THE CHOICE OF NATIONAL LAW APPLICABLE TO THE MULTINATIONAL ENTERPRISE AND THE NATIONALITY OF SUCH ENTERPRISES

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In the following Article, Dr. Hadari first analyzes the traditional Continental and Anglo-American conflict of laws theories of nationality and choice of law applicable to corporations. He then demonstrates how national interests often impinge upon these concepts, resulting in pragmatic systems of regulation when multinational enterprises are the subject of governmental action. Noting that consistency in regulation is lacking among nation-states and that this fact leads to great uncertainty in policy-making for multinational enterprises, Dr. Hadari sets forth guidelines to aid courts and legislatures in determining and formulating the applicable law and the nationality of such enterprises. In conclusion, the author acknowledges the necessity of relying on unilateral action in resolving conflicts between multinational enterprises and nation-states until a system of international collaboration can be developed, but Dr. Hadari opines that national authorities should consider and apply the guidelines set forth when making such determinations for the sake of essential order and certainty in the international business sector.

OUTLINE

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© Copyright 1974 Yitzhak Hadari. This is the second of two Articles on multinational enterprises. Both Articles are based on a doctoral dissertation submitted to the University of Michigan Law School. For the first Article, see Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729 (1973).

The author wishes to express his sincere appreciation to Mr. Richard H. Darsky of the New York Bar for his devoted assistance in the preparation of this Article for publication. The author also wishes to thank Mr. Peter H. Jakes of the New York Bar for his helpful comments and the New York City law firm of Willkie Farr and Gallagher for their valuable assistance.

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I. INTRODUCTION: THE CORPORATE NATIONALITY AND THE CHOICE OF APPLICABLE LAW

One of the important legal problems which a country faces when it deals with foreign corporations is which national law it should apply to various aspects of the life of such corporations. Should a country apply its local law, particularly its regulatory laws, or the law of another jurisdiction? Such question may also arise when a country deals with subsidiaries or affiliates of foreign corporations. This Article¹ will ex-

1. HEREAFTER THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

Convention Relating to the Mutual Recognition of Companies and Legal Persons, done Feb. 29, 1968, 2 CCH COMM. MKT. REP. ¶¶ 6083-107 (1972) (unofficial CCH translation based on German and French texts) [hereinafter cited as EEC Convention];

First Council Directive on the Coordination of the Protective Provisions of the Member States Concerning Companies, in the Interest of Shareholders and Third Parties, issued 1968, 1 CCH COMM. MKT. REP. ¶¶ 1355-69 (1972) [hereinafter cited as First Directive];

A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* (8th ed. 1967) [hereinafter cited as DICEY];

A. EHRENZWEIG, *CONFLICT OF LAWS* (1962) [hereinafter cited as EHRENZWEIG];

amine how nation-states have adapted or should have adapted themselves to the emergence of the multinational enterprise (MNE) in answering such choice of law questions.

The nation-states' response to the choice of law questions, to questions of the reach of their jurisdictions, and to other questions which require the characterization of corporations could usually be expressed in terms of attributing "nationality" to corporations. The question of whether or not "nationality" can be attributed to juristic persons, once very much in debate, is now settled,² since today nationality is attributed to corporations for various legal purposes.³ The concept of nationality has been extended to corporations despite the logical difficulties in attributing to a legal person such subjective characteristics as allegiance to a state.⁴ The nationality of a legal person, in the broadest sense of the concept, serves as a basis for subjecting a corporation or certain of its business activities to national laws and to the economic and fiscal powers exercised by a state. Nationality may also be used, *inter alia*, in order to classify a corporation as local or alien for purposes of applying certain protectionist economic restrictions,⁵ to define an "enemy" corporation,⁶ to qualify a legal person for national economic assistance and guaranty programs,⁷ to qualify for national

W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm. ed.) [hereinafter cited as FLETCHER];

R. PENNINGTON, COMPANIES IN THE COMMON MARKET (2d ed. 1970) [hereinafter cited as PENNINGTON];

E. RABEL, THE CONFLICT OF LAWS (2d ed. 1960) [hereinafter cited as RABEL];

E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS (1971) [hereinafter cited as STEIN];

RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter cited as RESTATEMENT];

Hadari, *Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise*, 20 AM. J. COMP. L. 111 (1972) [hereinafter cited as *Tax Treaties*];

Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729 (1973) [hereinafter cited as *The Structure of the MNE*].

2. 2 RABEL 18-19.

3. See EHRENZWEIG § 136, at 374 & n.22; 2 RABEL 17-24; S. ROBOCK & K. SIMMONDS, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES 338-39 (1973).

4. Cf. DICEY 482.

5. See Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961).

6. See notes 125-31 *infra* and accompanying text.

7. See, e.g., M. WHITMAN, GOVERNMENT RISK SHARING IN FOREIGN INVESTMENT (1965); Adams, *The Emerging Law of Dispute Settlement Under the United States Investment Insurance Program*, 3 LAW & POL. INT'L BUS. 101 (1971); Metzger, *Nationality of Corporate Investment Under Investment Guaranty Schemes—The Relevance of Barcelona Traction*, 65 AM. J. INT'L L. 532 (1971); Ray, *Evolution, Scope and Utilization of Guaranties of Foreign Investments*, 21 BUS. LAW. 1051 (1966).

treatment under the Friendship, Commerce, and Navigation (F.C.N.) Treaties,⁸ to enjoy special treatment under tax treaties,⁹ or to invoke the diplomatic protection of a state.¹⁰

Writings in international law, particularly in the conflict of laws area, frequently focus on concepts such as "domicile,"¹¹ "citizenship,"¹² or "residence"¹³ and often draw fine distinctions between such concepts. This Article does not address itself to these distinctions but rather attempts to deal more broadly with the interrelationship between corporations and the jurisdictions within which they operate. Thus, the term "nationality" has been chosen for use in this Article to describe the legal relationship between a corporation and a given state which enables legislatures, courts, or administrative agencies to associate that state with the corporation for a specific legal purpose; and, as used herein, the term encompasses the narrower concepts of domicile, citizenship, and residence of corporations.

The concept of corporate nationality becomes particularly complex when the MNE or parts thereof are under consideration.¹⁴ The genu-

8. See, e.g., Treaty of Friendship, Commerce, and Navigation with the Federal Republic of Germany, Oct. 29, 1954, art. XXV, [1956] 2 U.S.T. 1840, T.I.A.S. No. 3593 (effective July 14, 1956). See generally M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 352-60 (1967); Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956).

9. See, e.g., Convention with the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, art. II (1)(e), (f), [1954] 3 U.S.T. 2768, T.I.A.S. No. 3133. See generally *Tax Treaties* 111.

10. See *Barcelona Traction, Light & Power Co. Case*, [1970] I.C.J. 3, reprinted in 9 INT'L LEGAL MATERIALS 227 (1970) and excerpted and digested in 64 AM. J. INT'L L. 653 (1970); 8 M. WHITEMAN, *supra* note 8, at 1269-91. See note 176 *infra*.

11. See DICEY, Rule 72, at 482; EHRENZWEIG 240; G. CHESHIRE & P. NORTH, *CHESHIRE'S PRIVATE INTERNATIONAL LAW* 194 (8th ed. 1970).

12. An example of this idea is the concept of corporate citizenship for United States federal jurisdiction purposes (diversity of citizenship). See 28 U.S.C. § 1332(c) (1970). For a discussion of diversity cases involving corporations, see text accompanying notes 46-48 *infra*. Cf. *Fitzgerald v. Southern Ry.*, 176 F. Supp. 445 (S.D.N.Y. 1959). However, corporations have been denied citizenship for the privileges and immunities clause, notwithstanding that they were considered citizens for diversity of citizenship purposes. *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1868); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

13. An example of this idea is the concept of corporate residence for United Kingdom income tax purposes. DICEY, Rule 72, at 483. See notes 135-42 *infra* and accompanying text. In the United States, "commercial domicile" has been developed as a justification for state taxation of foreign corporations, i.e., of corporations operating in the state but possessing foreign "legal" domiciles of the state of incorporation. H. HENN, *LAW OF CORPORATIONS* § 81, at 113 (2d ed. 1970). The corporate residence for federal venue purposes is wherever the firm is incorporated, licensed to do business, or is doing business. 28 U.S.C. § 1391(c) (1970).

14. For the organizational structure and control characteristics and the new attri-

ine MNE is a single economic enterprise incorporated in several jurisdictions, managed and controlled from one or more countries, with business activities which may range all over the globe. The enterprise is organized in various complicated corporate and other forms, employing varying methods of ownership and control. Its business may be conducted in a particular country through an incorporated entity (which is usually a subsidiary or affiliated company), a branch, an agency which is not considered a branch, or through licensing or various other types of contractual arrangements with independent local businesses. The main characteristic of the total enterprise is that it is joined together by common control and management strategy emanating from the international corporate headquarters, as opposed to being a mere collection of corporations located in different jurisdictions which engage in business transactions with each other.¹⁵

Regardless of which form is utilized to establish the MNE as a unified economic entity, it is the interaction between transnational control of MNEs and the sovereignty of nation-states which generates the most significant legal, socio-economic, and political conflicts concerning the MNE. The crucial question is when and to what degree will nation-states recognize the existence of the transnational control.¹⁶ The regulating states must choose the national law applicable to the corporation under consideration. The state must decide when and for what legal purpose a corporation which is part of an MNE is subject to local law and when it is subject to foreign law. Such decisions could be looked upon as determinations of whether the corporation is a local national as opposed to the national of another state. Many times, in making such decisions the regulating state must also decide when and for what legal purposes a corporation should be treated not only as an independent entity operating exclusively within its own boundaries, but also as an integral part of a large enterprise headquartered and controlled from abroad. One who accepts such a broad use of corporate nationality may find it helpful to speak in terms of attributing a nationality to, or disregarding a nationality of, the corporation, whenever a state faces the need to choose the national law applicable to an MNE.

The need for establishing predictable and manageable criteria or theories for use in defining and determining corporate nationality, in-

butes of the MNE phenomenon, see *The Structure of the MNE* 729 (citing authorities).

15. *Id.* at 746-54 (discussing organizational and control structure of the MNE).

16. *Id.* at 757.

cluding a determination of the choice of the applicable national law, has increased in recent years due to the emergence of a new "world economy" and the MNE as its chief expression.¹⁷ But despite the tremendous recent growth of international corporate investments, the law applicable to the MNE has remained essentially national,¹⁸ and there is no generally accepted legal definition of the MNE. Because of the absence of a coherent legal approach, courts and legislatures are being called upon to develop new ways of dealing with MNEs. In so doing, both legislatures and courts should apply criteria or theories of nationality and choice of law which, on the one hand, will not allow MNEs to evade compliance with relevant legislation of the host or home state that is prompted by national, social, economic, and political goals, and which, on the other hand, will recognize valid interests of private investors and minimize the occasions when the MNE is subject to conflicting laws and policies of several countries.

In general, the purpose of this Article is to examine the concept of corporate nationality in the MNE context and to demonstrate the need for developing guidelines to be used in determining the nationality of the MNE, including the choice of its applicable national law, for specific legal purposes. It has been said that the essential activities of any legal entity are controlled by a single municipal law, an "ubiquitous personal law," as is the case with the personal law governing individuals.¹⁹ The validity and applicability of this statement to the MNE and any of its affiliated corporations is questioned throughout this study. However, in order to examine the validity of this statement, basic concepts must be clarified. Thus, the Article begins with an exposition of corporate nationality as viewed in the traditional conflict of laws approach. Thereafter, several illustrations are presented to show situations in which jurisdictions have combined the traditional conflict of laws theories of nationality with more pragmatic approaches in order to satisfy specific national interests in choosing the applicable national law. The Article then proceeds to set forth guidelines to be used in determining and defining the corporate nationality of the MNE, including the choice of the national law applicable to it. These guidelines, based upon the conflict of laws approach, isolate the major and often divergent interests which must be considered before any nationality is attributed to an MNE. Finally, the efficacy of these guidelines is demonstrated by the presentation of an example of their application to a specific legal problem area affecting the MNE.

17. *Id.* at 733-46 (placing the MNE in historical and economic perspective).

18. *Id.* at 754-67 (presenting the MNE from a legal perspective).

19. 2 RABEL 3.

II. THE FOREIGN CORPORATION AND THE CORPORATE NATIONALITY

A. *The Two Competing Theories*

From the traditional legal viewpoint "a corporation is called foreign when it is considered governed by the law of a foreign state."²⁰ The orthodox common law rule attributes to a corporation the nationality of the jurisdiction which chartered it²¹ and defines a foreign corporation as one which is "organized under laws other than the laws of this State for a purpose or purposes for which a corporation may be organized under this Act."²² Conversely, the civil law rule traditionally decides the nationality of companies according to their principal place of business or central administration, that is, the company "seat," *Siège* or *Sitz* (hereinafter the "Seat"), or the "real seat," *Siège social* or *Siège réel* (hereinafter the "Real Seat").²³

Under the Anglo-American conflict of laws concept,²⁴ a corporation is the creation of the state or country of incorporation. If a corporation is doing business other than in its place of incorporation, it is considered a foreign corporation in such other host jurisdiction, owing its existence to the laws of the incorporating home country.²⁵ It is a well settled Anglo-American rule that the legal existence and, for many purposes, the domicile, as well as the governing law of a corporation, are determined by the law of the state in which it was created.²⁶

20. *Id.* at 19.

21. See notes 25-26 *infra*.

22. ABA-ALI MODEL BUS. CORP. ACT ANN. § 2(b) (1971). The term "corporation," as used in this Article, normally refers to any other form of business enterprise organization which is a juristic person. The specific form of organization depends on the legal system in question and on the legal strategy of the MNE under consideration.

23. See generally EHRENZWEIG §§ 144-46; A. FARNSWORTH, *THE RESIDENCE AND DOMICILE OF CORPORATIONS* (1939); Conard, *Organizing for Business*, in 2 *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET—A LEGAL PROFILE* 1, 61-65 (E. Stein & T. Nicholson eds. 1960); Latty, *Pseudo-Foreign Corporations*, 65 *YALE L.J.* 137, 166-67 (1955); Stein, *Conflict-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market*, 68 *MICH. L. REV.* 1327, 1332-36 (1970). For the approach in common law countries, see notes 41-42 *infra* and accompanying text.

24. For a list of countries which follow the Anglo-American rule, see 2 *RABEL* 32-33. The Netherlands should be added to this list.

25. *Liverpool Ins. Co. v. Massachusetts*, 77 U.S. (10 Wall) 566 (1870), *aff'g* *Oli-ver v. Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531 (1868); *Barouess Wen-lock v. River Dee Co.*, 36 Ch. D. 674, 685 (1886) (per Bowen, L.J.).

26. For the British law, see *Henriques v. General Privilege Dutch Co.*, 92 Eng. Rep. 494 (K.B. 1728); *Newby v. Van Oppen*, L.R. 7 Q.B. 293 (1872); *National Bank of Greece v. Metliss*, [1959] A.C. 509, 518. See also *Continental Tyre & Rubber Co. v. Daimler Co.*, [1915] H.L. 1 K.B. 893; *Janson v. Dreifontein Consol. Mines Ltd.*, [1902] A.C. 484; *Lazard Bros. v. Midland Bank, Ltd.*, [1933] A.C. 289, 297; E. YOUNG,

Although the significance of corporate domicile has declined in Anglo-American law, it continues to govern choice-of-law questions in these jurisdictions. Pursuant to the traditional theory, the domicile of a corporation is in the state of incorporation.²⁷ Nevertheless, the corporation may engage in business and have an office, officers, directors, and stockholders in a state or country other than its place of incorporation, thus becoming a resident of such foreign state or country, while still preserving its original domicile.²⁸

In contrast, the Seat rule favors either the place of central administration, from which key business decisions are made and management and control are exercised, or the principal place of business, in determining nationality of companies for choice-of-law purposes.²⁹ The law of the company's Seat determines both its existence as a legal entity and its governing law. Most Continental countries adhere to the Seat rule, with the Netherlands being a notable exception.³⁰ Under the Continental rule, the Seat is determined according to the circumstances of each case, with the tendency being to rely on the place of the corporate head-

FOREIGN COMPANIES AND OTHER CORPORATIONS 182, 205 (1912). For a Canadian case on point, see *National Trust Co. v. Ebro Irrigation & Power Co.*, [1954] 3 D.L.R. 326 (Ont. High Ct.).

For the American law, see *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934), *rev'g* 189 Minn. 516, 250 N.W. 190 (1933); *Doctor v. Harrington*, 196 U.S. 579 (1905); *Continental Nat'l Bank v. Buford*, 191 U.S. 119 (1903); *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892); *Insurance Co. v. Francis*, 78 U.S. (11 Wall.) 210 (1870); *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1853).

27. 17 FLETCHER § 8300, at 28-29 (citing American precedents). Moreover, the United States Supreme Court said in a famous early case having little relevance today:

[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where the law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) (per Taney, C.J.).

28. For British decisions, see *Kuenigl v. Connersmarck*, [1955] 1 Q.B. 515; *Gasque v. Commissioners of Inland Revenue*, [1940] 2 K.B. 80, 84. For an American decision, see *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934).

In the United States, a corporation may avail itself of "domestication" under the law of two or more states. Under this legal alternative, the corporation may be incorporated in one or more states, rather than operating as a foreign corporation in either state. As a result, the corporation preserves its original domicile while acquiring additional ones. *See, e.g., Gavin v. Hudson & M.R.R.*, 185 F.2d 104 (3d Cir. 1950); *Fitzgerald v. Southern Ry.*, 176 F. Supp. 445 (S.D.N.Y. 1959). Of course, a new domicile may be created under Anglo-American law by, for example, a merger. A new corporation can be organized in another jurisdiction while the constituent corporations are dissolved. *See generally* 8 FLETCHER § 4032.

29. 2 RABEL 40; E. YOUNG, *supra* note 26, at 149; Latty, *supra* note 23, at 167.

