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# MULTINATIONAL CORPORATIONS

MIRIAM THERESA ROONEY\*

On June 9, 1974, in time for the 57th Session of the Economic and Social Council of the United Nations, an advance copy of Part I of the "Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations" (the Report) was released in limited quantity.<sup>1</sup> It will be available shortly as U.N. Sales Publication E/5500/Add.1/Rev.1-ST/ESA/6. The Report was produced by a committee of the Economic and Social Council of the United Nations in response to its Resolution 1721 (LIII).

It is a remarkable report in many ways. First, the method used to gain expert opinions on this modern phenomenon was quite innovative according to United Nations practice. Hearings were held in New York, Geneva, and again in New York, to which acknowledged leaders from labor unions, university departments, governmental and United Nations administrations, bankers, consumer representatives, and many others from concerned fields of activity, were invited to give opinions and respond to questions from the committee.

The surprising result was that all expressed concern over some activities of transnational enterprises and found themselves in general agreement that the United Nations, through its Economic and Social Council, should assume new functions and responsibilities for the monitoring of these activities without delay. All members of the group signed the report. Their individual comments will be published, in detail, in Part II of the Report.

Another reason for referring to the Report as a pioneering effort is that its recommendations, if and when adopted by the Economic and Social Council and the General Assembly, could mark the beginning of a new U.N. function and responsibility. A Commission of Experts would be established. Its members would serve in their individual capacities as Commissioners—similar in some respects to the International Law Commission and the U.N. Commission on International Trade Law. They would be charged with the responsibility of reviewing, on a continuing basis, the many aspects presented by the phenomenon of the multinational corporation and aiding the Economic and Social Council in reaching whatever

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<sup>1</sup> 57 U.N. ECOSOC, U.N. Doc. E/5500/Add. 1/Pt. 1 (1974).

intergovernmental decisions found desirable. As a corollary, the committee also recommended the establishment of an information and research center within the United Nations Secretariat, to provide continuous support for the Commission in the collection of data and statistics, which would also be available to the member states. This is of special importance to the developing states which have difficulty in acquiring the precise information they need to make the policy decisions necessary for national legislative controls over the multinational corporation.

At the hearings, the pros and cons of multinational corporate activity claimed for the economy in many places were debated. It may be that some of the tensions relating to this activity are due to lack of information and to lack of clarity in the response to requests for desired information. Similarly, unanticipated actions have taken place which may not have been fully provided for when the original agreements were made.

The issue of power was also considered. It was obvious to the committee, however, that, at present, "national and especially international institutions do not deal adequately with the various ways in which multinational corporations can use their power in a manner which may run counter to the needs of the societies in which they operate."<sup>2</sup> The allusion to the needs of society occurs more than once throughout the Report and indicates the value of the overall viewpoint from which the committee drafted its conclusions.

Previously, the phenomenon of the multinational corporation has signified efficiency in management, marketability of products, and growth in productive capacity. Many multinational corporations are, in fact, conglomerates. They have developed through stockholder bids and mergers, with an organization having either a centralized direction from the home office, or a more localized responsibility in branch plants abroad. These corporations feature diversity in products and markets and allow for losses in one area to be offset by profits earned in another. The goal of this expansion of business activity is profits and reinvestment in the interests of growth.

Over forty years ago, one of the monumental publications in American jurisprudence was published by Adolph A. Berle, Jr. and Gardner C. Means, under the title of *The Modern Corporation and Private Property*.<sup>3</sup> It was the basic thesis of their analysis that ownership in the form of stockholding in private corporations no longer could be identified with control. Direction of company planning is a function of the management in modern corporations and no longer a function of the stockholders. At annual meetings of stockholders, it is still possible for the owners, or rather, the investors, to question the salaried managers on the implications of policies they have adopted. However, the accumulation of capital for

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<sup>2</sup> *Id.* at 14.

<sup>3</sup> A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968).

investment and growth has resulted in such a multiplication of stockholders that a very small percentage of the stock ownership of the entire enterprise can give a few aggressive stockholders sufficient control over the decision-making practices of management. The vast majority have little say with respect to policies, their function being largely limited to receiving quarterly dividends from profits, or perhaps, selling or buying shares on the stock market to increase their incomes.

