

Centralizing the International Operations of Multinationals

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INTRODUCTION: A DEFINITION OF TERMS

The origin of the word "multinational" to describe certain types of corporations has gained rapid and wide acceptance within the past few years. These companies have been the subject of a good deal of critical, and not so critical, writing because of their tremendous growth in size and in numbers and because the breadth and density of their operations have drastically changed world economic and social structures.

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The first use of this term, according to Howe Martyn of the American University,¹ was made in an address by David Lilienthal of the Tennessee Valley Authority and later of the Development and Research Corporation, given in Philadelphia in 1958 and published in a book of essays in 1960.

Many large and even medium sized American corporations are already operating in other countries, in one way or another. By *operating* I do not mean merely that they have a financial stake, like a portfolio investment, in business in other countries than their own; nor do I refer only to sales, agencies, or distributors. I have particularly in mind industrial or commercial operations abroad which directly involve corporate managerial responsibility.

Such corporations—which have their home in one country but which operate and live under the laws and customs of other countries as well—I would like to define here as *multinational corporations*.²

It is essential at the outset to distinguish the multinational corporation from the international corporation. The latter basically is an international trader, an exporter of goods and services across state lines who fits within the traditional framework of international trade theories. The “internationalism” of the international corporation is basically concerned with barriers to international trade. A strong opponent of tariffs and quantitative restrictions, the natural inclination of the international corporation would be to support the movement recently manifested by international labor: to equalize costs of manpower and capital in all industrial countries.

On the other hand, the multinational corporation distinguishes itself by the allocation of its resources on an international basis. Thus, not only its produce, but also its basic factors of production—capital, management and technology—are all enlisted in the global search for profits.

For nations, then, to resort to tariff barriers in an age of multinational enterprise when transfers of production across national boundaries have made obsolete former trade theories, is to miss the point. Likewise, to encourage or even require voluntary restraints and other forms of quantitative restrictions, while inward foreign direct investment is unrestrained and outward foreign

1. H. MARTYN, *MULTINATIONAL BUSINESS MANAGEMENT* 1 (1970).

2. *MANAGEMENT AND CORPORATIONS* 1985, 119 et seq. (M. Anshen and G. L. Bach eds. 1960).

investment is inhibited or in some cases prohibited, is to succumb to the cure without understanding the disease.

This paper will examine what has been perceived as a growing trend among multinational companies toward the centralization of their international operations, which is, as this paper suggests, as it should be. In practice, however, one strongly suspects that most companies are still groping for an appropriate superstructure by or through which they may adequately control the far-reaching empires.

The groping for control and the battle over centralization versus decentralization of the international operations of the multinationals began in earnest in the early 1960's when the parent corporation suddenly became aware of the enormous investment it had outside the United States and of the fact that such investment was growing more rapidly than its U.S. investments. These captains of industry suddenly realized that their international operations were too important to be left to expatriates hardly known at the home offices. It was widely believed, that if international operations could do so well under the old regime of benign neglect, they should really prosper when the strings were brought back home to the bosom of the parent. Unfortunately, these disruptions were a blow to the morale of the international group and the centralization of control at the base of the parent's operations was generally without the sensitivity and understanding necessary to insure a smooth take-over and a properly functioning establishment thereafter.

Our thesis is that, ideally, international decision making should be managed from a central control point, leaving day-to-day management and operational control within each of the operating locations. The purpose of the central location would be, basically, to get an overview of the world, to put together the pieces of the global enterprise in such a manner as to be able to take advantage of the shifting trade, financial, monetary and development whims of not only the free world but, more recently, the communist world which is wont to enter the international monetary and development markets in a major way.

This thesis gains support from writers in the area of business administration and industrial management,³ from the existing international legal environment in which multinational enterprise operates, and from the inherent nature and ability of multinational enterprise to operate within a nation-state, while either avoiding or diminishing the impact of such state's laws and decrees.

3. See discussion under "A REVIEW OF THE LITERATURE," *infra* at 73-80.

A REVIEW OF THE LITERATURE

The greatest strength of the multi-national is not in its financial resources, nor its marketing methods, nor even its innovative technology. It is found rather in the managerial ability to marshal all the factors of industry in a dynamic and creative whole.⁴

The role of corporate management has, within the postwar period, been highlighted as one of businesses' most important corporate resources.⁵ Clearly, effective use of management, especially as viewed in the ever-expanding scope of multinational enterprise, can be ensured only by aligning top management with a suitable organizational structure and action format. No single management regime can be equally effective for all phases of multinational enterprise (*i.e.*, industrial, technological, service, etc.), as enterprise must yield in part to the pervasive laws and policies of the countries its operations transcend.

Nevertheless, the multitude of proposals to date are problematic not because each one offers the rudiments of a single scheme to be utilized by all corporations involved in global operations, but rather, because they treat the management anomalies of the multinational corporation (MNC) as they would a domestic or international corporation. The difficulties involved in managing the multinational are unique:

Managing a multinational firm is *not* just like managing a domestic firm on a bigger scale. It is a different job. It is *different* because of the special problems and needs, which are salient when a firm becomes multinational.⁶

Moreover, because the effects of external factors (*e.g.*, fluctuations of currency exchange rates, the laws and tax regulations of the various countries within which a global enterprise operates, shifts in the conditions creating foreign markets, etc.), are more severely felt in the MNC than in other corporations, a fundamentally different management structure is properly in order. This article is purposed upon outlining such a structure, one which will more

4. Sarnoff, *Multinationalism: A New Challenge to Management*, THE MBA 40 (1969).

5. Business International S.A., *Managing the Multinationals: Preparing for Tomorrow*, 144 (1972) in conjunction with the Centre d' Etudes Industrielles, Geneva.

6. R. HAYS, INTERNATIONAL BUSINESS: INTRODUCTION TO THE WORLD OF THE MULTINATIONAL FIRM 267 (1972) [hereinafter cited as HAYS].

perfectly integrate and more efficiently utilize all of the factors surrounding today's global enterprise.

An examination of those proposals already published⁷ is best accomplished by general summary, the emphasis being placed on those elements which acknowledge the notion of centralization and/or decentralization of management for the multinational enterprise.

Initially, it should be noted that throughout all phases of management of the multinational there exists an increasingly severe shortage of managers qualified by "international" experience. The vast majority of firms are American-based, and consequently employ primarily Americans in upper management. Though some countries require that firms operating within their borders employ a percentage of indigenous managers, these individuals generally are not promoted to top management levels. There is consensus that any effective regime should at least include processes whereby new managerial talent can be bred; talent which should include numerous foreign nationals.

Within those proposals expounding decentralization of management, certain considerations seem prevalent. First, the ability of a multinational enterprise to move far toward centralization is severely constrained in that the informational input from foreign subdivisions is so varied it cannot be validly processed by top level management (*ie.*, the international division). Moreover, marketing policies must be carefully designed around the specific needs of the foreign division, thereby defying utilization of a single, centralized format. The same holds true for economic conditions.

Second, the diversity of external factors requires the suborganizational structure of the MNC to solve problems which are peculiar to certain geographic regions, a requirement it would not be able to meet were its hands to be tied by a "centralized" policy. As heretofore mentioned, laws and public policies differ in each region (*e.g.*, tax laws, import/export restrictions, etc.). Managerial structure must yield to such divergencies. Too often, the implications of local politics are given insufficient consideration in a system which stresses centralization.

7. See generally E.J. KOLDE, *INTERNATIONAL BUSINESS ENTERPRISE* 218-33 (2d ed. 1973) [hereinafter cited as KOLDE]; J. STOPFORD & L. WELLS, JR., *MANAGING THE MULTI-NATIONAL ENTERPRISE/ORGANIZATION OF THE FIRM AND OWNERSHIP OF THE SUBSIDIARIES* (1972); J.S. SCHWENDIMAN, *STRATEGIC AND LONG-RANGE PLANNING FOR THE MULTINATIONAL CORPORATION* (1973); HAYS, *supra* note 6, at 260 et seq.; Mennis and Sauvart, *The Multinational Corporations, Managers, and the Development of Regional Identifications in Western Europe*, 403 *ANNALS* 22-23 (1972).

