

# SOVEREIGNTY, THIS STRANGE THING: ITS IMPACT ON GLOBAL ECONOMIC ORDER

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## I.

Nobody may be permitted to victimize others to further their own interests. There must be appropriate controls against those who abuse their economic powers. Wealth is to be apportioned in a just and reasonable way among those who helped to create it. The spirit of mutual assistance is directed toward a welfare society. We all accept these as sound principles without hesitation, and each State makes efforts to translate them into reality. Yet these efforts rarely transcend national boundaries. One out of every four people on this earth lives in abject poverty with an income of less than two hundred dollars a year. Half of all those who die have succumbed to either starvation or malnutrition. But these are the problems of other countries: we extend our sympathies but not a truly helping hand.

In law school curricula domestic laws are omnipotent. Citizens continue to worry and gloat as they are fed with data on the economic achievement of their own country in the international community. Since the eighteenth century, the concept of sovereignty has created in the global arena self-contained political units whose reaction to the international community is constantly self-oriented. The rise of nationalism, inspired by racial self-determination, has exacerbated the situation and even today, when mutual interdependence is a *sine qua non* for survival of any State, this pattern continues unchanged. In fact, those areas which were freed from colonial bonds after the World War II appeared to the world to be proud of their sovereigns. It was not questioned that each State was to have the absolute right to establish policy to its liking, and to implement that policy within its boundaries in the pursuit of national interests. Interference with this power by other States was accordingly regarded as an inexcusable intervention.

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## II.

But nation-minded politicians have started to realize that they are now confronted with a new partner in this international system: a world-wide network of huge corporations with annual sales greater than many nations' gross national products. It has become increasingly apparent since 1970 that the operations of these corporations could interfere with the smooth implementation of the policies of the State. For example, the world has gradually learned that the application of conventional monetary theories does not necessarily bring about the results expected by the monetary authority of the State. National leaders began to recognize the impact of the uncontrollable influence of some third power.

The myth that goods are transferred in the international market place mostly by way of trade, in accordance with the principles of competition, has long since been destroyed. By the 1970's the figure for the production and local sale of goods in foreign countries by multinational corporations had, for the first time in history, surpassed the figure for world trade. This fact alone should prove that the traditional role of each nation's monetary system in regulating the level of exports and imports is becoming limited. Furthermore, even in the area of traditional trade, considerations drawn from the global programs of multinational corporations are becoming decisive factors in determining quantity and prices. This is certainly a challenge to any national policy based on Keynesian economics.

No doubt States have the power to control the activities of a multinational corporation within their respective boundaries. States may even control the foreign operations of domestic corporations through their headquarters when those operations affect the domestic economy. But no State can trespass upon the sovereignty of another and seek to exert control within the other's boundaries. Multinational corporations thrive upon the unregulated interstices arising from the conflict of individual policies among nations. Recognition of this fact has led international agencies (particularly since 1970) to discuss means of addressing the problem. The crux of the problem is, of course, the absence of effective regulation on a global scale.

Until recently, it was generally believed that private investment to developing countries could contribute to their industrial development and raise their standard of living. It was thought that

along with the fall of trade barriers, the liberalization of private international investment would eliminate the unequal distribution of wealth. But in the same way that economic aid by governments is often not distinct from interest-oriented considerations of the donor States, corporation investments are overwhelmingly made in the pursuit of profits. At present, there is essentially a continuation of the bonds of the colonial days in that the old colony is connected through private investment to the enterprises of the old colonizer. The discrepancies of wealth between the North and South are widening. In fact, the standard of living in many of the non-oil-producing developing countries is even lower than in colonial days. Since the political and social freedom of the former colonies would be an empty concept without economic strength, it was natural under these conditions for new nations to have requested a more equal distribution of wealth and the imposition of global regulations over international business activities.

### III.

Corporations are the nucleus of free business activity and form the fiber of capitalism. A corporation is a juridical person created in accordance with the laws of the State which recognizes its establishment. A multinational corporation is merely a collective body of independent corporations; yet the activities of this amalgam of juridical persons are controlled by the central management. Though the parent and its subsidiaries may be lumped together for the purposes of antitrust law or tax law, the initial presumption upon which their unity is based is that they are separate juridical persons. The economic concept of the *enterprise* does not exist in the world of jurisprudence.

The company law presently found in Western States is a system which was initially designed to foster the economic growth of industrial nations under capitalism. In pre-World War II days, a nation could comfortably confine its corporate regulation to the protection of shareholders and the promotion of efficient management of its domestic companies because world markets were expanded mostly through trade and international investment, if any, was seldom direct. There may indeed have been a time in the past when companies did in fact operate as independent economic entities. At present, however, there is a large gap between the sociological and economic concept of the enterprise, and the corresponding legal concept.