30. For a list of countries which follow the Seat concept, see 2 RABEL 33-35.

quarters as the dominant factor.³¹ The place where the board of directors usually meets is considered decisive by some countries,³² while the location of the general meeting of shareholders is more important in other countries.³³ However, these factors are not always determinative; and even within the same country, courts may use different standards, depending upon the circumstances under consideration. In Germany, for example, various cases have held the Seat to be the corporate headquarters,³⁴ the place where the directors meet,³⁵ or the place of the general meeting of shareholders, if they control the board of directors.³⁶ Other German cases have held the place where the company conducts its major business operations to be the decisive factor, notwithstanding the fact that management is located elsewhere.³⁷ Moreover, in still other decisions, the German courts have come close to the common law rule, looking to the place of the registered office listed in the company's articles, though the headquarters was located elsewhere.³⁸ In one of these cases, such a decision was reached even when the corporation in question was a wholly-owned subsidiary of a foreign parent.³⁹

Company laws of many Continental countries require that the company's articles declare the location of the company Seat; therefore, a change of the national location of the company Seat demands an amendment of the charter.⁴⁰

Such a requirement does not exist in the common law countries.

31. *Id.* at 41.

32. *Id.* at 41-42. England is an example of this type of country. *See, e.g.,* *Cesena Sulfur Co. v. Nicholson*, L.R. 1 Ex. D. 428 (1876).

33. *Id.* at 41. Italy is an example of a country which focuses on the site of the shareholder meeting. *Id.* (citing authorities).

34. Judgment of March 31, 1904, RG 9 DJZ 555 (*Deutsche Juristen Zeitung*), 333 JW 231 (*Juristische Wochenschrift*).

35. PENNINGTON 98.

36. *Id.* at 99.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* 2 RABEL 38; Conard, *supra* note 23, at 61-62. For example, the German Stock Corporation Act of 1965 provides in section 5:

(1) The domicile [Seat or *Sitz*] of the company shall be the place specified in the articles of incorporation.

(2) As a rule, the articles of incorporation shall designate as the domicile the place where the company is engaged in business, or the place from which the company is managed or administered. GERMAN STOCK CORPORATION (*Aktiengesellschaft*, or *AG*) ACT § 5, at 35-36, *reprinted in* CCH COMM. MKT. REP. (F. Juenger & L. Schmidt transl. 1967).

The Seat rules and the need to amend the charter have raised some problems regarding a voluntary change of the corporate nationality. *See* notes 93-95 *infra* and accompanying text.

In most United States jurisdictions, a corporation has only to designate and maintain a registered office in the state of incorporation,⁴¹ which may not be the Seat of the corporation. The practice of American corporations of incorporating in one state, notably Delaware, while maintaining their headquarters or principal place of business in another state, is well established. Similarly, the English Companies Act requires the company to designate and maintain a registered office in England or Scotland,⁴² while the headquarters or principal place of business may be elsewhere.

The traditional rationale for the Seat rule is that it reflects the economic reality and prevents fraud or abuse of law.⁴³ The rationale for the Anglo-American rule is that it provides certainty in choice of law, since the state of incorporation is easily ascertainable. The Seat concept emphasizes the "commercial domicile" of the firm, but raises the factual problems of ascertaining the place of central administration or control⁴⁴ or the principal place of business. Where is the Seat of an enterprise when its interests are spread over several countries? The question does not arise under the Anglo-American rule in the choice of law context, at least if the enterprise is incorporated or chartered in only one jurisdiction.

An interesting analogy to the factual difficulty facing Continental courts is the problem faced by American courts in jurisdictional cases involving multistate corporations. Since 1958, the "principal place of business" has been one standard of corporate citizenship in diversity of citizenship cases where jurisdiction is at issue.⁴⁵ Consequently, American courts are confronted with a problem similar to that faced by the Continental courts in ascertaining the Seat of a company.⁴⁶ It

41. ABA-ALI MODEL BUS. CORP. ACT ANN. § 12(a) (1971); *id.*, Explanatory Notes § 12, ¶ 3.

42. Companies Act of 1948, 11 & 12 Geo. 6, c.38 § 2(1)(b).

43. The "real seat" rule was predicated on the assumption that a company would operate in a single state. The purpose of the rule was to assure that the bulk of the legal relationships within the company system will be governed by the law of the state where most of its transactions take place, so that the company could not "escape" the policy and law of that state. STEIN 32.

See also Stein, *supra* note 23, at 1332-33. For a discussion of the varying degrees to which nation-states protect their national interests by applying their laws to MNEs operating within their borders, see notes 101-24 *infra* and accompanying text.

44. For a discussion of the factual problems of ascertaining the place of control of the MNE, see *The Structure of the MNE* 749-52.

45. 28 U.S.C. § 1332(c) (1970). According to this 1958 amendment to the Judicial Code, a corporation is deemed a citizen of any state by which it has been incorporated or of the state in which it has its principal place of business.

46. However, it should be noted that, although the factual question is similar, the underlying policies are completely different and may justify different results. While

seems that the two main factors considered in such jurisdictional questions in the United States are the place of control and management (the so-called nerve center or home office) and the situs of the corporate business and activities. Illustrative of one group of cases is that of a manufacturing company where most of the business operations and day-to-day management were carried on in one state, while the overall management and control of the corporation were exercised from another state. In such a case, the United States courts have tended to find the former to be the corporation's principal place of business.⁴⁷ On the other hand, in the case of a genuine multistate corporation having no single principal locus of business operations, courts have selected the state from which overall management and control are performed, in addition to a substantial part of the company's business, as the corporation's principal place of business.⁴⁸

the traditional rationale for the Continental Seat rule is the countries' interest in preventing avoidance and abuse of their substantive law by the choice of another law (see note 43 *supra* & notes 101-20 *infra* and accompanying text), the question arises in the United States with respect to the jurisdiction of federal courts vis-à-vis state courts. The citizenship of a corporation in the United States determines whether the citizenship of the parties to a suit is diverse and therefore gives original jurisdiction to federal courts. The traditional explanation of the federal courts' adjudicatory authority based on diversity is the fear of the state courts' prejudice against aliens. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). Compare *Friendly, The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) with *Yntema & Jaffin, Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 (1931). See generally ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* App. A, at 458-64 (1968); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964).

47. *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960); *accord*, *Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140 (3d Cir. 1972). See also *Lurie Co. v. Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405 (N.D. Cal. 1970); *Bruner v. Marjec, Inc.*, 250 F. Supp. 426 (W.D. Va. 1966) (holding the forum state to be the principal place of business of a corporation which had its executive offices in another state but which had as its sole purpose the development of real estate and the operation of a country club in the forum state); 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.77[3] (2d ed. 1972).

48. *E.g.*, *United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568 (10th Cir.), *cert. denied*, 385 U.S. 960 (1966). *But cf.* *Federal Resources Corp. v. Shoni Uranium Corp.*, 408 F.2d 875, 877 n.1 (10th Cir. 1969). See also *Egan v. American Airlines, Inc.*, 324 F.2d 565 (2d Cir. 1963); *STP Corp. v. United States Auto Club*, 286 F. Supp. 146 (S.D. Ind. 1968); *Briggs v. American Flyers Airline Corp.*, 262 F. Supp. 16 (N.D. Okla. 1966); *Tolchester Lines, Inc. v. Dowd*, 253 F. Supp. 643 (S.D.N.Y. 1966); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959).

Nevertheless, American courts have been reluctant to pierce the corporate veil of a subsidiary corporation to show that its business and that of its parent were a unitary enterprise having a single principal place of business; instead, the courts have looked to the specific business of the subsidiary corporation. *Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1142 (3d Cir. 1972); *Caruera v. Lancaster*

B. *The Relevance of the Corporate Nationality in Choice-of-Law Questions*

The study of the "foreign corporation" traditionally has three primary aspects:⁴⁹ recognition of the corporation as a legal entity, determination of the governing law with respect to various internal corporate issues, and qualification and right of entry to do business in a foreign country.⁵⁰ The first two, discussed below, are basically choice-of-law (conflict of laws or private international law) issues; and the third involves areas of law not particularly pertinent to this discussion⁵¹

Chem. Corp., 387 F.2d 946 (3d Cir. 1967), *cert. denied*, 390 U.S. 1027 (1968); *Lurie Co. v. Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405, 410 (N.D. Cal. 1970).

For a discussion of the "commercial domicile" as a basis for a state's tax jurisdiction over foreign corporations, see note 13 *supra*. Section 1 of the Uniform Division of Income for Tax Purposes Act defines "commercial domicile" as "the principal place from which the trade or business of the taxpayer is directed or managed." UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT § 1(b) (adopted by eleven American states). Hence the emphasis is on the place of management and control.

49. 2 RABEL 19. See notes 53-100 *infra* and accompanying text.

50. For examples of qualification to do business, see the United Kingdom requirements, *The Companies Act 1948*, 11 & 12 Geo. 6, c.38, §§ 407, 410(1); Israeli requirements, *Companies Ordinance 1929* (Laws of Palestine Vol. I, cap. 22, at 161 (English edition)), *as amended*, §§ 248-50; New York requirements, notes 254-59 *infra* and accompanying text. For state requirements of entry and admission to do business, see 17 FLETCHER §§ 8446-63; Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C.L. REV. 1, 19-24 (1968).

The right of entry, one of the major socio-political and economic controversies with regard to MNEs, is beyond the scope of this study. It seems that sound policy by host countries would be to allow entry to most businesses in order to enjoy the benefits generated by MNEs, while at the same time subjecting them to some limitations and control to prevent circumvention of national policies. Even in the sensitive area of national security, there is room for MNEs. See Vernon, *MNE and National Security*, 74 ADELPHI PAPERS (1971).

51. See 2 RABEL 19. A preliminary question which may arise due to the various forms of business organizations in different jurisdictions, is how to characterize a foreign business organization for domestic legal purposes. For example, how should the United States decide whether a German limited liability company—*Gesellschaft mit beschränkter Haftung*, or *GmbH*—is a "corporation" or a "partnership" for American purposes? See *The Structure of the MNE* 762-63 (citing authorities). The *Restatement of Conflict of Laws* reads:

An organization formed in one state will be considered a corporation within the meaning of a statute or rule of another state if the attributes the organization possesses under the local law of the state of its formation are sufficient to make it a corporation for the purposes of the statute or rule. RESTATEMENT § 298.

See *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *Hemphill v. Orloff*, 277 U.S. 537 (1928); *Liverpool Ins. Co. v. Massachusetts*, 77 U.S. (10 Wall.) 566 (1870); EHRENZWEIG 410; 17 FLETCHER § 8297. See generally 2 RABEL 4-24. In the United Kingdom, it is presumed that the status ascribed to an association by the law of the country in which it was formed will be recognized by English courts. *Von Hellfeld v. E. Rechnitzer & Mayer Feres & Co.*, [1914] 1 Ch. 748.

and as a result is not examined in the Article.⁵²

1. *Recognition of Foreign Corporations*

Corporations are artificial legal persons and unlike natural persons owe their existence to the state which is their home country. A company must be "recognized" as a legal entity in the host country before it can legally enter a market as a foreign corporation. If not recognized, it will not have all the corporate attributes in the foreign country, such as the right to make contracts and to sue and be sued as a corporation. "In private international law . . . the 'recognizing' [host] nation-state agrees to extend to its own system certain legal effects attributed to a fact situation in the legal system of another nation-state."⁵³ One authority properly observed that

any legal person is such only in relation to a specific legal issue, such as his capacity to sue . . . , to be sued . . . , or, to hold property. It is meaningless, therefore, to speak of a legal personality in the abstract⁵⁴

The common law rule assumes that "the existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognized by the [forum] court."⁵⁵ Such rule brings certainty to the basic question of recognition: there is only one country of incorporation, and its law should be consulted.⁵⁶ By contrast, recognition under the Continental rule is determined according to the location of the Seat.⁵⁷ Because there may be several alternative locations for the Seat, it may not be certain which law should be consulted to answer the question of recognition. Therefore, theoretically, under the Continental approach the basic attributes of a company

52. A country will normally allow a foreign corporation to perform within its territory such isolated acts which do not constitute doing business, but recognition is a condition precedent even for such permission. For a discussion of what constitutes doing business, see RESTATEMENT, Explanatory Notes § 297, comment *f*; *id.*, Explanatory Notes § 311, comments *f-g*. Legal systems vary in what constitutes doing business and what is an isolated act. See 2 RABEL 173-225; ABA-ALI MODEL BUS. CORP. ACT ANN. § 106 (1971).

53. Stein, *Recognition of Companies*, *supra* note 23, at 1327.

54. EHRENZWEIG 408. It should be noted that although a foreign corporation is recognized for conflict of laws purposes, it still may be denied recognition as a separate legal entity for other purposes. A shell subsidiary of the MNE, or even an operating subsidiary, to the extent that it follows instructions of the parent, may not be recognized as an independent entity for purposes of corporate liability, tax, or anti-trust. See *The Structure of the MNE* 769-79 (discussing recognition of the wholly owned subsidiary as a distinct entity).

55. DICEY, Rule 70.

56. *Lazard Bros. v. Midland Bank, Ltd.*, [1933] A.C. 289, 297.

57. See text accompanying notes 29-48 *supra*.

may be questioned, since the various jurisdictions where it operates may differ in the basis by which they resolve the recognition problem. A corporation may be validly incorporated under the law of one country and be denied recognition by another country because the latter determines that the company's Seat is not in the country of incorporation. A decision of the German Supreme Court illustrates the point. A corporation incorporated in the United States for the purpose of exploiting Mexican mines maintained its headquarters in Germany. The German court held the company's Seat to be in Germany and consequently applied German law. According to German law, the corporation was denied recognition as a stock company because it failed to fulfill the German requirements for incorporation, and consequently it was treated as a German noncorporate association.⁵⁸ There are, however, German precedents under which the court could have decided that the Seat was in Mexico,⁵⁹ thus resolving the recognition problem according to Mexican law. Similarly, it has been suggested that French courts have been known to treat foreign companies as nullities.⁶⁰ However, these tribunals are now more willing to accept the domicile given in the company's articles as its Real Seat, and the question has not been raised for many years.⁶¹

Today it is not likely that a country would deny recognition for choice-of-law purposes to a corporation which is recognized in the country of its incorporation. As a result, the current European trend seems to be in the direction of the common law concept recognizing companies validly incorporated according to the law of the country of incorporation.⁶²

In many instances recognition of foreign companies is assured by bilateral treaties, most of which are known as Friendship, Commerce, and Navigation Treaties.⁶³ For example, the F.C.N. Treaty between the United States and the Federal Republic of Germany⁶⁴ provides

58. See note 34 *supra*.

59. See note 37 *supra* and accompanying text.

60. PENNINGTON 99.

61. *Id.*

62. *Id.* Cf. Cass. 12 Nov. 1965, Pas. 1966. I.366 (*Lamot v. Société "Lamot Limited"*); Rev. crit. d.i.p. 1967, 506, note Loussouarn; Clunet 1967, 140; Rev. prat. soc. 1966, 136. In *Lamot*, the Belgian Court of Cassation decided that a British company which had moved its Seat to Belgium did not cease to exist.

63. See generally R. WILSON, UNITED STATES 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).

64. Treaty of Friendship, Commerce, and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. 1840, T.I.A.S. No. 3593 (effective July 14, 1956).

national treatment (i.e., no discrimination) for companies of either state with respect to such matters as access to courts⁶⁵ and engaging in all types of businesses, "whether in a dependent or an independent capacity, and whether directly or by agent or through the medium of any form of lawful judicial entity."⁶⁶ The treaty expressly recognizes the right of a company to organize a subsidiary and to control and manage enterprises in the other country.⁶⁷ National treatment is also provided with respect to acquiring property⁶⁸ and holding patents.⁶⁹ Finally, the treaty states: "Companies constituted under the applicable laws and regulations within the territories of either party shall be deemed companies thereof and shall have their juridical status recognized within the territory of the other party."⁷⁰ In this fashion such F.C.N. Treaties manifestly adhere to the Anglo-American rule of looking to the state of incorporation in dealing with the problem of recognition.

2. *The Governing Law of Foreign Corporations*

After recognition, the question of what law should govern the corporation's internal and external affairs must be answered. The answer is again dependent on each country's private international law (conflict of laws) rules.⁷¹ As a general rule, the law of the country of the company's nationality⁷² not only determines the existence of a corporation but also governs its internal affairs.⁷³ According to the common law, such governing law, the so-called personal law of the company, is the law of the country of incorporation while according to Continental law, it is the law of the country of the Seat.⁷⁴

(a) *Internal Affairs.* The dividing line between the external and internal affairs of a corporation is not always clear.⁷⁵ Illustratively,

65. *Id.* art. VI(1).

66. *Id.* art. VII(1).

67. *Id.* The same article assures national treatment to subsidiaries or affiliates of companies of the other contracting state.

68. *Id.* art IX(3).

69. *Id.* art. X(1).

70. *Id.* art. XXV(5).

71. See Stein, *Recognition of Companies*, *supra* note 23, at 1327-32.

72. The common law uses "domicile" in this context. See notes 24-28 *supra* and accompanying text.

73. 2 RABEL 69.

74. Cf. EHRENZWEIG 411-13. Questions of external affairs, however, such as relations between a corporation and third persons, are subject to the same choice of law principles which would govern a given transaction involving individuals rather than corporations. See notes 97-100 *infra* and accompanying text.