Third, only with decentralization can the decision-making power of the enterprise be delegated to indigenous management. Clearly, this can be useful to supply powerful motivation to local managers, who might otherwise resent the subservience a centralized system would necessarily impose upon them. This is not to suggest, however, that local management may ignore the overall objectives of the MNC, but rather allows indigenous management to adjust individually to the subordinate national goals.

Similarly, with theories for centralization of top management of multinational enterprise, certain considerations are outstanding in the literature to date. Of greatest importance to the multinational is its need to function effectively as an organic whole. Such coordination presumes a central purpose. Only through centralized management can a worldwide perspective on the interests of the total enterprise be maintained and the goals of the corporate whole be achieved. Moreover, because international managerial talent is scarce, such available talent is best utilized centrally, since it would not otherwise be possible to duplicate the talent in each foreign affiliate.

Existing literature also goes on to point out the peculiar advantages centralization has over a system of decentralized subdivisions.⁸ With respect to foreign production, centralized management can provide alternative choices to indigenous costs of fabrication, labor rates, the price of raw materials and trade regulation policies. Furthermore, centralization provides the multinational corporation with better overview and control through which to adjust its operations to differing interest rates, fluctuations in currency stability, and the availability of foreign exchange, financing and funding.

Clearly, the extent to which there can be centralization of management is directly proportional to the degree to which subdivisions of the MNC can be integrated. As a practical matter, centralization seems the only alternative when a multinational enterprise has diversified operations. Otherwise, there would be no effective means of interrelating and integrating the MNC's global operations so as to provide the synergism which is its purported purpose and advantage over the purely domestic or simply international firms.⁹

8. KOLDE, *supra* note 7, at 227.

9. This is not to overlook the "behavioral" requirement that multina-

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The essence of the multinational corporation is its willingness to allocate all of its resources on an international basis. Its purpose in so doing is to maximize the global profits of the enterprise. This presupposes that there is somewhere a central organ to which all impulses and signals flow and from which all commands emanate. Otherwise, it is the nature of the individual operations, which are normally established as separate profit centers, to function and think for themselves, and to do that which is good only for themselves.

The power of the private corporate enterprise to transfer production from one country to another, to increase capital spending within any given country or to transfer capital from any given country to another has been its major source of strength and growth, as well as the basis for the widespread doubts about the capacity of any given national economy to experience self-generated growth. The national division of any global enterprise must naturally respond to the internal political pressures of the nation state within which it operates. The multinational enterprise, on the other hand, cannot afford to do so.

A Chicago program on Anti-Inflation Law: "Wages-Prices-Foreign Trade-Taxation," sponsored by the American Law Institute and the American Bar Association in October, 1971, provided a forum for speculation on some of the tools in the multinational corporate arsenal by which the impact of the new economic policies of the government of the United States could be avoided.¹⁰ In so doing, the following example was used:

Chrysler imports diesel engines from the UK to power certain of its U.S. built commercial vehicles. Similarly, Ford imports four cylinder engines from its UK subsidiary for incorporation into its U.S. built Pinto car. Both of these companies could, at least temporarily, substitute U.S. built engines in such vehicles and thus avoid the ten percent (10%) surcharge. If the surcharge were to

tional planning must necessarily be interactive with secondary management so as to: (1) prevent the feeling in lower level managers that they do not participate in the decision making process and (2) ensure that vital informational inputs from tertiary management is communicated freely and currently. Though some suggest that with increased centralization, the responsibilities of the various functional levels become difficult to define preferable, the central staff should act as coordinators and advisors of the substructure, while indigenous management remains responsible for the implementation of the centrally designed operational plans.

10. See the "Background Memorandum" of Seymour J. Rubin and the "Supplemental Background Memorandum" of Albert S. Golbert on *Multinational Enterprise and the New Economic Program*, ALI-ABA COURSE OF STUDY, ANTI-INFLATION LAW, WAGES-PRICES-FOREIGN TRADE-TAXATION 97, 107 (1971).

be with us for an extended period of time, it would be quite possible for both Ford and Chrysler to shift production of their respective vehicles from the United States to Canada wherein such engines could be imported free of surcharge. As the value of the UK engines to the whole vehicle is probably such that their use would not deprive the vehicle of its classification as a "Canadian" vehicle, it could then be imported and sold in the United States pursuant to the Canadian-U.S. Automotive Agreement free of such surcharge which is not applied to items which were previously imported free of duty.

While the first shift, from UK engines to U.S. engines, would be helpful to U.S. balance of trade and payments, and result in a "return" of jobs to the United States, the second shift, if the surcharge were continued on a long-term basis, to production in Canada, would prove the measures to be self-defeating and leave the economy worse off than before.

But multi-national firms are not simply profit maximizers. They have multiple concerns and live with multiple constraints, reflecting diverse interests within the corporate group and differing pressures from governments in various countries. Many of their decisions grapple with an uncertain and distant future, and it does excessive violence to their problems to imagine that there is a single best solution. Thus, should a variety of intra-company considerations lead Ford and Chrysler not to shift their production at all, but to absorb the ten percent (10%) surcharge in the U.S., or, by adjusting the intra-company pricing, to transfer all or part of its effects to the UK, there could be little or no balance of payments effect in the United States. Moreover, if the dollar has been devalued vis-à-vis the pound, a change in the terms of trade will have taken place and, as far as the consolidated books of the company are concerned, the sale of the engines even at a reduced price could, nevertheless, produce as much in dollars as it previously did.¹¹

Were the decision left to the UK or the Canadian company, or even to the U.S. operating company, it would, no doubt, be based upon what is best for that company, without consideration of the global enterprise. This, of course, is entirely understandable because no national branch or subsidiary of the corporate group is or can be aware of the global requirements of the enterprise.

Professor Jack N. Behrman, in writing for an earlier symposium on multinational enterprise, was of the opinion that "the means of operation and control" is one of "the characteristics which distinguish a multinational enterprise from other foreign investments."¹²

11. *Id.*

12. Behrman, *The Multinational Enterprise: Its Initiatives and Governmental Reactions*, 15 J. INT'L L. AND ECON. 215 (1972).

In distinguishing the activities of multinational enterprise from earlier foreign investment organizations under the "colonial" form and the "international holding company" form, Professor Behrman noted that:

The objective of the multinational enterprise is to meld its foreign affiliates into an operational entity, integrated with the activities of the parent, to serve the world market. It is the projection onto the world market of the concept and operation of the U.S. giant corporation as it operates in the continental common market of the United States. . . .

It has three characteristics which are significant from the standpoint of public policy: central control by the parent, a common strategy for the entire enterprise, and integration of operations of affiliates with each other and the parent. It is not enough for the parent to have control. . . . Control under the multinational enterprise is being exercised and applied in a common strategy. . . . The common strategy does include the integration of all affiliates with each other and the parent. Not all operations are as yet fully integrated, but multinational enterprises are moving in this direction as fast as it is economically feasible.¹³

Professor Behrman recognizes that "these characteristics are not fully accepted in the literature as yet"¹⁴ and certainly not in practice either. Nevertheless, the reasons for turning toward centralization are becoming more and varied, and both present impetus and future developments should prove to be compelling in this regard.¹⁵

In 1918, Walter Rathenau wrote that "the depersonalization of ownership, the objectification of enterprise, the detachment of property from the possessor, leads to a point where the other prize becomes transferred into an institution which resembles the state in character."¹⁶

In 1928, the Social Science Research Institute of America, following Rathenau's lead, reached the conclusion that the typical American corporation had ceased to be a part of business enterprise and had become an institution. As a result, Adolph Berle, Jr. and Gardner C. Means were commissioned to study the phenomenon

13. *Id.*

14. *Id.*

15. Further support of the tendency of MNC's "to centralize control of basic strategies in order to operate in the most efficient manner and to exploit opportunity on a worldwide basis . . ." comes from Hadari, *The Structure of the Private Multi-National Enterprise*, 71 *MICH. L. REV.* 729, 746-54 (1973). Although Mr. Hadari appears to be less than certain as to the trends indicating that "signs of decentralization have again appeared as a sign of foreign interests and firms has continued to grow thereby making centralization less manageable and efficient . . ." including that "the forms and trends of control . . . must be ascertained on a case by case basis," *Id.* at 751.