Of course each nation is free to determine rights and duties and their qualifications. For example, where a one-man company formula is utilized to limit liability and avoid taxes, or where subsidiaries are created to enable illicit manipulation of accounting or evade antitrust laws, the State would have no difficulty in dealing with them, provided these phenomena occur within the territory of the State. In this way, at least until 1950, each State could effectively implement its policy. However, the pervasive atmosphere favoring free capital movements and direct investment after the war resulted in the emergence of many companies established under local law with foreign capital. They were only component parts of foreign enterprises whose decisions as to price, quantity and destination in regard to production, imports and exports were controlled from outside the territory. But, on the other hand, local law continued to treat such companies as independent entities subject to all local rights and duties. Treating a company as an independent entity operating within the social fabric in the same way as a natural person, capable of enforcing rights and bearing duties, still remains the starting point for jurisprudence. This problem may have arisen from the fatal reality that there is no such thing as an *international* right or duty for transnational commercial activities. Whenever we talk of rights and duties in commercial settings, our reference is always directed to such rights and duties recognized under the applicable *national* law.

Global economic activities are closely tied. Many international businesses operate without territory. Nevertheless the present world legal scheme in determining rights and duties of a commercial nature treats even the largest international enterprise as a group of individual juridical persons recognized under the laws of nations. Each State continues to cope with them in this outmoded fashion, and denounces interference by the central managements of multinational corporations as evil. But who could not have imagined that with divergent domestic laws on the one hand and the international call for free direct investment on the other, the oligopolization of world markets by big business would have resulted.

#### IV.

Nations impose taxes according to some tax policy. Revenues from taxation on profits earned from international activities are not necessarily shared proportionately among the nations where

part of those profits are earned. Apart from some bilateral treaties, there are no international arrangements regulating the scope within which one nation may impose taxes. Each nation has complete freedom, pursuant to its sovereignty, to determine which activities it will tax. The possibilities are quite broad. In the end, each State's tax policy differs according to such factors as its international status, its economic and foreign policies, and other available sources of revenue. Nor are there uniform international accounting standards. International businesses constantly utilize their world-wide network to alter the tax revenues of a nation.

If revenues obtained from the taxation of profits derived from international operations are to be shared among nations, they must be divided equitably, without financial manipulations by enterprises. Nations such as the United States and Japan, with relatively similar economic backgrounds, can reach agreements on methods of taxation and on tax sharing. But many nations are not in such a position. The parade of individual tax systems engendered by the concept of absolute sovereignty is a large obstacle to any equitable distribution of tax revenues. As early as 1929 the League of Nations drafted an all-but-ignored model tax treaty designed to promote equal distribution of tax revenues in cases where the sales activities or corporate assets were located in more than one State. The United Nations has undertaken similar tasks for many years, without success and for the same reasons.

Nations with large amounts of direct investment such as the United States, England, France, West Germany and Japan, all have their own unique tax systems which reflect their national policies. One common characteristic is lenient tax treatment of overseas activities. This opens the door for multinational corporations to engage in widespread management and bookkeeping manipulations, together with the utilization of those tax-haven States which take more than ample advantage of the sovereignty doctrine. As already witnessed recently in the United States, the implementation of tax policies of individual nations which are restricted by their territorial limitation would someday prove to be totally ineffective against global business activities.

## V.

Many nations seek to insure the healthy development of economic activities by restricting unfair trade restraints and practices. Approaches vary, but all the Western nations have adopted some form of regulations controlling private economic activities.

It is inevitable that in developing such regulations, the nation's economic and political policy, both domestic and international, is reflected. However, in today's world, economic interdependence is unavoidable. If nations opt for the use of arbitrary power based on the right of sovereignty and narrow self-interest, economic coexistence could be easily disrupted due to the lack of any effective means of adjustment on a global scale. To maintain co-existence and promote prosperity, nations must agree to a certain degree of international order, while repressing self-interested motives and understanding that in the long run this is the most profitable course.

The GATT Agreement, for example, was adopted due to just this kind of consensus, which held that the protection of free trade contributed to the development of international economic prosperity. When it was adopted in 1947, however, most of the developing countries were not yet independent and, of the twenty-three original signatories, two-thirds were advanced nations; the African continent was represented only by South Africa and Rhodesia. The North-South problem was not a central issue. It was only in 1965, immediately after the establishment of UNCTAD, that GATT incorporated the famous Part Four, entitled "Trade and Development," which reflected the interests of developing countries. Part Four encouraged preferential tariffs for imports from the developing countries, and permitted concerted action with regard to the international sale of primary commodities.

To develop the world economy through free trade, it was necessary that fair competition be preserved. When developing nations competed in the export of manufactured goods with advanced industrial nations, they were often at an obvious disadvantage. To eliminate this handicap and raise the position of developing nations to some sort of parity, the GATT revision allowing relative tariff preferences moved—theoretically—in the right direction. This revision also ultimately promoted the overall purpose of GATT because expansion of the international market required improvement of the economic status of developing countries, through encouragement of industrialization.

