

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 95.

MAY, 1947

No. 5.

INTERNATIONAL COMBINES AND NATIONAL SOVEREIGNS

A STUDY IN CONFLICT OF LAWS AND MECHANISMS

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I

"Innocents Abroad"

Jeremy Bentham, exasperated by the iniquities and inadequacies of the 18th Century law of evidence, once described the law as the "art of being methodically ignorant of what everybody knows."¹ Intelligent revamping of the exclusionary rules and other parts of the procedural common law has largely outmoded this as a fair characterization of Anglo-American municipal law. But it can still serve as an apt description of the current substantive status of international law.

For example, despite the persistent buffetings of reality, conventional international law still resolutely disclaims any real responsibility for the regulation of international economic affairs,² leaving those affairs to be determined fortuitously by commercial usage, or

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The views herein expressed are those of the author and do not necessarily reflect the views of the Department of Justice.

1. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 6 (Dumont tr. 1825).

2. The laissez-faire orientation of international law on commercial matters has been acknowledged as its most striking inadequacy. See BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 7-8, 11-12 (1944).

by some municipal law happily in appropriate "contact" with the business transaction in question, or by some transitory compact between sovereign states. Faced by a collocation of states varying in pith and power from Ethiopia to one of the Big Four, international legal doctrine can still cling fondly and delusively to an antiquated conception of the sovereign equality of states.³ Confronted with independent enclaves in the international community that have obviously obtained preponderant power in the economic sphere (such as international cartels and combines, shipping pools, or international commodity agreements), international law blithely continues to assert, first that states are unqualifiedly sovereign, and second, that only states can be the "subjects" of international law.⁴ Implicit in this notion of exclusivity has been the studious neglect of the fact that the state is an aggregation of individuals; this has resulted in ascribing to the state an exalted metaphysical status free of the moral and social limitations that are expected to ground the social intercourse of individuals and other kinds of groupings of individuals. In fascist lands, this trend was pushed so far as to obliterate completely the sensible concern of the state for the welfare of its citizens, and to make power and rapacity the effective mainsprings of international action and war its ideal manifestation; even in the more democratic countries, the theoretical gulf between the private individual and the idealized state still serves to deprive the sluggish and brackish waters of international law of the ability to draw on the refreshing and extensive streams of private law doctrine and experience.⁵ It has become apparent that the obligations and duties which are generated by international combines and similar business associations are on an economic plane different from, and frequently contradictory to, the political loyalties and allegiances implicit in the concepts of nationality

3. See DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920). This is, of course, no criticism of the democratic tenet, part of the current ambiguous connotation of sovereign equality, that states, like individuals, are equal before the law.

4. See, for a general discussion, POLITIS, *THE NEW ASPECTS OF INTERNATIONAL LAW* 18-31 (1928); Timberg, *An International Trade Tribunal*, 33 *Geo. L. J.* 373, 394-8 (1945). Theoretically, individuals and other legal "persons" may be the "objects" of international law, *i. e.*, like pieces of property they may be the "object" of relationships certified by international law. However, multiplication of the objects of international law serves only to increase the number of chessmen on the international chessboard, whereas the real need of international law is for more effective chess players ("subjects").

5. See LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 44, 48, 49 (1927). This reluctance to draw upon private law analogies has been attributed to a "positivist" temper of mind on the part of international lawyers. This is doubtless verbally correct, but it would seem to be a somewhat provincial type of positivism that will overlook the facts of everyday life and plump so vigorously for an abstract Hegelian concept of sovereignty.

The recent Nuremberg trials are an indication that individuals will be held amenable to international criminal law. This may be a prelude to rendering individuals subject, under international law, to contractual and other civil liabilities.

or citizenship. The law, however, is still in the difficult process of being weaned away from the proposition that these international entities are nationals of some state or other, or that their "citizenship" has other than purely domiciliary implications.⁶

These shortcomings of international law are but reflections of the disparity between the territorially fragmented nature of legal systems and the integrated nature of business organization and economic practice. Businessmen have recognized (or at least have institutionalized without recognizing) the international interdependence of economic life and have, accordingly, developed international frames of organization for international economic activity. Lawyers, on the other hand, have adhered to rigidly compartmentalized national legal systems, which are unable to cope with an economic order of international dimensions. Since social organisms like combines are impossible without some type of governing law, however rudimentary and inconsistent, it is not strange that international combines have eclectically pressed into their service whatever "law" would serve their purposes. It is also no cause for surprise that any law which is called into being solely by the necessities and ambitions of an international corporation does not, as a matter of inherent necessity, conform to the social and political interests that prevail within the boundaries of the respective national states.

This article deals with perhaps the most potent of the newer institutions dominating the international economic scene, the international combine. An international combine may be roughly defined as a business organization characterized by (a) business operations in two or more countries, (b) a unified top direction, and (c) legally distinct but economically dependent business units subject to that unified direction.⁷ The unified top direction may take the form of (1) a holding company; (2) an operating company maintaining a parent-subsidary relationship to the dependent units; or, more rarely, (3) personal identity of top management personnel (as in the case of an American "trust"). So pervasive has become the practice of separately incorporating the dependent units of the combines, that inter-

6. See NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 146-7 (1943); Baty, *The Rights of Ideas—and of Corporations*, 33 HARV. L. REV. 358 (1920); Hamilton, *The Economic Man Affects a National Role*, 36 AM. ECON. REV. 735 (1946); Timberg, *Corporate Fictions*, 46 COL. L. REV. 533, 571-4 (1946).

7. The German analogue of the combine, the so-called Konzern, has been defined as a "merger of firms which remain juridically independent of one another into a single unit for the purposes of productive technique, administration, trading, or (especially) finance." LIEFMANN, *CARTELS, CONCERNS AND TRUSTS* 225 (1932). The definition here used is contrary to the British usage, where combines include cartels. See PLUMMER, *INTERNATIONAL COMBINES IN MODERN INDUSTRY* 18 (1938). In fact most of Plummer's book, despite its title, is devoted to what, in American literature, are called "cartels."

national combines may in the usual case also be validly described as multinational corporations.⁸

This article will attempt to indicate:

First, why, within its own sphere, the international combine has, to a large extent, wrested the substance of sovereignty from the so-called sovereign state;

Second, the extent to which it has become difficult and improper to ascribe to the combine (or its corporate members) the quality of nationality and citizenship, which characteristically implies a type of dependence on the political sovereign and subservience to the public interest represented by that sovereign;

Third, the consequent inability of national states and national systems of law and polity to cope with the activities of international combines;

Fourth, the further consequent necessity for both national states and the international community to cast off the illusion that the public interest in international economic activity is adequately safeguarded by national action alone, and to undertake some measure of conserving that interest in their own behalf and on their own initiative.

Unawareness of the complex significance of the international combine is not the exclusive prerogative of the international lawyer. Although the activities of international cartels have aroused considerable discussion among economists, lawyers, and those who are thoughtful about the art of politics, this has thus far not been true of the acts of international combines. Yet international cartels (loose-knit combinations of potentially resurgent competitors) are made both possible and perdurable by the fact that the membership of the cartels consists of large international combines (tight-knit combinations, frequently of liquidated competitors).⁹ Cartels are re-

8. As to the factors accelerating this process, see pages 583-587 below. Consolidations and mergers which have obliterated all independent legal units (see VON BECKERATH, *MODERN INDUSTRIAL ORGANIZATION* 221 (1933)) do not as a rule obtain on the international scene. However, the conclusions applicable to combines apply generally to the relatively infrequent cases of large single corporations with multinational stock ownership, or with extensive foreign investment holdings of a non-corporate nature (such as unincorporated sales agencies or branches, real estate, etc.).

9. *E. g.*, I. G. Farben, Imperial Chemicals and du Pont in numerous chemical cartels; I. T. & T., Siemens-Halske, and others in the communications equipment industry. The reader will find the references to the illustrative examples given in footnotes 9 to 17, in addition to others of a like nature, in PLUMMER, *op. cit. supra*, note 7; HEXNER, *INTERNATIONAL CARTELS* (1945); BERGE, *CARTELS: CHALLENGE TO A FREE WORLD* (1944); *Hearings before the Sub-Committee on War Mobilization of the Senate Committee on Military Affairs on Sen. Res. 107 and 702, 78th Cong.*, 2d Sess. (1944) (conducted by Senator Kilgore); *Hearings before Senate Patents Committee on S. 2303 and 2491, 77th Cong.*, 2d Sess. (1943) (conducted by Senator Bone).

garded as transitory in character and as needing constant renewal, whereas combines are presumptively permanent in operation, and difficult to dissolve. In fact, the combine has been regarded by imaginative industrialists as the ideal form, the "final cause", towards which the transitory and impermanent cartels were evolving.¹⁰ In some industries, the combine has already supplanted the cartel as the most inclusive framework of international economic organization, covering the preponderant part of the industry.¹¹ Furthermore, many cartels do not rely solely upon contractual commitments among their members but are largely held together by reciprocal stock participations on the part of their members;¹² the difference in staying power between a cartel characterized by both contractual and corporate interconnections of this type, and one characterized by contractual relationships alone, is the difference in tensile strength between ordinary and reinforced concrete. Partial adoption of combine machinery to procure added smoothness of operation for international cartels is also to be found in the widespread cartel practice of forming corporations for the purposes of buying up and removing from production excess plant capacity,¹³ developing patents and technology,¹⁴ engaging in joint manufacturing and sales operations,¹⁵ or otherwise acting as the cartel's administrative agency.¹⁶

One important advantage of the tight-knit combine edifice is that it is conducive to increased secrecy of business operations. Secrecy of operation, in turn, enables business relationships to escape observation and hence correction at the hands of the law or the state. The reason for this lies not only in a more disciplined and cohesive organization but also in the fact that legal systems involve, in one

10. See *MOND, INDUSTRIES AND POLICIES* 236 (1928); Hjalmar Schacht, as quoted in *PIOTROWSKI, CARTELS AND TRUSTS*, 55 *et seq.* (1933).

11. *E. g.*, the International Nickel Company in the nickel field; Climax Molybdenum in the field of molybdenum; La Forestal Land, Timber and Railways, Ltd., in the quebracho industry; Borax Consolidated and American Potash and Chemical in the borax industry.

12. *E. g.*, I. T. & T. and L. M. Ericsson in the communications equipment field; S. K. F. in the ball bearings industry.

13. *E. g.*, Alliance Aluminium, the Swiss company that was the central agency of the international aluminum cartel; the Swiss joint stock company organized to eliminate excess nitrogen producing plants.

14. *E. g.*, Magnesium Development Corporation in the magnesium field; the International Hydrogenation Patents Company, Ltd., organized in Liechtenstein to carry out cartel commitments on the part of I. G. Farben, Standard Oil, and Royal Dutch Shell.

15. *E. g.*, the various companies signifying the cartel cooperation of du Pont, Remington and I. C. I. in Latin-America; Canadian Industries, Ltd., performing a similar service in Canada; the Diamond Syndicate in London in the field of industrial diamonds; the Courtaulds' manufacturing subsidiaries in the rayon field. See, in this connection, *United States v. U. S. Alkali Export Association*, 58 F. Supp. 785 (S. D. N. Y. 1944); *WARD-JACKSON, A HISTORY OF COURTAULDS* 138-9 (1941).

16. *E. g.*, the International Cable Development Corporation (creature of the Principality of Liechtenstein) in the field of electric cables; the Phoebus Industrial Company for the Development of Lighting, a Swiss corporation operating for the international incandescent lamp industry.

way or another, the regulation of "relationships" between "legal entities." The formation of a combine, since it obliterates hitherto independent entities, automatically destroys the legally cognizable relationships existing between them.¹⁷ Thus, for example, a proxy fight in a large combine may result in a redistribution of patronage, outside contracts and emoluments that would make any large political machine lick its chops, yet the law and the state are powerless to intervene, except as nominal referees, because such a proxy fight involves only the "internal affairs" of the corporation—a single legal unit—and involves no injury to other "persons" with legal standing. Conflicts over individual company policies may involve economic and social consequences which, if they were discussed in a legislative forum, would result in extended hearings and debates; yet, if done within the corporate framework, the law is content to pass them by, whatever their scope, with the notation that they are matters within the "discretion" of the company's officers and directors.¹⁸

II

A Few "Economic States"—Their Claim to "Recognition"

The test for the recognition of a political government is that it is habitually obeyed by the bulk of the population and exercises authority within its territory and is willing and able to fulfil its international obligations.¹⁹ Applying these standards in the economic sphere, it is hard to see how international combines have avoided "recognition" at the hands of international law. Deft indeed, also, must be the rationales whereby combines such as the following man-

17. Concurrently with this development has taken place a shrinkage in the field of relationships which can truly be described as contractual, due to such factors as the use of standard forms, the vast coverage of newer types of collective labor and other agreements and the large powers of the parties involved. See Isaacs, *The Standardizing of Contracts*, 27 YALE L. J. 34 (1917); Duguit, *Collective Acts as Distinguished from Contracts*, 27 YALE L. J. 753 (1918). Because of the fact that the bulk of commercial law has evolved in terms of more conventional criteria of contract, the displacement of contract relationships by status relationships has presented an additional obstacle in the way of the law's taking account of a contemporary economic institution like the combine. Recent developments in municipal law, such as those which ground legal liabilities on a course of dealings or other circumstances as well as on an exchange of words and commitments are encouraging indications of a new-found resiliency in the law that may be able to cope with this disappearance of contractual elements in contemporary business life. Cf. *American Tobacco Company v. United States*, 66 Sup. Ct. 1125 (1946).

