *Barcelona Traction, Light and Power Co., Ltd. Case (Second Phase)*, (1970) I.C.J. 3; the genuine link principle was employed in the *Nottebohm Case (Second Phase)*, (1955) I.C.J. 4; the place of incorporation principle was used in the *Anglo-Iranian Oil Company Case*, (1952) I.C.J. 93 and the location of offices principle was used in the *Case of the S.S. "Wimbledon"*, (1923) P.C.I.J. ser. A. No. 1. *See generally* Abi-Saab, *supra* note 24 at 106-19, and Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT'L & COMP. L.Q. 275 (1969).

27. *Cf. Hearings*, *supra* note 20, at 90.

28. *Cf. BEHRMAN*, *supra* note 14, at 9. But Fatouros has noted that when the interests of the MNC and the host coincide, "we are treated to the moving spectacle of eminent lawyers, engaging in vigorous and eloquent defense of the host countries' sovereignty against infringement by the United States." Fatorous, *supra* note 8, at 343.

Most of these problems arise when the property of the MNC has been nationalized with little or no compensation being paid by the nationalizing foreign states. Though the rights of states to nationalize the assets of MNCs operating within their territories is no longer in dispute under international law, several writers still assert that any nationalization must be followed by "prompt, adequate and effective" compensation in order for it to be legal under international law.²⁹ While the accuracy of this assertion, is debatable, it will be addressed in this article.

To sum up, until a coherent body of laws is created by states, MNCs will continue to operate in a confusing legal spine of conflict. The paradox of this situation is that any harmonization of the present conflicting laws and policies of states regarding MNCs would effectively deny the latter most of their 'jay-walking' ability, an asset from which they now profit so enormously. The law in this area is slowly emerging, but a central question to be addressed in any new body of regulatory principles is the objection of the new system and the effectiveness with which the system works to achieve the stated objective.

CHAPTER TWO

Some Earlier Proposals For the International Regulation of MNCs

The most comprehensive attempt to devise ways and means of regulating MNCs at the international level was carried out recently by the Group of Eminent Persons, which was established under the auspices of the United Nations. The Group was a strange admixture of government ministers, university professors, experts and businessmen chosen in their individual capacities but nevertheless representing the world's major areas.³⁰ The unique approach adopted by the Group (conducting hearings during which testimony was received from a diversity of witnesses, including representatives of national governments and international institutions, top executives of MNCs, academicians, labor leaders and consumer advocates) enabled it to acquire a broad spectrum of ideas concerning international regulation of multinationals.

Before examining the recommendations of the Group of Eminent Persons in depth, a review of some earlier proposals, specifically, deconcentration, restructuring, global chartering and an international regulatory agency,³¹ will serve to add perspective to the development of the more recent recommendations.

(A) *Deconcentration*

At first glance, deconcentration might imply a policy of universal nationalizations, that is, conversion of local affiliates of MNCs into state-owned enter-

29. See FRIEDMAN, *INTERNATIONAL LAW CASES AND MATERIAL* 802-35 (1969) and STEINER & VAGTS, *supra* note 14, at 314-70.

30. The Group consisted of 20 persons from the industrialized countries of Western Europe, Japan and the Socialist Bloc and the developing countries. Public hearings were held by the Group in New York and Geneva in the autumn of 1973 and a total of 45 experts testified before it. Cf. *Hearings*, *supra* note 20.

The Group's *Report*, a 162-paged document, which also contained dissenting comments by some members of the Group, was submitted to the UN Secretary-General on May 22, 1974 and released on June 9, 1974. *Report*, *supra* note 1.

For a short summary of previous UN interest see note 2.

31. This section leans very heavily on material contained in Vagts, *The Global Corporation and International Law*, 6 J. INT'L L. & ECON. 247, 256 (1971).

prises of the different governments within whose territories the affiliates are situated. However, this is not the case, especially since MNCs are not particularly well-known for their great interest in joint-ventures or disinvestment.³²

What is usually meant by deconcentration is "an international version of the Sherman and Clayton Acts,"³³ i.e., a concerted effort by states to break up the monopolistic and oligopolistic structure of MNCs by reducing them to more manageable units. Upon close examination, one discovers the chimerical nature of this suggestion.

