A REEXAMINATION OF THE POSITION OF FOREIGN CORPORATIONS UNDER THE PHILIPPINE CORPORATION LAW

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With corporate activities transcending now more than ever the bounds of any particular single state, the promotion or frustration of corporate functions within each state affects vitally its economic interests to a much greater extent. Differences in legal systems often cause strain in their interaction and have, immediately or ultimately, deleterious effects on economic activity. As historical experience has shown, economic progress receives its strongest impetus when accompanied by a responsive, apposite legal framework. Thus the possibilities of legal adjustment and accomodation become highly significant to the country in quest of a more vigorous economic growth.

It is perhaps with a sense of urgency that a developing country faces these legal problems. The significant interplay between the legal problems involved in corporate business activity, whether domestic or international, and the economic needs of the underdeveloped country becomes more apparent when it is borne in mind that the pursuit of economic development entails the encouragement of foreign investments to solve the major problems of shortage of capital and entrepreneurial and managerial resources. Since as a matter of fact the greater proportion of private foreign investments is being carried out by corporate enterprises, the position that country takes as to the extent of its power to exclude foreign corporations from its boundaries, or to straddle with impositions and prohibitions its permission enabling the corporation to transact business within it, or to prohibit or regulate foreign participation in the ownership, management or control of domestic corporations, and the degree of legal security afforded such participation, is consequentially relevant to its economic policies. While the decision to invest in a foreign country may turn no doubt, in many cases, on non-legal factors such as the profit potential and the political climate of that country, nevertheless, given these factors as favorable, legal considerations would likely constitute the decisive elements in determining whether an investment is to be made. An inquiry into the appropriateness of principles applicable to and the modes of treatment of the business corporation is thus important not only from

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the point of view of the underdeveloped country but from the foreign investor's as well.

It is to such inquiry that this paper addresses itself, taking as its focus the legal situation in the Philippines. It is believed that a re-examination of Philippine private law dealing with the foreign business corporation, is appropriate and timely. Ever since its independence, the Philippines has viewed as one of its paramount objectives the acceleration of its own economic development. To that end, the Government has invariably been predisposed to the attraction of foreign investment. Since the corporate mechanism is likely to assume a major part in the industrialization of the Philippines, as in the United States and other western countries, the adoption of modern corporate laws is one step towards the achievement of this national objective.

This article does not undertake the formidable task of covering all phases of the legal set-up that bear on a country's economic development or its conditions for foreign investment, but will delve only into certain aspects of the provisions of the law on private corporations. The jurisprudence belonging to the category of protective labor measures, foreign exchange controls, tax laws, and so forth, are not within its scope, although it is recognized that these legal aspects may often prove to be more effective barriers to international commercial activity. They have been, however, the subject of recent, voluminous writings; on the other hand, it is believed that the proper relation of the private law on business organization to the needs for economic development has been for the most part overlooked.

What shall be mainly inquired into are the provisions of the Philippine law on foreign corporations. The problems considered are those concerning recognition of foreign corporations because it involves an inquiry into the bases and extent of the power of a state to exclude a foreign business corporation from doing acts within its territory, or to impose conditions on its admission, and because it affects primary rights such as the right to sue or be sued; the personal law of foreign corporations, which determines, *inter alia,* the extent of their powers and capacities, and their internal jural relationships; and the transaction of business in the Philippines, which substantially moves the corporation into the main stream of the business life of the country.

I. LEGAL RECOGNITION OF FOREIGN BUSINESS CORPORATIONS

The performance of acts by a corporation beyond the territorial limits of the state of incorporation may be circumscribed by two factors: The first of these concerns the question of whether the corporation has authority to act outside the state of incorporation, according to the

laws of such state. The answer to this question is easily determined and poses no formidable obstacle. General corporation laws usually provide that corporations formed thereunder may carry on activities both within and without the territorial limits of the state's jurisdiction. It is also common to let the articles of incorporation contain a similar provision as an added precautionary measure against prohibition to assume by implication such authority.[1]

The second and more difficult question relates to the legal reception accorded the corporation in a state other than the state of incorporation, the so-called problem of recognition, which is enwreathed with legal theories revolving around the conceptions of corporateness and the territoriality of sovereignty. It is these legal theories which are responsible for much of the difficulty attending the problem of recognition of foreign corporate entities. It is partly the thesis of this paper to minimize the importance of these theories; their consideration in any discussion of the problem of recognition is necessary only because of their influence on the subsequent development of the jurisprudence on this subject.

On the nature of corporate personality,[2] the predominant theories were the fiction and the real theories.[3] According to the fiction theory, a legal person is nothing but a fictitious creature of the law created for certain purposes, in the carrying out of which the law ascribes to the fictitious being some rights and duties; it, therefore, has no real existence, but exists only in contemplation of law. The real theory, on the other hand maintains that an association or group purposely formed for the achievement of common ends has a personality which is real, manifested in the group-will and entitled to recognition as much as the personality of a human being. The state by incorporating the association or group merely recognizes the existence of this personality. It distinguishes between the corporation's existence as a legal person which is real, and its capacity to be the subject of rights and duties. It cannot enter into legal relations unless given authority by law, but neither can human beings.

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[1] STEVENS, PRIVATE CORPORATIONS 817 (1936).

[2] For discussions on the development of the theories of corporate personality see Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655 (1926); Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 347 (1911); STEVENS, *op. cit. supra* note 1, Ch. 1; Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); FREUND, THE LEGAL NATURE OF CORPORATIONS (1937). See also Maitland, *Introduction to* GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (1927).

[3] A third theory, "the non-entity theory," is mentioned by Foley. According to this theory, "only human beings can have rights and duties, and where an association is incorporated, rights and duties are in the human beings who are its members, although as a matter of convenience, they are spoken of as being in the incorporated entity." This theory did not receive much judicial sympathy and rests on "the misconception that only human beings can have legal rights and duties." *Incorporation, Multiple Incorporation and the Conflict of Laws*, 42 HARV. L. REV. 516, 517-519 (1929).