16. W. RATHENAU, *IN DAYS TO COME* 120-21 (1921).

of the American corporation, particularly in the context of ownership.

The final paragraph of their classic study contained a conclusion which must then have been startling:

The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the states The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization.¹⁷

Thirty-five years later, John Kenneth Galbraith even postulated that the line between the corporation and the state would disappear.¹⁸

The international implications of the respective theses of Rathenau, Berle and Means were never developed by the authors, nor did Galbraith do more than indicate that the line between the corporation and the state was disappearing. Failure to deal with the international characteristics of the problem may be more than an oversight, it may be the result of an inability to deal radically with the nationality and political ties of multinational corporations which, for many purposes, are at once stateless and a quasi-state.

Except for the fact that a corporation lacks defined territory over which it exercises exclusive sovereignty and an administration which is recognized by other sovereigns as a "government," it has most everything else a nation-state should have, and many things which some recognized states lack. In short, it is a highly developed form of human association, the most significant aspect of which, especially, is sheer size and importance of purpose.

Thus, while the relationship between the multinational corporation and existing nations-states may be described in many respects as being symbiotic, it is also highly competitive in that the interests of the multinational corporation may not always coincide with those of the nations-states with which it has dealings, or for that matter, with those of the society of nations in which it functions freely.

It is highly unlikely, however, that the future holds an interna-

17. BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 313 (1967).

18. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 399-400 (1967).

tional status equivalent to that of nations-states in store for the multinational corporation, nor is it likely that corporations will be granted international status sooner than private individuals.

Clearly the private corporation cannot and should not be granted the international status equal to that of public international organizations. Unless all corporate persons or indeed all legal individuals were admitted to such status, the borderline between those who have and those who have not international legal status would be difficult if not impossible to draw. More importantly, the elimination of differences in status between states and public international organizations, representing public interests and constitutionally responsible to the public, and private corporations, representing private interests and pursuing private objectives, would be subversive of the basic objectives of international order. It would be no more tenable than the elimination, in municipal law, of the distinction between governmental and other public authorities on the one part and the private legal subject on the other part.¹⁹

It should be apparent from what has been said that not everyone is happy with the growth of multinational corporations. The report issued by the United Nations on MNC's estimates that in 1971 the multinationals controlled 1/5 of the world's gross national product not including the centrally planned economies. A recent report issued by the Diebold Institute entitled *Business and Developing Countries*²⁰ estimates the production of the multinationals is increasing by 10 percent a year, double the growth rate of the world's GNP. One author recently postulated an *exemplum horribilis* wherein the multinationals, having bought out the entire world, could all merge into a gigantic conglomerate, World Inc. whose chairman pulls down a 100 million dollars a year salary plus the customary "fringes" including Social Security benefits at age 65. World Inc. will control everything from the corner newsstand to the new world government, a subsidiary of World Inc., and colonies on the planets.²¹

THE BARCELONA TRACTION CASE: AN IMPETUS TO CENTRALIZED MANAGEMENT

From the prospective of the multinational, the lack of a definite international juridical status is a great drawback. Recent international jurisprudence, in respect of the protection of the international corporate investments of the multinationals, has provided good reason for their insecurity in this regard and another good reason for centralization of their operations.

19. W. FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 233 (1964).

20. Diebold Institute, *Business and Developing Countries* (1973).

21. Fuller, *Local Firms Seen Aiding LDC's*, *J. INT'L COM.* (Apr. 22, 1973).

In particular, the holding of the International Court of Justice in the *Barcelona Traction Case*,²² (Belgium v. Spain) should now have been read and absorbed by the corporate counsel of most multinationals and should have major impact upon their choice of corporate entity for the control of their operating subsidiaries and branches around the world. This case, standing alone, should be more than sufficient to ensure that such decisions are no longer to be made exclusively upon the basis of political, economic, or tax considerations.

Barcelona Traction: The Issues

Although Belgium sought the aid of the International Court of Justice in 1958, the proceedings were halted for a time while the parties tried to negotiate a settlement. No solution having been reached, Belgium again filed an application with the International Court alleging damage to Belgian nationals, shareholders in Barcelona Traction, Light and Power Co. Ltd., a Canadian corporation, resulting from conduct towards the company by Spain which violated international law. The Spanish government raised four preliminary objections to the Belgian claim. In 1964, the International Court rejected the first two Spanish contentions, that the previous discontinuance precluded the claim, and that Spain could not be required to submit to the jurisdiction of the court. The third and fourth preliminary objections, alleging that the Belgian government lacked standing to maintain the action and had not exhausted local remedies, were joined to the merits of the case. The gravamen of the case was that Spanish exchange control restrictions prevented certain Spanish subsidiaries of Barcelona Traction from transferring funds to their Canadian parent, which funds were required by the parent to service certain debt obligations. The obligations were owed, in part, to Spanish creditors, who successfully caused bankruptcy proceedings to be entered against the Spanish subsidiaries of Barcelona Traction. The subsidiaries were ordered seized, and constructive civil possession of their shares was taken. Barcelona Traction's efforts to contest the jurisdiction of the Spanish courts failed and in 1969 the Barcelona Court of Appeals approved the election by creditors of trustees in bankruptcy. The

22. *Barcelona Traction Light & Power Co., Ltd., Case [1970] I.C.J. 3* [hereinafter cited as *Barcelona*].

trustees procured a decision which cancelled the existing shares outside of Spain, made Barcelona the head office of the subsidiaries, and offered the public sale of new shares in such company. The former bondholders of Barcelona Traction, through a new Spanish corporation, gained control of the former Spanish subsidiaries and further proceedings by Barcelona Traction proved to be of no avail.

Although the Canadian government initially complained to Spain about the denial of justice to Barcelona Traction, and in particular suggested that such actions violated a treaty between Spain and Canada, Spain did not consent to a Canadian proposal for arbitration, and subsequently, the Canadian interest ceased.

In its decision on the merits of the case, the International Court ruled against Belgium on the ground that the Belgian government lacked standing to maintain the action because Barcelona Traction was a juristic national of Canada, and the mere fact that the majority of the shareholders were Belgian nationals did not give Belgium the right to espouse the claim.²³ The ruling was based on the proposition that only the nation of which the corporation is a national may protect the company.²⁴ The Court felt that the shareholders had mere interests in their corporation, and the indirect injury inflicted upon them was insufficient to allow Belgium to espouse their claim.²⁵

Although the Court correctly noted the absence of precedent for allowing shareholders to maintain an action in this type of situation, the decision is open to attack. Initially, should Canada have been considered the national state of Barcelona Traction when the latter's ties to Canada were limited? Secondly, is the distinction between shareholder rights and mere interests with respect to their company as clear as the Court would have us believe? Finally, is the decision consistent with other situations where the national states of shareholders have been permitted to espouse a claim for injury to the corporation, and the developing notion of multiple protection in international law?

Indeed, some of the judges who decided the case wrote separate opinions disagreeing with the majority opinion with respect to the above questions. Five judges wrote opinions in support of Belgium's right to bring the action on behalf of the shareholders. Four of these were concurring opinions with a lone dissent from Judge, *ad hoc*, Riphagen, chosen by Belgium.

