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MULTINATIONAL CORPORATIONS AND THE SOCIAL CONTRACT*

Abstract

The constitutions of many nations have been explicitly or implicitly founded upon principles of the social contract derived from Thomas Hobbes. The Hobbesian egoism at the base of the contract fairly accurately represents the structure of market enterprise. A contractarian analysis may, then, allow for justified or rationally acceptable universal standards to which businesses should conform. This paper proposes general rational restrictions upon multinational enterprises, and includes a critique of unjustified restrictions recently proposed by the Organization for Economic Cooperation and Development (OECD). I propose restrictions that may be tighter than the OECD and international law currently demand, because reason requires that the activities of enterprises accord with standards of environmental and governmental sustainability in addition to consortium, national law and international law agreements. I argue that it is justifiable that indictments may be presented by a citizen or a government against the local arm of a multinational enterprise in response to violations committed by an arm within a different

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Introduction

The Organization for Economic Cooperation and Development (OECD) is a consortium that represents the interests of twenty-nine nations. It has directed the following guideline, among others, to businesses:

> Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed. The entities of a multinational enterprise located in various countries are subject to the laws of these countries.[1]

The restriction, from the *Declaration by the Governments of OECD Member Countries on International Investment and Multinational Enterprises*, may seem reasonable. I will argue that it is not reasonable as presented by the OECD, for it offers to corporate executives no more than an unjustified restriction upon multinational enterprise. It would be preferable that the OECD would provide a rationally justified proscription, rather than a bald declaration. This paper presents an effort to provide such justification, treating multinational enterprises as rational and self-interested actors in a social contract framework.

Thomas Hobbes is the first in a tradition that argues that people contract to form government, and honor the contract thereafter, because it is in the best interest of each individual to do so. Later theorists, such as John Locke and Immanuel Kant, make different assumptions about right, human nature and the substance of the contract, and their accounts, like Hobbes', have informed the constitutions of many nations.[2] Hobbes' account of the contract, which is reviewed in the first section of this article, is central to the justifications developed here. Hobbes' defense of government for rationally self-interested actors is particularly relevant to the business environment, as I will argue in the second and third sections.

Hobbes' theory is in need of extension for multinational legal entities, however, and the main purpose of this article will be to craft such an annex.[3] His theory was developed in the seventeenth century, in the context of the

political responsibilities and frailties of citizens of the modern nation-state. Hobbes made no attempt to justify government to multinational entities, and further asserted that nations, even in peace, are "in a posture of war" with respect to one another, rather than in an international contract for peace. (XIII.12) Hugo Grotius, Kant and others would strive for a solution among nations, but a trans-national solution for multinational entities is also of great importance.[4] Privately held multinational corporations now represent many of the largest economic entities on Earth, larger than most countries, amounting to about thirteen of the fifty largest economic entities, and about forty-eight of the largest one hundred.[5] Multinational businesses have the ability to avoid or to hamper legal enforcement on certain occasions — by withdrawal or by threatening withdrawal from economically dependent nations, for example.[6] Our problem is: How could a national-level contract be firmly binding upon an entity with multinational status? Could particularly mobile multinational corporations become ungovernable entities?

I will argue that national social contracts, when considered from the multinational perspective, are rationally binding upon multinational entities. Establishing that point will be one goal of the second and third sections of this paper. The argument yields two further consequences that are discussed in the third and fourth sections. First, the contractarian justification suggests a guideline much like the OECD restriction, but with the addition of a clause pertaining to environmentally and socially sustainable business practices. Such a clause might run as follows:

> The entities of a multinational enterprise located in various countries are subject to the laws of these countries *and* to further trans-national restrictions relating to sustainable activity concerning all countries within which entities of the enterprise reside.

Second, the contractarian argument may justify citizen or government indictments against a local arm of a multinational enterprise in response to infractions committed by an arm within another nation. When viewed in light of this consequence, then, the sustainability clause might justify indictment of a

local arm of a multinational enterprise in response to non-sustainable exploitative activity and international law violations carried through by arms elsewhere. Such a novel form of prosecution might belong in international court, but could also be justified under a different and more practical legal structure, managed by courts within individual nations. I will refer to that legal structure as 'multinational' law.

1. The social contract as a basis for justification

To begin, I will introduce the social contract theory as presented by Thomas Hobbes in *Leviathan*.[7] I will then consider how the social contract might be applied to enterprises generally, and to multinational enterprise.

Hobbes conceived of government as justified by a social contract: either a hypothetical or an actual agreement of individuals to live in peace and to form a confederacy of government to yield peace. Why make the agreement? Government is preferable to the alternative, he suggests, for individuals would otherwise be in the hazardous condition of a “war ...of every man against every man:” a state of nature, rather than a state of society. (XIII.13)

Such war arises as a consequence of human nature, and is curbed by human nature as well, in concert with reason. Humans are self-interested, or egoistic, according to Hobbes, and this nature points them toward two ends, “principally their own conservation, and sometimes their delectation only.” (XIII.3) The acquisitiveness inherent to every human must be balanced against a more compelling desire for self-preservation. A balance is struck by reason, upon the realization that “ there is no man can hope by his own strength or wit to defend himself from destruction without the help of confederates (wherein everyone expects the same defence by the confederation that anyone else does…).” (XV.5) The need for such defense leads individuals to recognize the law of peace, that each must “be contented with so much liberty against other men, as he would allow other men against himself.” (XIV.5) This insight leads to further “theorems concerning what conduceth to the conservation and defence of themselves,” and the theorems ultimately outline a detailed contract for

peace that all reasoning individuals should find to be in their best interest. (XV.41)