From these legal theories evolved two contending schools of thought on the treatment of foreign juristic persons: The *restrictive* and the *liberal* theories[4] or as Rabel would rather call them, the *territorial* and the *extraterritorial or international* effect of incorporation.[5] The territorial theory, which came first in point of time, is prominent in its invidious treatment of foreign corporations. Inspired by the fiction theory, it holds that not only does a juridical person exist only in contemplation of law, but it exists only in contemplation of the law which created it. In the words of its most eminent proponent, the Belgian jurist Laurent[6]:

> "The legislature alone has power to create juristic persons; its power, however, ceases at the limits of the territory of the nation which has delegated to it legislative power; beyond these limits it exercises no authority; therefore the corporations which have no existence except by its will, do not exist in any place where that will is without force and without effect."[7]

The logical conclusions of the territorial theory were, of course, that the foreign corporation does not have any right to recognition *ipso jure* of its corporate personality, and that a state to whom it does not owe its existence has the absolute power to exclude it and will confer recognition only at its pleasure.

Whatever validity may be attached to its philosophical essence, the theory obviously provided a handy instrument to ward off corporations which, because of its "extraordinary and fearsome" attributes, were looked on as being capable of causing political disturbance by subversion within the state, and economic menace, by competition, to domestic commercial interests.[8] Thus in the United States, the theory reared its head in early American jurisprudence, taking form in the famous dictum of Justice Taney in the case of *Bank of Augusta v. Earle*,[9] having been nurtured, as it were, by the jealous protection of local interests from the incursions of foreign economic forces.[10]

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[4] For an extensive discussion of these two theories see YOUNG, FOREIGN COMPANIES AND OTHER CORPORATIONS 24-64 (1912).

[5] II RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 125 (2d ed. 1960). Rabel's terminology seems to be more accurately descriptive of the theories and will be adopted for purposes of this paper.

[6] Other advocates of this theory were Weiss in France, Mancini and Bianchi in Italy, Taney and Field in the United States.

[7] Cited in YOUNG, *op. cit. supra* note 4 at 24-25.

[8] II RABEL, *op. cit. supra* note 5 at 126.

[9] 13 Pet. S.C. 519 at 588 (1839). According to Justice Taney: "A company can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in the contemplation of the law, and by force of the law, and where that law ceases to operate and is no longer obligatory the company can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty." *Ibid.*

[10] See HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 10-35 (1918).

Nourished, therefore, by such distrust towards corporations and by the proclivity towards local insulation from foreign commercial interests, it became apparent that the doctrine could not survive the coming of industrialization which brought with it emerging new patterns of economic and business conditions. The need for more sources of raw materials and labor with which to feed the growing gargantuan that was capitalism and for markets into which to pour the industrial goods that it spewed forth, encouraged a more vigorous commercial and economic interchange between states. The immensity of such interchange required enormous capital; the corporations stood forth to supply this requirement.

Thus out of the growing "internationalism of business, of trade, of investment" was begotten the extraterritorial or international theory of the treatment of foreign corporations. This theory [11] regards corporations as analagous to natural persons and both "capable of being regarded and entitled to be regarded as legal persons and the subjects of rights in the same manner as natural persons." [12] In its view, corporations created by the competent state do not require any formal recognition of its legal personality in all other states,[13] but is entitled to said recognition as of right.[14]

Whether the *a priori* premises of the international theory are accepted or not, the doctrine finds its strongest merits in its historical integrity [15] and in its consistency with the habits of thought of the present commercial world, which has come to regard the legal entity as the normal business unit rather than the natural individual.[16] In the interest of international trade and investment, proponents of the theory argue, universal recognition as of right is essential.[17]

With the exception of Russia and possibly other Iron Curtain countries, most of the important commercial countries presently approximate the international theory in their treatment of foreign corporations.[18] Noteworthy is Great Britain where foreign corporations enjoy not only civil recognition *ipso jure,* but also freedom to carry on trade or business

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[11] Its proponents are Westlake, Young and Dicey in England, Henderson in the United States, Pillet in France, Bar in Germany, and Foire in Italy.

[12] YOUNG, *op. cit. supra* note 4 at 50; see also Foley, *op. cit. supra* note 3 at 518-519.

[13] II RABEL, *op. cit. supra* note 5 at 128, 140; YOUNG, *op. cit. supra* note 4 at 53.

[14] Note, U. of PA. L. REV. 1135-1138 (1931).

[15] See I POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 634-688 (2d ed. 1911).

[16] "It would be difficult to select any single agency of more universial use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the business corporation." Per Justice Stone in *California v. Tashiro,* 278 U.S. 123; 49 Sup. Ct. 47, 49; 73 L, Ed. 214.

[17] HENDERSON, *op. cit. supra* note 20 at 5, citing BAR, PRIVATE INTERNATIONAL LAW (Gillespie transl.), Sec. 41.

[18] For a survey of the recognition of foreign corporations as reflected in the legislation of different countries see II RABEL, *op. cit. supra* note 5 at 133.

with the minimum of requirements.[19] The United States have gradually shifted from the territorial to the international theories of recognition, although the United States Supreme Court is not yet formally committed to the latter theory,[20] and, indeed, the conceptual notion underlying the territorial theory, like Banquo's ghost, persists in the American Restatement of the Conflict of Laws[21] and in the language of some judicial decisions.[22]

Which theory does Philippine law follow? With the exception of one,[23] Philippine commentators have not stated where the position of the Philippines lies, and curiously, do not in fact discuss at all the problem of corporate recognition in the Philippines and its implications. The answer is somewhat obscured by the uncritical use of language in a decision by the Philippine Supreme Court. As will be seen foreign corporations enjoy in the Philippines rights that proceed from a recognition of their personal status which approximae those advocated by the international theory; judicial dictum, however, exists to caution any hasty adoption of this view.

The question was dealt with in a handful of cases involving the interpretation of sections 68 and 69 of the Philippine Corporation Law.[24] Section 68, in part, provides that no foreign corporation (a corporation formed, organized, or existing under any laws other than those of the Philippines) "shall be permitted to transact business in the Philippines until after it shall have obtained a license for that purpose. . . ." Section 69 in turn prohibits any foreign corporation "to transact business in the Philippines or maintain by itself or assignee any suit for the re-

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[19] WESTLAKE, PRIVATE INTERNATIONAL LAW sec. 306 (7th ed. 1925); YOUNG, *op. cit. supra* note 4 at 175. According to Westlake: "The right of foreign and colonial corporations to carry on business in England, without authority to that effect from parliament or Government, has now passed unquestioned for so long that it may be considered to be established; and it is a very exceptional instance of liberality. The Companies (Consolidation) Act, 1908, requires foreign companies which establish a place of business in the U.K. to file with the registrar the name and address of a person on whom legal process may be served; but with this condition they have all the privileges here of juristic personality." *Ibid.*

[20] Powel, *Changing Law of Foreign Corporations,* 33 POL. SCI. Q. 554-555 (1918). It is contended, however, that "the jural relations now existing between a state (of the United States) and foreign corporations are those advocated by the liberal theory, that is, the recognition as of right of the corporation's civil status, and equally in the exercise, if privileged, of its functional capacity." Note 79 U. of PA. L. REV. 1135-1138 (1931); II RABEL, *op cit supra* note 5 at 127.