The dissenting voice of Captain Oliver Lyttleton, for ten years manager of the international tin cartel, may be noted. He has said that the managers of single large monopolistic firms like Unilever or I. C. I. cannot evade their social obligations, and that it is cartel management which needs watching. *The Economist*, Apr. 5, 1941, pp. 436-7.

18. Defective as the law is in appraising the social and political implications of corporate and combine "legal personality" from the standpoint of external relationships, it is probably even more deficient in taking account of the internal administrative workings of that "personality."

19. Lauterpacht, *Recognition of Governments*, 45 COL. L. REV. 815 (1945).

age to maintain a theoretical "nationality" and loyalty to a "sovereign" state that would seem to be continually belied by their day to day operations:

(a) The world's most important artificial waterway is run by an Egyptian joint stock company; the majority of that company's shares and directors are French. Despite the legally most plausible Egyptian and French "nationality" of this company and its majority control, the Suez Canal Company has been traditionally assumed to be an instrument of British trade, colonial and foreign policy; certainly its development has not been primarily dictated by its geographical location in the Mediterranean-Moslem world. Perversely enough, the international ownership of the company's stock was only recently advanced by the United Kingdom government as a reason why it was not in a position to credit, in favor of the United States on the United Kingdom's Reverse Lend-Lease account, toll and other charges incurred by American vessels passing through the Canal.²⁰

(b) The most critical food shortage throughout the continent of Europe during the past war was in fats and oils. That field, encompassing among other things the manufacture of soap, candles, and margarine, is dominated by the Unilever combine, a corporate aggregate including over 600 companies. Unilever has crushing and refining factories and wholesale and retail outlets all over the continent of Europe and in the Dutch East Indies; it dominates the economy of West Africa. It has been said of it that "it controls the working life of the vegetable oil industries almost as completely as the Soviet monopolizes the working life of the Russian people. It embraces every activity from the production of the raw materials to the retail selling of finished goods. And curiously enough both the Soviet and Unilever catch whales in the Antarctic. For the investor and economist, however, the significant feature is that the more enlightened and efficient Unilever and the Soviet become, the more difficult it is to investigate their operations and to analyse their accounts."²¹ Unilever is controlled by twin holding companies, one incorporated in England and one in Holland; the directorates of these two private companies interlock, and each of them controls 50% of the voting power of the other.²² Does this type of dual national control augur a further development which will ultimately merge the British and Dutch empires into a political condominium that will match their current economic interweaving?²³

20. See WILSON, *THE SUEZ CANAL* 15, 22, 170 (2d ed. 1939).

21. *The Economist*, June 11, 1932, p. 300.

22. See PLUMMER, *op. cit. supra*, note 7 at 41-46.

23. This economic partnership is reminiscent of the situation obtaining in the 18th Century, when a third of the capital of the English East India Company, and extensive

(c) A Swedish industrial magnate committed suicide in a Paris penthouse in 1932. His act unnerved banking and investment houses in financial centers from Boston to Istanbul, precipitated the insolvency of A/B Kreuger and Toll, a Swedish company dominating the match industry of the world, and 150 Kreuger subsidiaries located in twenty-eight countries, and revealed that Kreuger had swindled the investing public of over half a billion dollars. It even affected adversely the financial standing of many countries which had tied in their state match monopolies to the Kreuger empire; like the shrewd private bankers, their governments had floated bonds and made financial commitments to an enterprise whose major assets were apparently the Kreuger talent for secrecy and the gentlemanly reluctance of businessmen to probe into his reticence. Bondholders' committees and trustees sent representatives all over the continent of Europe in one of the most fascinating and frustrating treasure hunts of all time—where and how valid were the assets of the Kreuger companies? Thirteen and a half years later, the trustees of International Match Corporation—the United States company which was the largest subsidiary of the Kreuger empire and had an annual sales volume of 14 million dollars—finally completed their report.²⁴

(d) The management of one of the largest drug chains in the world, incorporated in the United States, had for years been able to show non-existent values and inflated profits, by fictitious accounting entries covering inventories in non-existent Canadian warehouses, miraculous shipments *entirely by truck* from Johannesburg, South Africa, to New York City, etc. The accounts of this company were audited by the firm that was the leader of the American accounting profession; yet the fraud on the nation's investors continued for years and was finally uncovered by indirection.²⁵

(e) N. V. Phillips Gloeilampenfabrieke before the war was a Netherlands holding company in the radio and electrical equipment field, owning and directing approximately eighty subsidiaries located in Europe and South America. Sensing the imminence of the Axis onslaught, the Phillips executives moved their head offices to Curacao in the Dutch West Indies. Subsequently, the companies located in the Axis and the Axis-overrun countries continued to remain under the corporate aegis of the Netherlands corporation, which was first

stock interests in the Bank of England, belonged to the Dutch and other foreigners. See DU BOIS, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT* 283, 308 (1938).

24. See PLUMMER, *op. cit. supra*, note 7 at 49-52; Time, Nov. 5, 1945, pp. 88, 90.

25. See SEC, *REPORT ON INVESTIGATION IN THE MATTER OF MCKESSON AND ROBINS*, 3-4, 13 *et seq.*, 41 *et seq.* (1940).

placed under the control of executives of Phillips' German enterprises and ultimately of personnel even more subservient to the Nazis. However, the Phillips executives also ranged themselves on the side of the angels by drafting an elaborate British trust covering the British Empire subsidiaries of their organization, and an equally convoluted American trust for their United States and Latin American enterprises. When war came, therefore, the leading executives of the organization were able to leave Holland and assume active management of the British and American trusts and of the Curacao companies. With characteristic corporate impartiality, Swiss companies appeared as subsidiaries either of the Curacao or the Netherlands holding company, and Argentine subsidiaries emerged under both the English and the American trusts.²⁶ Well may such corporations be envied their amoeba-like fecundity and the psychological and political ease with which they are able to change and neutralize their "nationality."

III

One Economic Universe Lost in the Legal Galaxy

The antithesis, or at least lack of correlation, between corporate purpose and national policy in the foregoing cases is clear. The Suez Canal and Unilever Companies, to the extent that they exploit important natural resources for the benefit of major industrial powers, can hardly be expected to be passionately devoted to the welfare interests of the minor colonial states where those resources are geographically placed.²⁷ Kreuger and Toll, and McKesson and Robbins, are examples of how readily corporations of an international character can become instruments for violating a national policy not challenged in any civilized country—that of protection against fraud. The saga of N. V. Phillips indicates how complacently a multi-national corpo-

26. See EDWARDS, ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS (1944), Senate Subcommittee on War Mobilization, 78th Cong., 2d Sess., Monograph I (1944), pp. 70-1.

27. As far back as ADAM SMITH, WEALTH OF NATIONS, 601-603 (Mod. Library ed. 1937) it was pointed out that the British East India Company's interest as a commercial monopolist must necessarily run counter to its interest as the political sovereign of India. Its interest as a monopolistic trader was in buying Indian commodities cheap in order to sell at an enhanced profit, while its interest as the sovereign of India is to enlarge its revenues by buying dear in India. In an era when the East India Company no longer has sovereign political responsibility for the government of India, the incompatibility between trader and sovereign still remains.

For an interesting analysis of how the exploitation of nitrates by the Guggenheim interests in Chile kept on showing financial profits to those interests, favored local public officials and local representatives of the nitrate companies, but afforded no corresponding return in the way of revenues or employment to the native economy, see McConnell, *The Chilean Nitrate Industry*, 43 J. POL. ECON. 506, 511 *et seq.* (1935). The author's conclusion is that "government stability in Chile becomes a problem in corporation finance." *Id.* at 528.

ration can detach its functioning from that most fundamental of national crises—the conduct of war; yet it is notorious how subtly and tenaciously other international combines can become the enemy working within our midst.²⁸ Corporations with global connections, singly or in concert, have been able successfully to ignore or to circumvent numerous other economic and social policies of similar broad import, including taxation, price control, the stockpiling of essential materials, antitrust policy, prohibitions against trading with a resistant enemy, and disarmament restrictions sought to be imposed on defeated enemies.²⁹

In fact, opposition or indifference to the policies of specific national governments is inherent in the nature of the international combine. A corporation, for example, cannot be a subservient vassal of the German dynastic state without at the same time being the enemy of those nations with which Germany is at war. It is only politically neutral or apathetic multi-national corporations which can avoid conscious disloyalty to some of the national states on whose economy they impinge; patriotism to any one nation inevitably brings in its train some disloyalty and disservice to other members of the international community.

It is not feasible to generalize concerning the extent to which international combines are corporate Switzerlands, with the bland "economic man's" impartiality to the political and social interests of specific national states, or the extent to which they are conscious economic janissaries of militant governments, equipped to win for those nations either peace-time economic gains or war-time political advantage. The answer to this general question is dependent on a number of local circumstances, such as the national predilections of particular corporate managements, the basic economic and political philosophies of the governments and peoples of the respective states, the nature of the corporation's operations, the significance of those operations to the state. Because the United States has a non-dynastic political system and an economy in which international trade plays a significant but not a crucial part,³⁰ we have been inclined to let our

28. The fact that every major power involved in the last war has had to enact legislation to take care of enemy property is proof of this. See also *United States v. Chemical Foundation, Inc.*, 294 Fed. 300, 308 (D. C. D. Del. 1924), *aff'd.*, 5 F. 2d 191, 197 (C. C. A. 3d 1925).

29. This essay does not deal with situations where it is the cartel alignments of a corporation that lead it to flout its own national interests. Those situations have been dealt with in BERGE, *op. cit. supra*, note 9; EDWARDS, *ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS* (1944) (a study for the Subcommittee on War Mobilization of the Senate Military Affairs Committee); MORGENTHAU, *GERMANY IS OUR PROBLEM* 24-39 (1945).

30. See, *e. g.*, FRANK, *SAVE AMERICA FIRST* 109 *et seq.* (1938). It is of course true that mere quantitative evaluations of the volume of American foreign trade do

international combines drift along the path of political neutrality. The Germans, with their highly organized militaristic system, considerable dependence on foreign trade, and state-dominated political philosophies, have tended to convert the multi-national corporations under their aegis into direct-action implements for nationalistic economic and military domination.³¹ The British and the Dutch, with their overwhelming interest in international trade, long colonial history, and preoccupation with stabilizing their financial security,³² have quite understandably promoted a working collaboration between their multi-national corporations and the home government which affords these corporations substantial support.³³

The incongruity between the objectives of the national state and the international combine, and the superior effectiveness of the latter institution, is primarily the result of a new set of political factors which have upset the hitherto prevailing harmony (or at least lack of too troublesome incompatibility) between international commercial transactions and the *lex mercatoria* that governs them. The rise of nationalism, with its accompanying dogma of sovereignty, infused into the law a strong current of territorial limitation and locally divergent political interests that was inconsistent with the growing interdependence and integration of the international economic community.

In this lack of correlation between separatist national systems of law and an integrated international economic system, the ultimate loser was not the international economic system. In areas where national law had incomplete coverage, the international business community was able, almost without design, to take advantage of gaps and discrepancies; for the most part, however, the international community dispensed with governmentally accredited systems of law and adopted privately agreed-on codes of business conduct and perform-

not give a proper picture of the qualitative importance of that trade to the American economic system. RÖPKE, *INTERNATIONAL ECONOMIC DISINTEGRATION* 30, 31, 33 (1942).

31. Cf. MARSHALL, *INDUSTRY AND TRADE* 621 (1920), which says that British cartels were less under influence of military discipline than German cartels.

32. See COLIN CLARK, *THE CONDITIONS OF ECONOMIC PROGRESS* (1940); KAHN, *GREAT BRITAIN IN THE WORLD ECONOMY* (1946).

33. It remains to be seen how far the British Labor Party regime will reverse this trend. Despite the hostile attitude of Herbert Morrison towards cartels (see *The Economist*, July 31, 1943), the British Trade Union Congress has taken the view that industrial combination is inevitable but that the state should supervise and regulate industrial combinations, with the ultimate socialist end in view of nationalization.

All the generalizations in this paper are necessarily imperfect, subject to contradiction in specific cases, capable of qualification probably in all cases. Any boastful chauvinist reflections based on the last paragraph, therefore, should disappear in the face of their obviously statistical and approximative nature. Corporate organization remains in large measure a personalized and feudal framework conducive to a high degree of fortuitous movement and voluntary deviation.

ance. The real loser was the national state. First the nationalist state discovered that its possession of political and legal sovereignty was insufficient to keep under its control instrumentalities of business which were so largely operating outside its boundaries. Subsequently, it found its theoretical position of dominance and stability subtly undermined by the insinuating and persistent pressures of integrated business units addressing themselves to the practical and selfish necessities of international trade.