One threat to the stability offered by the contract for peace remains, however: the threat posed by the opportunist who would ignore the contract whenever disobedience would appear gainful. Hobbes takes care to argue two points at this juncture, to rule out the possibility of parasites enjoying the benefit of the social contract without sacrificing their own liberty.[8] First, he rebuts the claim that gain is to be had by such defection. This provides a rational restraint on law breaking, but is also necessary to make the contract itself a genuine option. Hobbes argues that all but a "fool" will recognize justice in the law of peace, and will find a rational basis for holding to agreements and instituting law, because the symmetry of the fool's situation for all contractors makes the fool's strategy unworkable:

> …he which declares he thinks it reason to deceive those that help him can in reason expect no other means of safety than what can be had from his own single power. ...if he be left or cast out of society, he perisheth; and if he live in society, it is by the errors of other men, which he could not foresee nor reckon upon; and consequently against the reason of his preservation... [XV.4-5]

The fool may commit either of two errors. Either he does not grasp what is necessary to enter the original covenant, and consequently neglects the overriding desire for self-preservation, or he makes an erroneous assumption about the superiority of his own intellectual capacity. For these reasons, Hobbes maintains, all rational individuals will honor their covenants, and will be prepared to join in the grand covenant of the commonwealth that can bear them all away from the state of nature.

With the possibility of a mutual contract for peace established, Hobbes erects a second block against the parasite's threat to the contract's stability. Though the social contract is an agreement among rational agents for mutual benefit, humans require more than the contract and the fear of its failure to rein in their desires. Laws of nature such as the law of peace, "of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like." (XVII.2) And so, "it is no wonder if there be somewhat else required (besides

covenant) to make their agreement constant and lasting..." (XVII.13) For the contract to provide stable government, agents must include within it a requirement to submit themselves to enforcement mechanisms, often referred to as "the sword" of the sovereignty. With this last support in place, the necessary details of the contract become clear:

> …the only way to erect such a common power as may be able to defend them... is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will... This done, the multitude so united in one person is called a COMMONWEALTH... For by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him that by terror thereof he is enabled to conform the wills of them all to peace at home and mutual aid against their enemies abroad. [XVII.13]

Government, then, is the result of agents freely contracting to submit themselves to a power with the might to ensure that each will follow its dictates. The self-imposed threat of the sword bolsters their fear of anarchy, and ultimately produces obedience to government. So goes a sketch of Hobbes' rational justification for government.

The contemporary political theorists John Rawls and Jürgen Habermas are heirs to the tradition of Hobbes.[9] The contractarian requirement of universal rational assent underlying just law is especially evident in Habermas' writing:

> Legal norms must be so fashioned that they can be viewed simultaneously in two different ways, as laws that coerce and as laws of freedom. It must at least be possible to obey laws not because they are compulsory but because they are legitimate. ...a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourse. [Habermas (1998) 158, 160]

Such a basis for legitimacy that parallels the coercion used by governments has clear attractions. If justice can be understood as a freely chosen fundamental agreement of all parties, then no further authority, from God or from arcane wisdom, is required to support such claims. If the binding of everyone lies in the rational agreement of each, a truly liberal justification for

government is achieved. And if such an analysis of law is deemed appropriate, it may serve to guide future development of law.

Our concern in this paper is with corporations that span nations, rather than humans within nations. We will consider the shift from human actors to corporations first, and from the national to the multinational case second. If corporations are egoistic by nature (a point that will be defended below), can government successfully restrict the actions of corporations, as it does for humans, providing the requisite coercive control of a "common power to keep them in awe"? Can we also endow laws with prior legitimacy from the corporation's perspective, which is to say: can each corporation itself be rationally bound to assent to government? We will consider coercive control and its problems in the following section, and legitimacy in the sequel.

2. Government and egoistic corporations

Multinational profit-making enterprises might be appropriately characterized as the kind of self-interested, rational actors that Hobbes takes all of us to be. Enterprise seems to fit at least the egoistic strain in the eyes of some of its classic champions, such as Milton Friedman. [10] Friedman is an advocate of the position that executives have the exclusive responsibility of promoting egoism "within the rules of the game" in the corporate setting:

> …there is one and only one social responsibility of business — to use its resources and engage in activities to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud. ...Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. [Friedman, 133]

Hobbes would have us realize that reason must rein in some behavior to promote egoistic action. Friedman's reference to the "rules of the game" might suggest agreement, but he does not clearly credit the executive branches of corporations with either the responsibility or the ability to set the rules. Though

he finds it a duty of corporate officials to rein in deception and fraud, he places the ultimate responsibility for all rules upon neither natural persons nor corporations, but rather, upon citizens and legislature:

> It is the responsibility of the rest of us to establish a framework of law such that an individual in pursuing his own interest is, to quote Adam Smith again, "led by an invisible hand to promote an end which was no part of his intention..." [Friedman, 133]

Thus, Friedman has characterized corporations as egoistic, but he grants neither the corporations nor their executive the responsibility that is due to rational actors. As a consequence, corporations and executive are to be externally constrained by egoistic, rational citizens, and law need not be shown to be legitimate from the corporation's perspective. The ultimate hold of law on corporations, then, is pure coercion: despite Friedman's claim, the hand that leads corporations must be a clearly visible one. My hope is to improve upon that approach. Rational constraints, or justification as seen from the point of view of the corporation, might be offered in place of unjustified recommendations such as those presented by the OECD. Rational justification that is logically prior to the law might also replace similar externally imposed legal restrictions.