[21] Secs. 167, 168.

[22] II RABEL, *op. cit. supra* note 5 at 128.

[23] SALONGA, PRIVATE INTERNATIONAL LAW (2d. 1957); PRIVATE CORPORATIONS (1952). It is said: "In the Philippines, the principle is recognized that every state may impose conditions on the exercise by foreign corporations of activities within its territory. The rational is obvious: the State may exclude foreign business units from operation; if it chooses to admit, it can impose conditions and restrictions." *Id.* at 371-372; PRIVATE CORPORATIONS at 494. As the text of this paper shows, such statement in its broadness rather confounds the concept of recognition, and tends to indicate an untenable adherence to the territorial theory.

[24] Act No. 1459 (1906) as amended.

covery of any debt, claim or demand whatsoever, unless it shall have the license prescribed in the section immediately preceding."

Under these sections there was no doubt that if the foreign corporation transacts business in the Philippines and does not have the license prescribed therefor, the prohibition to maintain an action in court "for the recovery of any debt, claim or demand" applies. The problem it seemed, aside from the question of determining what is or is not "transacting business," pertained only to the right of a foreign corporation which was not engaged in business in the Philippines to bring a suit before a local court. Could such a foreign corporation sue? European jurists and American exponents of the international theory carefully distinguish between what they denominate as the civil capacities (*Rechtsfahigkeit* or *activite juridique*) and the functional capacities (*Zwechthatigkeit* or *activite sociale*) of a corporation.[25] Young has clearly set forth the distinction:

> "They have two sorts of functions to perform. On the one hand they can sue and be sued; contract and own property. These are their civil capacities (*Rechtsfahigkeit*). On the other hand they have their purpose to fulfill; they can educate, heal the sick, insure lives, or mine gold. This we may call their capacity to discharge their functions, or functional capacity (*Zwechthatigkeit*). There is nothing in the nature of a juristic person to prevent it from exercising the former without exercising the latter. A commercial company may sue for a debt in a country without carrying on any business there . . . All reasoning hostile to the status and capacities of foreign juristic persons based upon the fact that they concern social interests and are therefore inseparably connected with the organism of some particular state, ignores this distinction. Their functional capacities may concern the social interests of a particular state, but their civil capacities do not. The mere power to sue and be sued, to contract and own property, bears no special relation to any one social organism rather than to another, and can be exercised in any state without interfering in that state's right to direct its own policy . . . The former alone concern social interests. Suppose that for that reason the juristic person cannot exercise them abroad; none the less can it exercise civil capacity abroad, because the exercise of civil capacity, in other words the performance of single acts in the law, does not necessarily entail the exercise of any functional capacity or involve any social interest."

The earliest Philippine case on the matter seems to be *Dampfschieffs Rhederi Union v. Compania Transatlantica*,[26] involving the collision in port of vessels owned by the litigants. The plaintiff, a foreign corporation, brought an action in court for damages based on negligence. The reported decision does not show whether the capacity of a foreign corporation was directly put in issue, but at any rate, the Supreme Court held that a foreign

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[25] YOUNG, *op. cit. supra* note 4 at 46-47; HENDERSON, *op. cit. supra* note 10 at 42, 183.

[26] 8 Phil. 766 (1907).

corporation which has not established itself in the Philippines, nor has engaged in business there could, without filing its articles of incorporation in the mercantile registry, maintain an action against another for damages.

It was in the case of *Marshall-Wells Co. v. Henry E. Elser & Co., Inc.*,[27] cited in subsequent decisions as the leading case, where the Philippine Supreme Court had the opportunity to deal directly with the question of the personality of a foreign corporation to enforce a contract entered into without a license. The Marshal-Wells Company, an American corporation, sought to recover from a domestic corporation the unpaid balance on a contract of sale of goods. It did not have a license to transact business in the Philippines. The defendant demurred to the complaint on the statutory ground that the plaintiff had no legal capacity to sue before a local court. Finding that the Marshall-Wells Company was not transacting business, the Supreme Court upheld its right to bring the action, stating through Malcolm, J.:

> "Corporations have no legal status beyond the bounds of the sovereignty by which they are created. A state may restrict the right of a corporation to engage in business within its limits, and to sue in its courts. But by virtue of state comity, a corporation created by the laws of one state is usually allowed to transact business in other states and to sue in the courts of the forum.[28] . . . The object of the statute was to subject the foreign corporation doing business in the Philippines to the jurisdiction of its courts. The object of the statute was not to prevent the foreign corporation from performing single acts, but to prevent it from acquiring a domicile for the purposes of business without taking the necessary steps to render it amenable to suit in the local courts. The implication of the law is that it never was the purpose of the legislature to exclude a foreign corporation which happens to obtain an isolated order for business from the Philippines from securing redress in the Philippine courts, and thus, to permit persons to avoid their contracts made with such corporations. The taking of an isolated order is not 'to transact business,' as that term is understood in corporation law."

Thus the rule established under the authority of the foregoing case is that any foreign corporation which is not transacting business in the Philippines may without condition precedent maintain an action on any cause of action, provided, of course, jurisdictional requirements are otherwise met. The limitation on personality to sue arises not from the bare failure to secure a license, but from the doing of business without such license. Here then, on the face of the Corporation Law, we find implicitly drawn the distinction the European and American legal scholars lay so much stress on, between the exercise by the foreign corporation of its civil

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[27] 46 Phil. 70 (1924); *cf. Spreckles v. Ward*, 12 Phil. 414 (1909).