75. There is no clear cut line between internal and external affairs. It has been

the personal law of companies has been applied in England, *inter alia*, to determine the dividend rights of different classes of stockholders,⁷⁶ to determine all incidents of the status of the corporation (including amalgamation, succession, capital reduction or increase),⁷⁷ to determine which corporate officers are entitled to represent the company,⁷⁸ and to determine the validity of directors' appointments.⁷⁹ In the United States, for jurisdictional purposes,⁸⁰ the following matters have been held to involve internal affairs of foreign corporations: a suit to prevent consummation of a corporate reorganization purporting to effect a complete change in the corporate structure and character and the rights of existing stockholders;⁸¹ an action to enjoin a shareholders' meeting called to obtain approval of a merger;⁸² a suit to change the status of shareholders and the relations between the corporation and its shareholders;⁸³ and an action to restrain officers of a foreign corporation from voting proxies at a meeting to be held in the state of domicile.⁸⁴

suggested that "'internal affairs' of a corporation [are] relations *inter se* of the corporation, its shareholders, directors, officers or agents" RESTATEMENT, EXPLANATORY NOTES § 302, comment a at 306-07. *See also* Wallace v. Motor Prods. Corp., 15 F.2d 211, 213 (E.D. Mich. 1926), *aff'd as modified*, 25 F.2d 655 (6th Cir. 1928). *See generally* EHRENZWEIG 413-23.

76. Spiller v. Turner, [1897] 1 Ch. 911 (1896).

77. National Bank of Greece and Athens S.A. v. Metliss, [1958] A.C. 509, 518 (1957).

78. Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A. 1937); Carl Zeiss Stiftung v. Rayner & Keeler, Ltd., [1966] 3 W.L.R. 125, 148, 193 (H.L.).

79. Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A. 1937). *See also* Pickering v. Stephenson, L.R. 14 Eq. 322 (1872); Risdon Iron & Locomotive Works v. Furness, [1906] 1 K.B. 49 (C.A. 1905); Brailey v. Rhodesia Consol., Ltd., [1910] 2 Ch. 95; Indian & Gen. Inv. Trust, Ltd. v. Borax Consol., Ltd., [1920] 1 K.B. 539 (1919); London & S. American Inv. Trust, Ltd. v. British Tobacco Co., [1927] 1 Ch. 107 (1926); Adelaide Elec. Supply Co. v. Prudential Assurance Co., [1934] A.C. 122 (1933). *See generally* DICEY 479 *et seq.*

80. Although most of the cases cited below (see notes 81-84 *infra*) are obsolete for jurisdictional purposes, they are still illustrative for the limited purpose of defining internal affairs of foreign corporations.

81. Wallace v. Motor Prods. Corp., 15 F.2d 211 (E.D. Mich. 1926), *modified in other respects and aff'd as modified*, 25 F.2d 655 (6th Cir. 1928), *noted in* 27 MICH. L. REV. 336 (1929).

82. Sterling, Grace & Co. v. Seeman Bros., Inc., 29 Misc. 2d 561, 215 N.Y.S.2d 559 (Sup. Ct. 1961).

83. Kelly v. American Sugar Ref. Co., 311 Mass. 617, 42 N.E.2d 592 (1942).

84. Woodruff v. Dubuque & S.C. Ry., 30 F. 91 (C.C.S.D.N.Y. 1887). Notice, however, that the jurisdictional question is subject, *inter alia*, to the modern doctrine of *forum non conveniens*, under which a court in its discretion may exercise jurisdiction over the internal affairs of a foreign corporation. The court balances the equities involved, one of which is interference with the internal affairs of a foreign corporation. *See* Williams v. Green Bay & W.R.R., 326 U.S. 549, *rev'g* 147 F.2d 777 (2d Cir. 1945); Lonergan v. Crucible Steel Co. of America, 37 Ill. 2d 599, 229 N.E.2d 536 (1967), *following* Koster v. (American) Lumbermen's Mut. Cas. Co., 330 U.S. 518 (1947).

Further examples of internal affairs, held to be governed by the laws of the state of incorporation, are declaration of cash⁸⁵ and stock⁸⁶ dividends, the validity of resolutions adopted by the board of directors authorizing issuance of stock,⁸⁷ and problems relating to stock⁸⁸ and bond⁸⁹ issues. Similarly, Continental courts have held the following corporate matters to be governed by the personal laws of foreign companies: status as a shareholder,⁹⁰ the right of a company to compel payment of its debt by a stockholder,⁹¹ and the right of a stockholder to sue a director for breach of duty.⁹²

One of the odd results of the Continental corporate Seat theory is the uncertainty as to the effect of a company's voluntary change of Seat from one country to another. Such a change may involve the company's subscription to a new personal law governing its internal affairs. This is not the result in common law countries since the law of the state of incorporation continues to govern the company's internal affairs despite a migration of its Seat from the state of incorporation to another common law country. On the other hand, it is uncertain in several European countries, such as Germany, whether a company's resolution to expatriate the Seat is valid. Although such a move creates uncertainty, it does not appear to involve a dissolution of the company as has been suggested by some European theorists.⁹³ The French Business Association Law, for example, prohibits such an expatriation of a company's Seat unless it is to a country with which there is a treaty permitting it.⁹⁴

The Continental rules also affect the operation of MNEs by limiting the freedom of choice of the place of incorporation. MNEs will

For a list of cases and illustrations, see 17 FLETCHER § 8425. See also RESTATEMENT § 313.

85. *Union & New Haven Trust Co. v. Watrous*, 109 Conn. 268, 278-79, 146 A. 727, 731 (1929).

86. *In re Fryeburg Water Co.*, 79 N.H. 123, 106 A. 225 (1919).

87. *Central Consumers' Wine & Liquor Co. v. Madden*, 68 A. 777 (N.J. Ch. 1908). See generally 17 FLETCHER §§ 8326, 8429.

88. See, e.g., *Harr v. Pioneer Mechanical Corp.*, 2 F. Supp. 517 (S.D.N.Y. 1932), modified on other grounds, 65 F.2d 332 (2d Cir.), cert. denied, 290 U.S. 673 (1933).

89. See, e.g., *Chalmers v. Nederlandsch Amerikaan*, 36 N.Y.S.2d 717 (City Ct. 1942). But New York law was applied to several issues involving German companies and Nazi regulations. See, e.g., *Central Hanover Bank & Trust Co. v. Siemens & Halske A.G.*, 15 F. Supp. 927 (S.D.N.Y. 1936).

90. PENNINGTON 100.

91. *Id.*

92. *Id.*

93. *Fundamental Changes in Marketable Share Companies* (A. Conard ed.), in 13 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 6, ¶ 14 (1972).

94. *Id.*

normally hesitate to incorporate in one European country while having their Seat in another European country. Instead, they will operate outside their home country through an incorporated subsidiary or an affiliate organized in each host country. Thus MNEs will avoid the uncertainties resulting from separation of the Seat and the place of incorporation and from a voluntary move of a Seat from one country to another.⁹⁵

It should be noted also that the current practice in transnational mergers is to establish one or more joint operating subsidiaries while turning the "merging" companies into holding companies. In reality, a single business unit is established but the two merging companies remain legally separate. Such practice is dictated primarily by tax considerations.⁹⁶

(b) *External Affairs.* Neither Anglo-American nor European courts have applied the corporation's personal law to foreign companies' transactions with outside parties.⁹⁷ Such transactions are governed by the law of the contract according to general choice-of-law rules, just as if the company were an individual. Thus, to the extent that the MNE operates outside its home state, most of its contracts are likely to be governed by the host country's law or by a third country's law if that country is the *lex loci contractus*.⁹⁸ For example, an English company was held by the German Supreme Court, applying German law, to be in violation of a contract made in Germany, although the firm's action was ultra vires the company under English law.⁹⁹ The German court, by applying the proper law of the contract rather than the English company law as the company's personal law, went even further in holding shareholders personally liable on contracts made by the company.¹⁰⁰

The general rules alluded to above affect the management of corporations in general and of MNEs in particular. The top management of an MNE must often plan its activities to insure compliance with the sometimes contradictory corporation laws and related legal require-

95. Conard, *supra* note 23, at 61-65.

96. *The Structure of the MNE* 759-60.

97. See note 74 *supra*.

98. See L. GOWER, *THE PRINCIPLES OF MODERN COMPANY LAW* 672 (3d ed. 1969); PENNINGTON 101 (citing cases). The *Restatement* reads:

The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties. *RESTATEMENT* § 301.

See also *id.*, Reporter's Note § 301, at 304-06.

99. Judgment of Dec. 17, 1959, 31 BGHZ 367, BGH NJW 1964 at 971.

100. PENNINGTON 101.

ments of various jurisdictions. Thus, a single matter of management and internal corporate affairs may be subject to different governing laws, due to differing criteria used in determining corporate nationality throughout the world. Furthermore, conflicting court decisions may occur when two countries attempt to govern the same act of management. The obvious result of such conflicting obligations and liabilities is a substantial inhibition on the efficient and economical operation of the multinational enterprise.

C. *National Interests and the Multinational Enterprise*

A basic question facing nation-states which are attempting to protect their national interests is whether or not to recognize the freedom or "autonomy" of corporations to choose their governing law.¹⁰¹ "Or is it necessary, in view of certain interests of a higher order, for the company to be governed by the law of the state of the 'real seat'?"¹⁰²

The orthodox Anglo-American concept is that founders of corporations are free to decide the country or state of incorporation and are not obliged to choose the state in which most of their business will be conducted or where central management will be located.¹⁰³ This concept is predicated upon the Anglo-American right of contracting parties to choose the proper law of the contract.¹⁰⁴

This emphasis on the proper law is doubtless the result of the historical development of English companies from partnerships; instead of regarding the formation of a company as a unilateral transaction creating a

101. STEIN 399.

102. *Id.* at 399-400.

103. *Cf.* *Wirt Franklin Petroleum Corp. v. Gruen*, 139 F.2d 659, 660 (5th Cir. 1944); *In re Rice Chocolate Co.*, 36 F. Supp. 365, 366-67 (D. Mass. 1941). *See generally* 2 RABEL 63-67. Some early American cases can be interpreted as holding that corporations authorized by their articles of incorporation to conduct business only outside the state of incorporation would not be recognized by host states. *See State ex rel. Godard v. Topeka Water Co.*, 61 Kan. 547, 60 P. 337 (1900); *Land Grant Ry. & Trust Co. v. Commissioners of Coffey County*, 6 Kan. 245 (1870); *Myatt v. Ponca City Land & Improvement Co.*, 14 Okla. 189, 78 P. 185 (1903); *Empire Mills v. Alston Grocery Co.*, 15 S.W. 200 (Tex. Civ. App. 1891). Other early American cases seem to hold that host states would not recognize corporations organized elsewhere for the purpose of evading the laws of the host states. *See Cleaton v. Emery*, 49 Mo. App. 345 (1892); *Empire Mills v. Alston Grocery Co.*, 15 S.W. 200 (Tex. Civ. App. 1891). However, it seems that these cases confused nonrecognition with doing business without qualification. *See Troy & N.C. Mining Co. v. Snow Lumber Co.*, 173 N.C. 593, 92 S.E. 494 (1917). *See also* *Boyington v. Van Etten*, 62 Ark. 63, 35 S.W. 622 (1896); *RESTATEMENT, Reporter's Note* § 297, at 292-93.

104. *Vita Foods Prods. v. Unus Shipping Co.*, [1939] A.C. 277, 289-90 (P.C.); *The King v. International Trustee for Bondholders AG*, [1937] A.C. 500, 529. *Cf.* *Brown v. Beleggings-Societeit N.V.*, 29 D.L.R.2d 673, 694-95 (Ont. High Ct. 1961).

persona judicata and giving rise to questions of status, the English lawyer treats it as an agreement of the parties to be dealt with in accordance with principles appropriate to contracts.¹⁰⁵

As a result of this development, Anglo-American companies are free to choose their personal law by careful selection of the place of incorporation.¹⁰⁶

Naturally, such unrestrained freedom of choice often leads to incorporation in the jurisdiction having the most favorable corporation, tax, and regulatory laws. In the United States this condition resulted in a competition among various states to enact liberal enabling corporation laws in an effort to entice lucrative businesses to secure the various benefits of incorporation in their states; however, the legislators often failed to provide adequate safeguards for the stockholders and creditors of the corporation.¹⁰⁷ In 1875 New Jersey¹⁰⁸ opened the race, and in 1899 Delaware¹⁰⁹ took the yet unrelinquished lead.¹¹⁰ A similar drive has occurred in the world market. Wherever possible, corporations, including MNEs, wish to incorporate in countries having the most lax corporate and regulatory laws, and especially in countries having the most favorable tax laws and least burdensome exchange control regulations. Governed by unrestrictive personal laws, corporations can then conduct business in harsher legal environments abroad, having a comparative advantage vis-à-vis local firms. Tax advantages are the paramount considerations in choosing the place of incorporation and jurisdictions with favorable tax laws have therefore become commonly known as "tax havens." Among the leading tax havens are Switzerland, Luxemburg, Liechtenstein, the Bahamas, Bermuda, the British Virgin Islands, the Netherlands Antilles, and Panama. Some are said to

105. L. GOWER, *supra* note 98, at 672.

106. *Id.*

107. *Liggett Co. v. Lee*, 288 U.S. 517, 557-60 (1933) (dissenting opinion of Brandeis, J.). In recent years this drive has been slowed by the revision of the corporation law in many states and, particularly in such powerful states as California and New York, by subjecting foreign corporations to more provisions of the local law. However, many large U.S. corporations remain incorporated in Delaware, including the three giant auto manufacturers, despite their principal place of business elsewhere. For this reason, members of the EEC are concerned about the possibility that once companies are able freely to move their Seat from one member-state to another, the Netherlands, due to its more liberal company law, may attract them. Stein, *Recognition of Companies*, *supra* note 23, at 1334. *But see* Leleux, *Corporation Law in the U.S. and in the E.E.C.*, 5 COMM. MKT. L. REV. 133, 149 (1967-68) (expressing the view that it is unlikely that what happened in the U.S. will be repeated in the EEC).

108. Act of Apr. 7, 1875, [1875] N.J. Rev. Stat. 3 (repealed).

109. Act of Mar. 10, 1899, ch. 273, [1899] Del. Laws, pt. 2, at 445 (repealed).

110. *See generally* W. CARY, CASES AND MATERIALS ON CORPORATIONS 9-13 (4th ed., unabridged 1969).

have more corporations than natural persons as local nationals.¹¹¹

Whereas under Anglo-American law companies enjoy wide autonomy in electing their governing law, many Continental company laws contain mandatory provisions reflecting political, social, and economic policies which preclude such autonomy because the host country is interested in protecting its national interests by applying its local laws to all firms having Seats within its territory and in avoiding reference to foreign legal systems as governing laws of such corporations.¹¹² As has been noted, the Continental principle also makes it difficult to transfer a company as an existing legal entity from one country to another.¹¹³ With respect to a "tax haven company," the Seat theory might lead the country of the Seat to treat the business enterprise as a mere unincorporated division having the nationality of the Seat for tax purposes.¹¹⁴

Most nations, regardless of their respective views of corporate nationality, are understandably adverse to MNE's seeking to operate within their jurisdiction to evade the application of the host nation's laws by setting up legal entities elsewhere and claiming the nationality of this latter location. This is particularly true with respect to tax laws and laws regulating economic activities.¹¹⁵ Countries often deal with the

111. See, e.g., Beardwood, *Sophistication Comes to the Tax Havens*, FORTUNE, Feb., 1969, at 95. For example, Tanganyika Concessions elected the Bahamas, where it is exempted from income tax and enjoys other advantages, as its place of incorporation, despite the fact that it is listed on the London Stock Exchange, has vast mining, timber, railroad, and land investments in Africa, Australia, and Canada, and is the largest stockholder in Union Minière, the Belgian mining and investment company. *Id.* U.S. Steel Corporation organized two shipping subsidiaries, Navirs and Navigen, in the Bahamas, though these subsidiaries operate most of their ships under the Liberian flag. *Id.* at 96. Off-shore funds, one of which is the beleaguered Investors Overseas Services (I.O.S.), are well known for their extensive use of tax havens. I.O.S., a life insurance and mutual fund concern, was incorporated in Panama and managed from Geneva. *Id.* at 96-97.

The drive to attract international business by the grant of tax holidays is continuing. For example, it is reported that in June, 1973, the Philippines effected tax exemptions and various other concessions as incentives for the establishment of regional or area headquarters of MNEs for the purpose of turning the country into the financial and business center of Southeast Asia. INT'L BUREAU OF FISCAL DOCUMENTATION, TAX NEWS SERV. II-31 (1973).

112. STEIN 400, citing Grossfeld, *Die Anerkennung der Rechtsfähigkeit Juristischer Personen*, 1967 RABELS ZEITSCHRIFT 1, 30.

113. See 2 RABEL 64. See notes 93-95 *supra* and accompanying text.

114. Similar results may be achieved by both legal systems in applying the "enterprise theory" pursuant to which local law will be applied to the controlling company rather than to the tax haven subsidiary. For a discussion of the application of the corporate entity concept to the MNE, see *The Structure of the MNE* 779-93.

115. Among the laws regulating economic activities are those assuring free and fair economic competition (the so-called antitrust laws) and those assuring adherence to

problem by simply extending their laws to foreign corporations as, for example, the United States and the European Common Market have done in the antitrust area.¹¹⁶ Countries also may cope with such problems by employing the traditional corporate theory of piercing the corporate veil and thus disregarding the distinct corporate entity of certain corporations for various purposes such as corporate liability and taxation.¹¹⁷ Another method, employed by some nation-states and closely related to the first two, is to ascertain the real character of a corporation by looking to corporate substance rather than to corporate form without a *complete* disregard of the corporate entity,¹¹⁸ all to the end of applying local law to the actual business participants.