The presence of any restraining hand due to law may be difficult to discern in the international arena, however, because legislation and enforcement are generally national, and not international in scope. Two absences are paramount: there appear to be insufficient curbs to illegal activities of multinational entities, and no curb at all to legal but nonetheless non-sustainable action.

First, consider illegal action. Hobbes finds that legal restrictions cannot successfully guide egoists in the absence of a mechanism for enforcement. Actors are bound by reason to their commitments out of fear: fear that illegal actions may result in either punishment disproportionate to possible gains or (worse) a return to a state of nature. A multinational corporation is mobile, however, and may successfully escape punishment — albeit at significant cost

— even surviving the collapse of a national government. It is not apparent how law can be enforced against an entity such as a multinational corporation, which may opt to withdraw from any nation at any time. If reason is used in service of egoism, then it is reasonable for the officers of a corporation to take into account the opportunity cost of breaking the law, just as it is reasonable for a citizen to do so. For a multinational corporation, that calculation could yield very different results than it would for a citizen. So despite that Friedman allows that corporations' egoistic behavior ought to be limited, in a Hobbesian framework it is apparent neither that it should be restricted to legal action, nor that it can be curbed by national governments.

Nations are also constrained in their hold over a multinational corporation because the latter may act in ways that few or no humans can. A corporation may practically lack a unitary *corpus*, as a starfish does, for example. The multinational may consider, and might survive, the calculated sacrifice of assets or of a corporate arm within a specific country. Some related concerns might apply to especially mobile citizens as well, but no equivalent freedom in the face of partial dissolution is available to any human. Withdrawal might not even be necessary for the corporation to avoid punishment, however, because of another property shared by only a few citizens: economic importance. For corporations that command capital, employment, and resources that represent a significant economic force within a country or region, the political threat of withdrawal may also suffice to significantly temper punishment. The same threat can be used, with foresight, to facilitate political lobbying which alters the laws that might otherwise have been broken. For any Hobbesian actor, political strong-arming for advantage would certainly be action worth considering.

Lobbying activity suggests a second concern: the possibility of corporations engaging in legal but nonetheless non-sustainable activity. Multinational corporations may, for example, press the advantages of multinational production too far. National differences in standards and wages are among their greatest advantages: corporations can yield maximum

advantage by exploiting the lax environmental standards of one government and the low wages of another. But such activity can take significant tolls on nations and on the environment.[11]

The advantages that accrue to multinational choice can also shade toward illegality in the area of taxation. Corporations may trade among their arms in a fashion that the OECD refers to as 'at less than arm's length.'[12] A transaction between two economic agents is at arm's length if prices or exchanges for products are set at full fair-market value. The arms of a multinational may trade at less than arm's length, however, allowing the company to conceal portions of the real value of supplies or of manufactured goods. By this means, a corporation may cloak traditionally taxable gains in value that unfold over various stages of manufacture. Such gains may ultimately be taxed at a different stage of trading, but the business can often declare added value where it is to its own advantage to do so, because taxes are lower in some states. Taxes may also be artificially reduced as a result of special arrangements with specific governments. By pooling taxation, multinationals may concentrate wealth in some favored countries, once again drawing upon other countries in non-sustainable ways.

Multinationals, then, are particularly well situated to gain from disparities in wages and standards across countries and also to realize gains by disregarding arm's length rules for transactions. Gainful activities of these sorts can be destabilizing, but they may nonetheless be entertained by corporate executives, whose job it is to look out for the good of the corporation. A statement by a recent president of Standard Oil (a corporation heretofore known as a producer of oil for use) provides a telling example:

> We're not in the energy business. ... We're in the business of trying to use the assets entrusted to us by our shareholders to give them the best return on the money they've invested in the company.[13]

If executives dedicate their reasoning powers to the service of corporations, a rationally compelling restriction for corporations is not only desirable — it is necessary.

3. Binding corporations

This section suggests how corporations can be rationally bound to assent to government in a social contract. I wish to establish legitimacy for law from the corporation's perspective: legitimacy that is logically prior to law, of the sort that Habermas and Hobbes have sought for natural persons. As a first step, I should establish that corporations are the sorts of things to assent to law and to be so bound, by showing that they merit the status of rational, self-interested agents. The treatment will be rapid, given the purposes of this article, but I shall argue (1) that corporations are rational in the appropriate respect, with the ability to flexibly direct activity toward ends; (2) that they have responsibilities as actors that are distinguishable from those of their owners and executive; and (3) that they have similarly distinguishable interests. Having supported my claim regarding their status, I shall show that obedience to national law is incumbent upon corporations resident within single nations. I shall then argue that multinational corporations have a related but slightly different status that is easily accommodated in a simple extension of the national social contract. That extension takes account of trans-national sustainable practice.