While anti-merger rules are highly developed in the United States, the contrary seems to be true in most other economies, especially the industrialized countries of Western Europe, Japan and possibly Canada. In fact, for some time the E.E.C. countries have been actively promoting the creation of giant, transnational corporate mergers in attempts to contain the American challenge.³⁴ Similarly, the massive help Japanese corporations receive from their country's government is designed for this purpose, and operated toward this end in conjunction with Japan's traditional reluctance to admit foreign investment.³⁵

In an age of increasing economic and political nationalism, "[e]ach country will be reluctant to curb its own favorite dinosaur (and) small countries that offer small markets will argue against disturbing monopolies to which they may have contributed by their own protectionist policies. (Thus), an international anti-trust agency would have to be able to distinguish between mergers that cease enterprises capable of taking advantages of economic scale and those that create mastadons that can win by sheer brute force of their long process."³⁶ The inherent difficulties of this suggestion for an international policing today are self-evident when considered in light of current political and economic realities.

(B) *Restructuring*

This proposal is designed to alter the physiognomy of MNCs by streamlining the national composition of their boards of management and top executive posts, together with the possible injection of some local capital into the equity of the corporation (to borrow Perlmutter's description); the idea is to convert hitherto "ethnocentrics" into "geo-centrics."³⁷

In real terms, this proposal would make MNCs more appealing. They would be able to create the appearance of responsiveness to the socio-political environment of the countries where they operate by allowing some amount of local capital into the venture and by appointing a handful of "natives" into visible posts in the subsidiaries.

32. Cf. BEHRMAN, *supra* note 19.

33. Vagts, *supra* note 31, at 257.

34. See, e.g., J. SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE* 157-62 (1968); Vagts, *supra* note 31, at 257-58; Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 781 (1969).

35. Cf. G. Namaguchi, etc. *Trend Towards Mergers & Acquisitions in Japanese Industry*, 2 MANAGEMENT JAPAN 16 (1963); Tsurumi, *Japanese Multinational Firms*, 7 J.W.T.L. 74, 75 (1973).

36. Vagts, *supra* note 31, at 258.

37. Cf. Perlmutter, *The Torturous Evolution of the Multinational Corporation*, WORLD BUSINESS 66, 69 (C. Brown, ed. 1970). The need to change the complexion of top management positions became very urgent. Modelski observed that "[I]n a group of 81 chief executives of the world's largest companies in 1965, there was none whose nationality differed from the nationality of his company." See Modelski, *supra* note 8, 74.

This public relations stunt is already being voluntarily performed by MNCs in many countries and there is a growing tendency among certain countries to stipulate the appointment of indigenes to specific positions, in lieu of which the MNC is required to train local manpower with a view to the takeover of responsible positions by these local persons in due course.³⁸

However, restructuring MNCs in this fashion is nothing more than shameless window dressing. The corporations might co-opt some local executives into the top management as some in fact now are doing. They might scout for local talent to be awarded training scholarships or send the more promising of their operative staff to periodic training and conferences at their headquarters. They might even accept token, minority, local equity participation as long as this does not hinder their ability to integrate subsidiaries into the overall strategy of the enterprise. The crux of the matter is, however, "[A]s long as ownership and management control remain centered in the company's home country . . . and as long as the bulk of the company's profits continues to originate in this country, it will be hard to convince the governments of the subsidiaries' host countries of the truly international inspiration of the company's business policies. Such suspicions will be especially strong where these governments lack the administrative capability to detect and control possibly such abuses as diversion of profits, restrictions on exports and the like."³⁹

(C) *Global Chartering*

Perhaps in response to the flaws of restructuring MNCs, George Ball suggested the creation of all-encompassing 'cosmocorps' which he defined as ". . . world corporations (which) should become quite literally citizens of the world." This, according to him, implies the establishment by means of treaty, "an international companies law, administered by a supranational body, including representatives drawn from various countries, who would not only exercise normal domiciliary supervision but would also enforce antimonopoly laws and administer guarantees with regard to uncompensated expropriation."⁴⁰