For example, a French case¹¹⁹ involved an American corporation which, after operating for some time in France through a branch as a foreign corporation, incorporated the French branch into a subsidiary, a French stock company. The court disregarded the corporate entity and its "fictitious domicile" and looked rather to the Real Seat, holding that the French subsidiary remained an American corporation subject to taxes imposed on foreign corporations. French courts in the past have gone further and, by disregarding the corporate entity, even when the Real Seat was at the place of incorporation, have held that headquarters had "fraudulently" migrated abroad either to "evade" the French corporation law or to grant special "privileges" to the controlling stockholders.¹²⁰

In contrast, the traditional Anglo-American view is that it is not fraud or evasion for residents of one jurisdiction to incorporate under the other laws of a foreign state in order to carry on business in the jurisdiction of their residence—while enjoying the less restrictive regulatory scheme of the state of incorporation.¹²¹ However, in Anglo-American law, both courts and legislatures, notwithstanding traditional views of the law of incorporation, have adopted new theories or criteria of

central economic plans, to balance of payments and monetary policies, to political policies (e.g., trading with the enemy laws and export and investment controls).

116. See *The Structure of the MNE* 788-93. See notes 164-69 *infra* and accompanying text.

117. For the general theory and its application in the multiple corporations context, see *The Structure of the MNE* 769-79. For the application of the corporate entity concept to the MNE, see *id.* at 779-93.

118. As to this fine distinction in the trading with the enemy context, see notes 125-30 *infra* and accompanying text. For illustrations in the tax context, see notes 132-63 *infra* and accompanying text. See also *The Structure of the MNE* 782-84.

119. Cass. (civ.) (June 29, 1937 (1938)) 65 *Clunet* 67. See 2 RABEL 43.

120. 2 RABEL 43-44.

121. See generally 8 FLETCHER § 4025.

corporate nationality in order to cope with problems created by international business in general and MNEs in particular. The general statement of Anglo-American law—"[t]he rule is also well settled that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, notwithstanding [that] it may lawfully do business in other states . . ."¹²²—has little relevance to MNEs when the host nation-state seeks to protect local interests.

Questions of nationality, including choice of the applicable national law, often arise when various nation-states seek to protect national interests through application of local laws to MNEs; but the treatment accorded the MNE may vary depending upon the nature and objectives of the particular law to be applied.¹²³ Therefore, such questions are properly discussed separately in relation to tax, corporation, antitrust, jurisdictional, procedural, and other laws. The laws which govern the MNEs' operations in various fields are unsettled in cases where various jurisdictions seek to protect often divergent national interests, and Justice Cardozo's statement is particularly applicable to today's MNEs:

The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it . . .¹²⁴

III. ILLUSTRATION OF DETERMINATION OF THE MNE'S NATIONALITY AND THE LAW APPLICABLE TO THE MNE FOR VARIOUS LEGAL PURPOSES

A. *Corporate Nationality for Purposes of Establishing Trading with the Enemy*

Characterization of corporate nationality proved to be a necessity under the Trading with the Enemy Acts which were enacted in many countries during the World Wars. The statutory language lent itself to a choice between the application of the place of incorporation test and some other test to determine the nationality of corporations for such purposes as seizing the corporate assets of enemy corporations. Even states which have adopted the place of incorporation test, with all its certainty, as the general rule for determining corporate nationality still have managed to maneuver and exercise control when needed to satisfy

122. *Id.* at 423 (footnotes omitted).

123. 17 FLETCHER § 8300, at 30 (regarding any foreign corporation).

124. *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

national interests. This area has been chosen to demonstrate the need of nation-states to depart from the orthodox theories of corporate nationality and the consequent necessity of applying new criteria for making such determinations.

A landmark English decision, the *Daimler* case,¹²⁵ looked to the shareholders and directors in order to determine whether a company incorporated in England was an enemy alien or a British resident. The company was an English sales subsidiary of a German parent. Lord Parker imputed to the corporation the character of an enemy since legal "control" was in the hands of alien enemies. Subsequently the "control test" was codified by the English by the time of World War II in the Trading with the Enemy Act of 1939.¹²⁶

The United States Supreme Court prior to World War II refused to adopt this test of control in similar circumstances.¹²⁷ Nevertheless, the Trading with the Enemy Act of 1917 was amended in 1941,¹²⁸ prior to the formal entry of the United States into World War II, and has since been interpreted by the Court as introducing the control test, rather than the place of incorporation standard, for defining an "enemy" corporation.¹²⁹

The result is that the theory of control, rather than the law of incorporation, has been applied both in England and the United States to determine corporate nationality for this purpose. However, a company incorporated in England does not otherwise cease to be an English company by reason of the fact that it is under enemy control and has thus acquired enemy character.¹³⁰

125. *Daimler Co. v. Continental Tyre & Rubber Co.*, [1916] 2 A.C. 307.

126. 2 & 3 Geo. VI, c.89 § 2(1)(c).

127. *Hamburg-American Co. v. United States*, 277 U.S. 138 (1928). In this case the Court held that under the Trading with the Enemy Act of 1917, Act of Oct. 6, 1917, ch. 106, § 2, 40 Stat. 411 (codified at 50 U.S.C. App. § 2 (1970)), property in the United States owned by a domestic corporation was nonenemy property, even though all of the stock was owned by an enemy, a German company. The Court followed its earlier decision in *Behn, Meyer & Co. v. Miller*, 266 U.S. 457 (1925), where the majority stock of an English company doing business in the Philippines was owned by a German.

128. First War Powers Act, Act of Dec. 18, 1941, ch. 593, § 301(1), 55 Stat. 839, amending 50 U.S.C. § 5(b) (1917) (codified at 50 U.S.C. App. § 5(b)(1) (1970)).

129. *Kaufman v. Societe Internationale pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952); *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480 (1947). Cf. Foreign Assets Control Regulations, 31 C.F.R. §§ 500.329(a)(4), .330 (a)(4) (1972) (the control concept with respect to the definition of "person subject to the jurisdiction of the United States").

130. In the noted *Daimler* case (see note 125 *supra* and accompanying text), Lord Parker rightly pointed out that this theory of control only permits the court to look at the shareholders in order to characterize the company as opposed to cases of truly

Enemy character is not substituted for the original character, but is something added to it. An English company which has acquired enemy character continues to owe its very existence to English law (under which it was incorporated) and remains subject to all its obligations toward the Crown under the Companies Acts as an English company.¹³¹

B. Corporate Nationality for Tax Purposes

International tax conflicts serve as a prime example of the challenge facing the world's legal systems in regulating the activities of the MNE. The challenge is to establish a system which will neither distort the proper allocation of economic resources by permitting evasion of national tax laws (the underlap situation) nor subject MNEs to double or triple liabilities pursuant to conflicting tax laws (the overlap situation).¹³²

What then is the corporate nationality for tax purposes? The basic American rule is that the place of incorporation determines corporate nationality,¹³³ thus employing the same criterion in determining nationality for tax purposes as for conflict of laws purposes.¹³⁴ The

disregarding a corporate entity, a distinction that many courts and commentators tend to ignore. [1916] 2 A.C. at 340-41. See L. GOWER, *supra* note 98, at 208. See note 131 *infra* and accompanying text. But see, e.g., 2 G. HORNSTEIN, CORPORATION LAW AND PRACTICE 265 (1959), stating: "During World War I an English court 'pierced the corporate veil' when it held that a corporation formed under English law, but owned or controlled by individuals who were enemies, came within the purview of legislation governing enemy property. (Footnote omitted.)" The British court did not truly pierce the corporate veil but rather used a different test in compliance with the statute and the national policy in question. In the United States, however, the majority opinion of the Supreme Court applied the concept of "piercing the corporate veil" in this context:

Thus, under the 1941 amendment the nonenemy character of a foreign corporation because it was organized in a friendly or neutral nation no longer conclusively determines that all interests in the corporation must be treated as friendly or neutral. The corporate veil can now be pierced. Enemy taint can be found if there are enemy officers or stockholders. *Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 159 (1952).

131. *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 535 (1954) (per McNair, J.). In this case an Austrian national organized a company in England in order to exploit mines in Beuthen, Upper Silesia. The registered office was in London, and the company dealt in the United Kingdom from 1926 to 1931. However, up to the outbreak of war, the management and control of the company's affairs were exercised in Germany. The corporate nationality for conflict of laws purposes remained in England, the place of incorporation.

132. For a discussion of this problem in the context of "transfer prices," see *The Structure of the MNE* 779-84. See also C. KINDLEBERGER, *AMERICAN BUSINESS ABROAD* 201 (1969).

133. INT. REV. CODE OF 1954, § 7701(a)(4).

134. The place of incorporation is also provided by the United States tax treaties as the criterion for nationality of United States corporations. See, e.g., Convention

United Kingdom has a different concept of nationality for tax purposes. While the company's nationality (domicile) under English law is at the place of incorporation, the "tax domicile" is at the company's residence, which is the place of central management and control.¹³⁵ Thus, by developing the concept of corporate residence, English tax law moves away from the basic common law rule of corporate nationality to one similar to that of the Continental Seat, with some of its attendant difficulties.¹³⁶ Accordingly, a company incorporated and therefore having its domicile in the United Kingdom might be held a foreign national for tax purposes,¹³⁷ while a company incorporated outside the United Kingdom might be regarded as having local nationality for tax purposes.¹³⁸ Consequently, under this theory a foreign subsidiary of a British-based MNE was uniquely held to be a local resident for tax purposes because it was managed and controlled by the board of directors of the parent company.¹³⁹ Interestingly, in one case when an English court faced the factual difficulty inherent in ascertaining the company's residence, the tribunal attributed to the company a dual nationality for tax purposes because its management and control were divided between two countries.¹⁴⁰ The United Kingdom tax statute goes even further and protects against loss of local revenue that would occur when local companies migrate by making such a move illegal without prior consent of the tax authorities.¹⁴¹ Thus, by adopting a special criterion for tax nationality, the United Kingdom protects national financial interests against certain international tax avoidance schemes, such as the use of shell companies organized in tax havens.¹⁴²

with the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, art. II(1)(e), [1954] 3 U.S.T. 2768, T.I.A.S. No. 3133.

135. British case law developed the theory that "a company resides for purposes of income tax where its real business is carried on [A]nd the real business is carried on where the central management and control actually abides." *De Beers Consol. Mines, Ltd. v. Howe*, [1906] A.C. 455, 458. This judicial test for determining tax residence is now articulated in the British tax statute. *Income and Corporation Taxes Act 1970*, c. 10, § 482(7). *See also* *Israeli Income Tax Ordinance* § 1.

136. *See* notes 29-48 *supra* and accompanying text.

137. *Egyptian Delta Land & Inv. Co. v. Todd*, [1929] A.C. 1.

138. *De Beers Consol. Mines, Ltd. v. Howe*, [1906] A.C. 455.

139. *Unit Constr. Co. v. Bullock*, [1960] A.C. 351.

140. *Swedish Cent. Ry. v. Thompson*, [1925] A.C. 495.

141. *Income and Corporation Taxes Act 1970*, c. 10, § 482.

142. It should be noted that various continental countries have gone further by defining corporate nationality for tax purposes according to either the Seat or the place of incorporation. For example, the Netherlands, unless a tax treaty provides otherwise, subjects to its corporate income tax any company which is (i) incorporated in the Netherlands or (ii) actually situated in the Netherlands. INTERNATIONAL BUREAU OF

Although the United States did not abandon for tax purposes its basic theory of nationality, it moved to protect its financial interests and the integrity of its tax system by other devices which have posed serious doubts as to the foreign tax nationality of certain foreign corporations controlled by American interests. One of the most notable of such devices affecting MNEs is contained in the 1962 amendments of the Internal Revenue Code. Prior to 1962, United States corporations were able to use foreign entities to defer taxation of income by the United States. The method employed was to channel funds into subsidiaries and affiliates organized in foreign tax havens and to accumulate income in such entities. Because this income of such entities was treated as income of a foreign corporation from foreign sources, it was not taxable by the United States. Thus, United States parent corporations were able to use these foreign subsidiaries either to defer United States taxation of income until such time as the money was repatriated and taxed, possibly as a long term capital gain, or to avoid United States taxation altogether simply by continuously reinvesting such income abroad. The inequity of this practice eventually generated protests within certain business and government ranks in the United States. As a result, in his message to Congress, President Kennedy stated:

The undesirability of continuing deferral is underscored where deferral has served as a shelter for tax escape through the unjustifiable use of tax havens such as Switzerland. Recently, more and more enterprises organized abroad by American firms have arranged their corporate structures—aided by artificial arrangements between parent and subsidiary regarding intercompany pricing, the transfer of patent licensing rights, the shifting of management fees, and similar practices which maximize the accumulation of profits in the tax haven—so as to exploit the multiplicity of foreign tax systems and international agreements in order to reduce sharply or eliminate completely their tax liabilities both at home and abroad.¹⁴³

In the subsequent Revenue Act of 1962,¹⁴⁴ the United States substantially reduced the possibility of using foreign corporations for tax avoidance by disallowing tax deferral in certain instances, primarily

FISCAL DOCUMENTATION, *THE TAXATION OF COMPANIES IN EUROPE*, Netherlands ¶ 118, at 61-62 (1969).

143. H.R. REP. NO. 1447, 87th Cong., 2d Sess. 57 (1962) (Chapter XIV on "Controlled Foreign Corporations"). The House bill, which did not go as far as the President's proposal, failed to eliminate tax deferral generally, but instead concerned itself primarily with tax haven devices. For a discussion of "intercompany pricing," referred to in the quotation, see *The Structure of the MNE* 779-81.

144. Act of Oct. 16, 1962, Pub. L. No. 87-834, § 12, 76 Stat. 960 (codified at INT. REV. CODE OF 1954, §§ 951-64).

those involving the use of tax havens. The authors of the 1962 Act attempted to accomplish this objective by introducing the concept of the controlled foreign corporation (CFC). The subpart F provisions,¹⁴⁵ added to the Internal Revenue Code by the 1962 Act, define a CFC as a foreign corporation more than fifty per cent of whose total combined voting power¹⁴⁶ is owned by United States shareholders.¹⁴⁷ For this purpose, the term "United States shareholder" means a United States person¹⁴⁸ who owns at least ten per cent of such voting power of the foreign corporation.¹⁴⁹ Consequently, a foreign subsidiary is not a CFC if, for example, its voting stock is equally divided among eleven or more unrelated United States stockholders. However, since most United States-based MNEs operate through wholly or majority owned foreign subsidiaries or affiliates,¹⁵⁰ many of their foreign companies are CFCs.

Using the concept of the CFC, the subpart F provisions attempt to subject American parent companies to tax on certain designated types of income of their CFCs, the so-called "tainted income,"¹⁵¹ as though such foreign affiliates had actually distributed such income to their American parents.¹⁵² In this respect, the law looks to the economic reality of the MNE rather than to its artificial form of operation.¹⁵³

145. INT. REV. CODE OF 1954, §§ 951-64. See, e.g., Friedman & Silbert, *Doing Business Abroad: Effects of the Revenue Act of 1962: An Introduction*, N.Y.U. 230 INST. ON FED. TAX. (1965).

146. See Treas. Reg. § 1.951-1(g)(2) (1965).

147. INT. REV. CODE OF 1954, § 957(a). See generally Alexander, *Controlled Foreign Corporations and Constructive Ownership*, 18 TAX L. REV. 531 (1963).

148. See INT. REV. CODE OF 1954, §§ 957(d), 7701(a)(30) (definition of a "United States Person").

149. *Id.* § 951(b).

150. See, e.g., D. ZENOFF, *INTERNATIONAL BUSINESS MANAGEMENT* 190 (1971). See also F. DONNER, *THE WORLD-WIDE INDUSTRIAL ENTERPRISE* 106 (1967).

151. One kind of such tainted income is the "foreign base company sales income." INT. REV. CODE OF 1954, § 954(d). This income is a part of the more general category of tainted income—the "foreign base company income." *Id.* § 954.

152. The American shareholder has the right to a foreign tax credit (under the so-called "gross-up") for foreign income taxes paid. *Id.* § 902.

153. It should be noted that the 1962 Revenue Act is a complex piece of legislation containing several loopholes which actually preserve tax haven advantages. For example, there are exceptions with respect to qualified income of less developed countries. *Id.* § 963(c)(4)(A). Regarding other income, one escape provision is found in the thirty-to-seventy-percent rule: namely, if a certain type of tainted income is less than thirty percent of the foreign corporation's gross income, none is considered tainted. *Id.* § 954(b)(3). Another major exception is the so-called minimum distribution rule which allows the MNE to elect actual distribution of dividends to the parent corporation in accordance with the percentages specified in the Code. Such an election may save taxes for the MNE when compared to the amounts of tainted income which

One way in which the Act attempts to elevate the economic reality above mere form is to examine the degree of joint control exercised over the CFC and the various entities with which it transacts its business. Frequently, such entities are either subsidiaries of the CFC or subsidiaries of the CFC's American parent. In such situations MNEs are able, by virtue of their control, to shift income away from countries having high tax rates and into areas having low taxes. A common example of such a shift, frequently referred to as "transfer pricing," is found where goods, manufactured by an affiliate in country A—a country which has high tax rates—are sold to the CFC which is located in country B—a country which imposes relatively little or no tax on sales income—for resale to another affiliate situated in country C, in which the ultimate purchaser is located.¹⁵⁴ By setting a low price on the sale between country A and country B and by setting a high resale price to country C, income is shifted away from countries A and C into country B. By these and other means, foreign source income is sought to be sheltered from both United States and foreign taxes. In order to pierce through such artificial tax avoidance by the use of corporate affiliates, the Act looks at the control relationship between the CFC and the other parties to the transaction. The statutory control link between the CFC and its related unit¹⁵⁵ required for such

would otherwise be taxed as a dividend even if not distributed. *Id.* § 963(b). To this extent, tax havens are still important to United States-based MNEs. Indeed, there may be sound business reasons for having holding companies in tax havens. Therefore, the 1962 Act, as amended by the 1969 Tax Reform Act, Act of Dec. 30, 1969, Pub. L. No. 91-172, tit. 9, § 909(a), 83 Stat. 718, provides a general exception for the foreign-based company income received by a controlled foreign corporation if the Treasury Department is satisfied that there was no significant purpose to effect substantial reduction in taxes through the use of the controlled foreign corporation. INT. REV. CODE OF 1954, § 954(b)(4). See Treas. Reg. §§ 1.954-1(b)(3), (4) (1973). See generally Beardwood, *supra* note 111, at 95; Olsen & Choate, *Foreign Operations—Base Companies*, BNA 23-3D TAX MGT. (1970). For commentary on off-shore funds, see Note, *United States Taxation and Regulation of Off-shore Mutual Funds*, 83 HARV. L. REV. 404 (1969); Note, *Off-Shore Mutual Funds: Possible Solution to a Regulatory Dilemma*, 3 LAW & POL. INT'L BUS. 157 (1971).