The social contract, as characterized in all of its classic formulations, is struck among persons with agency, interests and reason. We begin with reason. Hobbes' criticism of the fool presupposes that reason allows one to weigh options and to consider the advantages of restraining action in service of interests, so as to further other (greater) interests. I take this ability to deliberate on action to be the kind of reasoning ability suitable to a candidate for the social contract. Immanuel Kant would later refer to this ability as the capacity for practical reason, and he takes it to be a wellspring of duty and of legal obligation.[14] A defense of the claim that corporate entities fully qualify as practical reasoners in a Kantian framework, and so may be bound ethically in a Kantian sense, would extend this paper overmuch, and is presented elsewhere.[15] It seems clear, however, that corporations demonstrate the

capacity for practical reason from a Hobbesian perspective: they use reason readily in service of egoism through the activity of their executive. If it can be established that the corporation, and not just the natural persons who are its executive, is the appropriate sort of thing to be considered an agent, then corporations should be considered to be fully formed practical reasoners for the purpose of the contract.

Hobbes himself presents the first steps to an account of corporate agency in his discussion of persons:

> A person is he *whose words or actions are considered either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction.*
> When they are considered as his own, then he is called a *natural person*; and when they are considered as representing the words and actions of another, then is he a *feigned* or *artificial person*. [XVI.1]

An officer of a corporation feigns the person of a corporation, or "personates" the corporation, in acting on its behalf. Hobbes maintains that those natural persons lawfully in the role of executive may act on behalf of the corporation, and those lawfully in the role of ownership are the authors of its actions. Owners may hand over the authority to act to the executive branch, but are responsible for such action by reason of their legal ownership. Churches, hospitals, and even bridges are examples of "inanimate things" that may be personated by delegated natural persons; and it appears that corporate bodies generally — governments included — ought to be added to Hobbes' list. Actual governments, of course, also make provisions for the treatment of corporations as 'limited' persons before the law, reflecting Hobbes' own concern to establish a system of responsibility as well as one of right for corporate entities.

Hobbes' own concern in his discussion of artificial persons is to indicate that such entities are able to enter into legal contracts. But is it appropriate to treat artificial persons as contractors that can participate in the *original* contract that stands as the basis of justification for law? Evidently not, for Hobbes: the owners of a corporate body ultimately hold responsibility for it, and "things

inanimate cannot be authors." (XVI.9) Consider Hobbes' representation of the status of nations as "artificial men:" a nation certainly could not enter into the original contract that bases the formation of that same nation. A connected concern about participation in the justification at the base of law similarly arises for all legally constituted corporate bodies.

The historical social contract is, however, a fiction; and in this situation, it is a fiction that obscures. The contract is a spurious hypothesis, because rational assent theories are meant to concern our own positions, not those of historical or hypothetical agents. Philosophers have, since Kant, successfully extracted a rational kernel: There really is no reason for linking the ideal of government to its historical generation, if the rational ideal alone is what is to be understood or affirmed. Likewise, as Habermas suggests, the rational basis for adherence to law lies in the *possibility* for establishing rational assent by all relevant agents endowed with self-interest and reason. We, and not mythical contractors, demand a rationale to justify government and law, and to command our continued adherence to their dictates. If this argument is acceptable, then it seems a corporate body abides in a position relevantly similar to that of a natural person. Like natural persons, corporate bodies may demand what Habermas refers to as "legitimacy" for law.

If artificial persons are contractors who can demand legitimacy, then they must be in a position to act, or to withhold action, as well as to reason. They must be agents who bear responsibility for their actions. Are corporate bodies agents? The primary intuition that grounds doubt, I expect, is that corporate bodies have neither consciousness nor will. Our focus, however, lies elsewhere: it concerns the ability to act within a practical legal context, rather than the metaphysical agency traditional to philosophical discussion. Metaphysical agency concerns freedom of the will and its relation to physical determinism, and these topics are rightly linked more intimately to consciousness and will. Legal agency for the purpose of establishing responsibility, by contrast, requires no such consideration; it does not, for example, demand intention. Though the ability to form an intention is treated

as significant before the law for some action, responsibility may also be attributed to conscious persons for actions in which intention plays no part at all, and to non-conscious beings similarly. In keeping with Hobbes' account, I will refer to corporations as actors and as agents; whether the term sits comfortably with intuitions about will is beside the point, since responsibility, rather than metaphysical agency, is the relevant concern.[16]

Two more features appear to be relevant to determining whether or not corporations might be viewed as participants in a social contract: they must be self-interested, and those interests should coincide with government in respects appropriately similar to those of the other actors, the natural persons. The second of these points, given the first, requires little argument: if corporations resident in single nations are self-interested, those interests appear to be served by government in ways similar to the interests of human actors. Indeed, the need for government is paramount for corporations: in the event of a breakdown of government, corporations would be the first to go, since they would retain no resources of law to defend themselves against the self-interested behavior of their executive. Do corporations have interests, then, and are those interests egoistic? I take the egoistic aspect of corporate behavior to be well established by the authority of Friedman and the argument of the previous section. Friedman, however, does not suggest that the source or site of the egoism lies in the corporation itself: to establish as much, I must establish that corporate interests are distinguishable from those of their executive and owners, and that they are, indeed, egoistic.

