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Summary

International Law Problems of Multinational Corporations

Multinational Corporations and International Law

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1. Methodological remarks

The structural peculiarities of international law necessitate the inclusion of the political, social, and economic reality in the cognitive process. The „living international law" can only be perceived as a result of the mutual effects between the interpretation of such reality, the penetration of the extra-legal, „complementary" ambiance, and its legal, dogmatic shape.

2. Context of the subject

In the last analysis, the discussion centering around the multinational enterprise is an expression of larger, underlying problems: of the interdependence and the de facto undermining of sovereignty; of the developing countries and their striving for a new solidarity and world economic order; of the widening of international law with respect to content, sources, and subjects; of the relationship between state and private industry.

3. Definition and peculiarities of the MNE

a) An enterprise is multinational if it has a certain minimal shape, if it owns or controls plants of production or service outside its home state, and if it incorporates them into a common management strategy.

b) Each foreign entity of a multinational enterprise has its own nationality. The criteria of linkage may vary from country to country and according to the specific material question.

c) Generalizations concerning ,,the multinational enterprise" may be used only very carefully.

4. Advantages and disadvantages of the MNE

a) The big advantages and disadvantages which are ascribed to multinational enterprises prove their significance for the economies of the home and the host states.
b) Multinational enterprises can contribute to a meaningful supply of capital, technology and manpower an the international level.

5. Sovereignty and nonintervention

a) Multinational enterprises are one more factor contributing to the de facto undermining of the formal, legal notion of sovereignty.
b) It has happened that some multinational enterprises, or home states exploiting such enterprises, or home states together with such enterprises, have interfered with the domestic affairs of host states.

6. Responsibility of the home state for MNE

a) Attempts at boycotts, corruption, or subversion by multinational enterprises are, as a rule, municipal law problems of the host state.
b) As a rule, the home state is not liable for such attempts, except
   (i) if it has not observed its duty to prevent its territory from becoming a basis of military operations against foreign states; or
   (ii) if it has taken advantage of the multinational enterprises for the purpose of performing state functions; or
   (iii) if it can be proved that it has collaborated so closely with the enterprises that it must be held responsible in good faith for an illicit intervention.

7. Economic aggression and self-determination

a) In the relationship of states *inter se*, economic pressure is permissible, as long as it is used on a proportional and non-discriminatory basis, serves legitimate public interests and does not surmount a certain last limit of intensity.

b) The assertion of a right to economic self-determination does not, by itself, create new rights or annihilate existing ones, but it contributes to the further undermining of traditional standards of compensation for nationalizations.

8. Control of MNE by host states

a) As a sovereign state, the host state is free to take the statutory or contractual measures which it sees fit to curb the activities of multinational enterprises, provided it observes the limits imposed by international law.

b) Host states have chosen very divergent attitudes face to multinational enterprises: a conscious or relative liberalism, manifold controls, special contracts of concession or investment of the state with the multinational enterprises, ,,let them in and squeeze them later", ,,high threshold", ,,last-favored-treatment", tendencies towards nationalization, complete refusal.

9. Contracts between host state and MNE

Empirical inquiries demonstrate that the multinational enterprise, in concluding certain contracts of concession or investment, negotiates with the host states on a basis of equality and reciprocity and assumes ,,quasi-state functions", so that it seems logical to postulate that such contracts be ,,functionally internationalized".

10. Diplomatic protection and MNE

a) In triangular relationships such as those at the basis of the *Barcelona Traction*-decision, it is unlikely that the control theory will be permitted to play a substantial role in the customary international law of diplomatic protection.

b) The reasoning of the *Barcelona Traction*-decision leads to the forecast that the International Court of Justice will not admit a right to diplomatic protection of the home state of shareholders, either, if the damaging state is identical with the state of incorporation or of the *siège*.

c) Foreign subsidiaries or joint ventures by multinational enterprises may not be qualified as „Calvo societies" as such. The *Barcelona Traction*-decision can hardly be evaded by such qualification.
d) The future belongs, therefore, to contractual consensus.

11. Control of MNE by home states

a) Some home states (above all the USA) endeavor to regulate the behavior of foreign subsidiaries by attributing extraterritorial effect to their antitrust, trading with the enemy, or external commerce regulation law.
b) The admissibility of such claims is dependent upon a careful balancing of interests. Such balancing must insist on the requirement of a close connection with the incriminated action and must take into account the sovereignty, the principles of proportionality and non-discrimination, the interdiction of *abus de droit* and the protection of good faith.
c) Insofar as the American antitrust decisions are based on the pure principle of effect without adequate balancing of interests, they violate international law.

12. Control of MNE by international organizations

a) UNO, UNCTAD, UNIDO, UNCITRAL, the UN regional economic commissions, ILO, OAS, OECD, the Common Market and the Council of Europe, the International Law Association and the Institute of International Law are all concerned with multinational enterprises. Coordination is needed.
b) The programs of OECD, the Common Market and the Council of Europe are based on the principles of fighting abuse and improving information, of national treatment and nondiscrimination, of consultation and cooperation.
c) Whether the Code of Conduct to be elaborated by the UN Centre on Transnational Corporations will be binding upon multinational enterprises or not, is unlikely to play a major role in the long run.

13. Perspective

a) Multinational enterprises are threatenend by new unilateral host state measures, which will invoke the Code of Conduct as an alleged standard of modern international law, whether the Code will be based on a general consensus or not.

b) The future universal international law of cooperation must strive for a just balance between the interests of all concerned (home states, host states and multinational enterprises).