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## The Hypothetical Problem

Ken Curtin

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PROCEEDINGS FOURTH ANNUAL INTERNATIONAL  
BUSINESS LAW SYMPOSIUM:  
MULTINATIONAL CORPORATIONS AND  
CROSS BORDER CONFLICTS:  
NATIONALITY, VEIL PIERCING, AND  
SUCCESSOR LIABILITY\*

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I. THE HYPOTHETICAL PROBLEM

WHOSE CORPORATION IS THIS AND WHOSE LAWS OUGHT TO  
GOVERN ITS CROSS BORDER TRANSACTIONS?

In 1996 WINDSOR INDUSTRIES, U.S., Inc. (WINDSOR) was incorporated in Delaware. WINDSOR is equally owned by BRITTECH, PLC, and NORD A.G..

BRITTECH PLC is chartered in England with shares traded on the U.K. exchange in London. Ownership records suggest that the majority of shares are owned by several pension funds that operate throughout the former and remaining Commonwealth nations. The officers and directors are all U.K. nationals.

NORD A.G. is chartered in Liechtenstein. It is wholly owned by a

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\* Companion articles by Phillip I. Blumberg, Dan D. Prentice, and Michael W. Gordon on the issues raised in this symposium can be found in Volume 10 Issue 3 of this *Journal*.

wealthy Germany family in Konstanz. The Director is one of the family members and resides across the border from Konstanz in Kreuzlingen, Switzerland, under a permanent Swiss residence permit. The board members and officers are mostly German nationals.

BRITTECH is a holding company with numerous subsidiaries in the United Kingdom and abroad, investing in mining, agriculture, oil, construction, and hotels. One of its most successful enterprises is BRITLIB, a wholly owned subsidiary that refines oil in Libya and provides some thirty percent of the parent corporate profits. Because of increasing hostility towards Libya in the international community, BRITTECH discloses as little information about the Libyan business as possible, including the fact that the chief executive officer in Libya is an U.S. citizen carrying a British passport (through connections in Parliament). The parent company also prefers not to disclose its agreement with the Libyan government not to do any business in or with Israel, whether through BRITLIB, BRITTECH, or any of the other BRITTECH enterprises. One of those other BRITTECH enterprises is WINDSOR, the Delaware joint venture with NORD.

NORD owns nickel and copper mines throughout the world. Most are operated as wholly owned subsidiaries, but some are joint ventures. NORD has recently commenced operations under a joint venture contract with the Cuban government to operate a nickel mining operation in Eastern Cuba, which had been idle for more than thirty-five years since it was expropriated from its U.S. owners in 1960.

WINDSOR has mined copper in Alaska since its formation in 1965. WINDSOR has been an extremely successful enterprise. It is cash rich and much talked about as a possible target for purchase by Japanese interests. WINDSOR is now finishing restoration and operation of a copper/nickel mine in Utah, formerly operated by Anaconda. It will export much of the ore expectantly to a refinery in Canada owned by a joint venture between NORD and CAN-ORES Ltd., chartered in Ontario. CAN-ORES is owned by a private group of investors who have residency permits in Canada, but are Hong Kong nationals.

Some of the current plans and issues confronting the various companies are as follows:

1. To take advantage of the North American Free Trade Agreement as follows:
  - a. Send ore from the U.S. to Canada duty free.
  - b. Establish a nickel plating operation in Mexico where automobile bumpers will be plated, using nickel refined in Cuba and the United States or both, with finished bumpers sold to Ford of Mexico for manufacture of its Taurus models sold throughout the NAFTA area. The company, to be called MEXNIK, will be a Mexican corporation

owned fifty-one percent by a private Mexican investment group and forty-nine percent by WINDSOR. WINDSOR will have a right to appoint a majority of the seven-member board and the chief executive officer. WINDSOR intends to appoint to the MEXNIK board two Mexicans and two very senior officers for the U.S. WINDSOR entity. One of the latter will be the CEO and will take up residence in Merida, Mexico, where the plant will be located. The Mexican investors will appoint three Mexicans to the board.

2. In 1980 WINDSOR acquired a company chartered and located in Ontario, Canada that manufactured mining explosives. The company, EXPLODECO, was a very old enterprise whose name was well known throughout North America. Unfortunately, the grandson of the founder spent more time sniffing another, illegal powder than selling dynamite. The company's product diminished in quality. EXPLODECO was on the verge of bankruptcy. WINDSOR came along and bought the assets of EXPLODECO, including the name. It formed a new company chartered in Delaware, which after acquiring the assets, changed its name to EXPLODEWIN and began manufacturing explosives under much tighter controls in a modern plant in Alabama. It used all the old trademarks on its products, including the main dynamite stick, MineDy.