The United States Treasury Department has proposed an amendment to the Internal Revenue Code calling for taxation of certain foreign tax haven manufacturing subsidiaries presently enjoying tax deferrals. See Treasury Dep't Press Release (April 10, 1973), 9 CCH 1974 STAND. FED. TAX REP. ¶ 6160.

154. Therefore, the property which is purchased is produced outside the country of the CFC, and the property which is sold is for consumption outside such country. INT. REV. CODE OF 1954, §§ 954(d)(1)(A), (B).

155. For the definition of "related person," see *id.* § 954(d)(3). Such related unit includes a corporation which controls, or is controlled by, the CFC, or a corporation which is controlled by the same persons that control the CFC. *Id.* §§ 954(d)(3)(B), (C).

purposes is defined as "the ownership, directly or indirectly, of stock possessing more than 50 per cent of the total combined voting power of all classes of stock entitled to vote."¹⁵⁶ If a determination is made that such a control link exists, the United States imposes an immediate tax on the United States parent of the CFC, thus subjecting to its tax jurisdiction certain types of the MNE's worldwide income without regard to the foreign nationality of many of the affiliates involved.¹⁵⁷ It should be noted that by increasing the tax burden of United States-based MNEs and by forcing them to operate under conditions more rigid than those faced by their foreign competitors, the Act places them at a competitive disadvantage vis-à-vis European- or Japanese-based MNEs.¹⁵⁸ This is the price paid for a unilateral attempt to cope with

156. *Id.* § 954(d)(3). There is no intention to discuss here these provisions. It should be noted, however, that the CFC can be controlled by an intermediate sales subsidiary. *Id.*

157. It should be noted that in certain situations the income of the MNE may be reallocated by the United States from the foreign units to the United States parent company in order to prevent tax avoidance or to more clearly reflect the parent's income. See *id.* § 482; *The Structure of the MNE* 779-82. This "partial disregard" of the foreign nationality of the foreign subsidiaries and affiliates is authorized by the statute in order to "prevent 'artificial shifting, milking, or distorting of the true net incomes of commonly controlled enterprises.'" Commissioner v. First Security Bank, 405 U.S. 394, 400 (1972). See *Ach v. Commissioner*, 42 T.C. 114 (1964), *aff'd*, 358 F.2d 342 (6th Cir. 1966). The reference to international business was made by the United States Congress long before the recent expansion of the MNE, stating the purpose of the original provision to be "to prevent the arbitrary shifting of profits among related businesses, particularly in the case of subsidiary corporations organized as foreign trade corporations." S. REP. NO. 275, 67th Cong., 1st Sess. 20 (1921). See H.R. REP. NO. 350, 67th Cong., 1st Sess. 14 (1921). Furthermore, in some extreme situations the foreign entity is entirely disregarded for tax purposes and is considered as having full local nationality. This might be the case when a shell company which does not conduct substantial business of its own is incorporated in a tax haven to avoid taxes. See *The Structure of the MNE* 777-79, 782.

As a result, the United States, as well as other countries, modifies its concept of corporate nationality in order to reach the underlying economic enterprise of the MNE. For the approach of various countries regarding the MNE's intercompany transactions, see S. Surrey & D. Tillinghast, General Report, in *Criteria for the Allocation of Items of Income and Expense Between Related Corporations in Different States, Whether or Not Party to Tax Conventions*, in LV1b CAHIERS DE DROIT FISCAL INTERNATIONAL I/1, I/5 (I.F.A. 25th Cong. Washington, 1971).

158. For example, consider the following views of opponents to the 1962 tax amendment:

The administration purports to seek "equity" between U.S. firms operating abroad and competing firms located in the United States. This fallacious reasoning completely ignores the fact that American-owned foreign corporations must compete in a foreign country with foreign corporations which are foreign-owned. The American-owned foreign corporation can successfully meet this competition only so long as it is able to operate under the same rules as its foreign competitor The use of a so-called "tax haven" company to minimize taxes in foreign countries on transactions emanating from those countries is a practice common to foreign-owned corporations as well as

multinational tax problems where the approach emphasizes the integrity of the domestic system.¹⁵⁹

Under what theory of corporate nationality is the CFC taxed? The nationality of such affiliates has not been changed; and since the state of incorporation is still the criterion,¹⁶⁰ they continue to be foreign companies. And foreign companies generally are taxed only on income which is considered by American law to be derived from United States sources.¹⁶¹ But, as was shown above, certain types of foreign-source income of CFCs, though undistributed, are included in the taxable income of their American parent in the year earned by the CFC.¹⁶² Thus, in practice, the United States partly attributes local nationality to foreign parts of MNEs whose parent corporations are based in the United States. While not abandoning the basic theory of nationality for tax purposes, the United States has added a further criterion under the theory of legal control. Such theory must be distinguished from true piercing of the corporate veil, since the CFC is still treated as a separate taxable entity.¹⁶³

American-owned corporations. H.R. REP. NO. 1447, 87th Cong., 2d Sess. B-23 to -24 (1962).

For a study which rejects such views, see P. MUSGRAVE, UNITED STATES TAXATION OF FOREIGN INVESTMENT INCOME 71-162 (1969). For an earlier study discussing the tax neutrality and equity issues, see L. KRAUSE & K. DAM, FEDERAL TAX TREATMENT OF FOREIGN INCOME 44-56 (1964).

159. However, such inequities might be reduced since other countries are now moving in the direction of the 1962 United States amendment. For the Canadian law, see Income Tax Act of 1971, c.63, §§ 90-95 (Can.). For discussion of a German bill, see *Doing Business in Europe*, CCH COMM. MKT. REP. ¶ 30,603 (1972); *Germany: Measures Against Tax Avoidance*, 11 INT'L BUREAU OF FISCAL DOCUMENTATION, EUROP. TAX. 1/18 (1971).

160. INT. REV. CODE OF 1954, §§ 7701(a)(3)-(5).

161. *Id.* §§ 881-82. For the source rules, see *id.* §§ 861-64. The Internal Revenue Code of 1954 was substantially amended with respect to United States taxation of foreign corporations. See generally B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶¶ 17.03-.04 (3d ed. 1971).

162. INT. REV. CODE OF 1954, § 951.

163. Such a pragmatic approach may in some cases also be favorable to the MNE. The United States and certain other countries have granted to the local parent, in accordance with statutory limitations, direct tax credit for foreign tax withheld on dividends distributed to the local parent and indirect credit on such dividends for foreign income tax paid by the foreign subsidiary. The foreign tax credit is one of the methods designed to eliminate or minimize double taxation of foreign-source income received by local persons. The direct credit is given for the tax withheld by foreign authorities from distributions to the local parent. The deemed-paid, or indirect, credit is basically given to the local parent for foreign income tax paid by the foreign subsidiary which distributed the dividends, despite the fact that they are separate legal and taxable entities. Only a few countries, including the United States, unilaterally allow indirect foreign tax credits, while others allow them only through bilateral tax treaties. See, e.g., Convention Between Israel and Finland for the Avoidance of Double Taxation

C. *Corporate Nationality for Antitrust Purposes*

As discussed above, the United States generally modifies its concept of corporate nationality in order to reach the reality rather than the corporate form. In various fields the enterprise entity theory¹⁶⁴ has been used in order to look through the corporate form of controlled corporations to reach the underlying economic reality of a single business enterprise. Courts and legislatures disregard the multiple-corporate forms in such cases and focus on the whole enterprise as a single economic unit.

This enterprise entity approach has been applied in the international antitrust field, leading to attribution of the nationality of the controlling company to other affiliated members of the MNE. This concept is best illustrated by the antitrust practice in the European Economic Community (EEC). Despite the fact that an MNE may operate through subsidiaries located in various EEC member states, with such subsidiaries having disparate nationalities for conflict of laws and other

and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Jan. 21, 1965, art. 24(2), 581 U.N.T.S. 275, 302. See generally Office for Economic Cooperation and Development Fiscal Committee Draft, Double Taxation Convention on Income and Capital of 1963 (O.E.C.D. doc. c(83)(87), art. 23B (O.E.C.D. model)); *Tax Treaties* 117 n.20, 134, 143. A United States corporation is entitled to a unilateral indirect credit if it owns ten percent or more of the voting stock of the foreign subsidiary. INT. REV. CODE OF 1954, § 902. The United States deemed-paid credit is also applicable to second and third-tier foreign subsidiaries. *Id.* § 902(b). Accordingly, if the foreign subsidiary owns ten percent or more of the voting stock of another foreign company, the local parent may receive a foreign tax credit on distributions to it for the income tax paid by such second-tier foreign subsidiary as well. The United States statute also permits deemed-paid credit for third-tier foreign corporations which are at least ten percent owned by the second-tier subsidiary. *Id.* § 902(b)(3) (providing the conditions for such credit). In the case of the MNE which operates through wholly or majority controlled subsidiaries and affiliates, these credit provisions partially ignore the foreign nationality of such companies by giving priority to the substance underlying, rather than the form of, the single economic entity.

Most recent bilateral tax treaties adhere somewhat to the enterprise approach by eliminating or reducing the withholding tax on transnational intercompany dividends, despite the fact that the paying subsidiary and the receiving parent are of different nationalities. The O.E.C.D. model tax treaty limits the withholding tax on dividends to fifteen percent; but if the paying company is a subsidiary of the recipient, the rate is limited to five percent. Article 10(2)(a) of the O.E.C.D. model defines subsidiary as a company at least twenty-five percent owned. The Tax Convention between Israel and Finland, for example, provides for a similar reduction of the withholding tax to five percent, but defines a Finnish subsidiary of an Israeli parent as one at least fifty percent owned. Convention Between Israel and Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Jan. 21, 1965, art. 10(2)(a), 581 U.N.T.S. 275, 288.

164. For a discussion of the recognition of the wholly owned subsidiary as a distinct entity, see *The Structure of the MNE* 769-77.

legal purposes, the EEC Commission has treated the MNE as a single enterprise which is not expected to maintain normal competition among its affiliates.¹⁶⁵ It has been held to be impossible for the affiliates to act independently of each other with respect to those activities controlled by the foreign parent. Therefore, such intra-MNE collaboration does not violate EEC antitrust law insofar as it does not involve restrictive arrangements with unrelated parties.¹⁶⁶ Consequently, for antitrust purposes, the different nationalities of MNE members are ignored by virtue of their combination into a single nationality, that of the controlling entity.

The enterprise theory has also been applied to the detriment of the MNE in other antitrust cases for the purpose of subjecting the whole MNE to the laws of one jurisdiction. In the landmark *Dyestuff* decision,¹⁶⁷ the EEC Court of Justice found foreign-based MNEs liable, *inter alia*, for concerted price-fixing of dyestuffs sold within the Common Market. The court attributed the acts of the EEC subsidiaries to their foreign controlling parents since the latter were the decision-makers with respect to the anticompetitive acts under consideration. The court recognized the general separate legal existence and nationalities of the EEC subsidiaries for other purposes, but with respect to certain policy decisions centralized within the foreign headquarters, viewed the MNEs as single economic enterprises having the nationalities

165. Kodak Co., 13 E.E.C. J.O. No. L147, at 24, [1970-1972 New Developments Transfer Binder] CCH COMM. MKT. REP. ¶ 9378 (1970); Christiani & Nielsen N.V., 12 E.E.C. J.O. No. L165, at 12, [1965-1969 New Developments Transfer Binder] CCH COMM. MKT. REP. ¶ 9308 (1969). For a discussion of these cases and the United States approach, which does not necessarily coincide with the enterprise attitude, see *The Structure of the MNE* 785-88.

166. Kodak Co., 13 E.E.C. J.O. No. L147, at 24-25, [1970-1972 New Developments Transfer Binder] CCH COMM. MKT. REP. ¶ 9378, at 8819-20 (1970).

167. Separate decisions relating to nine companies were released together. See *Imperial Chem. Indus., Ltd. v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8161 (1972); *Badische Anilin-und Soda-Fabrik AG v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8162 (1972); *Farbenfabriken Bayer AG v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8163 (1972); *J.R. Geigy AG v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8164 (1972); *Sandoz AG v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8165 (1972); *S.A. Francaise des Matieres Colorantes v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8166 (1972); *Casella Farbwerke Mainkuckr AG v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8167 (1972); *Farbwerke Hoechst AG v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8168 (1972); *Azienda Colori Nazionali v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8169 (1972). With reference to the jurisdictional issue, the cases are basically the same; therefore, specific citations will be given only to the *Imperial Chemical Industries* case.

of the controlling parents. EEC antitrust law has thus been applied to the foreign-based MNEs by the court to hold them liable due to the fact that the prohibited practices were carried out directly within the Common Market.¹⁶⁸ In other words, the local nationalities of EEC subsidiaries were correctly disregarded when the subject acts were parent-controlled.¹⁶⁹

IV. GUIDELINES FOR DETERMINING THE APPLICABLE NATIONAL LAW AND THE NATIONALITY OF MULTINATIONAL ENTERPRISES

A. *The Issue*

As has been demonstrated, it is clear that the traditional criteria of corporate nationality—the common law rule of incorporation and the continental rule of the Seat—do not provide satisfactory or realistic solutions for all the problems of the MNE or for choosing the law applicable to such enterprises. One reason for this failure is that these orthodox theories originated at a time when national authorities had to cope primarily with national corporations. The MNE presents a fundamentally different situation: it is not simply a single local or foreign company, but rather it is a group of affiliated entities with potentially differing nationalities operating under a degree of common control peculiar to each MNE. As a result, certain important decisions of an MNE, although implemented within the local market area of a subsidiary, are made not at the local level, but at a higher level abroad.¹⁷⁰ Today, when a country attempts to regulate the activities of such an enterprise, it often must direct its laws to the appropriate organ or component of the enterprise which exercises control and not to the entity which formally performs the act. To accomplish this, states need not disregard the corporate entity as such; but for certain purposes a particular corporation in the concerned state may not be the proper object of the desired policy. The object may be either a larger unit of the enterprise, even the MNE as a whole,¹⁷¹ or a smaller unit, such as a branch.¹⁷²

168. *Imperial Chem. Indus., Ltd. v. Commission of the European Communities*, 2 CCH COMM. MKT. REP. ¶ 8161, at 8031 (1972). It should be noted that for the sake of this discussion, it is assumed that the court was correct in holding the subject acts to be controlled by the foreign parent. *Contra*, Mann, *The Dyestuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35, 46-50 (1973).

169. See *The Structure of the MNE* 788-93.

170. *Id.* at 749-52. This fact is illustrated by the *Dyestuff* cases. See note 167 *supra* and text accompanying notes 167-69 *supra*.

171. See *id.* at 779, 782-84, 788-93, 802-05.

172. A notable example is taxation of local permanent establishments of foreign cor-

In order to determine corporate nationality today, the traditional theories should be considered together with several other concepts developed as a result of the new economic, social, and legal problems presented by MNEs. Courts and legislatures alike should recognize the MNE as a new form of business organization, which, although composed of ordinary companies, results in a single enterprise presenting entirely new questions.¹⁷³ An analogy to the "trading-with-the-enemy" cases is instructive.¹⁷⁴ When faced with a new situation which required a decision as to whether companies created in the United Kingdom were "enemies" or "friends," the British Court added a new dimension to corporate nationality by substituting, for a limited purpose, a new corporate nationality for the traditional English one. Under this additional criterion, which was predicated upon legal control, English companies were characterized as enemy companies.¹⁷⁵ Strict orthodox theories of corporate nationality may continue to exist for conflict of laws and other purposes but they should be modified by new concepts defined for use in tax, antitrust, and other regulatory fields. Such a new approach to the nationality of the MNE is necessary in public international law as well.¹⁷⁶

porations as if they were independent entities, the prevailing rule under most tax treaties which followed the O.E.C.D. model. See *Tax Treaties* 128.

173. A major conclusion of the Canadian task force on foreign investment was that "[a]t the core of Canadian policy must lie a determination to recognize the existence of the multi-national corporation [MNE], the opportunities it creates and the constraints it imposes." FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY: REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY 356 (1968) ("Watkins Report").

174. See notes 125-31 *supra* and accompanying text.

175. See *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 535 (1954) (per McNair, J.). See note 131 *supra* and accompanying text.