[28] Citing the cases of *Paul v. Virginia*, 8 Wall. 168 (1869); *Sioux Remedy Co v. Cope*, 235 U.S. 197 (1914); *Cyclone Mining Co. v. Baker Light & Power Co.*, 165 Fed. 996 (1908).

capacity, i.e., the performance of single acts in law, and the exercise of its functional capacity, i.e., the transacting of business, or carrying on of activities in fulfillment of the purposes for which it was organized. That this legal analysis of the capacities of a corporation was in the mind of the Supreme Court when it was deciding the Marshall—Wells Company case is, however, open to question; and it seems that the Court did not accept the more important assertion made by the proponents of such analysis. It may be pointed out that what had more practical significance in private international law was not so much their distinction between civil and functional capacities of corporations, important though as they are, as was their conclusion that a corporation in international law may demand the recognition of their civil capacity, especially the right to sue, as of right, in the courts of every other sovereign,[29] and that, although subject to the state's control and regulation as to its functional capacity, nevertheless, once privileged within the state, the corporation may expect a measure of equality in its exercise.[30] That the Supreme Court was not willing to go this far is apparent in the dictum appearing in the extract of the decision quoted above, looking at the recognition of foreign corporations and its being able to carry on business within the Philippines as a matter merely of comity.

The maintenance by a corporation of a suit before the courts of a foreign state, without the need of fulfilling any statutory requirement, is not a new principle in law. In Great Britain, the Dutch West India Company had been allowed to bring suit in its corporate character as early as 1729.[31] In the United States, even before the case of *Bank of Augusta v. Earle*,[32] it was practically settled law that a foreign corporation may bring suit,[33] although it was later when the decisions began to distinguish between performing single acts and doing business.[34] The Court, therefore, in *Marshal-Wells Company v. Henry E. Elser & Co.* did not strike out a new judicial path in private international law by laying down or even considering the distinction between corporate civil and functional capacities, which it may well have done. Instead it adhered to an untenable legal theory.

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29 HENDERSON, *op. cit. supra* note 10 at 183; YOUNG, *op. cit. supra* note 4 at 47.

30 HENDERSON, *op. cit. supra* note 10 at 6.

31 *Dutch West India Company v. Henriques*, 2 Ld. Raym., 1532, cited in YOUNG, *op. cit. supra* note 14 at 170-171.

32 *Supra* note 9.

33 See *Bank of United States v. Deveaux*, 5 Cranch 61 (1809); *Society for the Propagation of the Gospel v. Wheeler* (1814) 2 Gall. 104; *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464 (1923); *Portsmouth Livery Co. v. Watson*, 10 Mass. 91 (1813); *Silver Lake Bank v. North*, 4 John. Ch. 370 (1920); *Lombard Bank v. Thorp*, 6 Cow. 46 (1826); *Lucas v. Bank of Georgia*, 2 Stewart (Ala.), 147; *Bank of Marietta v. Pindall*, 5 Conn. 560 (1925); *Bushel v. Commonwealth Insurance Co.*, 15 S. & R. 173 (1827).

34 *Frawley v. Pennsylvania Casualty Co.*, 124 F. R. 259 (1903); *Cooper Manufacturing Co. v. Ferguson*, 113 U.S. 727, 28 L. ed. 1137, 5 Sup. Ct. 739.

The Court's interpretation of section 69 of the Corporation Law is, of course, correct. It is submitted, however, that the premise on which the Court sought to base its ruling—that "corporations have no legal status beyond the bounds of the soverignty by which they are created," and it may act within the territory of the foreign state and sue in its courts only by virtue of comity—is tenuous, and represents nothing but the empty shell of a doctrinal concept—that of the territorial or restrictive theory—which has been implicitly, if not expressly, discarded by the jurisdiction whence it came, and, practically, elsewhere.[35]

The dictum in *Paul v. Virginia*,[36] on which the Philippine Supreme Court primarily relied, to the effect that a legal person, being a mere creature of the local law, can have no existence beyond the limits of the sovereignty which created it, repeats Justice Taney's concept of the territorial existence of a corporation enunciated previously in the case of *Bank of Augusta v. Earle*.[37] This legal theory advanced by both cases has been shown to be founded on a theoretical misconception of the nature of a corporation,[38] arising from the assumption—repudiated by modern jurisprudence—that only persons can be the subject of rights and duties. The overplay of the artificiality of corporate personality, that is the corporation's fitness to be the subject of rights, has unduly resulted in minimizing the rights or interests of the individual members themselves of the corporation. Unwonted emphasis is on corporate personality less as an expedient legal device which it is, and more as a philosophical conception which it is not.

> "When we speak of a corporation being the subject of rights, we mean that it has the capacity to enter into legal relations—to make contracts, own property, bring suits . . . To protect group interests as well as the interests of outsiders more adequately, and with less waste of legal effort, the corporate device has been contrived, by which the 'rights' and 'duties' of the members of the group with respect to a given transaction are replaced by a single set of rights and a single set of duties . . . It was only because our habits of thought had accustomed us to consider persons as the only subjects of rights and duties that the corporation has been termed a legal person. Its legal personality is entirely a creature of the law. So indeed is all legal personality even of human beings. If we wish to confine the term 'corporation' to this purely legal creation, the legal personality, we cannot quarrel with Marshall's famous definition.[39] It is . . . no more fictitious than any other legal concept, a right, a contract, a title . . . The vice in Marshall's theory of corporation law

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[35] II RABEL, *op. cit. supra* note 5 at 127.
[36] *Supra* note 27a.
[37] See note 9.
[38] See YOUNG, *op. cit. supra* note 4 at 53-54; also Foley, *supra* note 3 at 519.
[39] "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." Chief Justice Marshall, in *Trustees of Darmouth College v. Woodward*, 4 Wheat. 518, 636 (1819).