The criticism of 'cosmocorps' continues to grow. A recent article concluded that "[i]t is a supreme irony that the 'liberals' who advocate supranational regulation of the international corporation delude themselves into believing their proposals are progressive, when in reality they are retrogressive. For, instead of giving free rein to creativity motored by the instinct for survival—the strongest possible impulse—they seek to freeze into an illusory regulatory scheme existing arrangements, ownership situations, and psychological attitudes that reflect the foreign investment status quo."⁴¹

One might add that the *societas europeana*, frequently pointed to as the prototype of eventual global chartering, has yet to materialize, due to the seem-

38. This is particularly true of countries like Nigeria and Singapore, where quotas of permitted expatriates are actually set and agreed to before MNCs are allowed to start operating.

39. See Lachman, *The Role of International Business in the Transfer of Technology to Developing Countries*, 60 AM. SOC. INT. L. PROC. 31 (1966).

40. See Ball, *supra* note 4.

41. Nehemkis, *Supranational Control of the International Corporation: A Dissenting View*, 10 CALIF. W.L. REV. 286 (1974). See also S. Rubin, *supra* note 6 at 284, 296. According to Barnett and Miller such proposals are attempts to legitimize most of what global corporations are now doing by establishing minimal and largely unenforceable limits on their power to penetrate all national borders in the process of private global planning. Cf., Barnett Miller, *supra* note 3, at 372.

ingly irreconcilable political as well as economic contradictions among the member states of the EEC.⁴² Furthermore, the attempts to create the Treaty of Rome, concerning the establishment of companies which operate on traditional national and not supranational or transnational concepts.⁴³

(D) *An International Regulatory Agency*

Closely related to the idea of global incorporation is the suggestion for the establishment of an international regulatory agency to supervise the activities of MNC, presumably under a code of conduct specifically enacted for this purpose.

The need for such an agency to pierce the secret corporate veil of MNCs has become a pet subject among many writers. For example, Litvak and Maule, two Canadian experts on MNCs, concluded: "The transfer of confidential information from the host to the parent country with little, if any, official control, has given rise to concern in many countries. This problem has security implications and is analogous to that of the invasion of privacy at the national level."⁴⁴ Thus, MNCs are known to escape the financial restraints of many countries through their power to establish intra-company transfer prices and excessive or reduced service charges, as the case may be. The cumulative effects of the flexibility of dividend repatriation, payment of royalties, license fees, management prices on the host state's balance of payments, the concern of labor unions in the home state for the loss of jobs caused by MNCs establishment of subsidiaries abroad instead of at home and numerous other reasons, have accounted for the consensus reached by many scholars in urging the creation of some form of international regulatory agency for MNCs.

Despite the widespread agreement, the form the agency should take has remained a topic of considerable debate, as has the actual content of a code of conduct, if there was actually to be one. Generally, MNCs are in favor of the code of conduct put forward a few years ago by The International Chamber of Commerce, providing for local equity, part-ownership, and the induction of indigenes into management and their promotion to responsible positions. In short, this code called the maintenance of "good citizenship" described in the Canadian model, *i.e.*, respect for local laws, policies and social objectives.⁴⁵ However, many international corporate firms desire such a code to be voluntary and not legally binding.⁴⁶ Others want it to enumerate corresponding duties for states.⁴⁷

Thus, the views of MNC on the code range from symbolical to "equal participation," *i.e.*, a code of conduct for both MNCs and states. The former would rob the code of any effectiveness while the latter is simply frivolous—States and MNCs are not equal. States are subjects of international law, MNCs are and can only be objects. Not surprisingly, therefore, attempts to equate the status of MNCs with that of states always have met with the severest criticism of progressive scholars.⁴⁸

42. Cf., *e.g.*, Palianop, *Why Europe Needs Continental-Scale Firms*, EUROPEAN COMM. 3 (1968).

43. Cf. Kahn, *supra* note 21, at 508, 809. See also, Abi-Saab, *supra* note 24, at 104-106; Rubin *supra* note 9, at 31-35.