176. In the *Barcelona Traction, Light & Power Co. Case*, [1970] I.C.J. 3, the International Court of Justice had to determine the corporate nationality of an MNE incorporated in Canada, with operations and subsidiaries in Spain and major shareholders in Belgium, in order to decide if Belgium could initiate proceedings on behalf of such enterprise in its dispute with Spain. The court did not make itself entirely clear as to the criterion it used in establishing corporate nationality for diplomatic protection purposes. The majority opinion, in rejecting the corporation's "genuine link" theory (the theory of the *Nottebohm Case*, [1955] I.C.J. 4), emphasized the place of incorporation and registered seat as the criterion for determining corporate nationality. [1970] I.C.J. at 42. However, the court did not adopt the place of incorporation as the only criterion for corporate nationality, since it supported its decision by noting several factual links between the company and the state of incorporation, including that the state of incorporation was also the place where the corporate accounts and shareholder records were kept and where the directors met. It appears that the court felt that Canadian nationality was stipulated by the parties and, therefore, that nationality was not an issue. See *id.* at 34 (opinion of the court), 52 (concurring opinion of Petren & Onveania, JJ.), 83-84 (concurring opinion of Fitzmaurice, J.). Therefore, the final result might even have been derived by application of the Seat criterion. (Judge Jessup in his concurring

The new criteria for corporate nationality and for choice of national law applicable to the MNE can be developed from among a variety of often overlapping concepts relevant to today's corporate nationality. The place of incorporation and the Seat, while significant, are only two among a variety of theories to be considered in formulating the new concept of corporate nationality. The selection of appropriate criteria should also reflect the unique organizational structure of each MNE. Thus, consideration should be given to factors such as the commercial residence or principal place of business, the place of control or management, the situs of business assets or other commercial activities, and the nationality of directors, controlling stockholders, and other interested groups, such as employees or creditors. The selection should depend upon the specific issues involved and the desired policies to be implemented. Moreover, the selection of appropriate criteria should depend on the organizational structure of each MNE. Thus, for example, the nationality of the foreign parent should be attributed to the local subsidiary only insofar as its activities are actually controlled by the parent, while with respect to its independent activities, the subsidiary's own nationality should be preserved.¹⁷⁷

It follows that it is impossible to have a single criterion for all purposes.¹⁷⁸ With the determination depending upon the national policy to be implemented and the organizational structure and control of the particular MNE in question, an MNE could be viewed either as one possessing a single nationality or as several enterprises with several nationalities, the number of which does not necessarily coincide with the number of separate corporate entities comprising it. The innumerable bodies

opinion advocated application of the "genuine link" test to the corporations. *Id.* at 188). Furthermore, the court failed to properly analyze the circumstances and relevant policy factors behind the principle of international diplomatic protection. Among the relevant questions the court should have asked in defining a suitable criterion are: How will the result affect the world economic system? What are the international needs to be satisfied? What are the legitimate needs of the corporation? What are the national interests to be protected under the principles of diplomatic protection? Would these needs be best advanced by adherence to the place of incorporation criterion, or should other theories be used to determine the nationality of the given corporation for diplomatic protection purposes? It should be noted that Barcelona Traction was in fact an intermediate Canadian holding company of a Belgian parent (Sidero) with many characteristics of a "tax haven company."

177. *Cf. The Structure of the MNE* 802-04.

178. "The writers who have advocated one theory for everything are right in deploring the present chaotic experimentation. Obviously, however, no single theory is adequate for the task." 2 RABEL 24. First noted before the recent growth of MNEs, this observation is more meaningful today. See also Van Hecke, *Nationality of Companies Analysed*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 223, 224 (1961).

of administrative and commercial laws which control domestic businesses can in most cases achieve their objectives vis-à-vis MNEs as well through application of the traditional rules of corporate nationality. In such cases, the bulk of local law would be applicable to foreign and domestic companies alike. By contrast, laws aimed at achieving various significant national policies, such as trading with the enemy laws, would not achieve their objectives if enemy aliens could easily escape their application by trading with the regulating country through the device of domestic incorporation.¹⁷⁹ Similarly, how could a sound revenue policy be achieved if local businesses could avoid taxes by incorporating abroad in a tax haven?¹⁸⁰ The same problem arises when governments seek to regulate such areas as the balance of payments, exports and imports, restrictive business practices, and securities markets.

Unilateral definitions of the nationality of the MNE or any corporation thereof would inevitably cause international conflicts between different bodies of law.¹⁸¹ Any criteria applied should be designed to minimize the overlap and resulting conflicts between jurisdictions, while still protecting relevant national interests.

B. *The Guidelines*

The considerations in arriving at criteria for determining corporate nationality should be similar to those underlying conflict of laws rules, which in turn are essentially of two kinds: those which underlie the pertinent local interests and those which underlie international needs. The objective of any set of guidelines for defining the corporate nationality of, including the choice of national law applicable to, the MNE should be "to accommodate in the best way possible the policies of the various states underlying the potentially applicable local law rules of the states involved."¹⁸² The *Restatement on Conflict of Laws* mentions several factors relevant to the choice of an applicable rule of law:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,

179. See notes 125-31 *supra* and accompanying text (discussion of the *Daimler* case and the Anglo-American law).

180. See notes 111, 143-63 *supra* and accompanying text.

181. The conflicts among laws of various countries are inevitable in all areas, particularly when extended beyond sovereign territory (extraterritorial application of laws). For this and other reasons, it is clear that unilateral solutions to international problems would frustrate both governmental and corporate policies. The various interests involved would be best accommodated by intergovernmental cooperation. See notes 301-07 *infra* and accompanying text.

182. RESTATEMENT, Explanatory Notes § 5, comment *d* at 10.

- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of results, and
- (g) ease in the determination and application of the law to be applied.¹⁸³

Of course, these factors will conflict in all but the simplest cases, and the solution in each instance therefore necessarily reflects the relative weight given to each factor.

When applied to the determination of the nationality of an MNE, the *Restatement's* policy factors can be divided into three categories, each of which serves as a guideline. First is recognition of the essential need for a workable international system. In multinational situations, any determination "should seek to further harmonious relations [among countries] and to facilitate commercial intercourse [among] them."¹⁸⁴ The MNE rests upon an interdependent world economy¹⁸⁵ which has a common interest in encouraging multinational investments as a means for increasing world welfare. Recognition of this common interest could help bridge the gap and reconcile the differences between world legal systems and thus minimize the cases of "overlap"¹⁸⁶ and "underlap"¹⁸⁷ of countries' laws which presently cause international discord in the regulation of MNEs.

Second is recognition of the needs of the regulated parties. The resultant corporate nationality should protect the MNE's justified expectations by providing for certainty of law and predictability of result by eliminating application of conflicting legal requirements to MNEs. "Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another [jurisdiction]."¹⁸⁸ It is important to reduce interference with efficient management of MNEs so that their strategies can be governed by sound business, economic, and social considerations.

The third guiding category is recognition of the need to protect

183. *Id.* § 6(2).

184. *Id.*, Explanatory Notes § 6, comment *d* at 13; see *id.* Explanatory Notes § 302, comment *b* at 307.

185. See *The Structure of the MNE* 733-35.

186. See note 132 *supra* and accompanying text.

187. For the "underlap" caused by the use of "tax havens," see notes 111, 143-63 *supra* and accompanying text.

188. RESTATEMENT, Explanatory Notes § 6, comment *g* at 15.

justifiable national interests. In the case of divergent national interests, the forum country should genuinely seek to apply the law of the country whose interests are most deeply affected. Such decisions should depend upon the competing purposes, policies, and objectives of each jurisdiction involved and upon its consequent concern in having its rules applied.¹⁸⁹

In determining the relative weight to be given to the foregoing guidelines (Guidelines), the needs of judicial administration, namely the ease of determination and application of the law to be applied, should be considered by tribunals.¹⁹⁰ However, this concern, or possibly fourth Guideline, is of subsidiary importance and should be applied only when a state must assign relative values to each Guideline since in a particular case each will lead to a different result.

Countries ought to seek to avoid using MNEs as instrumentalities for indiscriminately imposing their own national, social, economic, and political policies upon other countries in which the MNEs operate. Countries should not, in a nationalistic approach, judge an MNE by its foreign character, but rather should judge it by its mode of operation.¹⁹¹

C. Application of the Guidelines to Conflict of Corporation Laws

The area of conflict of corporation laws has been chosen to demonstrate the efficacy of the Guidelines. This area was selected because the existing theories for determining corporate nationality in the context of conflict of laws has already been discussed at some length,¹⁹² and the problems presented thereunder particularly lend themselves to solutions by application of the Guidelines.

1. Recognition of Foreign Corporations

Without first being recognized as an existing legal entity, no member of an MNE would be able to apply directly for necessary business licenses, enter into agreements, or engage in other corporate acts.¹⁹³ It is submitted that the Anglo-American place of incorporation rule for determining corporate nationality is the one most appropriately geared

189. *Id.*, Explanatory Notes § 6, comment *f* at 14; *id.*, Explanatory Notes § 302, comment *b* at 307.

190. *Id.*, Explanatory Notes § 6, comment *j* at 16.

191. See C. KINDLEBERGER, *supra* note 132, at 5-6.

192. See notes 20-100 *supra* and accompanying text.

193. See STEIN 43. See notes 53-70 *supra* and accompanying text.

to the problem of recognition. This rule provides harmony and certainty in international business on the basic question of recognition of foreign corporations and is therefore compatible with both the first and second Guidelines.¹⁹⁴

Theoretically, the rule of the Seat can cause uncertainty and chaos in multinational transactions, though in practice it is hard to conceive that application of the Seat theory would today result in a total failure to recognize a corporation legally established in a foreign jurisdiction.¹⁹⁵ However, the mere existence of some uncertainty regarding both the factual and legal problems of ascertaining the Seat poses an obstacle to MNEs¹⁹⁶ which is inconsistent with the first two Guidelines.

The rule of incorporation, because it does not jeopardize the interests of involved states, is not incompatible with the third Guideline.¹⁹⁷ No national interests are sacrificed by merely recognizing, according to the laws of its place of incorporation, an MNE affiliate organized in a tax haven and administered elsewhere. The national interests with respect to such an affiliate become important later¹⁹⁸ in determining applicable personal law,¹⁹⁹ tax rules, and antitrust and other economic regulations. Further, since the law of the state of incorporation is easily identified, its application is desirable from the standpoint of judicial administration.²⁰⁰

Adoption of the place of incorporation as the standard for recognition by the continental countries would not be entirely revolutionary. There is at present a trend in European legal systems toward adherence to the rule of incorporation, or registered seat,²⁰¹ whereby incorporation by one state is recognized by other states. Acceptance of this standard has been reflected in many bilateral treaties to which Continental countries are parties²⁰² and has been supported by recent draft versions of

194. See notes 184-88 *supra* and accompanying text.

195. See note 62 *supra* and accompanying text.

196. See notes 29-48 *supra* and accompanying text.

197. See note 189 *supra* and accompanying text.

198. See notes 221-61 *infra* and accompanying text.

199. See notes 71-100 *supra* and accompanying text.

200. See note 190 *supra* and accompanying text.

An alternate test, with questionable efficacy, would adopt the law of incorporation theory with the single exception of companies having no economic link whatsoever with the place of incorporation. Such an approach was adopted in several proposed treaties. See notes 206, 218, 228 *infra* and accompanying text. It should be noted, however, that the alternate test is not necessary to protect national interests, since such intermediate companies, although generally recognized, might be disregarded for many legal purposes by piercing the corporate veil. See *The Structure of the MNE* 769-79.

201. STEIN 55, 401.

202. See notes 63-70 *supra* and accompanying text.

multilateral treaties.²⁰³ In 1951, the Hague Conference began an examination of the question which culminated in the 1956 Hague Convention Concerning Recognition of the Legal Personality of Foreign Companies.²⁰⁴ The question was also dealt with between 1952 and 1960 by the International Law Association,²⁰⁵ in 1965 when the Institute of International Law adopted a set of rules,²⁰⁶ and in 1966 when the Council of Europe drafted the Convention on Establishment of Companies.²⁰⁷ However, none of the draft treaties are yet effective. Nevertheless, these Conventions demonstrate a decided shift toward the Anglo-American state of incorporation standard. The Hague Convention, for example, subscribes to the incorporation theory in general terms,²⁰⁸ but significantly restricts the theory by stating that if a company organized in one state establishes its Real Seat in another state, it must be recognized in a third state only if the state of the Real Seat has accepted the incorporation theory.²⁰⁹ It is submitted that such a limitation is unacceptable when applied to recognition of the MNE, since it reduces the certainty necessary to the MNE and detracts from international harmony.

Within the EEC, the Treaty of Rome of 1957 (EEC Treaty)²¹⁰ does not contain explicit provisions on recognition of foreign companies.²¹¹ However, the treaty provides that a company organized in one member-state has access to the other members' markets and thus implicitly necessitates recognition of the company as a legal person.²¹²

203. PENNINGTON 100.

204. For the English text, see Document, *Draft Convention Concerning Recognition of the Legal Personality of Foreign Companies* (Sociétés), *Associations, and Foundations*, 1 AM. J. COMP. L. 277 (1952).

205. See REPORT OF THE 49TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 93-95 (1960).

206. See Briggs, *Institut de Droit International: The Warsaw Session, 1965*, 60 AM. J. INT'L L. 517, 523-26 (Annex II) (1966). See generally Drucker, *Companies in Private International Law*, 17 INT'L & COMP. L.Q. 28 (1968). Articles 1 and 2 of the Institute's rules introduced the incorporation rule. Briggs, *supra* at 523. Article 4, however, limited the application of the rule by allowing nonrecognition if the Real Seat is separate from the registered seats and there is no "real connection" with the state of incorporation. *Id.* at 524.

207. European Convention on Establishment of Companies, done Jan. 20, 1966, Europ. T.S. No. 57.

208. Document, *supra* note 204, at 277 (art. 1).

209. *Id.* at 277-78 (art. 2).

210. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (effective Jan. 1, 1958).

211. PENNINGTON 102.

212. STEIN 396. Such provisions as the "freedom of establishment" and the "freedom to supply services" clauses could not be accomplished if a company duly organized in one member state was not recognized by another member. Treaty Establishing the European Economic Community, Jan. 1, 1958, arts. 52-66, 298 U.N.T.S. 11, 37-42.

Notwithstanding these implicit recognition requirements,²¹³ the member-states, in February, 1968, concluded²¹⁴ the Convention Relating to the Mutual Recognition of Companies and Legal Persons (EEC Convention).²¹⁵ Under this Convention, each member-state explicitly undertakes to recognize companies incorporated and registered in another member-state.²¹⁶ Thus, a company validly incorporated and having its registered seat in one member-state must be recognized without regard to the location of its Real Seat.²¹⁷ However, on the basis of a vague and questionable exception, a member-state may refuse to recognize a company having both its Real Seat outside the territory of the EEC and no "genuine link with the economy of one of these territories."²¹⁸ The exception is designed to operate against a non-EEC enterprise which maintains as its only link to the Community a registered seat—a mere post-office box address—in one of the member-states, notably the Netherlands.²¹⁹ The Convention defines the Real Seat of a company as "the place where its central administration is located."²²⁰ When limited to matters of recognition, the rules of this convention, other than the exception, are generally acceptable.

2. *Governing Law of Foreign Corporations*

(a) *The Guidelines and Existing Theories of Corporate Nation-*

213. See STEIN 396.

214. This additional treaty was concluded pursuant to article 220 which provides that "Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring . . . the mutual recognition of companies . . . , the maintenance of their legal personality in cases where the registered office is transferred from one country to another, and the possibility for companies subject to the municipal law of different Member States to form mergers" Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 220, 298 U.N.T.S. 11, 87 (effective Jan. 1, 1958).

215. For the text of the EEC Convention in the four official languages and in an unofficial English translation, see 1969 BULL. E.C., Supp. No. 2, at 5-16. For another unofficial English translation, see 2 CCH COMM. MKT. REP. ¶ 6083 (1972); STEIN 525-33 (Annex II). For analysis of the EEC Convention, see *id.* 394-424; Goldman, *The Convention Between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons*, 6 COMM. MKT. L. REV. 104 (1968-69). The Convention is not effective yet. Five of the original six member-states have ratified it, while the Netherlands has not. Negotiations with the new three EEC members will start in the near future. 2 CCH COMM. MKT. REP. ¶ 9614 (1972).

216. EEC Convention art. 1.

217. *Id.* art. 7. However, any state may refuse to recognize rights and powers not given to local companies. *Id.* A similar condition was provided in article 5 of the Hague Convention. See Document, *supra* note 204, art. 5. For a possible German interpretation which, if accepted, would deny recognition, see STEIN 410-11.

218. EEC Convention art. 3.

219. STEIN 409.

220. EEC Convention art. 5.

ality. Prima facie, if certainty in international business is considered the principal goal, the Anglo-American theory must also be preferred for defining the corporate nationality which determines the MNE's governing law, thus enabling it to plan its internal affairs according to the law of the state of incorporation. Pursuant to this standpoint conflicts among jurisdictions, created by applying overlapping and conflicting laws to an MNE's internal affairs, would also be avoided if the MNE could choose its governing law by incorporating in jurisdictions with corporation laws most suitable to its operations. For those who accept such a view,²²¹ the theory of the Seat is inadequate and also incompatible with the first and second Guidelines²²² because it does not provide clear-cut rules to guide management in planning internal affairs.

However, in determining a company's personal law, serious consideration should be given to the third Guideline²²³ in order to prevent evasion of national socio-economic policies. In many instances, incorporation abroad to carry on business at home might permit both circumvention of local policies and unfair competitive advantages over local firms.²²⁴ The need for such protection thus renders the rule of incorporation, at least in its strict sense, incompatible with the third Guideline. Similarly, application of the Seat rule alone will not provide a satisfactory result. For example, if the Seat is determined according to the place of control, as is often the case, corporations, by carefully arranging the place of board meetings in and otherwise exporting control to the most advantageous state, may be governed by a foreign law which ignores local necessities. Due to the importance of the third Guideline in determining a company's personal law, this question cannot be dealt with on the same basis as recognition,²²⁵ and further analysis is necessary to determine the proper nationality for the governing law of corporations.

Protection of significant national interests may be accomplished by selective intervention into the internal affairs of foreign corporations. Such intervention occurs even in common law systems in relation to the so-called "pseudo-foreign corporations," which, though incorporated in one state, conduct all or most of their business activities, are headquartered, and therefore have their Seat in a different, the host,

221. See, e.g., Feliciano, *Legal Problems of Private International Business Enterprises: An Introduction to the International Law of Private Business Enterprises and Economic Development*, 118 RECUEIL DES COURS 213, 281 et seq. (1966 II).