> lay rather in its tendency to overlook the fact that this invisible, law-created entity is devised for the purpose of protecting the interests of a very tangible and 'real' group of men, with tangible common property and common interests. It is generally the fact of primary importance; the legal entity is no more than a means to an end . . ."[40]

Thus based on a faulty conception of juridical personality, the dicta in the leading cases of *Bank of Augusta v. Earle* and *Paul v. Virginia,* serving, as it were, as the "original fountain head" of the law of foreign corporations in the United States (the Philippine courts have not escaped the reach of their influence, either), were to result in an unrealistic approach to the law of foreign corporations and, consequently, in the resort to cumbersome and inadequate judicial makeshift constructions (the comity and agents theories, among them) as increasing economic and commercial activity called for a different accomodation of foreign business corporations. It was particularly with respect to jurisdiction of courts over foreign corporations and the power to exclude foreign corporations, that these dicta were to pose serious difficulties.[41] Henderson in 1918, in an incisive, perceptive analysis of court cases, tracing the development of American decisional law on foreign corporations, clearly showed the mischief wreaked in those areas of law by the Taney theory on corporate non-existence outside the territorial limits of the state of origin. Said he:

> "The developments which I have traced have come rather in the form of exceptions, of exceptions, of presumptions of fact, of fictions, of illogical deductions from the assumed principles. The result is a theoretical system which is inharmonious and unsymmetrical. The proper function of a juristic theory is to make for certainty and forseeability of judicial decision, for simplicity and harmony of legal technique. A legal theory approaches perfection according as it achieves these results and yet steers as close as may be to the dominant conceptions of policy and public interest. It can hardly be claimed that the traditional American theory of foreign corporations has fulfilled this function. It has not made for certainty; few branches of the law affect such large interests, yet it would be difficult to find one in which the decisions of the Supreme Court have

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[40] HENDERSON, THE POSISTION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 165-168); (1918); *cf.* STEVENS, PRIVATE CORPORATIONS 15-16 (1946): "Corporate personality is the result of the changes in substantive and procedural law which made it possible for the shareholders to act, to contract, to take property, to sue and be sued, to recover and to respond in damages, as if they were one person. The sum total of these privileges and of the rights and obligations of of group constitutes the corporate personality of the several members. This view leads to the conclusion expressed by Justice Bijur that 'a corporation is more nearly a method than a thing, and that the law in dealing with a corporation has no need of defining it as a person or an entity, or even as an embodiment of functions, rights and duties, but may treat it as a name for a useful and usual collection of jural relations, each one of which must in every instance be ascertained, analyzed and assigned to its appropriate place according to the circumstances of the particular case, having due regard to the purposes to be achieved.'"

[41] Some of these aspects are herein discussed. *Infra,* pp. 52-53, 55-64.

> been so hard to forecast, and in which so many of the most fundamental questions are as yet unsettled. It has not made for justice; for as applied to modern industrial conditions, it runs contrary to the whole spirit of our constitutional system by permitting, at least in theory, discrimination, retaliation, and commercial warfare between the states." [42]

This criticism if valid applies as well wherever the theoretical system at which it is directed appears in the Philippine legal framework on foreign corporations, statutory or constitutional.[43] The anomaly of carrying over to the Philippines the same theoretical misconceptions and shortcomings of the law of foreign corporations of the United States is obvious. The absurdity, furthermore, seems aggravated by the present, implicit rejection (American decisions have reached this stage of development at the time the case of Marshal-Wells Company was decided) by American courts of the territorial or restrictive theory,[44] notwithstanding the retention fo its derivative forms in the American Restatement of the Conflict of Laws, and its occasional recrudescence in some American decisions, as mentioned heretofore.[45] Also, such auxiliary devices as the theory of comity (whatever the term may mean), used by American courts to prop up the collapsing territorial theory, have been given short shrift by able legal scholars.[46] And, indeed, it is said that the law on foreign corporations of the United States now establishes corporate legal relationships advocated by the international theory, that is, the recognition as of right of the corporation's civil status, and equality in the exercise, if permitted of its functional capacity.[47]

Reiteration in Philippine judicial language of the "restrictive theory's archaic metaphysics" has no justification whatever, and serves only to obstruct the consistent development and clear understanding of the law.[48] Apart from the standpoint of law purely as jurisprudence, the pragmatic function of law will be better subserved by pruning away the deadwood of the legal system which is being emulated. A corporation is nothing more than a device or means juridically contrived to secure legal, empirical ends. Hence, the efforts to determine the proper legal relation of the corpora-

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[42] HENDERSON, *op. cit., supra,* note 40 at 164-165.

[43] The Philippine Constitution contains "due process" and "equal protection" clauses substantially similar to these embodied under the Fourteenth Amendment of the U. S. Constitution. See sec. 1(1), Art. III, Philippine Constitution.

[44] HENDERSON, *op. cit., supra,* note 40 at 100, 111. For an analysis of cases showing the adoption in the United States of the international theory, see Note, *The Adoption of the Liberal Theory of Foreign Corporations: II The Functional Capacity of a Foreign Corporation,* 79 U. of PA. L. REV. 1135-1138.

[45] *Supra,* notes 21, 22.

[46] YOUNG, *op. cit., supra,* note 4 at 37-39, 48; HENDERSON, *op. cit., supra,* note 40 at 36-49.

[47] Note, 79 U. of PA. L. REV. 1137. See II RABEL, *op. cit., supra,* note 5 at 127; STEVENS, *op. cit., supra,* note 40 at 26.

[48] It has been said that legal fictions are "scaffolding,—useful, almost necessary, in construction,—but after the building is erected, serving only to obscure it." GRAY, THE NATURE AND SOURCES OF THE LAW 34.

tion to a foreign state must be pragmatically oriented. In the Philippines, as elsewhere, expediency, not generalizations *in abstracto,* is the real jural standard. Such objectionable legal theories have no place particularly in a country which, by reason of its efforts to attract foreign capital, must perforce adopt a more cosmopolitan attitude towards foreign business corporations.

It would perhaps make for more clear and consistent formulation and application of the rules on recognition of foreign business corporations if the legal distinction between civil recognition and permission to transact business within the state were carried more often. Unfortunately, the distinction is often blurred by the indiscriminate use of judicial language. This confusion between the two concepts is obvious in the dictum in *Marshal-Wells Co. v. Elser,*[49] a case involving civil recognition only. Civil recognition does not include governmental consent to engage in business within the country. The imposition of several restrictions on business activities would, of course, detract from recognition much of its practical value. However, recognition involves legal personality only [50] which is nothing other than the fitness to be the subject of rights.[51] "When the question is posed as to whether an artificial person, constituted in one country, must be recognized in another, one is asking simply if such person will be considered in the other country as a subject of law, and not whether it will be able to extend its activity to that country." [52]

This distinction seems to have much merit. When a foreign business corporation carries out the purposes for which it had been created, engages in commercial or business activities within the state, exercises its functional capacity so to speak, it enters into the main stream of the State's economic life, and comes directly in competition with local business interests. For that reason the doing of business may be prohibited or regulated by the state. But the same underlying considerations of policy do not necessarily apply to the mere performance of certain legal acts which fall into the category of civil capacity. Especially so does this seem in the case of the right to institute legal proceedings which by its very nature [53]

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[49] *Supra,* note 27. Note that in the first sentence of the quoted extract of the decision (*supra* p. 11), the Court reiterates Justice Taney's geographical concept of corporate existence, but in the succeeding sentences speaks of transacting business within the state and, in addition, apparently puts on the same level with the latter the corporation's capacity to sue.