23. *Id.*
24. *Id.*
25. *Id.*

Judge Fitzmaurice felt compelled to vote with the majority of the Court strictly on the grounds of *stare decisis*. He noted that the established rule allowed only the national state of the corporation to bring an action for injury done to the company. But while he concurred with the majority on the basis of this technical rule as he referred to it, he went on to point out some of the shortcomings of the principle. He suggested that international law should be more liberal in recognizing harm to shareholders when their company has been injured. He also expressed displeasure over the failure of the parties to present argument concerning the nationality of the company itself, and the effect of the *Nottebohm*²⁶ (*Liechtenstein v. Guatemala*) decision on this case.

Judge Tanaka came to similar conclusions with respect to the right of Belgium to sue on behalf of its nationals, since the shareholders had suffered an injury. But he voted with the majority because he felt Spain would win on the merits of the case anyway. Judge Jessup also agreed with the principle of permitting the national state of the shareholders to sue on their behalf. However, he felt the plaintiff should fail in this case since continuous ownership of a substantial number of the shares by Belgian nationals had not been established. Finally, Judge Gros recognized the right of the shareholders to be protected, but he joined the majority here because he thought the connection between Barcelona Traction and the Belgian economy had not been sufficiently proved. In addition, he found that Belgium had failed to exhaust its local remedies in this case. Hence, the question of Belgium's capacity to bring the action upon which the decision turned was not as clear as the 15-1 vote would indicate.

Potential Bases for State Maintained Actions

There are two possible legal bases for permitting a state to maintain an action on behalf of the shareholders of an injured company. These two legal mechanisms will be discussed in the context of the *Barcelona Traction Case*, although they are certainly capable of more general application.

The first would allow Belgium to bring an action on behalf of Barcelona Traction Company itself on the ground that the cor-

26. *Nottebohm Case* [1955] I.C.J. 5.

poration was in fact a Belgian national. While the Belgian government did not ultimately claim to be the national state of the Company, the issue arises due to the International Court's opinion in the *Nottebohm Case*. Indeed, three of the concurring judges noted the issue in their opinions. Judges Fitzmaurice, Tanaka, and Gros expressed regret that the question of Barcelona Traction's nationality and the effect of the *Nottebohm Case* had not been argued by the parties.

The statute of the International Court of Justice provides that only states can be parties to actions brought before the Court.²⁷ Consequently, if an individual is to be represented before the Court, his claim must be espoused by his state. Nationality is determined by one of several factors including his place of birth, his country of naturalization, and other ties between an individual and a nation which would constitute a sufficient nexus to be determinative.

It has been the customary practice in international law to entitle a state to grant diplomatic protection to any company of its nationality. However, there have been diverging views as to the means of determining the nationality of corporations. The principle tests have been the "seat of control"²⁸ and "the place of incorporation."²⁹ Other tests include "domicile," "control," "beneficial interest," and "the place of responsibility for corporate action."³⁰ The "seat of control" test adopted by the civil law countries³¹ declares that the place where decisions are made concerning the operation of the company establishes the nationality of the corporation. Common law nations³² follow the "place of incorporation" test. In the *Barcelona Traction Case*, the application of both principle tests would result in the Canadian nationality of the company. The Barcelona Traction Company was incorporated and managed in Canada. Since Canada, as a common law nation, follows the "incorporation" test, and Belgium, a civil law state, has adopted the "seat of control" rule, it is not surprising that the Belgian government and the Court agreed that the Corporation was a Canadian national.³³

But the Canadian nationality of Barcelona Traction may not have been as clear as the majority opinion would have us believe.

27. 59 Stat. 1055, 1059 Art. 34-1 (1945).

28. This test has been adopted by civil law countries.

29. This test has been adopted by common law countries.

30. SCHWARZENBERGER, *INTERNATIONAL LAW* 288 (2d ed. 1949).

31. Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT'L & COMP. LAW Q. 275, 296 (1969).

32. *Id.*

33. See Barcelona, *supra* note 22, at 43.

In his separate opinion, Judge Fitzmaurice asked what would have happened if Canada had continued its efforts to act on behalf of Barcelona Traction.³⁴ Could it not have been reasonably expected that Spain would have challenged Canada's standing on the ground of an insufficient link between the Canadian government and the Barcelona Traction Company to permit the action by Canada? After all, Barcelona Traction was incorporated and managed in Canada only as a matter of convenience. No other ties between the two existed. The issue takes on added significance when one notes the constant references in the majority opinion to Canada's right to protect the corporation, since it seemed to be an important justification for the Court's holding.

In this regard, the International Court's decision in the *Nottebohm Case*, concerning the nationality of individuals, merits discussion. Nottebohm was born a German national, but resided in Guatemala where he conducted a business operation. Just prior to Germany's invasion of Poland, he became a naturalized citizen of Liechtenstein while visiting a relative in that country. Nottebohm then returned to Guatemala where he was removed to the United States for internment as a dangerous enemy alien, at which time Guatemalan legislation transferred most of Nottebohm's property in the country to the government. After his release, Nottebohm went to Liechtenstein which commenced proceedings against Guatemala in 1951 seeking damages for the expulsion of Nottebohm and the confiscation of his property. The Guatemalan government answered by claiming that the Liechtenstein action was inadmissible because there existed no "durable link" between Nottebohm and Liechtenstein. In dismissing the complaint, the International Court declared³⁵ that the legal bond of nationality must be based upon a "genuine connection" between the individual and the State assuming the claim in his behalf.

Although the *Nottebohm Case* dealt with the nationality of individuals, it is appropriate to explore the effects of the decision upon the nationality of corporations.³⁶ Companies have been considered as separate entities apart from their owners in both municipal and international law.³⁷ They have a distinct juridical personality

34. See Barcelona, *supra* note 22, at 80.

35. See *Nottebohm Case*, *supra* note 26, at 23.

36. See SCHWARZENBERGER, *supra* note 30.

37. See Barcelona, *supra* note 22, at 33.

similar to that of individuals. Consequently, the rules for determining the nationality of individuals may provide the basis for establishing the nationality of companies.³⁸

Assuming the Belgian government abandoned its traditional "seat of control" test for determining whether it would afford protection to companies, would the "genuine connection" test permit Belgium to maintain the action against Spain? Initially, there is some confusion concerning the "genuine connection" rule itself.³⁹ The Court in the *Nottebohm Case* noted at the outset in its opinion that it would limit its decision to the question of whether Liechtenstein could claim Nottebohm as a national vis-à-vis Guatemala.⁴⁰ Much of the discussion in the case is concerned with comparing Nottebohm's relationships with the two litigating nations. But after that discussion, the Court phrased the issue by focusing on Nottebohm's ties to Liechtenstein compared to *any other state*.⁴¹ If the Court meant to restrict itself to the scope of its initial analysis of the question, it would seem that "Guatemala" should have been used in its final statement of the issue rather than "any other state."⁴² Additional evidence that the use of "any other state" may have been a mere oversight appears in the Court's wording of its holding that Liechtenstein was not entitled to extend protection to Nottebohm vis-à-vis Guatemala. In applying⁴³ this interpretation of the rationale in *Nottebohm* to the *Barcelona Traction Case*, the Canadian ties to the Company become immaterial. The only question would be whether the corporation had a more "genuine connection" with Belgium than with Spain.

Having posed the issue resulting from the application of the above interpretation of the *Nottebohm* rule to the *Barcelona Traction Case*, the next step would be the creation of criteria for determining which nation had closer ties with Barcelona Traction. In this regard, the Court's discussion of specific factors⁴⁴ for determining the meaning of "genuine connection" in *Nottebohm* is not particularly helpful, since it was concerned with individuals.