A serious question of business ethics arises here. Recently, a few conscientious observers of the impact of business activity upon the lives of people, both home and abroad, have begun to ask serious questions about conducting huge business enterprises with little accountability for the human factors that must necessarily be basic in any activity having to do with the marketing of industrial products. Employment factors, including adequate wage contracts, have become associated with the organization of trade unions. Consumer appeal through advertising has become a dominant feature of salesmanship. Increasingly, governmental regulation based on accepted standards of quality and sometimes price, has been found necessary to protect the purchaser. Such buyers often lack knowledge or the means of verification of half-truths in sales contracts, which may amount to fraud, deceit or unwarranted overpricing. Eventually, the entire problem of capital accumulation for the indispensable factor of investment in productivity comes down to a question that must be answered by each and every investor. *How should my savings best be invested for the well-being of my fellow human beings as well as myself?* The decision-making that is ultimately required for the prosperity of all is clearly not only a matter of expanding profits, but also an ethical question which demands much more serious attention than it has been receiving in connection with the growth of multinational corporations.

How a modern business enterprise acquired its present pattern may well be asked at this point. The transition from a landholding economy featuring herding and farming activities on a comparatively local scale apparently began about the time the larger landowners acknowledged a chief or king. Since the primary function of kings in those early times was maintaining a common defense, the biggest problem became the raising of revenue to maintain the armed forces.

The development of overseas empires gave rise to the taxing of colonies, through goods and services, in order to increase the national revenues. Royal charters to join resources were granted to favored subjects in order to send out expeditions for the exploitation of the newly-found colonies. Chartered companies established by royal grant often amounted to monopolies. They excluded competitors from a substantial sharing in the import trade of such products as tobacco, wool, corn or wheat. When the colonials successfully revolted against taxes collected largely for the prosperity of the home country, the newly-formed states retained the charter-granting privilege and began to authorize specific grants of limited powers to investors to carry out needed activities such as the maintenance of educational

institutions and the development of transportation networks. Toward the latter half of the nineteenth century, the enactment of general incorporation statutes, instead of specific charters to specially named groups, marked the actual dividing line between close personal responsibility of investors and the newer, impersonal form of ownership in shareholding which eventually took on national and international importance with the growth of the stock market.

The manner in which business activity extends beyond state boundaries has not been due to legislative action, but rather to judicial action. The constitutional provisions concerning full faith and credit for state court decisions<sup>4</sup> as well as the equal protection clause<sup>5</sup> have been interpreted by the Supreme Court in such a way as to enable corporations to expand their markets across state lines and act as if they were nationally organized.

In placing responsibility upon the Supreme Court for effecting these changes, it must never be forgotten that court decisions are reasoned determinations between adversaries with concrete claims, and not theoretical judgments. Court decisions may be no better than the briefs of the attorneys. This means that responsibility for new directions in the law depends as much on the attorneys—and the law schools which trained them—as it does on the court itself.

Expansion of corporate activity in foreign countries also follows from decisions of the Supreme Court concerning constitutional provisions regulating foreign and domestic commerce,<sup>6</sup> and prohibiting taxes on exports.<sup>7</sup> More recently, Supreme Court decisions on the treaty-making power have amplified the ability of corporations to expand their organizational structures into areas of foreign trade. One of the principal decisions<sup>8</sup> involved a treaty with Canada aimed at protecting migratory birds crossing jurisdictional boundary lines.<sup>9</sup> Over Missouri's protest that the negotiation of such a treaty was not among the enumerated powers of the federal government, but was a matter reserved to the states,<sup>10</sup> the Supreme Court sustained the authority of the federal government for exclusive control of foreign affairs under the treaty-making clause.<sup>11</sup>

How could those flocks of little birds flying over Missouri have anything to do with the growth of multinational corporations? It signaled a step-by-step expansion of the treaty-making power, following the expan-

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<sup>4</sup> U.S. CONST. art. IV, § 1.

<sup>5</sup> U.S. CONST. amend. XIV, § 1.

<sup>6</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>7</sup> U.S. CONST. art. I, § 9, cl. 5; art. I, § 10, cl. 2.

<sup>8</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>9</sup> See *Treaty with Great Britain for the Protection of Migratory Birds*, August 16, 1916, 39 Stat. 1702 (1917), T.S. No. 628; *Migratory Bird Treaty, Act of July 3, 1918*, ch. 128, 40 Stat. 755 (1918).

<sup>10</sup> U.S. CONST. amend. X.

<sup>11</sup> U.S. CONST. art. II, § 2, cl. 2; art. VI, cl. 2.

sion of interests abroad after World War I. The treaty-making clause in the Constitution came to be relied upon for the development of new provisions in the renegotiation of standard treaties of Friendship, Commerce, and Navigation, subsequently referred to as treaties of Establishment. Most notable in this regard were treaties with Germany of December 8, 1923,<sup>12</sup> and with Nationalist China of November 4, 1946.<sup>13</sup> The clauses therein agreed upon became the standard form for negotiation of new treaties with other commercial nations. One of these clauses contained new language designed to guarantee protection not only for citizens travelling or doing business abroad, but for companies and associations doing business there as well.<sup>14</sup>

In addition to the protection afforded corporations through the treaty-making powers, an earlier line of Court decisions had already determined that corporations were in many respects similar to natural persons, and, as such, entitled to fourteenth amendment protection.<sup>15</sup> The fiction of elevating corporate status to that of a natural person, while clearly established in Court decisions, is, however, questionable from a philosophical point of view.