This was not the situation in the medieval or pre-nationalist period. That period was largely one of individualized sale and barter transactions, consummated in specific locales, with the principal parties to the transaction more or less directly confronting each other. Since trade interchanges between remote places was only an incidental feature of the feudal pattern and was free from the land basis that so largely grounded feudal relations, traders were able to select special trade enclaves within existing feudal boundaries and institutions, acquire special immunities for those enclaves, and apply to the transactions carried on within those enclaves those selective compounds of business usage, reminiscences of Roman law, and concepts of natural justice, that constitute the law merchant and the codes of admiralty. Who would say these merchants nay, particularly if they could help fill the coffers of their neighboring feudal lords?

The emergence of strong national states bent on careers of colonial exploitation naturally changed the patterns of international trade. Specifically authorized joint ventures yielded to more permanent joint stock and trading companies. These companies were the consciously appointed ambassadors of the foreign economic and diplomatic policy of their national sovereigns, although they doubtless frequently astonished the home authorities by the zeal, irregularity and latitude with which they executed their missions. Doing business in economically under-developed and legally less sophisticated areas, with the sanction of superior physical power, these companies encountered no legal factors which got in the way of their national allegiance and conformity to their own national interest, although any entity given such a large delegation of power necessarily obtained considerable opportunity for self-exploitation. Any conflicts between different systems of national law were but minor (albeit direct) corollaries of the larger clash between national states contending, under a mercantilist system, for political and economic power.

Gradually traders abroad transformed themselves from mere instruments of the national state into the main protagonists of international commerce, using the national state, if they had any occasion

for it at all, as their instrument. The dynastic state, with its eye so largely on political prestige, was gradually supplanted, in varying degrees in different places, by the modern welfare state with its increased diversity of interests and consequent inability adequately to supervise those manifold interests. Passive and submissive "underdeveloped" areas developed more active symptoms of nationalism and economic ambitiousness. The international division of labor became more of an international necessity and involved increasing contentiousness among the industrial and trading governmental powers and their private trade emissaries. International traders increasingly felt the necessity for order in their own commercial operations, and for an organized basis both of waging commercial war on competitors and of arriving at commercial treaties with them. The handling of these new necessities required a form of economic organization that would promote a security and stability in the commercial arena comparable to that achieved in the political realm. It was discovered that only a well organized and routinely accepted political state could insure internal order and provide the basis for external war and diplomacy. The discovery is not as yet verbally articulated, but it is being demonstrated in business practice that any unit desiring to achieve the same objectives in the economic arena does well to assume the proportions of an "economic state." The international combine is such an economic state, possessing an internationally integrated and regularized system of operation, but in no way cribbed, cabined and confined by territorial boundaries.

The only official law available to govern the operation of these international economic states (and for that matter international trade in general) remains, however, national law. That law is largely ineffective beyond the territorial boundaries of the national state and in consequence doomed to frustration and defeat in any effort to make the activities of the international trader conform to his sovereign's best interests. No more than the legal system of the feudal chatelaine could restrain or interfere with the activities of the merchant able to transfer his trade activities elsewhere, no more than the corporation law of a "sound" jurisdiction in our union can govern in what it conceives to be the public interest an interstate corporation able to take advantage of the laxity of the law of Delaware and New Jersey, is any one nation really able to cope with the activities of an international combine. This inapplicability of any official system of law does not imply the absence of law in international trade; it merely means that the parties to international commercial transactions by and large apply a private and reliable law of their own, which assumes the varying contours of codified

business usage arbitration, standard form contracts,^{33a} the selection of "appropriate" legal rules, the manipulation of conflict of laws criteria, not to mention the theme of his article—the internally binding law of the corporation.

It is not the purpose of this article to embroider this brief historical sketch. Rather the remainder of this article will deal with conditions as they now exist and will discuss the current disparity between the effectiveness of the national state and of the international combine. That disparity, and the reason why international combines do not possess the personal allegiance and amenability to state control which we expect of individual nationals, can be reduced to four major propositions:

(1) As a legal matter, the scattered geographic nature of the contacts and activities of international combines enables them to make a deliberate choice of forums and legal devices most suited to their objectives. The regulatory power of national states, on the other hand, is strait-jacketed by legal systems of restricted scope and flexibility.

(2) On the economic side, international companies are no longer the expression of a mercantilistic philosophy (*i. e.*, that all they do is for the benefit of their sponsoring sovereign) and of an exclusively mercantile orientation. They have become an expression of a process of vertical economic integration affecting all phases of production as well as marketing, that is based primarily on economic considerations and only incidentally related to political ones.

(3) On the administrative side, the corporation is endowed with more limited and hence more precise functions and organization than the state. Consequently it can be more effective and can be manipulated more readily than the democratic state, which is an unclearly organized tug-of-war between all sorts of conflicting pressure groups and forces trying to push it in various directions.³⁴

(4) As a matter of logical analysis, corporate personality does not represent a single logical fiction, but is an accretion of many fictions, the number, scope, applicability and maneuverabil-

33a. These three are major subdivisions of what is most appropriately called "droit Corporatif." See del Marmol, *Le Droit Corporatif de La Vente Commerciale*, 63 *REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE* 601 (1936).

34. This generalization has to be modified somewhat for the totalitarian states, which have a more unified political drive and animus than the democratic ones and have been run by an opportunistically aligned gang of freebooters that usually includes some members of the high corporate elite.

ity of which can only be adequately appreciated by a highly skilled technical expert fully aware of the fictive mechanism and of the facts of the individual business enterprise. Government officials have no opportunity to attain this exhaustive awareness.

England's dukedoms, marquisesates, and like embodiments of political power and social prestige were originally largely acquired by the people in the community who could write—the "clerks" who were proficient in literary symbols. In the same way, the great satrapies and fiefs of modern economic life have largely been conquered by the economically literate, the "financiers" with initiative and competence in the field of corporate symbolism—and their employees. The moving rationales behind this development (an allegorical restatement of the fourth proposition) have been dealt with by the author in a separate article.³⁵ The first three propositions will be elaborated in the next three sections of this article.

IV

Point Counterpoint—The Juridical Contrast

The relative impotence and immobility of the national state, and the correlative vigor and maneuverability of the international combine, can best be illustrated by a maritime analogy. Let us regard the mass of public and private interests that a state is expected to protect as a long, irregular, corrugated coastline. This coastline of socially acceptable interests is guarded by the state's legal system, which may be likened to a coastal system of defense—a scattered and poorly coordinated series of shore batteries dotting long sweeps of unprotected coastline. From time to time, the coastal defense launches some legal act intended to protect an accredited interest; this, let us say, is a torpedo ejected from the shore battery, a torpedo, however, of a make that cannot submerge and can travel only near the surface of the water. The international combine, on the other hand, can be compared to a submarine, and those of the combine's actions which contravene national policies and interests may be regarded as analogous to the smuggling of contraband by the corporate submarine. The legal torpedoes are launched from fixed judicial and legislative moorings. While the torpedoes may attain a certain amount of variation in course and speed, legal radar has not yet given them the mobility that is possessed by the corporate submarine, which can rely on all sorts of speedy turns and diversions.

35. Timberg, *Corporate Fictions*, 46 COL. L. REV. 533 (1946).

Situations arise where an international combine desires to ward off the impact of national policies opposed to its own course of action. Like a submarine engaged in smuggling contraband and desirous of avoiding legal gunfire, it has three main alternatives open to it. First, relying on the length of the coastline (the multitude and variety of the interests which the state must police) and the small number and weak staffing of the coastal emplacements (government supervisory and regulatory personnel), it can resort to economic harbors not policed by the state, or rely on periods of time in which state surveillance is dormant, for the overt and practically unconcealed fulfillment of its illicit mission. Thus, for example, the combine may take advantage of the fact that the only contractual situations likely to be litigated are those where one of the contracting parties finds it advantageous to go back on its contract. In the remainder of cases, where the combine and its contractees live honorably up to their mutual intention of circumventing the laws or policies of a particular jurisdiction, public policy can continue to be politely frustrated as long as the parties remain in unlitigated agreement, and this is the characteristic state of the great bulk of commercial transactions.

Second, if the international combine finds that it must pass through economic channels that are well guarded by national coastal patrols, it can conceal the true nature of its operations, *i. e.*, submerge its business maneuvers below the level of surface visibility. The inadequate extent to which corporations disclose their policies, the failure of the accounting criteria underlying balance sheets and profit and loss statements to supply an adequate basis for economic and social appraisal, and the condensed nature of the data furnished stockholders in annual reports, are indicative of what the corporation may do in this connection. Another illustration is the frequency with which basic constitutive (but illegal) arrangements for an industry (*e. g.*, division of industrial fields and geographic areas) go under the decorative and innocuous heading of patent license agreements or collective trademarks.

Finally, the corporate submarine can take advantage of its knowledge that certain ports along the coast have a more complacent and friendly attitude toward its activities than others.³⁶ It frequently happens in international business and trade that one national legal system (one set of coastal guards) will regard the corporate submarine as engaged in the transportation of entirely legitimate cargo, while another legal system regards the cargo as contraband and the submarine as a transgressor. In such cases, the corporate submarine will propel itself towards the friendly legal harbor, *i. e.*, a jurisdiction which

36. Venality has become a decreasing contingency in these matters.

will apply favorable legal doctrine to the validation of the dubious errand on which it is engaged. It is for this reason that combines resort to the device of separate incorporation in foreign countries and deliberately select the foreign jurisdiction in which they will execute or perform contracts.

In fact, the submarine may gain more than passive toleration; it may get positive aid from one sovereign in changing the attitude of another sovereign jurisdiction originally hostile to its program. In such circumstances, when the favoring jurisdiction comes to the aid of the corporate submarine, it fortunately now, however, does so politely and decorously by sending up a diplomatic flare, or firing (or filing) a purely formal political salvo (or protest).³⁷

The corporate submarine can also guide itself by knowledge of the legal restrictions that limit the effective range of the coastal batteries. While improvements in national law have made it possible to aim effectively at targets long distances away from shore, there will continue to be jurisdictional limits to the effective range of legal gunfire, as long as jurisdiction continues to be based so largely on territorial considerations. Thus, effective relief extends only to parties within the jurisdiction of the court or agency; it does not extend to the foreign natural or artificial persons who financed or otherwise sponsored the bootlegging conspiracy, if they have avoided the jurisdiction of the domestic court and remain smugly within their foreign territorial confines.³⁸ Or, even where jurisdiction of the parties technically inheres in a tribunal, domestic policy cannot touch transactions where too many acts and parties are out of "contact" with the forum.³⁹

Alternatively, the corporate submarine may seek to repel the explosive torpedo fired against it or neutralize it into impotence by

37. Action of this type has become much more genteel since the British in 1840 sent warships out to induce the Sicilian government to revoke the sulphur monopoly that it had granted (*see* 3 PHILLIMORE, *INTERNATIONAL LAW* 35-37 (2d ed. 1873); HEXNER, *op. cit. supra*, note 9). Or even since the more recent days of Dollar Diplomacy and the German Imperial Government's active intervention in behalf of Mannesman interests in North Africa. *See* STALEY, *RAW MATERIALS IN PEACE AND WAR*, 172-3 (1937).

38. *See* *United States v. National Lead Co.*, 63 F. Supp. 513, 525 (S. D. N. Y. 1945); *United States v. Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2d 1944); *Oseas, Antitrust Prosecutions of International Business*, 30 CORN. L. Q. 42, 53 (1944); *cf.* *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U. S. 212 (1945). In *United States v. U. S. Alkali Export Ass'n* (S. D. N. Y., decided July 17, 1946) jurisdiction was sought over a New York subsidiary of Imperial Chemical Industries, Ltd., that was described by the I. C. I. people themselves as a "highly specialized private commercial legation," yet it took an elaborate trial and opinion to dispose of the contention that the corporation was not "found" in the Southern District of New York for purposes of service of process.

39. *See* *America Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *but cf.* *United States v. Sisal Sales Corp.*, 274 U. S. 268 (1926).

the use of a demagnetizing or de-gaussing composition or apparatus. The manipulation of corporate nationality in the form of incorporation abroad or the shifting location of directors, records, and main offices in foreign lands is typical of this type of defensive tactic.

The predominance of the holding company set-up still further camouflages this defensive maneuver, by obscuring the significance and locus of corporate nationality. On top of this, the financial domination usually exercised by the controllers of a parent corporation over its subsidiaries dilutes considerably the already attenuated "nationality" of the corporate subsidiary. National states, however, particularly where their vital defense or fiscal interests are involved, are increasingly tending to launch the type of torpedoes that are not thus easily rendered innocuous. The Anglo-American test of corporate nationality as determined by the place of incorporation, and the civil law criterion of the center of administration of the company, have both been recognized as too easily mutable.⁴⁰ They are satisfactory primarily to the incorporators, who can dictate and speedily put into operation mutations of corporate status, but of no advantage to the national state, whose role is usually that of automatically registering the altered status decided on by the incorporators.⁴¹ Furthermore, not only easy mutability, but insubstantiality, has been advanced as an objection to both the commercial and civil law nationality tests.⁴²

40. The practice of multiple incorporation is one of the refinements of American corporate law. Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws*, 42 HARV. L. REV. 516 (1929). Cases are known where the corporation has been authorized to do business in every state *except* the state of its incorporation. Likewise, the ease with which the *siege sociale* of large European corporations was transferred beyond the Channel and the Atlantic is illustrated by the story of the corporations-in-exile during the war that has just ended. See Note, *Corporations in Exile*, 43 COL. L. REV. 364 (1943).