However, it seems that the establishment of appropriate guidelines for the "genuine connection" requirement with respect to companies would be consistent with the fundamental proposition

38. See SCHWARZENBERGER, *supra* note 30.

39. See SCHWARZENBERGER, *supra* note 30, at 289.

40. See *Nottebohm Case*, *supra* note 26, at 21.

41. See *Nottebohm Case*, *supra* note 26, at 24.

42. See SCHWARZENBERGER, *supra* note 30, at 290.

43. Assuming the *Nottebohm* principle may have some application to corporations. See note 31 *supra*.

44. See SCHWARZENBERGER, *supra* note 30, at 292.

described in the *Nottebohm Case*.⁴⁵ Nationality of corporations would hinge on economic connections⁴⁶ between the company and the countries involved in the proceeding. The primary considerations should reflect the contribution of the company to the economies of the litigating parties, the residence of the corporation, and the identity of its personal law.⁴⁷ In the *Barcelona Traction Case*, the application of the latter two factors would establish the Canadian character of the company. Barcelona Traction maintained its head office in Canada, and the Company was subject to the Law of Canada regarding Corporations. But, as noted earlier, the juristic relationship of Barcelona Traction to Canada is irrelevant. The only matter of concern is the Belgian government's rights vis-à-vis Spain. So the economic connection factor would be the single applicable test for determining whether Barcelona Traction was more closely attached to Belgium or Spain.

Spanish economic interests in the Company consisted of the location of the actual business activity (note that the place where a company conducts its business operations is not its place of residence) and the existence of Spanish creditors (the Spanish government, Spanish bondholders, and Spanish citizens to whom Barcelona Traction owed contractual obligations). On the other hand, Belgian nationals owned the majority of the stock in the Company.⁴⁸

It would thus seem reasonable to conclude that the consumption by the Spanish people of Barcelona Traction's services and its indebtedness to a number of Spanish citizens would not be sufficient to show a "genuine connection" greater than the ownership interest vested in the Belgian nationals who were its shareholders. Consumers and creditors have a very limited relationship with the companies with which they deal. Consumers merely have a right to expect a certain level of merchantability in the products or quality in its services; and creditors, a legal right to expect payment in due course. Shareholders on the other hand, are the actual owners of the corporation, and theoretically rank at the pinnacle of the corporate control hierarchy. Hence, Barcelona

45. See SCHWARZENBERGER, *supra* note 30, at 292.

46. See SCHWARZENBERGER, *supra* note 30, at 294.

47. SCHWARZENBERGER, *supra* note 30, at 293.

48. Belgium Nationals owned 88% of the stock in Barcelona Traction.

Traction would apparently have a more "genuine connection" with Belgium than with Spain.

It should be noted that if a *Nottebohm*-type rule were applied to nations seeking to protect corporations, companies would often have the right to acquire diplomatic protection from more than one country. Under the "genuine connection" test, Canada might also have brought the claim of Barcelona Traction against Spain. The multiple protection afforded by a general recognition of the "genuine connection" rule would certainly expand the avenues for relief to injured corporations and their shareholders.

The other interpretation of the *Nottebohm* rule is that the individual must have a stronger connection with the claimant state than with any other state. In the context of the *Barcelona Traction Case* the issue would be whether Belgium would have to show it had stronger ties with the Company than had Canada in order to require Spain to recognize the claim.

Application of the criteria mentioned earlier for determining the nationality of corporations would show a strong connection between Canada and the Company based on the residence and personal law considerations. Barcelona Traction was incorporated, established its head office, and was subject to the corporate law in Canada. On the other hand, Belgium's economic connection with the Company was much stronger than Canada's. So, under this view of the *Nottebohm* rule, the relative importance of the different criteria for determining corporate nationality is in question.

Obviously, if the residence and personal law tests took precedence, the "genuine connection" theory could be applied with greater ease by a court. It would also have the effect of increasing certainty in the law and reliance interests. But merely because a test may be administered without much difficulty does not automatically make it more just. The test selected should be the one which is most likely to reflect the policy followed by a state in its decision to protect a company. In other words, how would a state determine whether a sufficient "genuine connection" existed between it and a corporation before deciding to extend diplomatic protection.

The primary consideration in a state's decision to protect a company is the economic ties between the two. A state notes whether it, or its citizens, have been financially prejudiced by the wrongdoing of another nation. Indeed, the economic connection factor takes on added significance when one examines the actual practices of nations currently affording diplomatic protection to companies under the existing tests for determining corporate

nationality. Both the United States and the United Kingdom appear to require more of an economic connection than mere incorporation before granting diplomatic protection to companies.⁴⁹ In the United States, the nationality of the shareholders is a major factor in determining whether there is a substantial American interest⁵⁰ which warrants intervention. Apparently Canada made a similar assessment in the Barcelona Traction situation just before it lost interest in pursuing a remedy against Spain.⁵¹ While injured shareholders, individual and corporate, should not be rendered helpless because of the lack of interest or standing of nation-states entitled to maintain a suit in their behalf, nevertheless, that is the present state of the law of nations governing the international arena the multinationals call "home."

The other possible basis for the Belgian claim and the approach adopted by the Belgian government would permit the national state of the shareholders to maintain an action in their behalf. Judges Fitzmaurice, Tanaka, Jessup and Gros noted that international law should recognize a right in the shareholders for an injustice resulting in injury to their company.

In the *Barcelona Traction Case*, the Belgian government actually based its claim on the injury to the shareholders of the Company. As investors in the Barcelona Traction Company, the shareholders' financial interests were prejudiced by the action of the Spanish government. Thus, Belgium alleged it had the right to afford diplomatic protection to the shareholders who were Belgian nationals.

The International Court rejected the Belgian claim of injury to the shareholders. In doing so, the Court noted the separate legal personality of a corporation and the limited remedies available to shareholders for injuries to a company. Shareholders were held not to have the capacity to maintain an action in their own right for indirect injuries to their interests in a corporation.⁵²

Undoubtedly, the Court in the *Barcelona Traction Case* was correct in stating the separate legal personality of corporations.

49. See SCHWARZENBERGER, *supra* note 30, at 310.

50. HACKWORTH, 5 DIG. INT'L LAW 839.

51. Barcelona Traction Light & Power Co., Ltd., [1964] I.C.J. Reports 3, 62 [hereinafter cited as Barcelona].

52. See Barcelona, *supra* note 22, at 36.

It is also true that generally only the corporation may seek redress for wrongs done the company, shareholders being only indirectly affected by injuries to their corporation. However, shareholders suffer financial losses when their company is deemed bankrupt in the same way as when they are unjustly denied dividends (considered a direct loss). There are instances in municipal law where courts have pierced the corporate veil to permit shareholders to take action in their own names for injuries inflicted upon their company.⁵³ Generally these actions are allowed when the officers of the corporation either are responsible for the loss or fail to take proper steps to protect the company. So situations do exist in municipal legal systems in which investors may seek relief for damage to their indirect interests in a corporation.

But in the context of international law, an added problem arises. The shareholders of the Barcelona Traction Company were not forced to take action because the directors or officers of the corporation failed to act. Rather, they were initially frustrated by the lack of Canadian interest. It is firmly established in international law that a state has complete discretion in deciding whether it will grant diplomatic protection to one of its nationals. Therefore, Belgium could not claim that Canada failed to act as international law required. But it would appear that good reason exists for allowing Belgium to protect the shareholders. The Canadian government could hardly be expected to react sympathetically to the pleas of Belgian nationals. The Canadian government had no political responsibility to the foreign investors. Likewise, the mere Canadian nationality of Barcelona Traction Company was not a sufficient link with Canadian interests to expect the government to act. In other words, the Canadian government was under limited pressure to grant the political right of diplomatic protection to Barcelona Traction. The International Court failed to mention the weak position of the Belgian shareholders vis-à-vis the Canadian government when it emphasized the right of the shareholders to seek protection for the company from Canada. Shareholders should not be compelled to seek aid from a foreign state which is unlikely to be sympathetic to their plight. The Belgian shareholders were in a position similar to that of the investors, under municipal law, who are permitted to act because the officers of their corporation declined to do so. In both situations, the shareholders would be denied appropriate relief if their claim were disallowed. In fact, there may be stronger reasons for allowing the foreign shareholders to seek the diplomatic protection

53. Jones, *Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies*, 26 BRIT. Y.B. INT'L 236 (1949).

of their own government, since they have far less power to influence the state of the corporation than have the municipal investors to replace the officers of their company.