The attention which the unprecedented growth of the multinational corporation has attracted during the past decade necessarily calls for not only a reexamination of the legal structure upon which it has been built, but also for an in-depth examination of all its aspects. There is an ethical element involved which has already been noted earlier in this analysis. Even more significant is the logical aspect. The philosophical implications carry over from both the ethical and the logical analysis into the metaphysical elements of philosophy itself. What is meant, actually, by the term "person?" Can it correctly be used in an analogical manner to include a fictitious entity, created not by nature, but in the imagination of men's minds? Is it possible that such a concept has in fact led to fallacies in the statements of existing law, and, perhaps, was instrumental in introducing the call for a realistic jurisprudence? This is to be contrasted with a conceptual jurisprudence, which was discussed among juristic scholars earlier in the twentieth century, and has now increased in strength until it has

<sup>12</sup> Treaty with Germany on Friendship, Commerce and Consular Rights, Dec. 8, 1923, 44 Stat. 2132 (1927), T.S. No. 725 (effective Oct. 14, 1925).

<sup>13</sup> Treaty with China on Friendship, Commerce and Navigation, Nov. 4, 1946, 63 Stat. 1299 (1949), T.I.A.S. No. 1871 (effective Nov. 30, 1948). See also V. SETSER, *COMMERCIAL TREATY PROGRAM OF THE UNITED STATES* (Dep't of State Pub. No. 6565, 1958); R. WILSON, *U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW* (1960); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956).

<sup>14</sup> Treaty with China on Friendship, Commerce and Navigation, Nov. 4, 1946, art. III, para. 4, 63 Stat. 1299 (1949), T.I.A.S. No. 1871 (effective Nov. 30, 1948). See W. BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 488, 742 (1971); E. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1916).

<sup>15</sup> *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897).

become a clarion call for a more humanized jurisprudence.

The use of analogies in international law gave rise half a century ago to an innovative volume on international law<sup>16</sup> by Judge Lauterpacht, who subsequently became the British representative on the World Court. The questions he raised merited further consideration, which so far they have not received. A German work, translated into English at about the same time, *The Philosophy of 'As If'*,<sup>17</sup> did initiate a philosophical inquiry into the problem, although not on a very wide scale. This would seem to show the progression from actualities to fantasies in modern thought.<sup>18</sup> It is this view which presents a serious challenge to the Supreme Court's thinking. Is it fair, legal, or just to treat a fictitious person as if it were a natural person and accord it the same protection that the law was designed to give to human beings? Is analogical reasoning properly employed in applying legal rules which are formulated by the people, for the people, for the fulfillment of human needs?

When fallacies creep into legal thinking, injustices often follow. It may be years later before protests become articulate or before a case reaches the litigation stage to raise the issue again for further consideration.

As the Economic and Social Council Committee Report shows, there are benefits to be had from the organization of multinational corporations. There are, however, some manifest injustices. Some of these appear in the monetary field through unanticipated transfers of foreign exchange in unusually large amounts. Some serious effects are felt in the employment fields when branches are closed or moved suddenly from one country to another in order to avoid rising costs or perhaps prevent financial losses. A third disadvantage may come from the transfer of technology problems which follow in the wake of patented inventions which may in themselves offer desired improvements. The figure of balance, so often a symbol of the law itself in its function of effectuating the realities of fair apportionment of the world's goods, has to be sought in weighing the benefits against the disadvantages which characterize multinational corporations at the present time.

Today, people have a sense of being manipulated by forces that are somehow beyond their control. The notion of responsibility seems to have been subjected to some sort of an erosion process. The natural demands of human dignity revolt against such diminution of their claims to fulfillment. It is the function of the law to make straight the way to human freedom instead of presenting obstacles or embarking on detours away from the direct path of informed responsibility. The restructuring of legal

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<sup>16</sup> H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION* (1927).

<sup>17</sup> H. VAHINGER, *THE PHILOSOPHY OF 'AS IF'* (2d ed. C.K. Ogden transl. 1965).

<sup>18</sup> See Rooney, *Natural Law Actualities*, 12 *CATH. LAW.* 141 (1966).

institutions, such as multinational corporations, which are in fact a product of the creative mind, is an obligation of every generation, but more especially of those living in this century whose future lies immediately before them.