44. Litvak and Maule, *The Multinational Corporation*, *supra* note 14, at 641.

45. Cf. *Guidelines for International Investment*, International Chamber of Commerce (1972).

46. See, *e.g.*, *Statements of Giovanni Agnelli*, Chairman of FIAT, S.P.A. *Hearings*, *supra* note 20, t 150.

47. See, *e.g.*, Liotard-Vogt, *id.* at 283.

48. See, *e.g.*, Abi-Saab, *supra* note 24. Even the IBRD Investment Disputes Settlement Convention of 1965, an agreement between *states* providing for arbitration in cases of disputes arising out of

There has also been the suggestion of a General Agreement on MNCs much in line with the General Agreement on Tariffs and Trade (GATT), under which an agency would be formed to regulate issues involving MNCs.⁴⁹ According to the initiators of this suggestion, "[I]f (such an) agency 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. As its status in the world community improved, the agency could act as an ombudsman for corporations and countries seeking relief from oppressive policies."⁵⁰ Since the GATT itself has not fully proved equal to the task of regulating the less intricate problems of international trade, one cannot but question the wisdom in duplicating it to regulate MNCs.⁵¹

While no one can say with certainty whether a GATT-type arrangement for MNCs would succeed where its predecessor had failed, it is reasonable to assume that any regulation of this nature would face a major problem in dealing with MNCs—the lack of information on their activities. Even a consultative agency, such as the current successful experiment between Canada and the U.S., which has been advocated as a substitute for a GATT-type organization, would not work unless there was a full-proof monitoring agency concerned with the activities of MNCs.⁵² This is probably the reason why a number of writers have suggested that the terms of reference of any international regulatory agency be limited, in the first instance, to the gathering of information on the activities of multinationals.⁵³

Although Vagts maintains that if a multinational corporation is compelled to report its income on the same basis to all agencies in each country, it will not be able to shift income artificially to avoid taxation,⁵⁴ it has to be remembered that the profitability of the MNC depends to a large extent on its ability, to quote Kindleberger, to slip "between the cracks of national jurisdictions." Consequently, until *all* states decide to cooperate in the effective regulation of MNCs, the

foreign investment, cannot be a basis for equating states and MNCs. Little wonder, therefore, that the convention has been snubbed by several states (especially Latin American and Arab countries) and has been of no practical use since its conclusion. Jose' Campillo Sainz, Mexico's Under-Secretary for Industry and Commerce, has stated that "arbitration exists to resolve disputes between States. What is involved in the case of private foreign investment is a dispute with an individual who has agreed to abide by national legislation. We cannot agree to arbitration which would give the foreigner preference over the national." Cf. *Hearings*, at 20.

49. See e.g., Goldberg and Kindleberger, *Toward a GAAT for Investment: A Proposal for Supervision of the International Corporation*, 2 J.L. & POL. INT'L BUS. 295, 322 (1970).

50. *Id.* at 323.

51. Asked what he felt about this proposal, Professor Onitiri, Director of the Nigerian Institute of Social and Economic Research, summed up the feeling of many third world countries when he replied, "Such an agreement would be among non-equal members and, therefore, would be viewed with suspicion . . . unless their (developing countries) special situation was acknowledged by the agreement. If it was possible to bring about major structural changes in the developing countries before getting them to enter into that type of agreement the chances of success would be better. It is in the context of a grand settlement of the structural problems arising from colonial and imperial relationships that a GATT type of agreement would be suitable." *Hearings*, at 107-108. See also Compilio, *supra* at 27; Nehemkis, *supra* note 41 at 317; Rubin *supra* note 9, at 36; Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1971).

52. See, e.g., Rubin, *supra* note 9, at 36-37.

53. One of the leading proponents of this view is Professor Vagts of Harvard Law School who has concluded that, "In a world where there is little sign of rapid increase in agreement on basic values—indeed where there are signs of an inward-turning of national attention—it is going to be very difficult to create a mechanism for regulating the global corporation." Vagts, *supra* note 31, at 262. See also *Hearings*, at 389; Vagts, *The Host Country Faces the Multinational Enterprise*, 53 B.U.L. REV. 261 (1973).

54. Vagts, *supra* note 1, at 51.

creation of an information-gathering agency would only reduce and not completely extinguish the capability of MNCs to circumvent the laws of the countries where their subsidiaries operate.