A few of the concurring judges expressed the view that the development of international law in this area need not be bound by municipal and private law concepts. Judge Tanaka remarked that international law must be flexible and take the realities of the situation into account in determining the rules of law among nations.⁵⁴ He cited the following quote from Judge Wellington Koo from the 1964 judgment concerning the preliminary objections:

International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law. . . . It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words it is the substance which carried weight on the international plane rather than the form.⁵⁵

Accordingly, he dismissed the majority opinion's distinction between shareholder rights and interests as being too formalistic. An injury to an equitable interest is enough to warrant protection in international law.⁵⁶

In a similar fashion, Judge Gros expressed his displeasure over the suggestion that municipal rules of law should govern the development of international law.⁵⁷ Municipal law is nothing more than a fact in evidence to be considered with the other facts, and no more.⁵⁸ With that premise, he had no difficulty in deciding that when a company is destroyed the shareholders necessarily suffer a loss in the form of the destruction of their investment.⁵⁹ Such an injury is entitled to redress.

Hence, the shareholders in Barcelona Traction may be considered to have suffered an injury cognizable in international law, notwithstanding the rules of municipal corporate law. Belgium would then have standing to grant diplomatic protection of its nationals in an action against Spain for damage resulting to the shareholders.

54. See Barcelona, *supra* note 22, at 127.

55. See Barcelona, *supra* note 51, at 62-3.

56. Case of the Cayuga Indians (Great Britain v. U.S.), 6 U.N. Rep. 173 (1926).

57. See Barcelona, *supra* note 22, at 272.

58. See Barcelona, *supra* note 22, at 272.

59. See Barcelona, *supra* note 22, at 276.

Another means of justifying the right of Belgium to protect its nationals would be through analogy to the existing situation where the national state of shareholders may sue in their behalf. In its opinion in the *Barcelona Traction Case*, the International Court cited the "general rule" that state may only grant diplomatic protection to companies incorporated and maintaining a registered office in its territory.⁶⁰ This principle seems to be based on the notion that corporations in international law are distinct juridical persons which may be protected by their national states. However, the International Court also noted three so-called "exceptions" to the "general rule." The first exception arises when the state entitled to grant diplomatic protection to the corporation is the one which has inflicted the damage to the company. Obviously, a corporation can hardly receive adequate protection from the same nation from which it seeks a recovery. It has been the practice of a number of nations to intervene in this situation to protect their nationals who are shareholders in a foreign company.⁶¹ Were there no such exception, a nation could seize a company, compensate its citizens for their loss, and totally disregard the foreign interests involved, since these alien interests would be unable to take action against this state in the international sphere.

In the *Ziat Ben Kiran Case*,⁶² a Spanish corporation suffered injury due to a riot in the Spanish zone of Morocco in 1921. The United Kingdom brought a claim against Spain for negligence on behalf of one of its nationals who was a majority shareholder in the company. Spain contested Britain's standing to bring such a claim, since the corporation was not a British national. This objection was rejected by the claims commission because it would have been inequitable to preclude Britain from maintaining the action, since its national had suffered a loss and the national state of the corporation was the defendant in the proceeding.⁶³

A similar result was reached in the *El Triunfo Case*.⁶⁴ In 1894, the government of Salvador granted a concession to two United States nationals to set up a steamboat service on the condition that they form the corporation under Salvadorean law. The company was created and all the shares were owned by citizens of the United States. Due to certain irregularities in the corporation, its lawful directors were replaced with others who bank-

60. See *Barcelona*, *supra* note 22.

61. See Jones, *supra* note 53, at 328.

62. *Ziat Ben Kiran Case*, [1923-24] Ann. Dig. 129 (No. 102).

63. *Id.* at 130.

64. C.J. MOORE, DIGEST OF INTERNATIONAL LAW 649 (1906).

rupted the company in furtherance of their personal interests. The Salvadorean government then awarded the concession to another company. The United States attempted to intervene on behalf of an American shareholder in the corporation. Salvador objected, contending that, since the corporation was a Salvadorean national, the United States had no standing to maintain the claim. The decision of the arbitrator was that, under the circumstances, equity justified United States espousal of the claim.⁶⁵

The exception illustrated by these cases cannot be directly applied to the Barcelona Traction situation. Since it was a Canadian corporation allegedly injured by Spain, Canada always had the option to bring an action on the company's behalf.

Another exception to the "general rule" would allow the nation of which the shareholders were nationals to protect them when a company is virtually defunct or in liquidation. It is a fact that a corporation may be dismantled to a point where it cannot effectively initiate legal action, and in such case a receiver or liquidator may not be able to represent the company adequately in some situations.⁶⁶ Shareholder interests also become direct when a corporation is in liquidation, since they have a right to the remaining assets after the company's debts are paid. This exception is, in part illustrated by the *Delagoa Railway Case*.⁶⁷ British and United States citizens formed a company under Portuguese law for the purpose of constructing a railway. During the course of construction, a dispute arose between the Portuguese authorities and the directors of the corporation over the exact point of termination of the railway, whereupon the government of Portugal cancelled the concession and seized the railroad. Both Britain and the United States protested on the basis of the interests of their nationals. The United States made the argument that the company was without remedy and had practically ceased to exist, hence, the only recourse for the injured shareholders was through their respective governments. A tribunal of Swiss jurists permitted the claim,⁶⁸ although it must be noted that the issue of standing was, in effect, conceded by Portugal in that the question

65. See Jones, *supra* note 53, at 236.

66. See MOORE, *supra* note 64, at 647.

67. See MOORE, *supra* note 64, at 649.

68. See Barcelona, *supra* note 22, at 41.

put to the tribunal presumed the *jus standi* of both Britain and the United States to press the claims of their respective nationals to the extent of their interests in the Portuguese company.

In the instant case, Barcelona Traction was in receivership in Canada. The Court felt that such a status, far from impairing the rights of the company, actually preserved the corporate entity and its rights.⁶⁹ It is ironic, as suggested by Judge Fitzmaurice,⁷⁰ that the shareholders would have been in a better legal position had their company been rendered defunct by the action of Spain or had it been a Spanish national, since in either of those two situations it would initially seem that the company was at a greater disadvantage.

A third exception to the "general rule" concerns the situation where a treaty between the nation of the shareholders and the defendant state recognizes the right of each to sue on behalf of its shareholder nationals regardless of the nationality of the corporation. No such treaty existed between Belgium and Spain.

Perhaps the most interesting aspect of the Court's treatment of these three situations in the *Barcelona Traction Case* was labelling them as "exceptions" to the "general rule." The "general rule" regarding the protection of companies developed as a matter of convenience. Since shareholders in a corporation may consist of nationals of a number of different states, there existed a possibility for confusion in determining what nation might properly extend diplomatic protection to a company. So international law recognized the corporation itself as a distinct entity capable of enjoying nationality. To determine the nationality of companies, international law merely adopted the tests developed by the various municipal law systems.

Initially, it seems that the "general rule" is actually a means of accomplishing an objective. The goal is to assure that corporations will be properly protected in international law, and the rule deeming the corporation to have the nationality of its state of incorporation is merely a means of reaching the desirable result. Indeed, in most cases companies can be protected by their national states. But, as evidenced by the situations described earlier, other rules or means have been recognized for reaching the goal of adequate protection of companies in international law. Merely because cases involving the latter three fact situations may be infrequent is not sufficient reason for classifying them as "ex-

69. See Barcelona, *supra* note 22, at 75.

70. See Jones, *supra* note 53, at 236.

ceptions" to another more generally applicable mechanism for protecting companies. All four rules have been developed for the same purpose.