The new company has struggled and is only marginally viable financially. WINDSOR has continued to loan EXPLODEWIN money to keep it alive. Last year, a small mine in northern Mexico was using some MineDy manufactured in Canada by EXPLODECO in 1978 at the depths of its diminished quality. Because of what appeared to be grossly negligent manufacture and installation of the fuses, an explosion occurred killing four miners and injuring several dozen others. These parties have brought suit against EXPLODEWIN, WINDSOR, NORD and BRITTECH in an Alabama state court. The parties intend to bring suit in London and Konstanz if they are unable to obtain jurisdiction over BRITTECH and NORD in the United States.

The parties claim that EXPLODEWIN is liable under successor liability principles, and that the other three companies are liable under piercing the corporate veil theories.

3. If the European Union enacts the European Company Law, will a non E.U.-chartered company, such as EXPLODEWIN, be able to have full access to the EU whether it formed a subsidiary in the UK or Germany?

### A. *Identity of the Corporate Entity*

Before identifying and addressing some of the issues that this problem presents, it might be helpful to know the nationality of the various companies. Is it quite clear that WINDSOR and EXPLODEWIN are U.S. companies, BRITTECH a U.K. company, NORD a German company, CANORES a Canadian company, and MEXNIK a Mexican company?

How would each panel member's nation determine the nationality of each corporation?

Whether or not a nation might claim nationality over one of the companies, it might attempt to exert extraterritorial authority over a company. On what basis would it do so?

If control is a basis for determining nationality or jurisdiction to prescribe (legislate conduct), how is control to be determined and how is it applied to the above companies.

If more than one nation asserts jurisdiction over one of the companies, how would those nations resolve a concurrent jurisdiction conflict?

Would any nation's court seek assistance from the International Court of Justice decision in *Barcelona Traction, Light & Power Co.*?<sup>1</sup> Were it to seek such assistance, would it find assistance from *Barcelona Traction*?

Is the ability to determine nationality important to the European Union? Has the discussion of a European Company addressed the issue of determining nationality?

Does the North American Free Trade Agreement offer any help in determining nationality? What about Treaties of Friendship, Commerce and Navigation between any of the above nations?

### B. *Piercing the Corporate Veil*

The suit by the Mexican miners attempts to pierce the corporate veil. How would the courts in each nation address such a veil piercing issue?

What is the legacy of the English *Salomon v. Salomon & Co., Ltd.*?<sup>2</sup> decision in current English law?

What law would each court apply, that of the subsidiary or the parent?

Would any nation's courts apply a form of enterprise theory?

Would the *Deltec*<sup>3</sup> litigation in Argentina, which created a theory of *unidad económica* or economic unit, be useful, especially for Mexico?

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1. *Barcelona Traction* (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 20).

2. [1897] App. Cas. 22 (P.C. 1896) (appeal taken from Eng.).

3. *Compañía Swift de La Plata, S.A. Frigorífica s/ convocatoria de acreedores*, [1973-19] J.A. 579, 151 *Revista Jurídica Argentina-La Ley* 516 (1973) [hereinafter *Deltec*].

Would a U.S. federal court apply state law or a federal common law of veil piercing?

### C. *Successor Liability*

The Mexican miner suit must confront the question of the liability of the successor U.S. corporation EXPLODEWIN for negligence of the predecessor Canadian company EXPLODECO. How would each nation address the issue of successor liability?

Does it make any difference considering that the predecessor company was in one nation and the successor in another?

### D. *Extraterritoriality Regarding Boycotts*

The United States restricts trade with Cuba. Does any part of the hypothetical create a possible violation of United States law? If such regulation would impact on any of the other nation, how would they react?

How do the other nations use extraterritoriality to regulate "their" corporations actions abroad to achieve political goals?

The United States prohibits its "persons" from assisting in the Arab boycott of Israel. Is there any such problem with the above facts? How would other nations react?

Do any of the other nations similarly regulate their nations participation in boycotts against friendly nations?

## II. INTRODUCTORY REMARKS

WELCOME BY KEN CURTIN, EDITOR-IN-CHIEF, FLORIDA JOURNAL OF INTERNATIONAL LAW, AND DEAN BARRY A. CURRIER

When the first International Business Law Symposium was held, I was in my second semester in law school and a comment writer on the *Journal*. Last year's symposium was probably the most controversial symposium which I have attended. It was my first semester on the Board of the *Journal*. Now, it is my last semester in law school; I am Editor-in-Chief of the *Journal*; and this will be my last symposium. For me, it is sort of sad that this is my last semester and last symposium. I really believe that it will be one of best that we have put on.

This year's symposium promises to be very interesting and educational. With the ready availability of modern transportation and means of communication, the world has become smaller, and consequently, corporations have branched out. National boundaries no longer pose trade problems for multinational corporations. However, other problems have arisen with regard to corporate nationality and liability. I hope that this symposium will not