41. The concept of corporate nationality has become progressively denatured and ever more closely approximates the notion of corporate domicile. Its elimination from the domain of international law in the case of artificial persons has been urged with increasing persistence. See NUSSBAUM, *op. cit. supra*, note 6 at 146-7; Hamilton, *supra* note 6; Feilchenfeld, *Foreign Corporations and International Public Law*, 8 J. COMP. LEG. & INT'L. L. 81, 86-7 (1926).

Dissatisfaction with the accepted tests of nationality is further evidenced by alternative tests that have been advanced by legal writers but which have found little judicial acceptance, such as the place of principal exploitation of the enterprise and of the nationality of the corporate stockholders. In cases involving a determination of enemy character, however, the latter test, although repudiated after the last World War (see *Hamburg-American Line Terminal and Navigation Co. v. United States*, 277 U. S. 138 (1928)), has recently received more encouragement. See Hanna, *Nationality and War Claims*, 45 COL. L. REV. 301, 329 *et seq.* (1945). This has probably been on the theory that majority stock control was evidence that the persons in de facto control of the corporation (*i. e.*, its directors) were enemies. Cf. MCNAIR, *LEGAL EFFECTS OF WAR*, 63-5 (1944).

42. It can be said of corporate nationality, as was said of corporate domicile a long time ago, that the corporation may well find itself without a nationality or a dwelling "either in its office, its warehouses, its depots or its ships. Its domicile is the legal jurisdiction of its origin irrespective of the residence of its officers or the place where its business is transacted." See *Merrick v. Van Santvoord*, 34 N. Y. 208 (1866).

The corporate submarine these days relies not so much on direct alliance with the shore forces or on its internal structure and equipment, but on position and maneuverability. For these latter purposes, the intelligence staff of the corporate submarine (its lawyers) can use maps and charts that will insure the submarine's entry into a safe legal harbor (*i. e.*, deprive a hostile forum of jurisdiction over its activities) and ballistic and tidal tables that will enable the submarine to anticipate the social torpedo's course and escape its lethal effects (*i. e.*, deprive adverse legal systems of applicability). The basic data for these charts and tables are the conflict of laws doctrines determinative of which courts shall exercise jurisdiction over, and what national law shall be applied to, a transaction.

In international economic affairs, two or more national jurisdictions frequently compete in the regulation of corporate rights and relationships and are in a position to create differing rights and obligations for a corporation.⁴³ An intelligent and objective corporate management presumably, therefore, tries to bring any question of the validity of its activities before the court or other governmental organ most likely to acquiesce in its desires, or to impose on it more lenient obligations, or to interpolate into the controversy a substantive law or public policy favorable to the corporation's objectives. In the corporation's favor in this endeavor is the fact that it has specific dynamic aims to achieve, whereas the national state tends to apply its law in a routine and somewhat purposeless way.

Not only will resourceful legal staffs thus attempt to bring their cases before benign courts, but they will attempt to condition their transactions in such a way that even an unfriendly court will be legally bound to decide in favor of their clients. In this endeavor they can rely on the highly artificial nature of the judicial handling of interstate or international disputes. Before a tribunal can face the issue of what *rule of law* will be appropriate for it to apply to a given state of international economic facts, it must answer the following large and confused question: (a) What *jurisdiction*, among the several impinged on by the transaction, has the right to have its substantive rules of law applied?⁴⁴ Since the answer to that question is in turn frequently dependent on the legal "characterization" or nomenclature given various aspects of the subject matter of the specific dispute, a second series of involved questions then arises: (b) Is "real" or "personal" property involved? Are the "internal affairs" of a corporation the point at

43. See Sohn, *New Bases for Solution of Conflict of Laws Problems*, 55 HARV. L. REV. 978, 979 (1942).

44. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

issue? Is a "penal" law being applied? Is the share of stock sued on a "contract" or a piece of "personal property"?⁴⁵ Finally a third series of questions is raised by the general notion that, while a court should not apply its domestic substantive legal policies where another state properly has jurisdiction over a controversy, it should not, on the other hand, deviate from its usual procedures and remedies but should uniformly apply its own procedural and remedial law. This raises a most dialectical issue: (c) What is "procedure" and "remedy", as opposed to "substance"?⁴⁶

Only after the combine lawyers and their adversaries have thus played around with the conceptual counters inherent in the law of conflicts is the court ready to face the substantive issues that would arise at the outset in an ordinary uncomplicated domestic case. Unless the court decides that conflicts principles dictate that it follow the law of its own state, or that the issue is a remedial or procedural one, it must blindly follow the law of a foreign jurisdiction, unless it decides that its public policy is fundamentally violated, which is a rare and difficult determination for it to make. The rarity and the difficulty arise from two factors—the lack of technical criteria for evaluating public policy (as contrasted with the abundance of criteria for playing the conflicts game), and a commendable humility on the part of judges that convinces them that they are in most cases not equipped to formulate public policy.

Without entering into the legal gymnastics involved in the third series of questions, let us get a very general view of the confusion created by the first and second series in the case of an international combine. It is in the nature of heroic over-simplification to point out that alternative and non-synchronized conflict of laws rules attach differing legal consequences to: (1) the situs of the physical properties of the combine; (2) the places of execution, performance, and "other centers of gravity" of contracts entered into by the combine; (3) the location of the combine's directors, officers and records.

45. Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORN. L. Q. 570 (1936); BATY, *POLARIZED LAW* 81, 86 (1914).

46. See Cook, "*Substance*" and "*Procedure*" in the Conflict of Laws, 42 YALE L. J. 333 (1933); McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. OF PA. L. REV. 933 (1930); Guaranty Trust Co. of New York v. York, 326 U. S. 99 (1945); Sibbach v. Wilson & Co., Inc., 312 U. S. 1 (1941); Klaxon Company v. Stentor Electric Manufacturing Company, Inc., 313 U. S. 487 (1941). Two pertinent paradoxes are raised by the "substance-procedure" dichotomy:

(1) a court will usually follow the law of its own state on less important (*i. e.*, procedural and remedial) matters and discard it on more important (*i. e.*, substantive) matters;

(2) the court will take no account of the fact that on occasion a decision on "procedure" is more significant than, in fact may even vitiate, a decision of "substance."

The physical base of an international combine, its so-called operating properties, consists of mines, plantations and other natural resources owned by it; refining, processing and fabricating mills, plants and other facilities; rail, ship and vehicular modes of transport; stocks and warehouses; and the manifold physical adjuncts of marketing and distribution. The way in which these properties are operated, nay their mere existence, affects the welfare of local labor and management forces, the fiscal interests of local government, and the standard of living of local communities. Consequently, the jurisdictions in which these properties are located feel justified in relying on their police power and in pressing for the application of the traditional doctrine that the law and policies of the state of the situs of property should govern the operation and disposition of such property. This simple territorial assumption, however, need not settle anything which assiduous counsel do not wish it to settle. Lawyers can manage to conceal physical properties from judicial view by interposing assets of an intangible nature, pieces of paper, and other contractual interests only halfway on the road to hardening into property interests (such as government concessions, stock interests, patent licenses, rights of way, easements, etc.), which require different legal treatment. Further complexities are raised by the various legal consequences attendant upon the determination that the property is "personal" or "real", the problem of giving the correct legal localization to properties whose major commercial *raison d'être* arises from the fact that they are employed in a larger corporate context, etc.

More importantly, however, the physical properties of a combine are lifeless unless set in motion by a host of specific contracts and agreements entered into with suppliers of raw materials and component parts, vendees, brokers and other middlemen, shippers, workers, and competitors. It is here that legal divergence and confusion are at their apex, for the law of contract, the essential content of the commercial law, is a body of legal doctrine much more pliable and ambivalent than any dependent on the situs of property.

Where international combines are involved, their contracts will frequently involve as principals the residents of several national jurisdictions, and will set in motion a course of business operations taking place in several jurisdictions. In such situations, the combine has considerable power of choice and manipulation as to which national law is to govern any particular contract.⁴⁷ It can, for example, follow the doctrine that the express intention of the parties decides what law is

47. For an analysis of the various tests governing the intrinsic validity of contracts, see COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS*, 347 ff. (1942); Beale, *What Law Governs the Validity of a Contract*, 23 *HARV. L. REV.* 194 (1909).

to govern the validity of a contract.⁴⁸ This is, of course, *carte blanche* to a clear-headed and purposeful corporate management, particularly in dealing with weaker rivals whose feeble "intent" can readily be removed from the transaction. Also, the criticism has validly been made of this doctrine that it involves a "delegation of sovereign power to private individuals" and "practically makes a legislative body of any two persons who choose to get together and contract."⁴⁹ Applied to transactions involving international combines, such a comment points to an unaccountability in a business combine similar to that which in theory should characterize only a political sovereign. While the intent rule may operate satisfactorily where only private interests are involved, it contains no guarantee that public interests will be adequately safeguarded,⁵⁰ for it is all too frequently precisely the lawfulness of that intent which is at issue.⁵¹

The governing law for the validity of a contract favored by the Restatement and most American critics, the law of the place of contracting, sometimes results in sheerly fortuitous selection, sometimes can be so readily manipulated by the parties that it becomes legal mumbo-jumbo for the law that was in fact intended by the parties.⁵² On the other hand, the so-called dominant English rule, the "proper law" test, calling for the application of the law of the jurisdiction with the most

48. Mainly adhered to by English, European and Latin-American Courts. This view has been approved by Professor Cook, provided the intent is explicitly expressed; there are substantial contacts with the state intended by the parties; and the law of the state intended by the parties is not against the public policy of the forum of the place of contracting. COOK, *op. cit. supra*, note 47 at 410, 418-9. Landmark cases in which the intention of the parties was upheld despite the fact that the law intended was that of a jurisdiction with only an ephemeral connection with the transaction are *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A. C. 277, 289-90.

49. See Lorenzen, *Validity and Effect of Contracts in Conflict of Laws*, 30 YALE L. J. 655, 658 (1921); BEALE, *TREATISE ON THE CONFLICT OF LAWS* § 332.20 (1935).

50. The protection of public interests is extremely difficult in private litigation, where they are rarely effectively raised or clearly presented. See p. 616 *infra*.

51. See Cavers, *supra*, note 44 at 185; BATY, *op. cit. supra*, note 45 at 45 *et seq.*

52. For example, the rule that a contract is executed by the last operative act in its formation is subject to all sorts of stage management in an age where contracts are consummated by mail or cable rather than by the handshakes of the parties. The courts have, therefore, tended to pay less and less attention to the place of actual execution of a contract as a conflicts criterion. See *Hoopeston Co. v. Cullen*, 318 U. S. 313 (1943); Mr. Justice Brandeis, dissenting in *New York Life Ins. Co. v. Dodge*, 246 U. S. 357 (1918); Cheatham, *supra*, note 45 at 570, 586; Neuner, *Policy Considerations and Conflicts of Law*, 20 CANADIAN BAR REV. 479, 490 (1942); Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 YALE L. J. 1082, 1092 (1934).

In *DeBeers Consolidated Mines v. United States*, 325 U. S. 212 (1945), an affidavit submitted by counsel for the United States recited that the defendants had tried to avoid the jurisdiction of United States courts by making sales abroad only and requiring purchasers to pay in advance for all purchases. See Lockwood and Schmeisser, *Restrictive Business Practices in International Trade*, 11 LAW AND CONTEMP. PROB. 663, 672 (1946).

substantial and vital contacts with the transaction⁵³ has much to commend it. However, care must be taken to see to it that substantiality and vitality are predicated not on the formal legal criteria of the law of contracts or conflicts, but on the proper evaluation of the social, as well as private, interests involved.⁵⁴ Even tests involving less leeway than those already mentioned, which are applied in more limited situations, such as the application of the law of the place of performance of the contract, or the law of the "center of gravity" of a contract,⁵⁵ contribute an atmosphere of indeterminacy from which the international combine, with its trained intelligence staff, usually profits.^{55a}

Corporate domicile has also been invoked as the litmus test for the appropriate forum or governing law in issues involving the internal affairs of the corporation. While the so-called internal affairs of a corporation involve such ostensibly procedural matters as the powers and constitution of boards of directors and corporate officers, the holding of corporate meetings, and the rights and privileges of stockholders, these matters frequently have a serious and substantive bearing on the economics of the corporation and its underlying property and contractual relationships. Some evidence of this serious bearing is to be found in the extent to which multi-national corporations have made use of Switzerland, Liechtenstein and similar international Delawares as a place of incorporation for their constituent business units.⁵⁶

53. WESTLAKE, *PRIVATE INTERNATIONAL LAW* 300 (7th ed., Bentwich, 1925); CHESHIRE, *PRIVATE INTERNATIONAL LAW* 254-6 (2d ed. 1938). Where the contacts with two jurisdictions seem to be equally significant, this school will tend to apply the law of the place of contracting.