Ironically, at the time preferential tariff reductions were suggested, the high tariff era of GATT's inaugural days had long since passed and the Kennedy Round for radical tariff reductions was in full swing. As witnessed in the succeeding Tokyo Round, a

new era began where the emphasis was no longer on reduction of tariffs. Consequently, the actual effect of preferences was slight and temporary. Worse still, the profits generated by these preferential tariffs were to end up in the coffers of multinational corporations whose subsidiaries were located in developing countries. Moreover, this preferential tariff scheme could have been used as a weapon by a developed nation to force establishment of closer economic affiliation. At any rate, the general ineffectiveness of the scheme meant that other approaches for spurring economic development were needed. The 1965 GATT amendment itself included another major component—authorization of certain concerted actions with regard to primary commodities. But it was UNCTAD which promoted this reform, not the Western-oriented GATT. As already indicated, it must also be remembered that since 1970 the international transfer of goods is no longer primarily conducted by trade.

## VI.

Under present international law, it is entirely up to the sovereign decision of each State which political system it chooses and which policies it implements. So long as a matter remains essentially domestic, interference with this decision by other nations is a trespass. The United Nations Charter advocates appropriate international measures for matters of international concern (arts. 1(1)(3), 14, 55 and 66), but it also announces quite clearly in article 2(7) that essentially domestic matters are not to be interfered with by other nations. Today, however, most of the actions taken by a nation affect international society one way or another, and purely domestic problems are becoming rare. Thus, sanctions on South Africa have been justified because of the substantial political impact on other African States of its discrimination policy. But this is an exception. Many of the reported serious violations of human rights in other nations are left undisturbed because they are essentially domestic in scope. Meanwhile, the international community consoles its conscience by adopting abstract human rights documents. The determination as to whether a matter is of international concern appears in reality to be left entirely to either unilateral action or high level diplomatic and political decisions by a group of States. Delegates representing governments are duty-bound to be faithful to governmental interests, which by their nature oppose any move toward decentralization of powers. The

concept of absolute sovereignty preserves the old notion that the King doeth no wrong.

In establishing economic policy, myopic domestic political considerations prove much more important than considerations based on any long-range global perspective. For example, politicians are attracted to import restrictions because this is one of the rare areas where the interests of labour and management correspond, particularly when the issue of unemployment is a hot domestic concern. Attainment of efficiency by means of an international division of labor remains a utopian notion. Certainly there was great enthusiasm for free trade until recently. But now that neo-Machiavellism appears resurgent, it seems that the maintenance of free-trade was never more than a mere coincidence, caused by the parallel direction of self-oriented decisions by individual States. The contradiction of sovereign units promotes the confrontation of the workers of the world. This pressure is constantly reflected in each nation's policies, both domestic and international.

The Charter of the Economic Rights and Duties of States adopted by the United Nations in 1974 provides, in addition to calling for permanent sovereignty over natural resources, that every State has the right "to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account *its* relevant laws and regulations and *all circumstances that the State considers pertinent.*" (art. 2(2)(c)) (emphasis supplied). It is apparent that the tone of this provision favors unilateral determinations by the seizing State. The recognition by the United Nations of the concept of permanent sovereignty over natural resources further justified unilateral determinations of appropriate compensation, particularly when the object of nationalization relates to natural resources. Adoption of this provision was a high-tide of developing country unity, occurring immediately after the success of the OPEC cartel. It was a confrontation between the North and South backed by the strange concept of sovereignty. People as such were ignored.

The fundamental contradiction of this approach was revealed when the United Nations Conference on the Law of the Sea proceeded on the belief that natural resources on the sea-bed under the high seas are the *common heritage of mankind*. If global cooperation towards an equitable distribution of wealth to *human beings* and *not* to nations is truly to be attained, it is arguable that

energy supplies should not be an exception. Putting aside the issue of whether the current world depression began with the oil crisis, it is questionable whether this trend of confrontation, calculated in terms of State interests in maintaining or increasing shares of global wealth, would ultimately benefit the world population.

## VII.

The present confused scheme for world order has been maintained under the jurisprudential concept of sovereignty. This concept arose in eighteenth-century Europe, when the *world* consisted only of European Christian nations of similar background. The concept certainly did contribute to the maintenance of order. It once had *raison d'être* in the context of the old world, but the world has ever since changed radically. It was unfortunate that the self-oriented inclination of human races, both North and South, sustained the belief in sovereignty under the slogans of nationalism and the maintenance of national interests. The call for the New International Economic Order may certainly be a step forward for a fairer distribution of wealth. But it is still nothing more than a patch-work within the existing framework, and does not truly eliminate the root evil.

Apart from dreams for a unified world, there is a strong and encouraging current of philosophy holding that territorial sovereignty should be transformed into functional sovereignty. The traditional distinction between domestic laws and *international* laws must also be questioned. For example, in the field of traditional conflict-of-laws, we are told that the relevant laws come from national legislatures; hence some choice is necessary. Yet the authorities who imposed this premise ignore the existence of a *lex mercatoria* during the medieval age which knew no boundary for its application, and do not tell us how all transnational transactions became under the control of national laws. In the administration-oriented economic law field, we must also realize that the adherence to ego-influenced exercises of sovereignty will only further confusion and confrontation in a world of interdependence. This is an observation which need not be restricted to the present North-South confrontation.