With this background, it would seem that another rule based on the *Barcelona Traction* situation should be recognized. The principles which allow the state of the shareholders to intervene when the corporation is defunct or when the offending nation is also a state of which the company is deemed a national are grounded upon the notion that corporations are entitled to means of receiving *meaningful* protection. Although the latter rule may have the further justification that a state can hardly maintain an action against itself, there is no reason why a nation may not protect a company which is a national in the former situation. In other words, when the injured corporation is defunct, it has two options in seeking diplomatic protection. The company may solicit the aid of its national state. But if this type of representation will be of no practical effect,⁷¹ international law has, and should, recognize the right of the country of which the shareholders are nationals to intervene on behalf of the shareholders. The justification for this rule is based on assuring meaningful avenues of relief for injured companies and their shareholders. Similarly, when the national state of a corporation expresses little interest in protecting the company, the existence of the right of the national state to intervene is of no practical effect. The nation of the shareholders ought to have had the same right of intervention in the *Barcelona Traction Case* as is recognized in the case of the defunct corporation. In both instances, a rule conceding the right of the national state of the shareholders to protect the shareholders is necessary to assure the meaningful protection of the corporation and the shareholders.

Even if the three rules mentioned by the International Court in the *Barcelona Traction Case* were accepted as exceptions to the general rule that only the national state of the corporation may protect it and the shareholders for injuries inflicted upon the company, the situation involving the Barcelona Traction Company should be deemed as another such exception. It should be recalled that the reason for the first two exceptions centered on the admission that corporations and their shareholders are entitled to

71. See *Barcelona*, *supra* note 51, at 60.

meaningful protection. In the same way, an exception should be developed to cover the case where the national state of the corporation fails to act. The company in the *Barcelona Traction Case* was denied protection when Canada refused to continue its right to pursue the claim. The majority opinion dealt in significant length with the clarification of the Company's right to be represented by Canada, but conveniently neglected to emphasize the lack of Canadian interest. If the decision-makers in the past cases regarding the recognized exceptions to the general rule had also failed to inquire into the realities of the situations before them, the development of those exceptions might never have occurred. Fortunately, the realities of the situation were examined, and the International Court perpetuated an injustice by failing to examine them in the *Barcelona Traction Case*. An additional exception to cover the *Barcelona Traction* situation is necessary to assure adequate protection for the Company. The situation in *Barcelona Traction* parallels the past exceptions to the general rule, and an additional exception to the general rule ought to have been developed to cover it.

Although it may be conceded that the state of corporate nationality should have the initial right of action just as corporations have the right to maintain an action in the first instance in municipal law, there is no legal justification for restricting the avenues of international relief to actions taken by the state of corporate nationality, nor has this been the international practice in the past when the rule has failed to assure the adequate protection of shareholders.

A co-existing rule⁷² permitting the state of the shareholders to maintain an action when the state of which the corporation is a national fails to act would be consistent with the rule which allows shareholders to act on behalf of the company when the corporation is defunct. Both serve to assure that corporations and shareholders receive effective protection⁷³ of their interests.

The Idea of Multiple Protection

The two mechanisms discussed above have a singular purpose. Adequate protection of corporations and shareholders is the common goal. The notion of multiple protection plays a major role in assuring that investors will be able to get relief for injuries inflicted upon their company. The idea of multiple protection is not really a new development in international law. In the

72. See *Barcelona*, *supra* note 51, at 58.

73. *Reparations for Injuries Case*, [1949] I.C.J. 174.

*Reparations for Injuries Case*⁷⁴ the International Court recognized that a person may have more than one basis of protection. This case was distinguished by the Court in the *Barcelona Traction Case* without much discussion of the similarities and dissimilarities of the two situations. Of course, there is a factual difference between the two cases. The *Reparations for Injuries Case* dealt with an individual's right to be protected by his national state and by the international organization to which he belongs. The International Court in *Barcelona Traction* apparently distinguished the case by noting the individual's direct loss in the *Reparations for Injuries* situation, while classifying the shareholders' interests in *Barcelona Traction* as indirect. But, as discussed earlier, shareholders have been given the right to take action for indirect losses when they would otherwise be denied a remedy. So shareholders may have two bases⁷⁵ of protection as did the individual in the *Reparations for Injuries Case*. Indeed, Judge Jessup noted the distinct possibility for multiple protection in the instant case based on an analogy with the *Reparations for Injuries Case*.⁷⁶

There are difficulties, however, in attempting to use the *Reparations for Injuries Case* as precedent for allowing the Belgian claim in the *Barcelona Traction Case*. The factual difference and the direct-indirect injury problems cited above are two such pitfalls. In addition, it is always dangerous to expand the holdings of prior cases to encompass situations probably not contemplated by the Court in the previous decision. But, at the very least, the *Reparations for Injuries Case* does support the fundamental idea of multiple protection, and only the extent of the doctrine is really now in question.⁷⁷ There is also evidence in the recent literature that the notion of multiple protection is being accepted as a principle of international law.⁷⁸

Given the developing principle of multiple protection, the question of how best to implement it into the *Barcelona Traction* situation remains. The first rule discussed, which would allow the nation of the shareholders to claim the corporation as its national vis-à-vis

74. *Id.*; and see *Barcelona*, *supra* note 22, at 38.

75. See *Barcelona*, *supra* note 22, at 199.

76. Flemming, *Case Concerning the Barcelona Traction Light & Power Co. Ltd.*, 3 CAN. Y.B. INT'L L. 306, 313 (1965).

77. See *Barcelona*, *supra* note 22, at 43.

78. See *Barcelona*, *supra* note 22, at 34.

an offending state or any other state because of a more genuine connection with the company, has unnecessary pitfalls. It would create a situation where the mere transfer of stock across national boundaries would result in a change of the nationality of the corporation. In view of the rapid way in which shares may change hands in today's world, such a rule could create havoc in determining the nationality of many companies.

The rule which would enable the nation of the investors to maintain the claim on behalf of the shareholders themselves does not entail the difficulties presented by the other method of expanding the avenues of relief to shareholders. The nationality of the company need not change with the transfer of shares. In developing the rule, the International Court would be serving the ends of justice in international law and exercising due caution.

However the International Court might choose to develop the rule, the expansion of the multiple protection idea to the *Barcelona Traction* situation will aid shareholders seeking a remedy. But problems of a procedural nature are bound to emerge. The most serious ones would include: (1) situations where both the corporation and its shareholders are separately seeking the aid of their respective national states to maintain an action; (2) problems created by the easy transferability of shares; (3) amount of shareholder interest which would justify intervention by the state of the investors; (4) inconsistency in judgments. The first difficulty could be resolved by recognizing a primary right in the state of corporate nationality to protect a company. Shareholders would be permitted to seek the aid of their own government only after the state of a corporation has declined to take action. The problem created by the easy transferability of shares might be solved by a requirement similar to that found in derivative suits under municipal law. Before shareholders may act in municipal law, ownership of their shares must be shown to have been concurrent with the injury to the company. The third and fourth procedural difficulties might also be eliminated through supervision by the International Court to assure either that the state initiating the action would properly represent all the shareholders and reserve to their respective states a pro rata share of any recovery, or preferably, the development of a joinder-type rule whereby a number of states having nationals as shareholders in the injured company join in the proceeding. The application of the concept of *res judicata* would prevent a multiplicity of suits.

To be sure, these procedural guidelines could turn out to be quite intricate. But the institution of a judicial system for the

resolution of disputes should be primarily concerned with the administration of justice and not with administrative convenience.

Barcelona Traction and the Management of Multinational Enterprise

In writing its opinion, the International Court of Justice was not unmindful of the existence of multinational corporations and the impact of its decision upon them. In noting the "profound transformations which have taken place in the economic life of nations . . ." the Court specifically recognized "the corporate entity" as "one of these phenomena . . . which have transcended frontiers and have begun to exercise considerable influence on international relations."⁷⁹ In fact, the court even expressed a measure of surprise in observing:

Considering the important developments of the last half century, the growth of foreign investments in the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which at first sight appear surprising that the evolution of law has not gone further and that no general accepted rules in the matter have crystallized on the international plane.⁸⁰

It is rather unfortunate that the opinion of the court did not significantly add much substance to the process of "crystallization."