54. This view also comes close to that suggested by Cook in his classic work. See COOK, *op. cit. supra*, note 47 at 431.

55. *E. g.*, the corporate domicile usually supplies the governing law in any contracts between stockholders and their corporation; the state in which a stock or produce exchange is located will govern transactions taking place on those exchanges; and the law of the situs of the property will govern contracts affecting real property. NUSSBAUM, *op. cit. supra*, note 6 at 171.

55a. Typical of the fluidity and amorphousness of the concepts that make up this field are the propositions laid down in Wolff, *Choice of Law by the Parties in International Contracts*, 49 JURID. REV. 110 (1947). According to Wolff, the parties are permitted, by their own "intention," to select the "seat" or "center of gravity" of a contract from "any system of law with which it is internally connected," and thereby determine "the proper law" of the contract. However, even if the parties choose a system of law with which the contract has no connection, *i. e.*, do not choose a proper law, the law selected will govern unless it contravenes any of the "compulsory provisions of the true proper law." The situation is further confused by the fact that there may be several proper laws.

56. Compare the amusing description of the way in which the Viking marauding expeditions of the 10th Century "put an end to headlong competition in the trade," and tried to place themselves "above the accidents of national politics." As in the case of modern corporations, "it was necessary to find a neutral ground on which to establish the home office of the concern. Such a medieval-Scandinavian New Jersey was the Wendish kingdom at the south of the Baltic." VEBLEN, *An Early Experiment in Trusts in THE PLACE OF SCIENCE IN MODERN CIVILIZATION* 497, 505-6 (1919); also available in 12 J. OF POL. ECON. 270 (1904). See also Archawski, *Switzerland, Mother of Cartels*, 187 HARPER'S MAG. 304 (Sept. 1943).

While the combine is able thus to create legally determinative "facts" and can subsequently select and manipulate them, the national state has much more restricted powers of creation and selection. The law, it is true, is historically established by the legislative and judicial organs of the state. However, as has been seen, the plurality and the territoriality of legal systems converts law into an arsenal of legal weapons serviceable mainly to private parties rather than to the state.

The state in theory has a few general legal doctrines at its disposal that are not available to private persons like combines. They are, however, negative in nature and limited in application. Thus, for example, the state refuses to lend itself to the validation of private objectives not directly or appropriately enough linked to its sphere of legally acceptable interests by asserting that it lacks jurisdiction over the controversy. Nevertheless, in practice, lack of jurisdiction is rarely raised unless one of the parties raises it, and both sides in a private dispute will frequently agree that a certain forum has jurisdiction, in order to avoid the consequences that would attach if some other, possibly more directly connected, jurisdiction were to become the forum.⁵⁷ Theoretically, also, courts may say that a corporate activity sought to be validated is so counter to the public policy of the forum that they cannot validate or give effect to that activity. For the public policy test to be applied, however, there must be an outright and unequivocal repugnance, not mere contrariety, between the corporation's activity and the policy of the forum. Thus, even where doctrines of apparent advantage to the state are concerned, they all too frequently, in the language of a learned critic, constitute potentialities rather than realities.⁵⁸

V

Current Tides in Economic Affairs

An increasing international division of labor has geographically scattered the physical operations and commercial transactions of modern economic society and caused them to impinge on many different national jurisdictions. On the other hand, economic necessity has caused these activities to come increasingly under a single directional roof. The procedure whereby the individual processes of raw material extraction and supply, intermediate and final fabrication, and ancillary and ultimate distribution and transportation, have become the function of administrative departments of a single enterprise, rather

57. See Kronstein, *Business Arbitration—Instrument of Private Government*, 54 *YALE L. J.* 36 (1944); note 48 *supra*.

58. See NUSSBAUM, *op. cit. supra*, note 6 at 143.

than the independent activities of numerous separate business concerns, has been called integration.⁵⁹

Vertical integration on the international scale is the result of several factors. For one thing, business management has become increasingly aware of the international contagiousness of prosperity and depression; it recognizes the necessity, in order effectively to insure against the bumps and troughs of the business cycle, of controlling both markets and raw material supplies that may be spread over many countries. In some fields, notably the chemical and synthetic industries, patents and scientific research have created "squeezes" of a more constrictive and permanent type than conventional international commodity monopolists or speculators could have contrived; the combine absorbs the process together with the entire productive plant built around it and thereby degrades originally independent industrial competitors to the status of financial servants. In addition, the need of industries for new capital, and the drive of accumulated capital for new investment, has tended to subject larger and larger segments of industry to a single financial direction. This has largely occurred not for valid technological reasons, but because of the natural tendency of surpluses to fill up vacuums⁶⁰ and because of non-economic prestige motives on the part of financiers of a type not too distantly related to successful stamp collectors. Then, perhaps more contributory to horizontal than to vertical integration is the fact that an expanding technology is producing more and more products that can be commercially substituted for each other and has contrived ever more exalted uses for originally neglected industrial by-products.⁶¹

The modern multi-national corporation accordingly diverges drastically in economic pattern from its legal progenitor, the trading company, regulated or joint-stock, of the 17th and 18th Centuries. The

59. E. A. G. ROBINSON, *THE STRUCTURE OF COMPETITIVE INDUSTRY 126-131* (1932). The term "administrative department" is here used in a lay and not a legal sense. Despite Western Electric's distinct corporate status, the Supreme Court, for example, has had no difficulty in describing it as the manufacturing department of the American Telephone and Telegraph Corporation. *Smith v. Bell Telephone Co.*, 282 U. S. 133, 151 (1930).

60. Falling within this category is the phenomenon of internal financing, *i. e.*, the tendency of large corporations to meet all of their new financing needs from their own capital surpluses.

61. Thus, I. G. Farben, Du Pont and Imperial Chemicals have reduced production costs (to themselves) and eliminated the insecurity of competition by constantly producing innumerable new items; International Nickel and the copper Big Three will not, unless extraction costs are prohibitive, neglect the cobalt, silver, lead and other minerals and metals present in their nickel and copper ore deposits. 40 per cent. of duPont's 1940 income was said to come from products not even manufactured by it six years before. Currently, industry is shifting from a purchasing and marketing technique which stresses physical and chemical composition (*e. g.*, wires consisting of 98 per cent. pure copper) to one involving use specifications (*e. g.*, wires having certain tension, malleability, or conductivity coefficients). This shift will serve to make the reign of the large international combines more secure than ever.

function of the trading company was to reap profits on mercantile ventures in the literal sense—imports and exports. The cultivation or extraction of raw materials was the job of residents of overseas colonies or foreign nations; the further fabrication of those materials and ultimate sale of the fabricated products one for the entrepreneurs of the home country. Broad governmental powers and facilities were given the venturers, but theirs was nevertheless a simple segment of the international division of labor, the procurement of fish, furs or minerals in exchange for the products of the home country.⁶²

The increasing international interdependence of business activity has changed all that; the compartmentalized nature of the mercantile pattern has been recognized as both too unprofitable and too precarious.⁶³ Contractual relationships, whether they be of a vendor-vendee nature or involve commitments of potential competitors not to compete, are considered too subject to change and abrogation, as one or the other party sees a chance to press a temporary bargaining superiority to immediate advantage. The solution was to adopt a close-knit form of organization which, by the mere fact of its establishment, would tend to congeal and regularize commercial transactions and put an end to business fluctuations that had led to too much financial insecurity. And so, whole segments of international trade and industry have passed, to reverse Maine's at best wishful generalization, from the realm of contract and free-wheeling to that of corporate status and regularity.⁶⁴ This transition was aided by legislative liberalization and broadening of permissible corporate purposes, which in earlier corporate authorizations had been specifically and narrowly defined.⁶⁵ It was further spurred on by the discovery that the close-knit corporation, by exploiting a spurious legal similarity to natural single persons, skated more readily than loosely-knit trade groups around legal inhibitions, at least those of Anglo-American law.⁶⁶

62. James Mill's three volume HISTORY OF BRITISH INDIA (1817) (which is largely a history of the East India Company) is full of dynastic vicissitudes and political embroglios, but the few economic summaries contained in it are limited to tabulations of imports and exports.

63. Even at the time of our Constitutional Convention, it was said that lack of integration of commercial activity made trade dearer to the people. See letter to Thomas Jefferson, cited in ERNST, THE ULTIMATE POWER 146 (1937). The issue, however, is still unsettled whether the economies of integration necessarily redound to the benefit of the consuming public, or whether they are taken advantage of by the managers of the integrated business.

64. While Maine's famous generalization purported to describe the general course of legal history as he saw it, it seems more like a rationalization of an implicit belief in the validity of laissez-faire.

65. See page 605 *infra*.

66. See Mr. Justice Brandeis, dissenting in *American Column and Lumber Company v. United States*, 257 U. S. 377, 418-9 (1922); Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179 (1932).

Thus, for example, tire manufacturers, anxious to avoid the repetition of painful price squeezes by the owners of the rubber plantations of British Malaya and the Dutch East Indies, acquired substantial tracts of rubber land for cultivation and established new purchasing agents abroad; companies like U. S. Rubber, Firestone and Dunlop now control a considerable proportion of their own supply of crude rubber. Or Anaconda, Kennecott and Phelps Dodge, anticipating competition from lower cost copper ores outside of the United States, acquired extensive mine properties in Chile and elsewhere. This is known as backward integration. Backward integration may arise out of a fear of having inadequate inventories and being charged exorbitant prices by the people in control of raw supplies, fears usually realized during boom periods, but it may also be the product of more sanguine economic moods.

In the case of automobile, radio and telephone companies like General Motors, N. V. Phillips and the International Telephone and Telegraph Company, and the manufacturers of complex items of machinery and equipment like International Harvester, Singer Sewing Machine, and Standard Radiator, however, the raw material factor is not so important; these firms derive their revenues mainly from the manufacture and sale of fabricated products. Consequently, they have established operating and selling companies all over the world, so that they will be assured of continuous outlets for their products. This is known as forward integration, which is justified as a method of surviving recurrent depression periods by annexing and conserving an irreducible minimum of consumer purchasing power—but also involves taking advantage of opportunities for “normal business growth.”

Companies like Unilever, the great English fats and oils combine, and Alcoa, the American aluminum titan, are examples of so-called complete (backward and forward) integration. In addition to the creation and retention of standing market outlets, they have been relieved of the possibility of discontinuity of operation, financial embarrassment, or unwanted competition by acquiring the peanut oil and bauxite of British West Africa and Surinam.

Because of the more abundant natural resources of the United States, we have in predominant measure been able to achieve industrial integration entirely within our national borders. This has not been true of the more compactly situated entrepot powers, like the British and Dutch, who must reach outside of their own boundaries to attain a scale of integration that will keep their large scale enterprises secure against the vicissitudes of the business cycle. Furthermore, for the British and the Dutch, the conduct of foreign relations and the man-

agement of colonial empire had originally been largely in the hands of the trading companies, which were in effect "chosen instruments" for exercising and aggrandizing public power and therefore received ardent state backing; the later internationally integrated corporation has become the beneficiary of that traditional political and diplomatic support.⁶⁷ The United States, on the other hand, was in a sense founded on a basis of revolt against exploitation and victimization by alien trading companies, and had no established tradition of state support to tide the new multi-national corporations over the general negativism of laissez-faire commercial policy. It is therefore understandable why powers like the United Kingdom and the Netherlands, so dependent for existence on foreign trade, should be inclined to give their international corporations, the ostensible protagonists and symbols of that trade, extensive political backing. While international corporations supply only the fringe of the American national income and standard of living, they were regarded as essential to the well being of the United Kingdom and the Netherlands.

More recently a new factor has arisen which has served both to spur on the process of vertical integration and to identify more closely the interests of national states with the activities of multi-national corporations. With the advance of modern industrial technology and its unfortunate and inevitable alignment with the forces of war, the war-making abilities of all states have been impaired by their inability to control adequate supplies of critical and strategic materials. For security reasons, therefore, nations which are dependent on foreign imports for the raw materials that go into industrial military⁶⁸ production have lent stronger support to a process of economic integration that will assure, to enterprises under their control, ample supplies of such materials.

While the integration of international enterprises is mainly due to financial and industrial considerations, economic, legal and technical factors have greased the way. For one thing, the forms and procedures of modern finance are international in character; banking operations do not radically differ as between Tokyo and New York. Then there is the legal lingua franca of corporation and commercial law; legal sys-

67. The early trading companies, in addition to asking for monopoly privileges, exemptions from import and export laws, and remissions of customs duties, also asked for the governmental powers of imposing taxes on their own members, deciding their own disputes, and defending themselves against pirates and other enemies. In fact their maintenance of fortifications and consular agents and their governmental functions were the main reason for the continued existence of these companies when their economic functions had ceased. See 8 HOLDSWORTH, *HISTORY OF ENGLISH LAW*, 200 *et seq.* (2d ed. 1937).