A reasonable minimal criterion for proper action authored by an executive is that it should be intended to be in the interest of the corporation. In cases such as that presented by the chair of Standard Oil, the expression “in the interest of corporate shareholders” might be applied to such judgments (and the expression “in the interest of stakeholders,” allows us to include less precisely delineated corporate bodies). Those interests are judged with respect to the individuals’ legal connection to the corporation and are not taken as those of natural persons, however. For among shareholders may be other

corporations; and some action on behalf of shareholders as persons that is not in the corporation's interest would be considered to be inappropriate. This point concerning the separability of a corporation's interests from those of its stakeholders can be generalized. Peter French has argued for the distinct identity of corporations by noting that they have structure, unlike mere aggregates of people such as mobs.[17] Corporations have structures recognized in law, such that some stakeholders can legally press their interests against those of other stakeholders. If a corporation is structured to allow for this possibility, it is not evident that the interests of the corporation can be identified with those of any particular stakeholder, or any set of stakeholders. For example, an executive that acts with the intention to satisfy the interests of even a great stakeholder majority at the expense of minority stakeholders may be found culpable in law.[18]

Once again, discomforting intuitions about interests may arise, and again they ought to be put aside, if the relevant application of the term is distinguished from its metaphysical use. The difference is made clear if interests are contrasted with goals and intentions. Practical reason, in humans, serves to point interests toward goals, and the intentions of the owners and executive indicate goals that are relevant, and that might be identified as the goals of a corporation. But duplicating their goals and re-dubbing those the goals of the corporation is pointless — pointless because there is no distinct metaphysical agent that re-points (intends) those goals. This difference is underscored by the fact that in law, the corporation is routinely held liable for action, and the executive is held liable for intent. By contrast, corporations can rightly be said to have interests, rather than goals. Though a corporation is an actor, no metaphysical agent entertains goals on its behalf; yet the corporation plainly has genuine interests distinguishable from those of its owners and executive, since the corporation's interests may diverge from theirs. A distinction is similarly evident with respect to responsibility: shareholders (owners) are not held liable as persons for the actions of a corporation.

I have argued that corporations may qualify as rationally self-interested

actors for the purposes of the social contract. I now proceed to the case for rationally binding multinational entities. I have argued that corporations resident in single nations are bound to the national contract. One might expect that multinational corporations would have similar status in each of the nations within which they reside. But we have seen, in section two, that this is not so: multinational corporations with many arms may survive the loss of individual arms in some nations, and we should anticipate that their practical reason might entertain calculated losses that undermine the social contracts of some of their nations. With this extra freedom comes attendant responsibility, however, since the purview of multinational entities also transcends the boundaries of individual nations. Social contract theory makes it incumbent on multinational entities to apply reason trans-nationally if possible, and so, multinational actors are rationally bound to consider the opportunities available for forming trans-national social contracts.

Multinational entities are, as a consequence, in an unusual position. They stand beyond the level of national government; so how may standards be established for their conduct that are in accord with reason? The problem is particularly acute where the standards of different nations, to which the corporations might comply, come into conflict: some standards may be stricter than others, and some may straightforwardly contradict others. A thorough treatment of the standards to which a multinational corporation must cohere would require an extended discussion by itself. I hope to show below that such a discussion may be developed through legal theory joined to a history of case law, and so may more properly be considered in a different forum than this journal. But we may, at least, point out some general principles. One overarching rule grounds my amendment to the OECD guideline in the introduction to this article, and can be put quite briefly: practical reason requires that a multinational corporation must act according to standards that promote global sustainability of government, labor conditions, and resources.

The defense of such a sustainability requirement recapitulates Hobbes' arguments at the international level. Were a multinational to flout sustainable

activity in any nation, its action would tend to destabilize the governments of all nations, promoting an outcome that cannot be in any corporation's interest, nor in the interest of any corporate owner or stakeholder. A short-term and localized strategy of non-sustainable but highly profitable exploitation might appear, at first glance, to be in the interest of a multinational corporation, since the corporation could withdraw from the local area after engaging in ruinous behavior. Such a strategy, however, cannot be universalized; it may work for any one company, but were other corporations to engage in similar behavior, widespread collapse would follow. The opportunistic strategy, then, reflects that of the fool who neglects to consider the similarity of his position to the positions of others. In short order, the fool would find himself in a society that has lost the ability to draw contracts; similarly, the multinational corporation would face the prospect of other multinational corporations destabilizing the governments of every nation. And so, reason suggests, such activity would promote the corporation's own dissolution.