222. See notes 184-88 *supra* and accompanying text.

223. See note 189 *supra* and accompanying text.

224. See notes 101-24 *supra* and accompanying text.

225. See notes 193-220 *supra* and accompanying text.

state.²²⁶ In many cases such corporations are organized by nationals of the host state. When a common law host state thus extends its laws to the internal affairs of such corporations,²²⁷ the gap between the Anglo-American theory and that of the Continent is narrowed.²²⁸

The question of protecting national interests is more complex with respect to an MNE which may or may not have any business relations with each of its many states of incorporation and whose business ties are not always easily identified with one host country to the exclusion of others. Incorporation in a particular country may be based on legitimate business reasons²²⁹ or may be aimed at avoiding the laws of one or more host countries.²³⁰ In the latter case, a host country may be justified when it intervenes into the internal affairs of foreign corporations. The host country may then apply as the governing law of such companies either its own rules of law or those of a country having an overriding interest, the latter nation often being where the international headquarters is located. When such an approach is taken, it is difficult for the MNE to escape application of the laws of the country in which its major decisions are made.

(b) *A Desirable Criterion for Determining the Governing Law.*

226. Cf. Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. REV. 26, 52-53 (1954).

227. Consider the Western Airlines litigation in the United States, where the California Court applied the law of the forum, the California Securities Act (Blue Sky Laws), CAL. CORP. CODE § 25009(a) (1955), as amended, CAL. CORP. CODE § 25017(a) (West Supp. 1974), to the internal affairs of a Delaware corporation. *Western Airlines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (Dist. Ct. App. 1961). Later decisions in related cases include *Western Airlines, Inc. v. Schlutzbank*, 258 Cal. App. 2d 218, 66 Cal. Rptr. 293 (Dist. Ct. App. 1968), and *People v. Western Airlines, Inc.*, 258 Cal. App. 2d 213, 66 Cal. Rptr. 316 (Dist. Ct. App. 1968). See also *Mansfield Harwood Lumber Co. v. Johnson*, 268 F.2d 317 (5th Cir.), cert. denied, 361 U.S. 885 (1959); *Toklan Royalty Corp. v. Tiffany*, 193 Okla. 120, 141 P.2d 571 (1943).

228. Cf. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433 (1968) (where the author advocates more intervention by host countries and thus leans toward the doctrine of "commercial domicile," which is somewhat similar to the European Seat rule); Latty, *supra* note 23, at 137; Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118 (1958). For an attempt to define the facts required beyond mere issuance of a corporation's charter in order to establish a "real connection" with a state, see Resolutions Adopted by the Institute of International Law, Warsaw Session, on Companies in Private International Law, Sept. 10, 1965, art. 4, reprinted in 60 AM. J. INT'L L. 524 (1966); I & II Annuaire (Inst. of Int'l L., 1965); Drucker, *supra* note 206.

229. In doing so, the MNE tries to submit its internal affairs to a single law, rather than to several overlapping, often conflicting, corporation laws. For an illustration of the legal difficulties that arise by multiple incorporation in the United States, see Proxy Statement, cited in STEIN 474 n.393.

230. See notes 101-24 *supra* and accompanying text.

A desirable criterion for determining the applicable personal law could be established by creating a rebuttable presumption which would cause application of the law of the place of incorporation or the registered seat to the internal affairs of foreign corporations. When required to satisfy the third Guideline,²³¹ the host country could rebut the presumption and apply to the extent necessary its own corporate laws or those of a third country with an overriding interest in the issue under consideration. Thus, the presumption could be rebutted in instances of clear evasion or circumvention of local laws or in cases of pseudo-foreign companies.²³² In other cases, the presumption could be rebutted on a more selective basis to allow the host country to protect local shareholders and creditors by applying certain regulatory provisions of its corporation and securities laws even though they affect the internal affairs of the foreign corporation. The resulting application of the law of the place of incorporation in all but extreme cases would satisfy the first and second Guidelines by providing harmonious international relations and relative certainty in the management of international enterprises and would also give necessary protection to national interests under the third Guideline.

The *Restatement* generally supports this approach by suggesting that the law of the state of incorporation be applied as the governing law of corporations unless application of the law of some other state is required to satisfy an overriding interest of such other state.²³³ The *Restatement* approach was designed for use particularly "when the corporation has little or no contact with the state other than the fact that it was incorporated there."²³⁴ Furthermore, the *Restatement* includes special rules as to the law governing the liability of shareholders and directors.²³⁵ While such detailed solutions for each corporate issue may prove helpful in ascertaining the interests of the parties involved,²³⁶ the successful implementation of such a specific approach would be difficult to achieve internationally since it requires a detailed multilateral treaty assuring the necessary adherence to the standards.

The conflict between laws of different jurisdictions and its adverse effect on multinational business can be best solved through international agreement on general principles based upon the presumption suggested above.²³⁷ In addition, harmonization or unification of corpora-

231. See note 189 *supra* and accompanying text.

232. See notes 226-28 *supra* and accompanying text.

233. RESTATEMENT § 302.

234. *Id.*, Explanatory Notes § 302, comment *g* at 311.

235. *Id.* §§ 307-10.

236. See *id.* § 308.

237. See notes 231-32 *supra* and accompanying text.

tion law provisions would further reduce conflicts, since MNEs would then be subject to similar substantive requirements in the collaborating jurisdictions.²³⁸ Thus far, however, international attempts to cope with conflicting corporate personal laws have not brought desirable results. The EEC Convention relating to the Mutual Recognition of Companies and Legal Persons of 1968²³⁹ introduced the principle of the place of incorporation for the purpose of recognition,²⁴⁰ but preserved, to a certain extent, the Seat principle, with its aforementioned infirmities,²⁴¹ for application to the corporate personal law. An EEC member state may declare that it will apply "mandatory" local provisions to a foreign company whose Seat is within its territory.²⁴² However, such member-state may also apply the nonmandatory, optional provisions of its company law if the company's charter does not contain a reference to the law of the state of incorporation or if the company fails to prove that it has in fact conducted business activities "for a reasonable time" in the state of incorporation.²⁴³ This rule creates the problem of determining whether or not a provision is mandatory pursuant to each member-state's corporate law.²⁴⁴ Consequently, uncertainty still exists when the forum state is the country of the Real Seat, and the company is compelled to operate under two different, and often conflicting, company-law systems, those of the registered seat and of the Real Seat. This problem could be alleviated by defining "mandatory provisions." Further, "Seat" is defined as "the place where its central administration is located,"²⁴⁵ a definition which entails complex legal and factual problems²⁴⁶ that could be alleviated by a more specific definition of "Seat."

However, in evaluating the EEC Convention, it seems that progress was made. First, much more certainty is provided in the recognition of foreign companies.²⁴⁷ Second, in the case of a separation between the registered seat and the Real Seat of a company, certainty is provided to any third member-state, since it will apply the law of the state of the registered seat as the personal law of the company. The result is that the basic EEC approach is the closest yet devised

238. For the EEC efforts in harmonizing companies laws, see notes 249-51 *infra* and accompanying text.

239. See note 215 *supra*.

240. See note 216 *supra* and accompanying text.

241. See notes 29-48 *supra* and accompanying text.

242. EEC Convention art. 4.

243. *Id.*

244. STEIN 410.

245. EEC Convention art. 5.

246. See notes 29-48 *supra* and accompanying text.

247. See notes 215-20 *supra* and accompanying text.

to being acceptable, since the notion of applying certain provisions of the local law to foreign companies which are headquartered locally is desirable; furthermore, a few important provisions of local law may even be applied to all foreign corporations dealing locally.

It should also be noted that further undertakings in the area of company laws are being pursued within the Common Market. A proposal for a European Company (S.E.) has as its object the establishment of a new European form of business enterprise to be organized under a supranational company law.²⁴⁸

In addition, the EEC continues to attempt harmonization of the divergent company laws of its members. Five directives on coordination of company laws of the member-states have been issued by the Council of Ministers or proposed by the Commission to the Council since 1968.²⁴⁹ As a result of these directives, various EEC members

248. *Proposed Statute for the European Company*, 3 BULL. EEC (Supp. Aug. 1970). For a discussion of proposals for a "European Company" law, see *The Structure of the MNE* 797-802. The proposed statute would allow the S.E. (European stock corporation) to elect several registered seats in several EEC states. *Proposed Statute for the European Company* art. 5, 3 BULL. EEC (Supp. Aug. 1970). It should be noted that with a single European company statute throughout the EEC, national laws would be applied only to matters not dealt with by such a statute. See generally Picker, *The Proposed Statute of a European Corporation*, 1971 J. Bus. L. 167, 170.

249. The first directive on coordination of company laws was issued by the Council of Ministers in 1968. See First Directive. Such directives are issued pursuant to the Treaty of Rome. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 54(3)(g), 298 U.N.T.S. 11, 39 (effective Jan. 1, 1958). See generally STEIN ch. 6-7. The first directive deals with public disclosure of material information, First Directive art. 2; maintenance of company records, *id.* art. 3; company dealings with outsiders, *id.* arts. 7-9; and existence of the company, *id.* arts. 11-12. A second directive on coordination of company laws, dealing with companies' capital, was proposed by the Commission to the Council in March, 1970. Press Release from the Commission of the European Communities, No. P-11, [1970-1972 Transfer Binder] CCH COMM. MKT. REP. ¶ 9350 (1970). A third directive, proposed in June, 1970, deals with intrastate mergers and acquisitions, including the pertinent rights of shareholders, employees, and creditors. Information Memorandum from the Commission of the European Communities, No. P-30, [1970-1972 Transfer Binder] CCH COMM. MKT. REP. ¶ 9374 (1970). (An additional directive, on the annual statements of stock companies, was proposed on November 11, 1971. See Information Memorandum from the Commission of the European Communities, No. P-39, [1970-1972 Transfer Binder] CCH COMM. MKT. REP. ¶ 9467 (1971)). A fourth directive, proposed on November 16, 1971, deals with the form and content of the company's financial reports. Proposed Fourth Directive, 1 CCH COMM. MKT. REP. ¶ 1391 (1972). And a fifth directive, proposed in October, 1972, deals with the harmonization of national corporation laws in such important areas as companies' management and control. Information Memorandum from the Commission of the European Communities, No. P-43, [1970-1972 Transfer Binder] CCH COMM. MKT. REP. ¶ 9532 (1972). The fifth directive contains provisions concerning the formation of a company, the two-tier board of directors (consisting of a managing board and a supervisory board), the shareholder meetings, the voting rights, and the participation of employees in appointment of the supervisory board. For a

have undertaken a major reform of their company laws, adjusting them to the EEC models. The Netherlands amended its law in 1971,²⁵⁰ and new bills are pending in Belgium, Luxemburg, and Italy. Moreover, the new EEC members—the United Kingdom, Ireland, and Denmark—are in the process of enacting such legislation.²⁵¹

Since such detailed intergovernmental collaboration is even more difficult to obtain outside the EEC, individual jurisdictions throughout the world should, until a greater degree of successful collaboration is reached, adopt the suggested rebuttable presumption,²⁵² which would operate in favor of the application of the law of the state of incorporation. Such an approach would best be implemented by legislation restricting the application of local laws to the necessary protection of national interests, including interests of local investors. Furthermore, such a legislative scheme should be designed to provide a broad application of local corporation law both to foreign corporations proved to have been chartered abroad to evade local law and to pseudo-foreign corporations,²⁵³ which should be specifically defined. The legislation should also provide for application of certain provisions of the corporate law to internal affairs of all foreign corporations on a selective basis. This selective approach should be designed to protect local investors and must be applied without need of proof that the foreign corporation was chartered for the purpose of evading domestic law.

The New York Business Corporation Law uses a somewhat similar approach, with several of its provisions being applicable to all foreign companies doing business in New York.²⁵⁴ Thus, particularly since September, 1963, the New York Business Corporation Law, after requiring such foreign corporations to become qualified to do business,²⁵⁵

discussion of certain characteristics of European corporation laws, including dual management provisions and codetermination of employees, see *The Structure of the MNE* 762-67.

250. Wetboek van Koophandel (W.v.K.) §§ 50-52 (Netherlands Business Corporation Code) (for an unofficial English translation of this statute, see CCH COMM. MKT. REP. No. 193 (1972)); Law on Works Council of Jan. 15, 1972 (Betriebsverfassungsgesetz) (for an unofficial English translation, see CCH COMM. MKT. REP. (transl. H. Beinhauer 1972)). See *The Structure of the MNE* 764-67; Van de Ven, *Corporate Developments in the Netherlands*, 27 BUS. LAW. 873 (1972).

251. For the United Kingdom amendments, see European Communities Act 1972, c. 68, § 9, amending Companies Act 1948, 11 & 12 Geo. 6, c. 38, § 435 (enacted in order that the British Company law would comply with the requirements of the First Directive of the Council of the European Communities). See Comment, *European Communities Act 1972—Company Law*, 32 CAMBRIDGE L.J. 1 (1973).

252. See text accompanying notes 231-32 *supra*.

253. See note 226 *supra* and accompanying text.

254. N.Y. BUS. CORP. LAW §§ 1304-19 (McKinney 1963), as amended, (McKinney Supp. 1973).

255. *Id.* §§ 1301, 1304-05, 1308-09.

protects local interests by applying to such foreign companies several of its material provisions which govern local corporations.²⁵⁶ In order to provide even broader protection for local interests, New York law applies additional local provisions to foreign corporations which are not on a national securities exchange and which have fifty per cent or more of their business income allocable to New York.²⁵⁷ The New York Business Corporation Law provides certainty as to the scope of its application to foreign corporations by largely avoiding the use of terms such as "mandatory-provisions" and "Real Seat,"²⁵⁸ which would otherwise cause confusion.²⁵⁹

Although a system incorporating the rebuttable presumption would be best implemented by legislatures, courts would, for example, be charged with rebutting the presumption and applying local law to a foreign corporation in the absence of a specific or clear statutory mandate when the interests sought to be protected are substantially local and the law of the state of incorporation does not provide adequate safeguards, as, for example, has been the case in the operation of many offshore funds.²⁶⁰ Courts would also be charged with determining whether the interests of a third country are overriding and therefore require application of its personal law. Adherence to such a policy would require courts to examine the interests to be protected, the laws involved, the underlying policies of the concerned states, and the relation of such states to the issue and the parties.²⁶¹

256. *E.g.*, *id.* §§ 1317(a)(2), (b).

257. *Id.* § 1320. The directors of these foreign corporations are liable to the corporation, creditors, and shareholders, *id.* §§ 720(b), 1317(a)(2), for violations of New York statutory restrictions with respect to declaration of dividends, *id.* §§ 510(a)-(b), 719(a)(1), 1317(a)(1); repurchase of the corporation's shares, *id.* §§ 513, 719(a)(2), 1317; and directors' loans, *id.* §§ 714, 719(a)(4), 1317. Similarly, such corporations may be liable under the New York law for failure to disclose required information in the same manner as domestic corporations, *id.* §§ 520, 1318, with respect to certain distributions, *id.* §§ 510(c), 511(f)-(g); repurchase of shares, *id.* § 515(d), *as amended* (McKinney Supp. 1973); reduction of stated capital, *id.* § 516(c); and other items, *id.* §§ 517(a)(4), 519(f). Such corporations are subject to a variety of other provisions. *Id.* § 1319, *as amended* (McKinney Supp. 1973), such provisions refer, *inter alia*, to shareholder's derivative suits, *id.* §§ 626, 1319(a)(2)-(3); *id.* § 627, *as amended* (McKinney Supp. 1973); and indemnification of directors and officers, *id.* §§ 721-25; *id.* § 726 (McKinney Supp. 1973).

258. See notes 29-40 *supra* and accompanying text.

259. However, it seems necessary to provide a sales allocation formula to determine which foreign corporations are subject to the broader application of the New York statute.

260. See, *e.g.*, Note, *Offshore Mutual Funds: Possible Solutions to a Regulatory Dilemma*, 3 LAW & POL. IN INT'L BUS. 157 (1971).

261. For examples of such an approach, see note 227 *supra*. See also *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Blazer v. Black*, 196 F.2d 139 (10th Cir. 1952); *McCormick v. Statler*

D. Reconciliation of Competing Interests Through Conflicts Thinking

Solutions based on the Guidelines inherently take into consideration private and national interests other than those of the host country. Such solutions are best achieved through international collaboration. However, until international agreements are reached, national authorities should unilaterally exercise their powers cautiously by considering all the competing interests involved. The United States federal securities laws serve as an interesting example of the accommodation of clashing foreign interests. In order to protect significant national interests, the United States applies its federal securities laws to foreign companies which offer their stock publicly in the United States. Subject to several specific exemptions for foreign issuers,²⁶² such companies must comply with the various registration,²⁶³ disclosure,²⁶⁴ and other requirements applicable to an American issuer.²⁶⁵ Foreign corporations are aware of these requirements and take them into consideration before seeking public financing in the United States market. However, in 1964, the United States attempted to go one step further in protecting its national interests. Using the authority provided in the Securities Act Amendments of 1964,²⁶⁶ the Securities and Exchange Commission proposed to extend registration requirements to certain foreign issuers not

Hotels Del. Corp., 30 Ill. 2d 86, 195 N.E.2d 172 (1964); *Gresov v. Shattuck Denn Mining Corp.*, 29 Misc. 2d 324, 215 N.Y.S.2d 98 (Sup. Ct. 1961).

262. Foreign issuers other than North American and Cuban companies are exempt, for example, from the proxy rules under section 14 of the 1934 Act; and their directors, officers, and principal shareholders are exempt from the reporting requirements and trading prohibitions of section 16 of the 1934 Act. Rule 3a12-3, 17 C.F.R. § 240.3a12-3 (1973). Notice, however, that these exemptions do not apply if

(1) more than 50 percent of the outstanding voting securities of the issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States, and (2) the business of such issuer is administered principally in the United States or 50 percent or more of the members of the Board of Directors are residents of the United States. *Id.* § 240.3a12-3(b).

Companies which do not qualify for the exemption, notwithstanding their place of incorporation, are not considered foreign nationals for these purposes.