An effective monitoring and/or information gathering agency presupposes harmonization by states of their inconsistent laws affecting the activities of MNCs. But in reality, such harmonization of all laws relating to MNCs would remove the need for an international regulatory agency.⁵⁵ Unfortunately, however, even a multilateral consensus in this regard has yet to appear on the horizon.

CHAPTER THREE

The Recommendations of the Group of Eminent Persons

The focus of the Report of the Group is an international machinery and action to regulate MNCs. However, it recognizes that primary responsibility for taking action lies with individual states. The Group emphasized international action because "many of the measures that . . . (are) necessary will be ineffective and frustrated unless they are accompanied by action at the international level which promotes cooperation and harmonization. Furthermore, on a number of issues, effective action can only be taken at the international level."⁵⁶

The major proposal of the Group is for the continuing involvement of The Economic and Social Council of the U.N. (ECOSOC) concerning the issue of MNCs through the establishment of a special commission for multinational corporations and an ancillary information and research center. The Group recognized that there is an urgent need for international machinery because, although international production has become an important factor in international trade; no comparative institutions like the GATT or UNCTAD exist to handle the problems brought about by MNCs. However, this did not convince the Group of the necessity of creating an entirely new institution.

It reported that "The existing institutions can be geared and strengthened to respond to the requirements. Given the functions and responsibilities vested in the United Nations in Chapters IX and X of the Charter, and the methods of conceptualization and negotiation that it has developed over the years . . . the Economic and Social Council itself, being fully representative of the membership of the United Nations, is the intergovernmental body in which, on the basis of adequate support, the subject of multinational corporations in all its ramifications should be considered and negotiated on a regular basis."⁵⁷

Consequently, the Group saw fit to recommend that a full discussion on the issues related to MNCs be held in ECOSOC at least once a year, to consider in particular the report of the proposed commission on MNCs.

(A) *The Commission on MNCs*

The commission itself was to be structured along the lines of the existing United Nations International Law Commission. It would consist of 25 members serving in their individual capacity, but nominated, however, by the U.N.

55. Cf. Barnes, *Multilaw*, *supra* note 13, at 327: "Nation-states are in a better position to administer an international regime than an international agency can ever be; the nation-states have the power of enforcement . . . if all states agree on the rules to be applied by each in dealing with the enterprises, there is little need for international machinery."

56. *Report of the Group of Eminent Persons*, *supra* note 1, at 51.

57. *Id.* at 51-52.

Secretary-General and approved by ECOSOC for a renewable three-year term.⁵⁸ In choosing the commission's members, due regard would be given to geographical distribution in order to ensure equitable representation of a variety of the states of the world as well as a diversity of backgrounds including politics, public service, business, labor, consumer interests and universities.⁵⁹

The commission's function would be to do the following:

- (a) Act as the focal point within the United Nations system for the comprehensive consideration of issues relating to MNCs;
- (b) Receive reports through the Council from other bodies of the United Nations System on related matters;
- (c) Provide a forum for the presentation and exchange of views by governments, intergovernmental organizations and non-governmental organizations, including MNCs, labor, consumer and other interest groups;
- (d) Undertake work leading to the adoption of specific arrangements or agreements in selected areas pertaining to activities of MNCs;
- (e) Evolve a set of recommendations which, taken together, would represent a code of conduct for Governments and MNCs to be considered and adopted by the Council, and review in the light of experience the effective application and continuing applicability of such recommendations;
- (f) Explore the possibility of conducting a general agreement on MNCs, enforceable by appropriate machinery, to which participating countries would adhere by means of an international treaty;
- (g) Conduct inquiries, make studies, prepare reports and organize panels for facilitating a dialogue among the parties concerned;
- (h) Organize the collection, analysis and dissemination of information to all parties concerned; and
- (i) Promote a program of technical cooperation, including training and advisory services, aimed in particular at strengthening the capacity of host, particularly developing, countries in their relations with MNCs.⁶⁰

Furthermore, the commission would hold one session per year and special sessions or working group sessions to deal with specific questions as they arose. An annual report would be submitted to ECOSOC by the commission and special reports would be issued on specific subjects.⁶¹

(B) *Information and Research Center on MNCs*

The Group's Report also recommended that an Information and Research Center on MNCs be established. The U.N. Secretary-General proposed that the center be organized as a full-fledged autonomous center within the U.N. system and that it be headed by an Executive Director appointed by the Secretary-General. This center would be established as soon as the decision to create the commission on MNCs was made by ECOSOC.⁶²

58. *Id.* at 57.