68. Modern conditions of warfare of course make the phrase "industrial military" a redundancy.

tems of all nations have, for example, made way for the parent-subsidary concept and recognize the binding nature of contractual obligations. Patent, accounting and other technical procedures are comparable in different countries. A monopoly of know-how in limited hands may bring about a degree of integration that no amount of financial pressures and commercial *quid pro quo* could encompass. The technical personnel that has mastery of the operations and procedures of modern international business is extremely mobile. Except for political and cultural factors, therefore, there have been no basic economic and legal impediments in the way of corporations becoming integrated over the international as well as the national terrain.

It may be argued, however, that autarchic political and cultural factors have brought about a degree of disintegration in the case of multi-national corporations. Upon closer analysis, however, it will be seen that this disintegration is a matter of legal conceptualism and surface physical appearance rather than real evidence of economic disunity. For example, unfriendly national tariff and restrictive exchange policies have accelerated the formation of national corporate units that will have political viability as "domestic" employers of labor and "domestic" taxpayers.⁶⁹ As a concession to nationalistic trends, international combines have undergone the formality of local incorporation, put local residents on their boards of directors, and endeavored to give as large a measure of employment as possible to local workers.⁷⁰ There has been an increasing tendency to solicit the investment of local capital, and to encourage local manufacture of components and local assembly of fabricated products.⁷¹ All of these concessions to political nationalism, however, have not overthrown the primary allegiance of these combines to their top direction, which, whatever else it is, is primarily not a political entity. The corporate subsidiary remains assimilated in its functioning to a branch office;⁷² the corporation remains an economically integrated unit.

VI

The Administrative Arts of Command and Obedience

As in the case of all fusions of men and institutions, generalizations concerning state and corporation must necessarily be in terms

69. LIEFMANN, CARTELS, CONCERNS AND TRUSTS 244, 265 (1925). It has been recognized that industrially underdeveloped countries have a legitimate grievance at mono-commodity exploitation which deprives them of integrated exploitation of their resources. See Coudert and Lans, *Direct Foreign Investment in Underdeveloped Countries; Some Practical Problems*, II LAW & CONTEMP. PROB. 741, 746, 748 (1946).

70. See Bonsal and Borges, *Limitations Abroad on Enterprise and Property Acquisition*, II LAW & CONTEMP. PROB. 720, 727, 737-738 (1946); Coudert and Lans, *supra* note 69, at 750-751.

71. PLUMMER, *op. cit. supra*, note 7 at 52-53. Progressive domestication of capital ownership has been urged. Coudert and Lans, *supra* note 69, at 754-755.

72. See LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS 159-60 (1938).

of probabilities rather than absolutes, and distinctions between the two consequently become matters of degree, innuendo and approximation rather than clear-cut and outright contradictions.⁷³ This is particularly true with respect to the comparative administrative functioning of the national state and the international combine. However, since all matters of judgment depend on occasionally fallible generalizations and on distinctions of color tones rather than primary colors, let us plunge into the risky business of institutional generalization, having forearmed ourselves with this apologia for error and deviation.

First of all, it should be noted that the international combine has preempted for itself a more limited field of social activity than the national state. To the combine, therefore, accrues the major advantage inherent in specialization of function—a readier adaptation of mechanism to purpose. There are moments when the corporation encroaches on objectives within the legitimate domain of the state, but they are usually limited to urgent corporate business; they partake, therefore, of the intensity of the corporation's basic purposes and the efficiency of the corporation's implementing drives. As a matter of internal administrative mechanics, the international combine is a quicker, more flexible and hence usually more successful entity than the national state. Although all large-scale bureaucratic organizations have their inevitable confusions of purpose, the international combine nevertheless has specific commercial objectives, *e. g.*, the performance of certain types of business activity, the maximization of profit, the assurance of financial security. These, though broad, are more encompassable and explicit than the vaguely felt political and social objectives of the modern state.

Where conflict arises, as it occasionally does, as to which specific corporate class interest or purpose is paramount, the corporate organization presents, in the form of a board, committee, or responsible official, a relatively compact and efficient mechanism for review and reconciliation of the conflict. The "legislative" powers of the stockholders, the "executive" role of the board of directors, and the pressures exercised by outside groups such as creditors, labor and consuming public, all have their moments of significance in the determination of general corporate policy, but are necessarily impotent abstractions as far as the bulk of specific corporate acts are concerned.⁷⁴

73. A system would appear to be doomed politically that relies exclusively on the concept either of a "government of laws" or of a "government of men," and does not attain a good admixture of both. Cf. HARRINGTON, *OCEANA*; FRANK, *IF MEN WERE ANGELS*, Ch. XII (1942).

74. See Kahn-Freund, *Separation of Powers in Company Law*, 7 *MOD. L. REV.* 73 (1944) for a discussion of a recent example of "executive" functions of the directors being preserved from impairment by the "legislative" acts of the stockholders.

The legal powers of "control" over an enterprise that these groups nominally possess are rarely exercised in practice. When exercised, these powers usually involve the checking and approving of policies initiated largely as routine matters by the corporate management, rather than independent policy initiation or the performance of specific acts. Thus both the day-to-day decisions and the long run policies of the corporation tend to emanate from its executive and managerial group. Within this group responsibility for corporate action may vary, according to whether, for example, a specific price determination or an over-all financial decision is involved. The bulk of specific decisions, however, are usually speedily consummated within the lower echelons of the corporate enterprise, without any necessity for further review. Those decisions which determine the basic status of the corporation within its economic community (*i. e.*, financial decisions as to major acquisitions of competitors and expansion of internal plant, and dividend and reinvestment policy; labor matters; over-all legal and financial organization) tend to be centralized in the chief executives of the firm. As for other important decisions not so centralized, there is a reviewing and deciding focus within each corporation—be that focus the vice president in charge of a specific function, a division superintendent, or some policy committee drawn from the entire firm.⁷⁵

Business corporations are no longer restricted to the precise specifications of powers and line of activity with which they first emerged into history, but may cover all lines of business, grow to any possible size, use by-laws to define their internal organization and other rights as they please, and amend those by-laws without recourse to further legislation or any other governmental intervention. What were at one time outlawed *ultra vires* acts of corporations have acquired legal approval; corporations, for example, have been given unlimited powers to purchase and guarantee the securities of other companies and to act as holding companies.

Utilizing all these administrative advantages of unity of purpose, speedy action, centralized responsibilities, and broad powers is an integrated group that possesses substantial financial resources, technical knowledge not easily obtainable by strangers, and staying power and initiative not typical of governmentally constituted groups. In

75. A good analysis, based on many case studies, of how corporate decisions and policies are reached is to be found in GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* (1945). For a description of the decentralized operation of the General Motors Corporation and of the "objective tests" which are employed to check the operations of a large business corporation, see DRUCKER, *CONCEPT OF THE CORPORATION* (1946), especially pages 41-71. The reader should perhaps be warned that the ease and plausibility which characterize some of Drucker's conclusions flow from the skillful selection of his basic premises.

short, the corporate management has all of the advantages of an entrenched and disciplined minority at work among the somewhat gangling and incoherent groupings that characterize modern political systems.

The "sovereign" state which attempts to exercise a supervisory or regulatory jurisdiction over the international combine has corresponding infirmities. It is characterized by a multiplicity of purposes and objectives of a political and social, general welfare and diplomatic, character, which prevent it from giving needful single-minded attention to the protection of the national interest in the economic domain. The combine, its consumers, and its rivals constitute a matrix of opposed social and economic vectors and attractions that frequently results in leaving governmental activity at dead center. This clash of purposes (economic desiderata for society may run counter to basic political principles, for example) is often not recognized.

Characteristically, moreover, the governmental mechanisms for ironing out differences are either non-existent or clumsy in operation. The determination of what constitutes the public interest, and the presentation of data relevant to that determination, are the function of groups with selfish interests and biased and partial views (trade associations, labor groups, etc.). Not only does the state have to share the oversight and regulation of commercial affairs with corporate management itself, the trade association or cartel to which the corporation belongs, and outside labor and financial groups, but those groups are able, unpredictably but at times powerfully, to determine governmental policy over matters involving the corporation.⁷⁶

Constitutional limitations, and a human diffidence that is understandable in matters as technical and altruistic as public administration, withdraw whole segments of corporate activity completely from governmental scrutiny. The legislature, the courts, and one or more administrative agencies all have spheres of interest in the laying down of governmental policy, but those interests are sporadic, variable and not well integrated with each other; jurisdictional questions and fears arise in connection with them that are not readily ironed out and which retard affirmative action. Government regulation, in the few areas where it exists, involves primarily the laying down of general policies (rule-making, quasi-legislative conduct), and enforcement of those policies is of necessity partial and irregular. Government regulation which is not of a legislative and rule-making nature involves the review of actions that have been initiated by the corporation and not the in-

76. See LASKI, *FOUNDATIONS OF SOVEREIGNTY* 28, 219 (1921); CONDLIFFE, *THE RECONSTRUCTION OF WORLD TRADE* 33-34 (1940).

itiation of positive action by the state itself; the state must wait for the corporation to do something which rises to the level of administrative cognizance.

Finally, the staff within government which is devoted to the task of public supervision and regulation does not have the emoluments and usually does not possess the mass of recorded and unrecorded technical knowledge possessed by a corporate management. In sum, and in contrast to the corporation, the government as an administrative entity is characterized by diversity and clash of purpose, diffusion of responsibilities, limited powers, largely passive functions, and limited knowledge, coverage, and fiscal and intellectual resources.

The modern state has been likened to a body that has apoplexy at the head and atrophy at the extremities.⁷⁷ The international combine, on the other hand, preserves a rather good balance between active central direction and peripheral movements; it converts the directing brain signals into answering reflexes and responses without too much delay or equivocation.

The foregoing contrast between the supple and athletic corporate sovereign and the lax and lumbering political sovereign may not appear quite as striking in the case of a fascist or totalitarian economy, although one can see a great deal of business self-government and state inefficiency persisting in the day-to-day activities of German and Italian business before the Nazi defeat. Presumably also, even in the case of democracies, the concentration of a business corporation upon its commercial objectives and its disassociation from or antagonism to the political and social objectives of the national state has been considerably qualified of late, although the conformity of corporate policy to national interest remains demonstrably defective. But the superior efficacy of the corporation as a technique of administrative organization is evidenced by the constantly growing number and range of functions of government corporations, and the increasing extent to which intergovernmental corporations are displacing diplomatic concords and bodies as devices for regulating the international economy.⁷⁸

VII

The New Concert of Economic and Political Powers—the Possible and Probable

Thus, the modern democratic state, in its dealings with the international combine, is handicapped by a legal system that enables the

77. Lamennais, as quoted in DUGUIT, *LAW AND THE MODERN STATE*, Ch. XV, (1920).

78. The recent Russian plans for the economic development of Hungary and Rumania have taken the form of government corporations with mixed Russian and local

combine to out-manuever it; territorial limitations that give the state only a partial glimpse into, and an even more restricted supervision over, the far-flung economic activities of the combine; a corporate vocabulary and conceptualism that frequently becloud underlying business purposes and realities; and a creaky and frequently confused governmental administrative set-up. These factors make it impossible to ascertain clearly what are the proper obligations of the corporation to the state, and serve to impede the state in its enforcement of even those corporate obligations that are more or less clear. Since at least some of these corporate obligations are of a character ordinarily associated with the duties of a "national," it is evident why there exists currently a tendency to dismiss nationality as a meaningless corporate attribute.⁷⁹ National sovereignty, the juridical correlative of that fleshless corporate nationality, likewise in this context becomes a hollow phrase, devoid of substantive implications.

Is the situation actually this hopeless? Or can the concepts of corporate nationality and national sovereignty be salvaged, and to what extent? The answer will depend in part upon how we are able to rework the legal, economic, analytic and administrative frames of reference, just described, that conspire to reduce the concepts to nullity in practice. Even if we decide to abandon the concepts, appreciation of the reasons for their uselessness may result in a more comprehensive and more refined social and analytical orientation towards basic economic phenomena.

The comparative administrative inertia and confusion of the modern state, which has been generally described in the preceding section, can be mitigated, but this will necessarily be a slow and selective process. The problems that will be encountered are analogous to the difficulties present when the government attempts to control its natural citizens, and the democratic state's easy-going accommodation to these problems has thus far been rightly accepted as vastly preferable to the legend of totalitarian efficiency and administrative vigor. Nevertheless, greater administrative acumen, streamlining and drive is possible and is needed within the state machinery if political government is effectively to deal with strong rival economic governments like international combines.

It is possible that a corporate setup which is properly delimited as to scope, powers and obligations, and appropriately constituted as to control and management, may function as a helpful adjunct to, nay as a potent instrumentality of, the democratic national state and a

participation, and there has been considerable backing for the proposal that the heavy industries of the Ruhr be run by internationally constituted corporations.