[50] II RABEL, *op. cit., supra,* note 5 at 133.

[51] YOUNG, *op. cit., supra,* note 4 at 171.

[52] PILLET, *op. cit., supra,* note 25, sec. 16.

[53] "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens." *Chambers v. Baltimore and Ohio R.R.,* 207 U.S. 142, 148 (1907).

stands apart from the other incidents or consequences of civil recognition.[54] As has been said the right is one with respect to which no reasonable classification can be made between natural persons and corporations, except as to matters of procedure and security.[55] There is much weight to the argument, therefore, that the right to sue should be available to the foreign corporation as much as to the foreign individual [56] and cannot be abridged with respect to the former merely because of the fact of its being a corporation, but the general rules of international law should apply with equal force to the one case as to the other.

Included in the recognition of a corporation's personal status, if the classification made by the adherents of the theory giving international effect to incorporation were to be followed, is the doing of all acts short of the transacting of business, such as the execution of "casual" contracts or the performance of "isolated" acts. Inasmuch as the Philippine Corporation Law purports to regulate the transacting of business only, it is unnecessary to consider the exact area entailed in the "doing of all acts short of the transacting of business." The capacity to enter into contracts and to own property may, however, be mentioned, in addition to the right to sue, as the most frequently cited incidents of personal status. The problem of the capacity to contract is often intimately involved in that of the right to sue; indeed, the latter may be considered as the necessary means with which to vindicate the former, and the capacity to contract as the necessary adjunct of the right to own property.

As regards the foreign corporation not transacting business in the Philippines, it has been seen that the Supreme Court in *Marshal-Wells Co. v. Henry E. Elser & Co., Inc.*[57] has upheld its right to sue. This case, furthermore, upholds the capacity of foreign corporations to enter into casual contracts, which is also one of the consequences of recognition.

The ruling in the Marshal-Wells Company case was affirmed in subsequent cases.[58] In *Pacific Vegetable Oil Corp. v. Singson,*[59] it was held that the taking of an isolated order for business from the Philippines does not constitute transacting business in the Philippines in contemplation of the law "which required any foreign corporation to obtain a license be-

[54] Young, *op. cit., supra,* note 4 at 89, says that the capacity to sue "is not so much a right as the means of realizing rights. To deny it would be to deny, for instance, that a German manufacturing company can sue in an English Court for the price of goods sold and delivered in Germany to a domiciled German who had subsequently migrated to England. Without it a foreign juristic person would have no means of protecting itself; and its admission to personal status and to the exercise of capacities in virtue of such status would be illusory."

[55] HENDERSON, *op. cit., supra,* note 40 at 183.

[56] See text of note 29, *supra,* p. 17.

[57] *Supra,* note 27.

[58] *Pacific Vegetable Oil Corp. v. Singson,* G.R. No. L-7917, April 29, 1955; *Eastboard Navigation Ltd. v. Juan Ismael & Co., Inc.* G.R. No. L-9090, Sept, 10, 1957,

[59] *Supra,* note 58.

fore it could have personality to file its suit in the Philippines." It is interesting to note that absent from the language of the decision is any reference to the geographical theory of corporate existence. And in *Mentholatum Co. v. Mangaliman*[60] it was observed, by way of dictum, that "the recognition of the legal status of a foreign corporation is a matter affecting the policy of the forum, and the distinction drawn in our Corporation Law is an expression of that policy." This dictum, however, is too broad to be very meaningful. It is undoubtedly within the power of a state to prohibit, restrict, or regulate the performance within its territory of acts which are deemed contrary to some strong public policy of the state. This is so whether the acts be those of a corporation or a natural person. When the evil, in respect of which the acts are prohibited or controlled, are peculiar to the case where such acts are performed by corporations, then the prohibition or restriction applies to both domestic and foreign corporations.[61] On the other hand, where the evil to be prevented arises from the alien character of the person doing the acts, then the prohibition or restriction should apply equally to the alien individual and the alien or foreign corporation. Consequently, the essence of the imposition of restrictions on a foreign corporation's capacity, either civil or functional, which are not applied to a domestic corporation, is the fact of *foreignness,* not that of *corporateness.* This ought to be frankly recognized; resort to the notion of territorial limitation of corporate personality is irrelevant and only confuses the issue. The writer knows of no case where the imposition of a restriction on a foreign corporation's capacity has had for its sole rationale the mere fact of its being a corporation. If there be any, its validity in international law is open to question.

An example of a restriction on the civil capacity of a foreign corporation grounded on the fact of "foreignness" is the constitutional provision limiting the right of ownership of land in the Philippines to corporations, whether domestic or foreign, sixty per centum of the capital of which is owned by Philippine citizens.[62] Needless to say constitutional provisions are the strongest pronouncements of public policy. But the underlying consideration of the limitation here is the fact of foreignness, perhaps not so much of the legal person itself, in the case of a foreign corporation, as of the stockholders. An interesting dictum that seems to support the view being held out here appears in the case of *Hernaez and Alunan v. McGrath.*[63] The plaintiffs, during the Japanese occupation, sold several parcels of real estate to Hakodate Dock Company, a Japanese corporation. After the war, the plaintiffs filed an action for ejectment and damages

[60] 72 Phil. 524, 529 (1941) (dictum).

[61] See sec. 1, Art. XIII, Sec. 8, Art. XIV, Constitution of the Philippines (limiting, respectively, the development of natural resources and ownership of land, and the operation of public utilities to corporations sixty per centum of the capital of which is owned by citizens of the Prilippines).

[62] Section 1, Art. XIII.