59. *Id.* at 58.

60. *Id.* at 57.

61. *Id.* at 58.

62. *Id.* at 11-12.

The Group was motivated to make the recommendation for the establishment of the center by the lack of competent information concerning MNCs. The Group expressed its difficulty in getting "useful, reliable and comparable information on many aspects of this subject" throughout the duration of its study.⁶³ In particular, there is a dearth of information concerning restrictive business practices, transfer of pricing and taxation, legislation and policies of both home and host countries, geographical and industrial distribution of activities of MNCs, transmission of technology and financial flows, organization, structure, ownership and global strategies of MNCs and the effects of MNC's activities on national and international development. The purpose of the center would be to rectify this dearth of material by collecting, analyzing and disseminating information and conducting research for the commission on MNCs. The center would thus provide administrative and substantive services for the commission.⁶⁴

The center would coordinate work on the information and reporting procedures. The desirability of an agreed international accounting standard to be devised by an expert group would be given special consideration. Another important role of the center would be to engage in operational activities in technical cooperation by accommodating within its set-up an advisory unit, consisting of inter-disciplinary teams of economists, engineers, lawyers, social scientists and others. This advisory unit would be made available by the U.N. to requesting governments to assist them in evaluating investment proposals and, if desired, to provide technical advisory support to the governments in their negotiations with MNCs.⁶⁵

It is not surprising that on the whole, the Report is a compromise between the views of the various persons that constituted the Group. However, it appears that the Group was aware of this, as it declared that its Report should be seen as "the first step in a comprehensive program of study, discussion, negotiation and practical action which will unfold in the years to come."⁶⁶ In fact the Group admitted that an appropriate longer term objective would be the conclusion of a general agreement on MNCs having the force of an international treaty and containing provisions for its implementation. Notwithstanding, "[t]he world community should not have to wait until such a general agreement is finally concluded"⁶⁷ Therefore, the Group supported the work going on in different U.N. agencies on such issues as transfer of technology, restrictive business practices and harmonization of tax and labor laws, which when taken together with its recommendations would be a useful, albeit temporary remedy for the problems brought about by MNCs.⁶⁸

It is interesting to note the Group's Report has come under attack from a number of quarters, not excluding even members of the Group!⁶⁹ For example, a U.S. comment on the Report described it as negative and partial, with emphasis devoted largely to restricting MNCs, "rather than (to) constructive measures for ensuring that capital and technology are as free as possible to flow on a world-

63. *Id.* at 53.

64. *Id.* at 54.

65. *Id.* at 53, 54.

66. *Id.* at 52.

67. *Id.* at 54.

68. *Id.* at 54.

69. *See, e.g.*, the comments by individual members for the Group, at 99-161.

wide basis in order to find their most productive uses.”⁷⁰ It added, “The report reflects a strong bias in favor of governmental as opposed to private decision making. It shows little awareness that private foreign investment must yield a reasonable rate of return or it will be withdrawn.”⁷¹ Consequently, the fear was expressed in the comment that implementation of some of the recommendations in the report would “reduce the flow of overseas investment with consequent reductions in the rate of development in the LDCs.”⁷² One can expect similar observations on the Report from the other home countries of MNCs. But as a noted authority on the subject has observed, “. . . The tensions created by the spread of multinational enterprise cannot be solved by facilitating its operations.” Hence harmonization is a side issue, as are most proposals for “codes of good behavior.”⁷³ According to Professor Behrman, “[t]he required orientation is that of willingness by Governments to agree on means of sharing the benefits of international production among and between the advanced and developing countries. Such an attitude requires a restructuring of the international economic order along lines reflecting the shift in the preeminence from international trade to international production, from market based decisions to those of the multinational enterprise, and from the policy leadership of the United States to nations which do not have their policies rooted in classical economic theory.”⁷⁴