79. See note 41 *supra*.

peaceful international community.⁸⁰ This, however, calls for an extensive re-examination of hitherto more or less unquestioningly accepted axioms and their consequences. A first step in this far-sweeping revaluation is to take account of the totally different economic character of small and large corporations, respectively; this is something which has become increasingly obvious to careful observers of the economic scene but of which the doctrinaire legal system has taken almost no account.⁸¹

Next, it is desirable that international combines, their corporate constituents, and their individual agents, be recognized as "subjects" of international law, a notion to which, as has already been said, conventional international law doctrine has been notoriously recalcitrant.⁸² However, it is not sufficient to give combines and similar economic units a direct representation in international law similar to that possessed by national states. It is necessary as well to restate the interests both of state and combine in international law—to recognize that these interests are not of an "eternal and inalienable" character different from and transcending those of individuals, but approximate in nature those economic interests with which individuals and private municipal law are concerned.⁸³ Such a revaluation should result in increased recourse to private municipal law as a method of irrigating the arid interstices that characterize so much of the potentially fertile acres of international commercial law.⁸⁴ In this connection, without stirring up any phobias against corporations, there might well be effectively revived a little of that salutary skepticism and distrust with

80. The modern state, it is to be hoped, has advanced somewhat from the political confusion of the era in which Hobbes wrote, when he described as an infirmity of a commonwealth "the great number of Corporations which are as it were many lesser Commonwealths in the bowels of a greater, like worms in the entrayles of a natural man." *LEVIATHAN*, Ch. 177 (Everyman Lib. ed. 1931).

81. See BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); RIPLEY, *MAIN STREET AND WALL STREET* 64, 66, 75 (1927); Rutledge, *Significant Trends in Modern Incorporation Statutes*, 22 *WASH. U. L. Q.* 305 (1937).

82. See note 4 *supra*.

83. See LAUTERPACHT, *op. cit. supra*, note 5 at 48, 73.

84. Note that the Statute of the Permanent Court of International Justice, Art. 38 (3), requires that court to apply "the general principles of law recognized by civilized nations." It is curious that it should be the international lawyers of common law England and the United States who have so largely stressed Roman law as a source of international law. See LAUTERPACHT, *op. cit. supra* note 5 at 26, 29, 30. Lauterpacht places the reason for this in the persistence in England of a natural law background, and the preoccupation of British practitioners of international law with admiralty law, which is of Roman origin. The author is inclined to suggest—natural law concepts surely did not disappear from the civil law continent of Europe—an implicit conception of an economic pax Britannica under "liberal" auspices that paralleled the earlier pax Romana. "Morality" and "law" as abstractions have an unhappy flexibility about them—they can either be harnessed to practical everyday economic dealings and necessities or they can become the intellectual and almost religious tools of a dynastic state, as was true of the German Hegelian tradition.

which the states of this Union originally regarded the activities of corporations, particularly those created in other states.⁸⁵

Acceptance of the foregoing leads to a further conclusion, that it is necessary to deal with the more important international combines by the case method, an approach which is always cited as one of the glories of the common law but has long (and, the author submits, mistakenly) been abandoned in the field of Anglo-American corporation law.⁸⁶ Adopting necessarily arbitrary criteria as to what constitutes a "large" international combine, each large international combine might, for example, be required to obtain a special charter of incorporation to engage in international economic activity, after careful scrutiny and acceptance by the chartering authority of its peculiar economic circumstances and corporate policies. By-passing for the time being the very troublesome question of who and whose agent the chartering authority should be, new corporate acquisitions, transfers, and other transformations of such combines taking place after the issuance of the original charter might require similar approval. This procedure would supplant the practice, now followed by the national states, of perfunctory issuance of general charters to whatever corporate creations a controlling financial group sees fit to sponsor, merely upon compliance with a few formal technicalities. It would also give the chartering authority a chance to review the massive accretions of financial power that may alter and enlarge their corporate dominion ten-fold without otherwise calling for official re-examination. Large international combines are in fact so few in number as to make this procedure not too onerous a one, in view of the large ends to be accomplished; after all, the more complete the economic and social stock-taking involved in a governmental survey of du Pont and U. S. Steel, for example, the more complete our assurance that the world's chemical or steel industry is functioning within economic and social bounds that we would regard as proper. Considering the vast complexities of modern industrialism, a corporate charter must to a large extent remain a hunting license, but it could at least be a license to hunt in season and for specified game, and not one to poach at will in the economic domain.

The standards which the chartering authority can use in appraising these corporate Titans are already in large measure suggested by

85. See Mr. Justice Brandeis, dissenting in *Liggett v. Lee*, 288 U. S. 517, 541 (1933); RIPLEY, *op. cit. supra*, note 80 at 22. Maitland states that American corporations have always lived in greater fear of the state than English corporations. See his *SELECTED ESSAYS* (Hazeltine, Lapsley, and Winfield ed. 1936).

86. A special license from the executive arm is still required of corporations in many countries of the world. See Eder, *Some Restrictions Abroad Affecting Corporations*, 11 *LAW AND CONTEMP. PROB.* 712, 714 (1946); Bonsal and Borges, *supra* note 70,

municipal law, and are being gradually developed through international economic bodies and conferences. Safety, efficiency and other standards have been developed, for example, in specialized fields like aviation, telecommunications and fisheries; conservation and other economic norms in connection with those commodities that are the subject of international commodity agreements.⁸⁷ The International Labor Office has evolved detailed standards in the field of working conditions and relations, and the proposals constituting the basis for the incipient International Trade Organization are replete with suggestions.⁸⁸ Perhaps the most acute lack in the way of available international standards are social norms for the functioning of the corporate mechanism itself. However, this is merely a carry-over from a similar deficiency in the domestic field, where non-lawyers are disinclined to view the corporation as anything but a formal legal device, and lawyers are perhaps too exclusively preoccupied with the fascinating legal and literal ramifications of charters, minutes, certificates and other corporate papers.

In addition to imposing obligations, norms, and negative restrictions on corporations, the grant of a charter could also serve to confer on the combine legal standing and specific positive rights under international law. This has been suggested in the past,⁸⁹ but, it is submitted, to the exclusion of a balancing emphasis on enforcing the correlative duties of corporations. Here, what is needed is a more functional handling of the corporate concept, so that the multi-national corporation can act out in society its excellent philosophic status as a "right-and-duty bearing unit." Sophistication and acuity of analysis are required in order that creditors' rights, the government's revenue needs, and the countless other nationally and internationally accredited social and individual interests may be served and not impeded by corporate activities. Here, as elsewhere, what is needed is not the wholesale discarding of prior concepts and doctrines but their discriminatory pruning, qualification, and analysis, in the light of the interests that they should intellectually clarify and pragmatically serve.

This program is sheer intellectual by-play, however, unless, when we classify pertinent interests, we also determine whether a state of this Union, a federal government, a form of international government

87. See references cited in Timberg, *An International Trade Tribunal*, 33 GEO. L. J. 373, 393, 398-9 (1945).

88. See PROPOSALS FOR EXPANSION OF WORLD TRADE AND EMPLOYMENT (U. S. Dep't State 1945).

89. *E. g.*, Feilchenfeld, *supra*, note 41 at 260. at 731. It is of course necessary that these special acts not be mere occasions for the display of xenophobia.

not yet formed, or some combination of these three, is their appropriate governmental protector. That determination of appropriate sponsorship will in turn point to the appropriate authority (or joint authorities) for the issuance of the proposed international charter. Such a classification of germane interests, and their assignment to a guardian government for protection, is a difficult and complicated process;⁹⁰ only a few broad and approximative criteria can here be suggested. A good starter would be to determine the territorial area of the more or less direct impact of specific corporate activities. That impact is both within, and external to, the corporate ambit.

It will be helpful, in evaluating the effect of corporate acts within its internal organization, to think of the combine not as an undecomposable single entity, but as an amalgam of elements fused in practice but separable in analysis and theory. Among these corporate elements are the individuals forming the corporation, the classes of corporate property, the corporate franchise, and the various corporate purposes.⁹¹ What is mainly needed, however, is a transfusion, from the comparatively virile veins of municipal law, of intellectual blood to remedy the pernicious anemia of international law, *e.g.*, a clearer perspective of the divisibility and occasional contrariety of the various corporate groups and purposes.⁹²

As to the external ramifications of corporate acts, the problem is more difficult. This is because the consumers, creditors, vendors, vendees and competitors of a combine have even less "subjective" standing in international law than the combine itself. One rarely thinks, for example, of their "nationality" as a legally significant element in a transaction, although it is frequently a political factor of considerable importance. On the whole, these economic classes affected by the economic activities of the international combine are remitted (like the mental and infantile incompetents who figure so prominently in international law analogies) to the protection of the

90. This process of "appraising the Governmental interest of each jurisdiction" involved is analogous to the procedure followed by the Supreme Court in our federal system pursuant to both the full faith and credit and due process clauses. See *Alaska Packers Assoc. v. Industrial Accident Comm'n. of California*, 294 U. S. 532 (1935); *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934). It would, of course, be advantageous if international society possessed a judicial tribunal which could perform for it what the Supreme Court has done in this country. The history of the classification of respective state and federal interests in interstate commerce that began with *Cooley v. Board of Wardens*, 12 How. 299 (U. S. 1851), has been magisterially recapitulated in such recent decisions as *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938); *Parker v. Brown*, 317 U. S. 341 (1943); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). See also Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

91. The writers on public and private international law, in describing the "contacts" which are determinative of jurisdiction and controlling substantive law, have broken ground in this connection.

92. See notes 83 and 84, *supra*; Timberg, *supra*, note 35 at 557-566.

sovereign states, with their monopoly of international law "subjectivity."⁹³ This, too, is an unsatisfactory state of affairs.

Once the territorial area of impact of a corporate activity is determined, the jurisdiction or jurisdictions most nearly co-terminous in area with the area of impact would, *prima facie*, be the appropriate sponsor for any needed regulation of that activity, for it would be the appropriate conservator of the interests to which that corporate activity was directed or which it should be kept from impairing. For those purposes, the combine would owe allegiance to the policy and mores of that jurisdiction.

This is an abstract formulation, but specific illustration from our experience in the United States may give it concreteness. Thus, for example, the national impact of the labor and financial policies pursued by large interstate corporations has led to repeated legislative proposals for federal incorporation aimed at safeguarding the national interest in the labor and investment fields.⁹⁴ It has also resulted in elaborate federal legislation with respect to labor, financial organization, and social security.⁹⁵ That federal legislation in turn has had the collateral but important effects of protecting the standards and policies of progressive states from disregard and attrition at the hands of lower standards elsewhere, and of raising the standards of the backward states; contrary to the *Cassandras*, both developments are enhancements of, and not encroachments on, an effective state sovereignty.⁹⁶ Ultimately, area by area, federal and state governmental rivalry has, with the help of a guiding supreme tribunal, been supplanted by a cooperative condominium of control.

To what extent does our domestic history supply guidance in the international sphere? In the first place, it is more urgent that effective controls over corporations be exercised in the international than in the domestic field. The recent vast slaughter has indelibly underscored the demonic difference between the totalitarian states and the democratic ones. We have learned from our fascist enemies

93. See notes 83 and 84, *supra*.

94. Urged by President Theodore Roosevelt in 1905 and President Taft in 1910. For a fuller history of this proposal and the arguments pro and con, see *Letter Containing Compilation of Proposals and Views For and Against Federal Incorporation or Licensing of Corporations*, SEN. DOC. No. 92, Pt. 69a, 70th Cong., 1st Sess. (1934). Full hearings were held on a measure introduced by Senator O'Mahoney in 1937 (S. 10 and S. 3072), which contains affirmative regulations and prohibitions with respect to working conditions, corporate finance, management controls, and trade practices and restraints. See *Hearings Before Senate Committee on Judiciary on S. 10 and S. 3072*, 75th Cong., 3rd Sess. (1937).

95. This is exclusive of regulations of specific industries such as packers and stockyards, radio broadcasting, public utilities, aviation, etc. For a good statement of the opposed contention that national sovereignty and international law are mutually exclusive, see WILLIAMS, *ASPECTS OF MODERN INTERNATIONAL LAW* 25 *et seq.* (1939).

96. See Timberg, *supra*, note 87 at 375-376, 400.

the sinister results that come from a persistent and humorless elevation of duties above rights; that, where "the State is an organ of Divinity, patriotism is a religion;" and that even behind the noble Kantian categorical imperative lurks the Prussian drill sergeant.⁹⁷ War, which in the time of von Clausewitz had been even for dynastic states merely a continuation of political intercourse by other means and was confessedly directed to a political objective, had, by the time of von Treitschke and Bernhardt, become for Germany an end in itself—the fulfillment and fructification of the national State.⁹⁸ In a framework of war-like aggressiveness, where religion and ethics have proven papier maché, the corporate creatures of the dynastic state have likewise become pliant instrumentalities of national aggression. A similar submissiveness has not been true of the corporations centered in the more democratic states, which have retained a free-wheeling approach that only rarely assumes the phase of opposition to the state's objectives or of too open an involvement with governmental machinery, but usually preserves an equable indifference to political objectives.⁹⁹ It is therefore increasingly incumbent upon the democratic states, when they confer privileges on powerful self-governing business associations, to maintain some measure of surveillance over the activities of their corporate creations.