263. Securities Act of 1933, 15 U.S.C. § 77a-77aa (1970). Section 5 of the Securities Act generally prohibits the use of any means or instruments of interstate commerce in order to sell or offer for sale securities in the United States, unless a registration statement has previously been filed. *Id.* § 77e. For the registration provisions and prospectus requirements in sections 6, 7, 8, and 10 of the Act, see *id.* §§ 77f-h, j. For civil liabilities on account of false or misleading registration statements or prospectuses, see *id.* § 77k (section 11 of the Act).

264. *E.g.*, Securities Exchange Act of 1934, §§ 12-13, 15 U.S.C. §§ 78a-78hh (1970).

265. See generally *id.* § 10, 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5 (1973).

266. Securities Acts Amendments of 1964, 15 U.S.C. § 78l (1970).

actively seeking a public market for their securities in the United States. This extended application of the United States securities laws raised strong protests from foreign governments and commentators who alleged that such application violated international law principles.²⁶⁷ As a result of such protests, the Securities and Exchange Commission ultimately agreed to modify its approach and in the course of such modification presented a good example of the proper accommodation of competing national interests.²⁶⁸

The rules finally adopted by the United States under section 12(g) of the Securities Exchange Act granted an exemption from registration to foreign issuers whose shares are traded in the over-the-counter market if they or their governments voluntarily furnish to the Securities and Exchange Commission substantially the same information as they have (1) made public pursuant to the law of the country of their incorporation, (2) filed with a foreign stock exchange which lists their securities and which made public such information, or (3) voluntarily distributed to their stockholders.²⁶⁹ In addition, a full exemption was given to foreign issuers if the class of equity securities is held by less than 300 United States resident shareholders.²⁷⁰

The solution provided by the American law is based on conflicts

267. See Committee on International Law, *The 1964 Amendments to the Securities Exchange Act of 1934 and the Proposed Securities and Exchange Commission Rules—International Law Aspects*, 21 RECORD OF N.Y.C.B.A. 240 (1966); SEC Securities Exchange Act Release Nos. 7427 (Sept. 15, 1964), 7746-49 (Nov. 16, 1965), 7867 (Apr. 21, 1966), [1964-1966 Transfer Binder] CCH FED. SEC. L. REP. ¶¶ 77,123, 77,301-04, 77,340. See also Ellis, *The Legal Aspects of European Direct Investment in the United States*, in *THE MULTINATIONAL CORPORATION IN THE WORLD ECONOMY* 52, 71 (S. Rolfe & W. Damm eds. 1970).

268. The Securities and Exchange Commission proposed to subject foreign corporations which met the standards of section 12(g)(1)(B) of the 1934 Act to registration requirements similar to those with which United States domestic corporations that meet such standards must comply. However, the rule ultimately adopted by the SEC, Rule 12g3-2, 17 C.F.R. § 240.12g3-2 (1973), exempted certain foreign issuers from the registration requirements of section 12 of the Exchange Act, 15 U.S.C. § 78l (1970), and the companion reporting provisions of section 13, *id.* § 78m. For the Commission's explanation of the rule and the background to its adoption, see SEC Securities Exchange Act Release No. 8066 (Apr. 8, 1967), [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,443 (1967).

269. Securities Exchange Act of 1934, § 12(g)(3), 15 U.S.C. § 78l(g)(3) (1970); 17 C.F.R. § 240.12g3-2(b)(1) (1973); SEC Securities Exchange Act Release No. 8066 (Apr. 28, 1967), [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,443. See generally Bartor, *Extraterritorial Application of Law: U.S. Securities Laws*, 64 AM. J. INT'L L. 141 (Proceedings of the 64th Annual Meeting, 1970); Buxbaum, *Securities Regulation and the Foreign Issuer Exemption: A Study in the Process of Accommodating Foreign Interests*, 54 CORNELL L. REV. 358 (1969).

270. 17 C.F.R. § 170.2g3-2(a)(1) (1973).

thinking.²⁷¹ After weighing the competing national and individual interests involved, foreign securities law requirements were accepted by the United States, the host country, with respect to certain activities occurring within its jurisdiction. Arguments based upon the first and second Guidelines²⁷² outweighed the necessity of protecting national interests.²⁷³ Thus, a potential conflict between jurisdictions was averted, and foreign companies were not subjected to undue interference. Interests of local investors were not neglected because, when subject to section 12(g),²⁷⁴ the foreign issuer is required to disclose certain basic information.²⁷⁵ Furthermore, direct local public offerings by foreign issuers are still regulated by local law. Moreover, the United States adopted a new criterion of corporate nationality to protect local investors against misuse of foreign incorporation by local firms or firms with a dominant local interest, since section 12(g) subjects such firms to the provision that

[t]he exemptions provided by paragraphs (b) and (d) of this section shall not be available for any class of securities if at the end of the last fiscal year of the issuer (1) more than 50 per cent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States and (2) the business of such issuer is administered principally in the United States or 50 per cent or more of the members of its Board of Directors are residents of the United States.²⁷⁶

Thus, competing interests were resolved through the application of conflicts thinking.²⁷⁷

E. International Collaboration in the Tax Area

The field of international taxation is illustrative of the type of

271. Since it is the technique here used which is instructive, there is no need to examine the result obtained.

272. See notes 184-88 *supra* and accompanying text.

273. See note 189 *supra* and accompanying text.

274. Compare 17 C.F.R. § 240.12g3-2 (1973) (the exemption for the foreign issuer) with Securities Exchange Act of 1934, § 12(g)(1)(B), 15 U.S.C. § 78l (1970) (the exception for the American issuer).

275. See note 269 *supra* and accompanying text.

276. 17 C.F.R. § 240.12g3-2(e) (1973).

277. It might be claimed that public international law principles were violated by the extraterritorial application of section 12(g) and that the exemptions therefrom could not validate an act which was a mere nullity under public international law rules. For the subordination of conflict of law rules (private international law) to international jurisdictional rules, see Mann, *The Doctrine of Jurisdiction in International Law*, 111 I RECUEIL DES COURS 19 (1964). See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note § 10 at 31 (1965); *id.* § 19.

problem encountered as well as the progress which can be made by international collaboration. Nations have long recognized the futility of unilateral attempts either to eliminate tax evasion by multinational businesses or to prevent multiple taxation of income. No rules of international law exist to limit the tax jurisdiction of nation-states over their nationals, on the one hand, or to require a country to grant relief from international double taxation, on the other hand.²⁷⁸ Therefore, within its own legal and fiscal framework, a country is free to adopt any theories of tax jurisdiction it selects.²⁷⁹ Any foreign direct investment by the MNE or any transnational transaction gives rise to at least two potential tax claims: that of the investor's home country and that of the host country in which the investment or transaction takes place. Since the rules of determining tax jurisdictions vary from country to country, the situations of overlap or underlap are inevitable.²⁸⁰ The basic principles upon which the host and the home countries assert their tax jurisdiction may often overlap, as, for example, when the host country imposes its income tax on an activity of the MNE because the source of the income is there, while at the same time the home country imposes a tax on the same income because the MNE, of the specific corporation which is part of it, is considered to have the home country's nationality for tax purposes.²⁸¹ In such circumstances the total tax burden is greater than it would have been if the income had been subject to a single tax jurisdiction.²⁸² The tax systems of most countries provide for unilateral relief measures to mitigate the problem of double taxation. Such relief is usually granted by exempting certain types of income from tax or by giving credit for the foreign taxes paid on the income. Nevertheless, the unilateral relief measures in most cases only mitigate the double taxation without alleviating it satisfactorily.²⁸³

278. 1 C. HYDE, *INTERNATIONAL LAW* 674 (2d rev. ed. 1947).

279. NORR, *Jurisdiction to Tax and International Income*, 17 *TAX. L. REV.* 431 (1962).

280. See note 132 *supra* and accompanying text.

281. For the tax nationality (domicile or residence) of corporations, see notes 132-63 *supra*.

282. For illustrations of the problem of overlapping jurisdictions, see *Tax Treaties* 114-19.

283. For the deficiencies of the unilateral relief and the accomplishments of tax treaties, see *Tax Treaties* 117; Smith, *The Functions of Tax Treaties*, 12 *NAT'L TAX J.* 317 (1959); Surrey, *International Tax Conventions: How They Operate and What They Accomplish*, 23 *J. TAX* 364 (1965). It should be noted that even if countries grant full unilateral relief from international double taxation, economic double taxation may occur when two countries together find a total taxable income on a transaction greater than the economic profit. This may be the result of the use of different tax definitions and therefore an application of the statutory relief measure to different bases of income by the two countries involved. U.N. Dep't of Econ. & Social Affairs,

In addition, countries have not succeeded in coping with the international tax avoidance which occurs when the MNE manages to conduct its operations without being subject to substantial taxation by either jurisdiction.²⁸⁴ As a result, it is no wonder that some 200 bilateral tax treaties have been adopted in efforts to reduce cases of double taxation and of international tax avoidance.

Most of the bilateral treaties adopted recently have followed the form of the model tax treaty drafted by the Organization for Economic Cooperation and Development.²⁸⁵ However, this development, while progressive, is not entirely satisfactory. Multilateral rather than bilateral tax treaties are preferable because the operations of an MNE are likely to raise in several countries tax questions pertaining to the same income.²⁸⁶ It would be possible to supplement a given multilateral treaty with bilateral treaties specially adapted to the peculiarities of the participating nations' tax laws. The bilateral treaties could then be amended periodically to reflect current changes in national tax laws, while the multinational treaty would continue to govern the primary principles of MNE taxation.²⁸⁷ Furthermore, the consultation procedure between the respective competent national authorities²⁸⁸ should be improved and consideration should be given to the creation of international interpretive, and possibly adjudicative, forums. In addition, nations should consider harmonization of certain basic tax rules. International tax issues are currently under further study by several international organizations.²⁸⁹

Tax Treaties Between Developed and Developing Countries 37, U.N. Doc. E/4614/ST/ECA/110 (1969). Economic double taxation may also arise from the fact that two countries do not apply the same rules for reallocation of the MNE's income or do not adjust the MNE's income in accordance with reallocation by another state. See S. Surrey & D. Tillinghast, *supra* note 157.

284. For a discussion of tax havens as an example of a commonly used method of creating "underlap," see notes 111, 143-63 *supra* and accompanying text. For a discussion of the use of transfer pricing as an "underlap" method, see note 157 *supra*.

285. See *Tax Treaties* 128-45 (discussing the operations of current tax treaties which follow the O.E.C.D. draft and evaluating such treaties); Kragen, *Double Income Taxation Treaties: The O.E.C.D. Draft*, 52 CALIF. L. REV. 306 (1964).

286. Cf. *The Structure of the MNE* 779-84 (discussing disregard of the corporate entity for international tax purposes).

287. Cf. EUROPEAN FREE TRADE ASSOCIATION, A STUDY ON THE FEASIBILITY OF A MULTILATERAL CONVENTION FOR THE PREVENTION OF DOUBLE TAXATION I/318 (1970). For the EEC efforts for a multilateral tax treaty, see Anschütz, *Harmonization of Direct Taxes in the European Economic Community*, 13 HARV. INT'L L.J. 1, 45-58 (1972).

288. See *Tax Treaties* 134-35, 141-42.

289. Notably the O.E.C.D. and the United Nations are studying international tax questions.

V. CONCLUSION

The typical MNE is a cluster of separate units, located in various jurisdictions throughout the world. The MNE often organizes a subsidiary or affiliate in each country in which it conducts substantial business activities. In some countries the MNE operates as a foreign corporation through branches,²⁹⁰ and in others it engages in certain limited transactions as a foreign corporation, notwithstanding the presence of its local subsidiary or affiliate. All of the various corporations or other legal entities are potentially of diverse nationalities, but are joined together by common control.²⁹¹ The effect of such central control is that certain local activities are carried out in response to instructions from decision-makers located abroad within the parent company or international headquarters. As a result, local authorities in various states must decide which part of the MNE is subject to their jurisdiction and which is the applicable law with respect to each issue or transaction under consideration. These decisions must be made whether the MNE operates in a state as a foreign corporation²⁹² or by means of a local subsidiary or affiliate.²⁹³ In making such decisions, the various states choose the applicable national law, and, in fact, determine the nationality of the MNE and its parts. This Article has attempted to demonstrate that such determinations cannot be based upon the rigid application of narrow rules. Neither the Anglo-American focus on the place of incorporation²⁹⁴ nor the Continental Seat rule²⁹⁵ provides an adequate accommodation of the myriad of conflicting interests which must be balanced in arriving at a just outcome. Nor do such approaches properly recognize the fact that a determination of nationality should vary for different legal purposes.²⁹⁶ What is needed instead is a flexible approach, one that will help to highlight the more relevant considerations and provide a rational basis for consistent decisions. The use of conflicts thinking is such an approach. Each des-

290. See notes 14-15 *supra* and accompanying text.

291. For an extensive discussion of the concept of control within the MNE and an analysis of the business and legal ramifications of this concept, see *The Structure of the MNE* 749-54.

292. For the current Anglo-American and Continental treatment of foreign corporations, see notes 20-100 *supra* and accompanying text. For the desirable criteria suggested in this Article, see notes 192-261 *supra* and accompanying text (discussing application of the Guidelines to conflict of corporation laws).

293. For illustrations of national tax and antitrust treatment of subsidiaries and affiliates, see notes 132-63, 164-69 *supra* and accompanying text.

294. See notes 101-24 *supra* and accompanying text (discussing national interests and the MNE).

295. See notes 29-39 *supra* and accompanying text.

296. See notes 178-80 *supra* and accompanying text.

ignation of nationality and each attempt to subject an enterprise which spans many boundaries to local rules should be accomplished by application of the Guidelines set forth earlier in this Article. In other words, each such determination should be guided by the need for harmonious international relations,²⁹⁷ by the certainty of law and predictability of results necessary for realization of the justified expectations of the MNE,²⁹⁸ and by the protection and balancing of the national interests of concerned states.²⁹⁹

The optimal means for implementing these Guidelines and thus averting international conflicts resulting from attempted regulation of the MNEs' activities would be provided by multilateral agreements among nation-states.³⁰⁰ This is true because the inherent danger in applying the Guidelines unilaterally is that host countries will often emphasize the protection of their own national interests without proper regard for the interests of the MNE, the interests of other involved states, or the needs of a workable international system.³⁰¹ However, since the issues presented by MNEs are diverse, each presenting unique problems to both the various regulatory authorities involved and the MNE itself, it would be difficult, if not impossible, to conclude a single treaty covering most of the potential areas of conflict.³⁰² The only practical method for implementing the required international collaboration is through a series of multilateral agreements, each dealing with one or more separate issues posed by the MNE. In addition, efforts should be made in each agreement to establish a forum, or to empower an existing one, which would provide consultation ma-

297. See notes 184-87 *supra* and accompanying text (First Guideline).

298. See note 188 *supra* and accompanying text (Second Guideline).

299. See note 189 *supra* and accompanying text (Third Guideline). For a demonstration of the efficacy of the proposed Guidelines, see notes 192-261 *supra* and accompanying text.

300. The EEC Commission has recently proposed to the Council of Ministers a resolution relating to measures the Community must take to resolve the problems raised by the development of multinational enterprises. See Information Memorandum from the Commission of the European Communities, No. P-60, November, 1973, 2 CCH COMM. MKT. REP. ¶ 9610, at 9369 (1972) (unofficial translation). The proposed resolution stresses the need for international cooperation because some problems between the MNE and the EEC "have a worldwide dimension." *Id.*

301. The EEC Court in the noted *Dyestuff* cases did not consider any non-EEC interests. See notes 167-69 *supra* and accompanying text.

302. It is not feasible that one agreement can embrace several areas of conflict. For an example of another view, see Goldberg & Kindleberger, *Toward a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 LAW & POL. INT'L BUS. 295 (1970). It should be noted that such a proposal would require an international organization more properly structured than the loose organizational framework of the General Agreement on Tariff and Trade.

chinery within which participants could work out understandings in the area which is the subject of the particular agreement. While it is not realistic at this stage to expect broad subscription by the nations of the world to such multilateral agreements, it is not unlikely that agreement could be reached on at least a few of the areas of conflict between the MNE and nation-states, such as antitrust³⁰³ and tax.

A related approach would attempt harmonization of national laws in order to subject the MNE to less divergent regulation in certain areas and to adapt the world legal environment to the economic realities of the MNE.³⁰⁴ This would be difficult to accomplish because it would be necessary to amend national laws to incorporate the internationally agreed upon provisions. Even more difficult to attain is the close consultation among countries necessary to achieve unification of laws, whereby each nation would have to introduce identical legislation for enactment, with the prototype established by adoption of a model law or by convention.³⁰⁵ However, even harmonization or unification of laws would not eliminate the possibility that differences in application and interpretation would disrupt the desired international harmony.

The progress made to date under bilateral tax treaties³⁰⁶ indicates the international accommodation possible when conflicts involving MNEs threaten the national policies of concerned nation-states. Until such international agreements are reached in other areas, the involved states should individually exercise their legislative and judicial powers cautiously to foster international harmony, to satisfy the justifiable expectations of the MNE, and to protect national interests. Such an approach can best be implemented by the application of conflicts thinking.³⁰⁷

303. The cooperative procedure developed by the O.E.C.D. for international anti-trust cases should be noted. See COMMON MARKET AND AMERICAN ANTITRUST (J. Rahl ed. 1970); *The Structure of the MNE* 804 n.438. As yet, there is no international agreement providing international antitrust rules or even defining national antitrust jurisdiction.

304. For company law as a subject for international unification, see STEIN 68-74. For EEC efforts in harmonizing company laws, see notes 249-51 *supra* and accompanying text.

305. European Free Trade Association—Study by the Secretariat, No. 17/70, at 8 (1970). See generally David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (R. David ed. 1971).

306. See notes 278-84 *supra* and accompanying text.

307. See notes 262-77 *supra* and accompanying text (discussing reconciliation of competing interests through conflicts thinking).