A helpful characterization of sustainable corporate activity may be gleaned from Joe DesJardins' recent contribution to this journal, "Corporate Environmental Responsibility."[19] DesJardins considers effective policies for egoistic and rational corporate agents. Because of his focus upon sustainability, corporate interests are considered for the long-range view. DesJardins is not a social contract theorist, however: corporations are obliged to comply with a "moral minimum" of standards, grounded in non-egoistic ethical intuitions, rather than in egoistic practical reason. DesJardins' account appears to be based in constraints, and from an ethical frame independent of the perspective of corporations.[20]

DesJardins begins from a characterization of the World Commission on Environment and Development: sustainable development "meets the needs of the present without compromising the ability of future generations to meet their own needs." This formulation does not quite match practical reasoning from the corporate perspective. DesJardins' modification, however, comes closer to our ideal:

> A helpful image for understanding these responsibilities is to think of natural resources as capital. Our economic goal should be maximum sustainable yield in which we live off of the income generated by that capital without depleting the investment itself. (832)

Thus, those who deplete non-renewable resources are obliged to fund work in development of alternative sources: "non-renewable resources can be used only at the rate at which alternatives are developed or loss of opportunities compensated." (833) "In summary," DesJardins writes, "industries ought to be modeled on ecosystems."

DesJardins' mention of stable ecosystems provides a useful normative model for resource sustainability that may be extended to all areas of the business environment. I will suggest an amended alternative that generalizes, and takes better account of DesJardins' mention of non-renewable resources. Sustainability may be taken to ordinarily demand either stability or growth for all of the economic resources necessary for running a business, including the treatment of workers and the treatment of the laws of national governments. Further flexibility might be desirable in a context of innovation, however. A corporation might be in a position to show that non-stable activity can nonetheless be sustained by, for example, ongoing technology implementation, or retraining of workers. So, I suggest a normative stability model: sustainability and stability should be normatively linked in the absence of explicit demonstration that sustainability does not require stability. This model has the advantage of producing an effective counter to extended, non-sustainable exploitation of resources without requiring an inflexible, prior delineation of conditions for sustainable use. If the burden rests with the corporation to show that destabilizing activity can nonetheless be sustained, then a useful starting position for legal treatment of global sustainability is available.

4. Multinational law: jurisdiction and enforcement

General conceptions of sustainability and stability are helpful beginning points from which to develop a multinational social contract. How could such a contract be articulated, however; and how could it be enforced? The United

Nations and the World Court have had some success at promoting universal legislation and rulings, but subscription to their decisions will inevitably remain a weak point in a world of independent governments. Though nations and their citizens have, at times, ignored trans-national judgments on their behavior, an isolationist strategy should be much less effective for entities with arms in many nations. The problem of enforcement in the absence of a sufficient trans-national police force — in the absence of a trans-national sovereign and sword — remains a significant barrier, however. Though trans-national juridical and enforcement bodies are conceivable solutions to the problem of order, the *multi*nationality of corporations suggests another solution that is available at the national level. I will argue that practical rationality allows that a proper jurisdiction lies within *each* of a multinational's resident nations for enacting judgment and enforcement on action in *every* nation within which it resides.

How would multinational law be articulated in the absence of a trans-national legislative body? It could begin from philosophical principles, but would develop as case law, through judgments. The legal theorist's role would be to debate the rational appropriateness of principles from the multinational perspective. If general guidelines, such as the ecological and the normative stability models mentioned above, are articulated and found to be acceptable, then multinational law could develop through challenges to corporations beginning from the guidelines. The law would take the form of a changeable body of precedents arising out of the guidelines (which might be accepted by subscription, or may also be open to consideration in the courtroom). By its essence, multinational law would be concerned with the multinational perspective: with political and environmental sustainability over the entire set of nations in which a multinational entity is involved at the time of an action under consideration for legal sanction. Advocates for opposing parties would, then, argue the merits and failings of a particular business practice with respect to that perspective.

Concerning legal jurisdiction, I can find no reason in the case of a multinational concern (as opposed to a universal or international concern) to

privilege international court over courts within any nation in which an arm of the multinational resides.[21] Placing cases at the national level would also provide advantages for enforcement that will be noted below. A multinational violation — a breach of sustainable activity within a collection of nations — impinges upon the group, and so might be dealt with by the group, in an international court (or, better, a universal court). But the violation also impinges upon nations as members of the ecological unit, and upon individual citizens of those nations as members of the nations. It would appear reasonable that charges may be leveled from any or all of these levels. A governmental or non-governmental organization, a corporation or even a private citizen, then, might indict a multinational corporation in national civil court for inappropriate action carried out in another nation. The defendant for such an indictment would be an arm of the multinational entity, the artificial person that resides within the organization's or citizen's own country.

How could such trans-national social contracts and standards be enforced? Note that Hobbes has provided for protection against fools and irrationality in civil society: the sword of the common power holds them to their contract by terror when reason fails them, and if terror fails them also, the sword is finally used to excise them from civil society. Similarly, one should not expect that corporations would at all turns be successfully ruled by reason. If the multinational contract is realized, the threat and the use of the sword should be made available as it is within the nation. But how do we restrain the behavior of multinational entities if no trans-national body has direct access to “a common power, to keep them in awe”? (XVII.13)

Trans-national government with an effective police force would certainly serve as one effective method, but such an enforcement solution, which is not presently available, is not actually required for a contractarian solution. The problem of enforcement can be solved much as the problem of jurisdiction was solved, by exploiting the multinationality of such corporations. If national enforcement can be realized, then trans-national standards of conduct may never require enforcement above the level of independent nations. Given that

a lack of enforcement could damage government, it is in the interest of nations and of members of nations to enforce such laws at the national level.