[63] 91 Phil. 565 (1952).

against the Philippine Alien Property Administration on whom the lands in question were vested as property of an enemy alien, pursuant to the United States Trading with the Enemy Act and the Philippine Property Act of 1946. Although the issues were not raised by the parties in the pleadings, the trial court, by way of additional support to its conclusion invalidating the sale, stated that the transfer of real property would at any rate be null and void under the Constitution, and, moreover, that the Hakodate Dock Company was never registered nor authorized to transact business in the Philippines in accordance with the Corporation Law. In passing over this aspect of the lower court's decision when it came up on appeal, the Supreme Court stated that the Constitution was not in force during the Japanese occupation of the Philippines and was, for that reason, inoperative at least with respect to Japanese citizens; that, furthermore, there is "no law or provision of the Corporation Law which prohibits a business concern not authorized to transact business from buying or owning real property."

This opinion of the Supreme Court certainly points in the direction of the view among others, first, that except for valid restrictions thereon, there is nothing in the character of a foreign corporation as a legal person which will prevent it from exercising its capacity to own property in the Philippines, even as to real property, and, second, these valid restrictions as appear in the Constitution have for their basis the element of foreignness, which is justifiable because alienage in this case gives rise to the evil sought to be avoided.

Likewise, legislation restricting the capacities of a foreign corporation may be justified if it is in the reasonable exercise of the police power of the state, aimed at protecting public interests and conserving public policy. It is furthermore, even appropriate to entirely refuse recognition to a foreign corporation whose existence of itself is repugnant to the public policy or public morals of the forum. It is difficult, however, to see how the mere recognition of the legal existence of a foreign *business* corporation may affect the public policy of the forum. The full exercise of some of its capacities may run counter to public policy, yes, but the case is rare, if it exists at all, where the existence of a foreign business corporation in all its aspects may contravene public policy.

In any event, these existing restrictions are not absolute but affect capacity only with respect to certain cases or aspects of its exercise. Thus in the case of capacity to own and hold property, the restriction is only in respect to certain types of property, real property in this instance in view of the aforementioned constitutional provision, and does not affect the capacity to own personal and other property. As has been heretofore mentioned, capacity to own and hold property is a con-

sequence of personal status. The obvious implication of the dictum in the case of *Hernaez and Alunan v. McGrath,* above, is that, for the constitutional prohibition, a foreign corporation would have capacity to own real property in the Philippines, under the provisions of the Corporation Law. As to other property, there is no prohibition or limitation on the capacity of the foreign corporation.

In *Western Equipment Supply Co. v. Reyes,*[64] the Supreme Court held that a corporate trade name is a property right, a right *in rem,* which the corporation may protect in any court of the world even in countries where it does not transact business.[65] According to the Court, "a foreign corporation that has never done any business here and which is unlicensed and unregistered to do business here, but widely and favorably known here through the use of its products bearing its corporate trade name, has a legal right to maintain an action in Philippine courts to restrain the residents here from organizing a corporation therein bearing the same name as the foreign corporation, when it appears that they have personal knowledge of the existence of such a foreign corporation, and it is apparent that the purpose of the proposed corporation is to deal and trade in the same goods as those of the foreign corporation. For the same reason, the corporation has a legal right to restrain an officer of the Government, who has full knowledge of those facts, from issuing a certificate of incorporation to residents of the Philippines who are attempting to organize a corporation for the purpose of pirating the corporate name of the foreign corporation and of engaging in the same business, for the purpose of making the public believe that the goods it proposes to sell are the goods of the foreign corporation and of defrauding it and its local dealers of their legitimate trade."

The liberality of this decision is noteworthy considering the absence of any express provision in the Corporation Law granting to corporations such rights. The ruling seems to be in accord with the English common law although it is not altogether clear whether injunction would also lie, thereunder, against the registering government official. Nontheless, a foreign corporation is entitled to use and protect its trade name against fraudulent infringement, whether it has a branch or not in England, and injunction will issue against the defendant corporation and its

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[64] 50 Phil. 115 (1927).

[65] But see II BEALE, CONFLICT OF LAWS, sec. 167.23 at 802 (1935): "That a corporation may have a right to the exclusive use of its name is clear. Whether there is any legal title in the name itself is more doubtful under our law. . . . The common-law right seems to be no more than the right to protect the corporate name as a trademark; existing only when the name is a distinctive one, and the use of it by the defendant would cause deception and loss to the plaintiff."

"There is no property in a trademark. It is not a thing to be possessed, but a right the infringement of which may be prevented, and that can only be done by striking at the origin of the injury." YOUNG, *op. cit., supra* note 4 at 295-296.

incorporators or members.[66] English courts "would certainly interfere to protect a foreign trader which has a market in England from having the benefit of his name annexed by a trader in England who assumes that name without any sort of justification.[67]

In the United States, apart from statutory provisions, the rule is not apparently as liberal. Under common-law principles, since the right of protection of a corporate trade name is based on unfair competition,[68] its use in one state only will not entitle it to protection in another state.[69] neither does it seem, in the absence of express legislative provision, will injunction be available to a foreign corporation to prevent the proposed action of the state of establishing a domestic corporation with a similar name, or restrain, after the latter's formation, the use by such domestic corporation of its own name.[70] The reason is based on the power of a state to exclude foreign corporations: A foreign corporation, which is after all "acting merely by license of the state," cannot complain of the acts of the state done in the exercise of its prerogatives. And the creation of a domestic corporation with its particular name is one such prerogative of the state.[71]

The decision in *Western Equipment Supply Co. v. Reyes*, is more realistic in the light of, and more responsive to modern business conditions. Yet, the Supreme Court backed down from this position in the case of *Mentholatum Co. v. Mangaliman*,[72] when it said, relying heavily on American decisions, that "the recognition of the legal status of a foreign corporation is a matter affecting the policy of the forum, and the distinction drawn in our Corporation Law is an expression of that policy. The general statement made in *Western Equipment Supply Co. v. Reyes* regarding the character of the right involved should not be construed in derogation of the policy-determining authority of that state." The foreign corporation in this case which was an action for violation of trademark and for unfair competition, was considered transacting business in the Philippines. Since it did not have the prescribed license it was denied the right to prosecute the action.

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[66] *La Societe Anonyme des Anciens Establissements Panhard et Levassor v. Panhard Levassor Motor Co. Ltd.*, (1901) 1 Ch. at 513.

[67] *Id.* at 516.

[68] STEVENS, *op. cit. supra* note 1 at 117 and cases cited thereunder; II BEALE, *op. cit. supra* note 65.

[69] STEVENS, *op. cit. supra* note 65, sec. 167.23.

[70] See II BEALE, *op. cit. supra note* 65, *sec.* 167.23.