The control of international economic operations raises not only more dangers but also more difficulties than the control of domestic activities. With the subsiding of the original "nationalism" of the states of our Union, for example, those states no longer have violent political feelings with respect to interstate corporations organized in other states. There still remains an antagonism based on undesirable economic and social trends for which these foreign corporations are deemed responsible, such as the lowering of labor standards, the defrauding of domestic investors, the export of income and capital from the state to absentee landlords resident elsewhere, the creation of undesirable social and esthetic conditions such as overcrowding and smoke or the overthrow of an idealized economic pattern (*e.g.*, the transition from farm-owning yeomanry to tenants managing farm-lands in behalf of alien insurance companies). These conflicts and

97. See DEWEY, *GERMAN PHILOSOPHY AND POLITICS* 52, 57, 99 (1915).

98. See CLAUSEWITZ, *ON WAR* 16 *et seq.*, 594 *et seq.* (Modern Library ed. 1943); LAUTERBACH, *The German Idea of Military Society* in *STUDIES IN WAR* 36-55 (Infantry Journal 1943).

99. It is true that there lurks in the ostensible subservience of some servants of the modern state a certain element of leadership. Modern business is in some measure the Admirable Crichton with which no nation at war can dispense, and this has been true to some extent of a dynastic state like Germany. It is also true that the businessmen of democratic nations are patriotic when patriotism is clearly defined. Nevertheless, basic lines of differentiation exist between the totalitarian states and the democracies.

the irritations which they engender are, however, pale carbon copies of the antagonisms which corporations centered in different nations can arouse. In the first place, nations have the potentiality of waging war, whereas the states of our Union do not. There is a relative cultural and linguistic homogeneity among our states that promotes social intercourse and freedom of economic communication, for which no parallel exists on the international scene. There is also a greater similarity of basic laws and institutions on the domestic scene, although a unifying trend is discernible in international economic life. The increasing industrial development of what were originally agrarian states has served to render the corporations of one state more acceptable to the citizens of another. Above all, the United States is characterized by the restraining influence of a federal constitution and federal legislative and judicial organs, which prevent the states of the Union from developing either the economic autarchy so characteristic of independent nations or the atomistic legal doctrines usually implementing that autarchy. In sum, therefore, we have on the international scene greater divergencies of public policy and economic conditions; augmented risk of infraction of national policy; increased necessity for, along with a greater difficulty of, reconciling national policies with respect to large and potent corporations; and a more urgent need for seeing to it, in times of war or other public crisis, that the corporation conforms to national policies.

It should be noted that the preservation of national control and national sovereignty over corporations does not preclude the use of international mechanisms or norms. A large part of the activities of an international combine does not concern vital national interests; the basic purpose of corporate activity is usually irrelevant to such interests. Another large segment of the combine's activities takes place in areas where national sovereignty is doomed to defeat, because any one sovereign has incomplete coverage of the situation, and the combines are consequently able to pick, from the lottery of municipal, private and public international law norms, the most lax standard which they can find.¹⁰⁰ A corporation does not become a worse citizen of the national state because it conforms to obligations of international derivation or exacted by an international authority, particularly where those obligations could not have been effectively imposed or enforced by the national state itself.

Sovereignty has always had the connotation of paramount power. This is true regardless of whether it is given the meaning assigned to it by the international lawyers, *i.e.*, the predominance of

100. See pages 593 to 598, *supra*.

the national state and its unanswerability both in its external and internal relations (a largely negative and anarchic conception), or the meaning used much earlier by apologists for a budding nationalism like Bodin and Hobbes, *i.e.*, the locus of absolute governing power within the state (an essentially positive and unifying use of the term). Anything therefore which detracts from that power or cuts down on the possibility of its exercise *ipso facto* impairs national sovereignty. No state can validly claim to be all-powerful if international combines are in a position to thwart and negate its laws and policies. If national sovereignty is to have real meaning, the national state must be in a position to exercise adequate powers of review and coordination over the activities of corporate and other groups operating within its borders. There is therefore considerable merit, even as a device for the conservation of national sovereignty, to the suggestion that charters of international incorporation be issued by an international authority.¹⁰¹

The public policy issues raised by our international trade are too vital, and too prone to be settled by the unconscious yet tidal sweep of current events, to be left to slow and sporadic pin-pricking by judges deciding individual cases with the help of conflict of laws criteria. In the first place, court cases constitute a sparse and atypical sampling of the entire grist of international economic activity. Furthermore, the "sense of justice" and "just results" that an adequate system of conflict of laws is expected to promote¹⁰² has thus far largely been limited to striking a private balance between the parties involved, and has tended to ignore the public law implications of the concept of justice. It is increasingly true, particularly of the distributive aspect of justice,¹⁰³ that justice must seek its effectuation in the domain of public law and must look to the state as its primary sponsor. It is therefore somewhat unfortunate that the administration of distributive justice still depends, in the present scheme of things, on an adversary scheme of presentation by private parties, which frequently does not allow for a full revelation of the facts and policies relevant to the public interest. Indicative of the extent to which private interest considerations dominate current conflict of laws solutions of international economic disputes is the emphasis

101. See, *e. g.*, STALEY, *WORLD ECONOMY IN TRANSITION* 310 (1939). A charter is, of course, only an administrative mechanism, but a mechanism rendered desirable by the probably slow development of legislative standards in this field. The elaboration of standards, and the clarification of interests which it is incumbent upon such an international authority to clarify and protect, must be the subject of continuing international palaver and agreement.

102. See Cavers, *supra*, note 44 at 200.

103. See ARISTOTLE, *NICOMACHEAN ETHICS* 1006 (McKeon Basic Aristotle 1941).

placed on maximum enforceability of contractual promises¹⁰⁴ and on certainty of predictability of legal consequences.¹⁰⁵ Meritorious as these canons are for the accommodation of purely private interests, they should yield where incompatible with public interests of a higher urgency.¹⁰⁶

Litigation has the additional disadvantage of involving a fortuitous selection of cases, so that it results in a discontinuous drafting of public policy rather than in a firm and uninterrupted delineation thereof. American and English judges, with whom public policy is an unpopular conception, have commendably recognized the incompetence of judicial process as a framer of public policy, by adopting a narrow construction of what are public policy issues and by being unwilling to make decisions that involve choices among conflicting political ideologies and matters primarily within the competence of the political and diplomatic arms of government.

Dissatisfaction with conflict of laws tests and procedures should not, however, blind us to the fact that legislative and administrative changes of the kind that will develop into a new public international law are a matter of glacial evolution. In the interim, we must still look to some framework which will reconcile conflicts of laws. It would be presumptuous, on the frail basis of this essay, to advance any revolutionary or even novel suggestions in this field. It may be in order, however, to recapitulate a few general comments already explicit or implicit in the current literature. Thus, it is suggested that some of the superfluous logical exercises that constitute our conflict of laws system be dispensed with. Professor Cavers has shown how little valid service is performed by the mental operations that cluster about the problem of choice of laws, yet it is evident that the intellectual carrying charges are heavy.¹⁰⁷ The work of Professors Cook, Lorenzen, Cheatham, and others, clearly shows that the "conflict of laws" operations of concepts like "substance," "personal prop-

104. Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 YALE L. J. 1082, 1100-1, 1107-8 (1934). A variant formulation is that good faith international transactions requires that they be upheld. See Neuner, *supra*, note 52 at 499. It is characteristic of this trend of thought that it favors the conflict rules which would allow the maximum amount of damages to the plaintiff. Heilman, *supra*, at 1105.

105. Heilman, *supra*, note 104 at 1099.

106. It is, of course, not contended that public interests are always of higher urgency than private ones, or that the public interest does not comprehend private interests. It is recognized that "private" and "public" rights are not mutually exclusive categories; that there are private means of enforcing public rights; and that individual rights are conceived by "public" action. See Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485 (1940); *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946). Public interests as used in this discussion refer to that residual increment of social values over and above the satisfaction of individual interests.

107. See Cavers, *supra*, note 44; Note, 33 COL. L. REV. 508, 513 (1933).

erty," etc., frequently bear no relationship to their internal law definitions and genesis¹⁰⁸—another area for the liquidation of bankrupt intellectual machinery. Concurrently with these two lines of what one might call the elimination of superfluous intellectual holding companies should go a continuing process of intellectual recapitalization and reorganization. Private and public interests, like financial securities, do not retain at all times their initial market valuation—they appreciate or depreciate in value. Obsolescence or change of social machinery may change the relative importance of the interests recognized by society, just as similar obsolescence or change in the industrial field deflates or inflates security values. Therefore, it is incumbent on judges and others, when weighing the interests of the parties, of the forum, and of other jurisdictions connected with a transaction, to give those interests the most current appraisal possible, and not to place high values on interests that perished or were outmoded with an earlier social and economic era.

While imperfections in the existent conflict of laws system are inevitable, this essay is not a plea for the instantaneous adoption of global law, or for the abandonment of tested municipal legal systems or policies except after due deliberation and sincere concurrence. A system of private international law (conflict of laws) has a definite social viability that is not characteristic of a system of public international law; what in public international law is a direct clash of sovereignties is in private international law sublimated into a conflict of legal doctrines.^{108a} From the standpoint of speedy practical results, therefore, we should keep on improving the system of private international law. Under that system, states perform out of a sense of fairness and ethical justice (the lineal descendant of the old conflicts doctrine of "comity") what no amount of physical and moral compulsion under a public international order could make them do.

It should also be borne in mind that universality and uniformity of application is not necessarily synonymous with excellence, and that contrariety of creed is one of the fundamental values of an expansive civilization.¹⁰⁹ Homogeneity of law is of secondary importance to

108. See notes 45 and 46, *supra*.

108a. There is a school of thought which contends that there is no essential distinction between private and public international law in that both involve conflicts between sovereigns. See Starke, *The Relation between Private and Public International Law*, 27 L. Q. Rev. 395 (1936). The type of conflict involved in settling a conflicts case is, however, largely a cerebral one that can be resolved by individual judges and not a full scale political conflict accompanied by all the trappings of diplomatic conferences and negotiations, such as characterize an important disagreement in the public international law fields. More conventional Anglo-American theory regards private international law as a category of municipal law and differentiates it completely from public international law.

109. "That variety, which is the condition of progress, must be preserved at whatever cost of immediate convenience." BARY, *op. cit. supra*, note 45 at 13.

the production and practical application of the best possible system of law that people can devise. Moreover, legal homogeneity can be achieved in other ways than by formulating general propositions which immediately become universally accepted; as in the past, it can be attained by the more gradual process of selection and amalgamation among discordant legal systems of limited scope.¹¹⁰ The "harmony" of legal doctrine that is one of the professed objectives of conflict of laws systems would, in a legal world full of clashing basic social and philosophical premises, dissenting opinions, reversed lower courts, etc., be largely illusory even if there were no conflicting systems of laws. For this reason, the fact that American business enterprises must carry on their overseas operations in localities with legal systems based on different economic premises than our own does not require us to jettison our own carefully thought out legal and economic system, as has, for example, been proposed by certain protagonists of cartels.¹¹¹ Rather we should continue to strive to obtain for our own viewpoints the widest practicable scope, both by applying our own municipal law to its fullest legitimate extent and by gaining acceptance of our principles in the legislatures of other countries and in international law.

While divergent public policies may thus continue to be given effect, this should be with discretion and progressive diminution. Differences from internationally accepted norms should be encouraged only when they involve essentials. The policies and preconceptions of the domestic jurisdiction should not be identified with the optimum policy for international affairs in economic situations that are in their essence linked to foreign jurisdictions. In the case alike where a forum insists on a negative deference or positive adherence to its public policy, such an insistence should be predicated on the substantiality of the social and private interests under its guardianship which it conceives to be impaired by non-application of its public policy.¹¹²

110. As was true of the *jus gentium* of the Roman law, *id.* at 172-5.

111. This thesis, advanced by Milo Perkins in *Cartels: What Shall We Do About Them?* 189 HARPER'S 570 (Nov. 1944), is wisely answered by Judge Rifkind in *United States v. National Lead Company*, 63 F. Supp. 513, 526 (S. D. N. Y. 1945). Cf. also Lockwood and Schmeisser, *Restrictive Business Practices in International Trade*, 11 LAW AND CONTEMP. PROB. 663 (1946).

112. Applying this test, the author, for example, disagrees with Nussbaum's recommendation that our courts take a vigorous stand against the expropriatory and foreign exchange policies of other states. See NUSSBAUM, *op. cit. supra*, note 6 at 1041. Despite the divergence of those policies from our own economic norms, the cases he deals with involve a paucity of contacts with our own domestic jurisdiction.

Likewise, the general willingness to uphold arbitration contracts should be qualified by scrutiny of the possibility that the parties may have desired to avoid the application of law represented by a jurisdiction with a major interest in the transaction, see note 57 *supra*.

Whatever the final allocation of interests to national or to international organs for protection and administrative implementation, one proposition seems clear—the territorial scope of the regulatory and enforcement power should in the main be co-extensive with the territorial impact of the activities regulated and interests to be protected. It was recognized by the Founders of the Constitution that “the regulation of commerce was in itself a matter indivisible.”¹¹³ If this was true over a hundred and fifty years ago, it is at least true, in the age of the Atomic Bomb, that, if the power to regulate has to be divided, there can be no unregulated gaps in that partition.

113. John Madison, as cited in ERNST, *op. cit. supra*, note 63 at 144.