I suggest that reason demands jurisdiction and the possibility of enforcement within every nation of residence of a multinational entity. The national solution reflects a simple argument that citizens and nations may justly place before abusive multinationals: “Practice global sustainability or suffer sanctions within my country, for your unreasonable activity in other nations ultimately serves to destabilize my own.” But note that this national solution can only apply to multinational non-governmental corporate entities. It does not sanction attacks pressed by a nation or a citizen against governmental action within a distinct, sovereign nation's borders. It also does not sanction penalization or direct seizure of the assets of a multinational that belong to arms that lie outside of the country in which prosecution occurs. Successful prosecution within one nation concerning a multinational corporation's behavior elsewhere might often be perceived as implicit criticism of one government’s policies by another. Judgment is found only against the multinational corporation, however, and does not provide for seizure of assets within that other country. Such a solution has the advantage of allowing collusion between enterprises and corrupt or inept governments to be judged outside of the jurisdiction of the courts of those governments. Of course, those advantages also come with attendant disadvantages in a political world.

5. The multinational business perspective

Multinational corporations are artificial products much like states: as Hobbes might say, they are designed by people “to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly..." (XVII.13) The OECD is also an artificial product, a consortium entity built by national governments. Its perspective is a product of those of its member nations, and we should not expect corporations to manifest the same priorities, because they maintain a different perspective. Nor should we expect them to conform to those priorities without

justification.

The OECD recommendation to multinationals that is quoted at the beginning of this article suffered from a lack of justification that I have attempted to repair. Other recommendations in the document appear to reflect a distorted view, from the multinational perspective. Though one of the primary declarations of the document is that "foreign-controlled enterprises" be treated "no less favorably than ... domestic enterprises," (p. 6) the OECD appears to promote discrimination in favor of smaller or locally based corporations further on. That appears to be the intent of the following recommendation:

> [Multinational] Enterprises should, while conforming to official competition rules and established policies of the countries within which they operate: 1. Refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example ...Predatory behavior toward competitors... [Annex I, "Competition," p. 11]

There appears to be no graspable content to "abusing a dominant position" while nonetheless remaining within the bounds of "official competition rules and established policies" in a world of markets. It is not clear, then, that the OECD has recommended anything but an arbitrary curb to competition. If "predatory behavior" in the final phrase refers to, e.g., pricing a product below possible profitability for a short period in order to drive out competitors with small reserves, then such predation is ordinarily outlawed at the national level. There should be no need for the OECD recommendation, which is not law, and so does not serve the necessary role of providing legal protection where it is due to smaller corporations. If predatory behavior is taken to be efforts to maximize market share by effective marketing and exploiting increases in efficiency by scale, then the OECD is suggesting that multinational enterprises should not exercise customary corporate behavior against competing enterprises. The latter amounts to an asymmetry favoring the (single nation) enterprises to which the OECD document is not addressed. This is certainly a request that demands a rational basis, if we wish to appeal to all enterprise via

rational assent.

If, as I suggest, corporations are egoistic actors with practical reason, then the OECD faces a Hobbesian adversary. In that case, the OECD does not present a strong suit in making recommendations at all, since the recommendations do not have the force of the sword behind them. Effort would be better spent minding the sword, and seeking to articulate possible solutions tied to law against the destabilizing or unjust tendencies that multinationals might promote. I have attempted in this paper to provide a framework within which solutions may be developed.

For-profit enterprises are not national in character, and are not the sorts of things to be national: indeed, we may see (we may even hope to see) them become truly global in nature, breaking free of 'home nations' entirely. Their perspective is genuinely orthogonal to nationality, and so, they will conflict with nations at many turns if not accommodated and policed in their actions to an extent commensurate with their abilities. If we choose to include enterprise among our institutions, then our nations should also be constructed so as to respect that orthogonal perspective, and recognize the practical autonomy of this similar human product. The practical reason of corporations demands that they act according to principles of sustainability, however. As a consequence, and because they are evidently dependent upon law for their existence, corporations might be governed by nations in a just manner, if suitable means of legislation and enforcement are made available.

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[1]Organization for Economic Cooperation and Development. *Declaration by the Governments of OECD Member Countries on International Investment and Multinational Enterprises.* OECD Working Papers v.5, #20. (Paris: OECD, 1997), Annex I, 7, p. 9.

[2] John Locke. *Two Treatises on Government.* Peter Laslett, ed. (Cambridge, UK: Cambridge, 1988). Immanuel Kant. *Practical Philosophy.* Mary J. Gregor, ed. (Cambridge, UK: Cambridge, 1999). For discussion of the place of these theories in national constitutions, see Philip Kurland and Ralph Lerner, eds. *The Founders' Constitution.* (Chicago: University of Chicago Press, 1987). See also Eric Palmer, "Social Contracts and Multinational Corporations," *Knowledge Tools for a Sustainable Civilization*. (Toronto: IEEE, 1996), p. 176.

[3] For an extended treatment of social contract issues in relation to business, as well as a review of recent work, see Thomas Donaldson and Thomas W. Dunfee. *Ties that Bind*. (Boston: Harvard Business School Press, 1999). Donaldson and Dunfee focus less specifically than I do upon solving the conceptual problem of justification (*cf.* p. 17), and justification in relation to multinational status in particular. The discussion of this article will focus especially upon for-profit enterprise, since the assumption of self-interested action suffuses the Hobbesian framework that will be defended. Some conclusions pertaining to governance that arise toward the end of this article may be applicable to other multinational entities such as charities and other non-governmental organizations. A different framework of analysis, however, would be required to bind other sorts of multinational actors. A contractarian analysis utilizing different assumptions for these different sorts of organizations might, nonetheless, remain available: see footnote 15.