The lessons, such as they are, for multinational corporations and their counsel to be distilled from *Barcelona Traction* may perhaps be summarized as follows:

1. Multiple bases of protection probably will not be available and the MNC must choose the situs from which to make its foreign investments on the basis of its ability to obtain diplomatic protection for such investments as well as on other economic, political, managerial and tax considerations.

2. Effective protection for such investments in the absence of the availability of diplomatic protection can only be afforded second tier investments by:

- a. agreement with the host country to submit any dispute arising thereunder to the Centre For Settlement Of Investment Disputes;⁸¹

79. *Id.*

80. *Id.*

81. Pursuant to the Convention of Investment Disputes between States

b. by the conclusion of a multilateral treaty providing for the espousal of diplomatic claims for the protection for shareholder interests.

3. By centralizing its international operations and consolidating the beneficial interests of its subsidiary companies in the "parent" corporation, the MNC assures itself of a firm legal basis for obtaining the benefits of the diplomatic protection of the country of its charter.⁸²

A GLANCE AT THE FUTURE

It would be interesting to speculate the role, if any, that would today be played by multinationals had the International Trade Organization, as originally perceived by the Havana Conference, not been scuttled and replaced by relative innocuousness. The ITO was designed, of course, to create an international free trade area amongst its membership without the necessity of leaping the barriers of free trade. With its creation the methodology and, quite probably, the purpose of the multinationals would have developed differently and purely international corporations, those with a home base of operations with merely foreign markets rather than subsidiaries, might well have developed in their stead.

While backwards speculation as to what might have been may be interesting, it is not necessarily productive with respect to our present problem, "Centralizing the International Operations of Multinationals." On the other hand, speculation as to the next few decades may be useful in making future projections and predictions as to the operations and management characteristics of multinationals.

and Nationals of other States March 18, 1965 formulated by the Executive Directors of the International Bank for Reconstruction and Development following on the convening of four regional meetings in Adis Ababa, Santiago de Chile, Geneva and Bangkok, ICSID, HISTORY OF THE CONVENTION (in four volumes), (1970).

82. In addition, it could expect to receive the benefits of legislation presently existing which serves as a deterrent to foreign takings of, for example, investments of U.S. companies. See the "Hickenlooper Amendment" to the Foreign Assistance Act, 22 U.S.C. § 2370(e) (1962), which provides that, "The President shall suspend assistance to the government of any country which has . . ." expropriated or seized ownership or control of property owned by any U.S. citizen or corporation; see also "Sabbatino Amendment" to the Foreign Assistance Act of 1964, 73 Stat. 1013, as amended 22 U.S.C. § 2370(e) (1964) which provides that, "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state a confiscation or other taking after Jan. 1, 1959, by an act of that state in violation of the principles of international law. . . ."

One of the most interesting examples of crystal ball gazing was, as noted earlier, undertaken by the Diebold Institute⁸³ wherein it was suggested that industrial growth would move from the highly industrialized and developed areas of North America, North-west Europe and Japan to Southern Europe, North Africa, South America, and quite conceivably, to the Communist East European and Asian spheres. Their prediction appears, at first glance, to be a happy prophesy—industrial production being shifted from the economically impoverished four-fifths of the world whose people hunger for jobs and the benefits of industrial plenty. The article anticipates a “manufacturing revolution” as industry “rolls South from the rich North to the poor South of the world.”⁸⁴ At the same time, the authors predict political crises resulting from the aggravated tensions and stimulated nationalism that will develop as a result of the extra-territorial and basically exploitative nature of the process of industrialization. While applauding the redistribution of wealth and betterment of the less developed sectors of the world, Mr. Diebold and the Diebold Institute recognize the necessity of requiring the MNC’s to develop a code of conduct by which equitable and beneficial relations with the host countries should be established. At the same time, the multinational is not going to escape being the target of a dissonance in the industrialized North where, for example, labor has teamed with protectionists to support in the United States the Burke-Hartke bill,⁸⁵ which would have the effect of retrenching the process of multinationalism and withdrawing the corporate enterprise to fortress America in order that the jobs now being created for “foreigners” will be created for “Americans.”

The Diebold proposals also fail to note the enormous crisis in the international monetary system and the role the multinational enterprise has played in developing and exacerbating this crisis.⁸⁶

83. See Diebold Institute *supra* note 20. See also Diebold, *Precarious Path of the Multinationals*, Wall St. J., August 17, 1973, at 19; and Diebold, *Business, Government and Science: The Need for a Fresh Look*, 51 FOREIGN AFF. 555 (1973).

84. Wall St. J., *supra* note 83, at 19.

85. H.R. 10914, 92d Cong., 1st Sess. (1971).

86. See, e.g. Bowen, *Multi-national Corporations*, U.S. NAVAL INSTITUTE PROCEEDINGS 55 (1973); Fisher, *The Multinationals and the Crisis in the U.S. Trade and Investment Policy*, 53 BOST. U.L. REV. 308 (1973); Baum, *The Global Corporation: An American Challenge to the Nation State Query*, 55 IOWA L. REV. 410 (1970).

Nevertheless, it gives us a framework for conceiving of a world twenty years hence where multinational treaties will have provided a measure of consistency to the status and treatment of multinationals (although note that the word "control" has been purposefully omitted); where industrialization has spread to the developing areas of the world; but where the origin, source, development and control over technology remains in the North. In other words, the underdeveloped countries may get their jobs and the benefits of development, but the inevitable pollution and the ecological problems which naturally follow the process of industrialization will come to plague them as well. On the other hand, while the North can expect to benefit from the clean air and waters that may follow as factories are packed up and moved to the waiting labor in the South, the major impact of the shift of production will be to strengthen its international position because computerization and the requisite control over marketing, distribution and wealth will continue to lead to more and more control by the North being exercised over global business.

Such projections call for expansion of training facilities and the development of both broader and deeper educational and technological bases for what will essentially become a "white collar" North, even as "blue collar" jobs are shifted in a southerly direction. The very nature of these developments will lead to increased concentration of the intellectual, technical and managerial talent in what is and will apparently remain the center of multinational enterprise.

CONCLUSION

We began by noting that the process of centralization of the international operations of multinationals began in the 1960's. From what has been said, there is every reason to believe that centralization is the proper trend for managing the operations in the 1970's and, by all that can presently be anticipated, this trend will remain the key toward success in the 1980's and beyond.

While tangential reference occasionally has seemed appropriate, the purpose of this writing was not to explore the many satellite problems to the primary thesis; problems which need not only exploration, but resolution, if multinational enterprise is to continue to exist in the decades ahead. The problems of host countries, the reasonable aspirations of their peoples, the international monetary system and the other multifarious requirements of international trade and investment that affect the operations not only of the multinational corporations, but also the nation-states who

continue to have primary responsibility for the global welfare of mankind, will all have to be served.

The point of our paper and its modest goal was to suggest that by centralizing its international operations, the MNC would obtain many benefits not the least of which would be increased control of its global operations because of its greater flexibility and improved ability to react rapidly to changed circumstances as well as to new opportunities. In addition, centralizing control along beneficial ownership of its global investments would bring the MNC within the existing legal framework of diplomatic protection. Furthermore, it is not too optimistic to expect some unexpected fringe benefits to develop in the form of less hostility from Congress, the Treasury Department and labor unions, once the use of second and third tier offshore investments are liquidated into the U.S. parent. Finally, the requirements of the future—when technological innovation and research and development become the major industry of the parent corporation, and management planning, marketing and distribution become its major contribution to its industrial empire—appear forcefully to dictate the concentration of control at the source of the power structure. In short, just as “all paths lead to Rome,” all the international operations of multinational enterprise should lead inevitably to a central hierarchy, a centralized superstructure and base from which all are controlled.

If multinational enterprise is to continue to survive, and more importantly, to thrive, it will have to find its place in the overall hierarchy of things; to contribute more to world order than to its own private coffers. Perhaps this is too much to ask. It is, however, but a matter of enlightened self-interest, and multinational enterprise, which has been so quick to conform and to adapt to the exigencies of international business in an essentially hostile environment, is not apt, at this juncture, to fail itself.