One can readily conclude that this charge which proposes that the basis of the new international economic order should not be multilateral non-discriminatory trade and conduct but selective discrimination has not fallen on receptive ears. Such selective discrimination would be based on the recognition of the inapplicability of the law of comparative advantage in situations where factors more readily, are under the direction of single large enterprises, and are constrained by both labor and government.⁷⁵

The day is still a long way off when states would agree to use the various forms of international business to achieve international distributive justice through the establishment of an organization for international industrial integration between governments and business on selected key sectors, and for consultation concerning the location and development of these industries all over the world. Until then, perhaps the recommendations of the Group, though not a panacea, might prove to be a useful palliative for the problems of the multinational enterprise in a world of apparently invincible sovereign states.⁷⁶

Conclusion

Much of what is written about MNCs these days is a mixture of truth and exaggeration. Though there have been proved atrocities committed by MNCs, there is little evidence to suggest that they have become monsters devouring the nation-state piece by piece. Therefore, there is no actual necessity to establish a special mechanism to bring the beast to heel, regardless of how desirable control may be.

70. Cf. *Current Status of International Studies on Multinational Corporations (MNCs)*, U.S. Department of State (Sept. 16, 1974) at 2.

71. *Id.*

72. *Id.*

73. Cf. *Hearings*, at 4; also, the comments of Juan Somavia in the *Report of the Group of Eminent Persons*, *supra* at 162.

74. *Hearings* at 6.

75. *Id.*

76. Cf. FATEMI & WILLIAMS, *MULTINATIONAL CORPORATIONS* 246 (1975).

The fact has to be stated that to the extent that MNCs trample on national sovereignty, the fault lies chiefly in the failure of states to assert their sovereign powers at all levels. The view that state sovereignty is an antiquated concept in the twentieth century is simply without foundation. It follows, therefore, that the problems arising from the activities of MNCs are not unique, but reflective of the different aspects of the general problems associated with foreign investment.⁷⁷ It has been suggested that because of the situation of confusion, uncertainty and chaos surrounding the MNC, "many sober heads call for creation of an international body that would provide the kind of public oversight of multinational corporations that governments normally provide at home."⁷⁸ However, what is needed is not a peculiar supervisory organ but a firm determination by *all* states, both home and host, to evolve a "law corporate" just like the medieval "law merchant," reflecting the new trends appearing in international economic relations—the struggle of the poorer countries to achieve international distributive justice. If this is not achieved, then one should expect re-enactments of the Andean Investment Code in many of the areas where MNCs now operate, however, distasteful such a forecast might be to the apologists of global corporations.

While the fact of visible contradictions among constituent members of regional economic groupings has to be conceded, no one can discountenance the increased awareness in Africa, Europe and Latin America for the enhancement of regional integration arrangements. The recently-created Economic Community of West African States is a case in point.

The establishment of a U.N. monitoring agency is meaningless without the cooperation of all States. If this measure, (which is actually a minimum one), does not succeed, MNCs had better start making preparations for tougher bargaining in the years to come. The bargaining will not be with spineless, weak and isolated countries but with blocs of countries, possessing uniform investment laws, policies and approaches to MNCs.

Shortly before the close of the XXIX Session of the U.N. General Assembly, the resolution on the Charter of Economic Rights and Duties of States was adopted by an overwhelming majority of 120 in favor to 6 against. Article 2 of the Charter guarantees the right of every State to regulate and supervise the activities of MNCs.⁷⁹ The effective regulation of MNCs by each State depends to a very considerable extent on the international cooperation of States. The alternative, hopefully remote, is confrontation of States. One can only hope that reason would prevail and mankind would be spared the bitter experience of another world war in its bid to resolve what is steadily becoming one of the major problems of our times.

77. Cf. *Report of the Council on International Economic Policy* at 17 (Wash. 1974).

78. Fatemi & Williams, *supra* note 76 at 233.

79. Cf. XIV International Legal Materials 255 (Jan. 1975).