[4] Hugo Grotius. *The Rights of War and Peace.* A. C. Campbell, trans. (Washington, M. Arthur Dunne, 1901). Kant, "Toward Perpetual Peace," in Kant, *op. cit.* The term 'trans-national' is used here to indicate universal relations that apply either across all nations of the globe, or to all nations of direct relevance to the operation of a multinational entity. 'International' is used to indicate relations among specific independent national *governments*. For example, the OECD is constituted by international agreement among governments of member nations, whereas human rights are held by some to be a trans-national relation, and a universal one.

[5]Comparison of *Fortune Magazine*'s 1999 "Global 500" Gross Corporate Revenues to 1998 Gross Domestic Products as listed by World Bank. A comparison with GNP produces similar results: corporations rank thirteen of the top fifty, and forty-seven of the top one hundred. *Fortune*

Magazine: Global 500, http://www.fortune.com/fortune/global500. World Bank: World Development Indicators 2000, http://www.worldbank.org/data/databytopic/GDP.pdf, http://www.worldbank.org/data/databytopic/GNP.pdf, June 12 2000.

[6]For a case study, see Manuel Velasquez, "International Business Ethics: The aluminum companies in Jamaica," *Business Ethics Quarterly* 5, 1995, pp. 865-70.

[7]Thomas Hobbes. *Leviathan*. (1651). Quotations from *Leviathan* are taken from edition of E. Curley. (Indianapolis: Hackett, 1994). The presentation of this article will focus sharply upon the reasoning leading to the establishment of the natural social contract. Hobbes' argument also involves dimensions of natural law and theology that will be bypassed for the sake of brevity. A less schematic, but nonetheless brief presentation may be found in Edwin Curley's introduction to the above volume.

[8] In contemporary game-theoretic terminology, this case is one of parasitism (in which a rider on the contract gains her benefits and injures others, at no cost to herself), rather than free riding (in which a rider gains the benefit without cost to others or herself, as a free rider does on a less than full subway). See David Gauthier. *Morals By Agreement.* (Oxford: Oxford, 1986). pp. 96-7.

[9]John Rawls. *Political Liberalism.* (Cambridge, MA: Harvard University Press, 1995). Jürgen Habermas. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg. (Cambridge, MA: MIT Press, 1996). Habermas, "Remarks on legitimation through human rights," *The Modern Schoolman* 75 (1998), pp. 87-100; and reprinted in *Philosophy and Social Criticism* 24 (1998), pp. 157-71. See Habermas' accounting of the contractarian legacy in Habermas (1996), pp. 449ff.

[10]Milton Friedman. *Capitalism and Freedom.* (Chicago: University of Chicago, 1962).

[11] Velasquez, *op. cit.*

[12]OECD (1997), "Taxation," 2, p.12.

[13]Quoted in Fritjof Capra. *The Turning Point*. (New York: Simon & Schuster, 1982), p. 228.

[14]Immanuel Kant. *Groundwork of the Metaphysics of Morals*, in Kant, *op. cit*. (Standard edition pagination: IV:400).

[15]Eric Palmer, "Corporate bodies and categorical imperatives," *Proceedings of the Ninth International Kant Congress (2000)*. Forthcoming.

[16]For a detailed introduction to this conception of the agency of things, see Bruno Latour, "On Technical Mediation," *Common Knowledge* 3 #2 (1996), 29-64.

[17]Peter French, "The corporation as a moral person," *American Philosophical Quarterly* 16 (1979), p. 210.

[18]See "Consolidation snubs Shareholders," *St. Petersburg Times*, Sept. 29, 1997. (http://www.times.spb.ru/archive/times/300-301/consolidation.html); Stroh v. Millers Cove Resources Inc. (1995), 55 A.C.W.S. (3d) 87 (Ontario Gen. Div.) (http://www.mccarthy.ca/cc7-corp.html), December 5 1998.

[19] Joe DesJardins, “Corporate Environmental Responsibility,” *Journal of Business Ethics* 17 (1998), pp. 825-838.

[20]For example, DesJardins maintains, "given that human preferences can include those that are both silly and immoral, we cannot assume that the maximum satisfaction of preferences is an ethical goal." (827) DesJardins also offers a conceptual analysis of sustainability that invokes "the values underlying economic markets" in his article. That analysis and the utilitarian and liberal treatments that follow it are not contractarian, however, for they invoke liberal ideals beyond Hobbes' assumptions (835-6) and presuppose "constraints upon managerial prerogative" that appear unjustifiable from practical reason. (834)

[21] See footnote #4 for an explanation of these terms. Placing decisions in national courts seems a conceptually superior strategy to international court, in fact. There appears to be no rationale, from the multinational perspective, for judging multinational entities in the courts of a consortium of nations. By contrast, reason for prosecution at the national level seems quite clear, and should command respect by the multinational: see the final paragraph of section 4 for that reasoning.