[71] *Lehigh Valley Coal v. Hamblen* 23 F. 225 (1885). "The complainant is in the attitude of a foreign corporation coming into this state, and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own sovereignty, has been fit to bestow upon one of its own corporations." *Hagleton Boiler Co. v. Hazleton Tripod Boiler Co.*, 142 Ill. 494, 30 N.E. 339 (1892).

[72] 70 Phil. 534 (1942).

At any rate, and as if by cue from the above dictum of the Supreme Court, the Congress of the Philippines enacted in 1951 a law providing that a foreign corporation, whether or not it has been licensed to do business in the Philippines, shall have the right to file suits before local courts for infringement, unfair competition, or false designation of origin and false description of its trademark or trade name which has been duly registered under Philippine law, only if the country of which said foreign corporation is a citizen, or in which it is domiciled, by treaty, convention, or law, grants a similar privilege to corporations or other legal persons of the Philippines.[73] A similar law exists with respect to an action for infringement of a patent for an invention or design.[74]

The first law, of course, practically overturns the decision in *Western Equipment Supply Co. v. Reyes.* Whatever policy these laws may have been thought to subserve, and it is difficult to perceive of any worthy one, it certainly works at cross-purposes with the efforts at industrialization, which is looked at as an urgent problem. The present low level of the scientific and technological development of the country forces it to turn, and to keep on turning, to the industrially advanced societies for the necessary industrial and technical knowledge and skills, perhaps until, at least, it attains a sufficiently high level of capability and resources to permit satisfactory self-development. But whatever the form and manner of foreign investments the country may wish to encourage, whether these be investments entirely controlled by foreign investors, or in partnership with local capital, or exclusively local capital with foreign inventions, processes, and so forth, being utilized through licensing arrangements, the effect of these laws will be to discourage investments. More often than not, a valuable proportion of the assets of a corporation contemplating investment or commercial ventures abroad, especially as regards long established, reputable companies, would consist of industrial property rights and good-will, including trademarks and trade name. It is too much to expect that foreign corporations which do not meet the conditions of reciprocity, would commit these assets in a country which affords them no protection. The harshness of the legislation in question is apparent if it is borne in mind that the condition of reciprocity is applicable even to corporations which are *lawfully doing business in the Philippines with a license.*

However that may be, and these occasional legal aberrations notwithstanding, it is submitted that, in the Philippines, as a general rule all foreign corporations are recognized to exist as legal persons and possess personal status. It has been seen that the most important consequence of civil recognition, the right to sue, is implicitly available to the foreign

[73] Rep. Act No. 638.
[74] Sec. 41-A, Rep. Act No. 165 as amended by Rep. Act No. 637.

corporation not doing business within the Philippines. And recognition of a foreign corporation's capacity to sue implies recognition of its status as a person (and, conversely, recognition of personal status implies recogtion of capacity to sue).[75] The same is true with respect to the capacities to enter into contracts and to own property, faculties which flow from the possession of personal status. In fact the recognition of the right to sue would almost be meaningless without these last two capacities. In the Philippine cases where the right of a foreign corporation has been put in issue, the litigation often has had some connection with a contract being enforced by or against the foreign corporation.[76] And the right of the foreign corporation to own property in the Philippines is clear, except for the constitutional limitation with respect to real property.

It is further submitted that the above posited rule, that all foreign corporations are recognized to exist as legal persons and possess personal status in the Philippines, apply even to corporations transacting business without the license prescribed by section 69 of the Corporation Law, notwithstanding the provision of this section denying to such corporations the right to sue. As will be seen,[77] contracts entered into by a corporation without the necessary license are merely unenforceable and the right to bring suit is only temporarily stayed, pending compliance with the statutory requirement by the defaulting corporation. The law forbids the corporation to transact business *sans* a license, but it does not necessarily preclude it from executing contracts or entering into other legal relations within the Philippines. The implication is clear from what the Supreme Court in *Hernaez and Alunan v. McGrath*[78] said to the effect that there is no law or provision of the Corporation Law which prohibits a business concern *not authorized to transact business* from buying or owning real property, that the disability imposed by law is not so much on the capacity of the foreign corporation to enter into legal relations as on its right to seek judicial remedy. Nor is the obstacle to such legal protection permanent: only for as long as no license is acquired. All this, of course, leads to the conclusion that even during the period the corporation is transacting business without benefit of license, it is deemed to have existence and personal status in the Philippines. A non-existent entity cannot enter into a contract, even an unenforceable one, nor own property.

Again, the existence of the corporation is affirmed by the fact that although it cannot sue on "any debt, claim or demand whatever," it can, nonetheless, be sued, at least by residents, whether upon a cause of action

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[75] YOUNG, *op. cit. supra* note 4 at 90.

[76] See, e.g., *Marshall-Wells Co. v. Henry E. Elser & Co., supra* note 27; *Pacific Vegetagle Oil Corp. v. Singson, supra* note 58; *Eastboard Navigation Ltd. v. Juan Ysmael & Co., supra* note 58; *General Corp. of the Phil. v. Union Insurance Society of Canton, Ltd.*, 87 Phil. 313 (1950); *Hernaez and Alunan v. McGrath, supra* note 63.

[77] See *infra* pp. 479-481.

[78] *Supra* note 63.

arising from contracts entered into by the corporation,[79] or otherwise. Service of process is effected in accordance with the provisions of the Rules of Court,[80] and a judgment *in personam* may be rendered against it.[81] The foregoing, of course, can proceed only on the basis of the view that the corporation is regarded as being within the Philippines.

Section 68 by laying as a condition precedent to the doing of business by a foreign corporation the acquisition of a license, does not purport to set down the prerequisites for the recognition of the corporation's legal status. Rather, the provision is intended only to facilitate the exercise of some form of control over foreign corporations to assure, among other things, fiscal solvency and honest management.[82] In truth, neither section 69 nor any other provision of the Corporation Law is in the nature of a rule on the recognition of foreign corporations. This law, like the German General Commercial Code of 1862,[83] assumes the civil existence of foreign corporations in the Philippines. Neither is the enjoyment of civil recognition dependent on the theory of comity, nor is it necessary to base recognition on such theory in order to protect public policy.

II. REGULATIONS OF AND JURISDICTION OVER FOREIGN BUSINESS CORPORATIONS

The present policy in the Philippines, as shown in legislative enactments, is to subject foreign corporations to local regulation only when they essay to "transact business' in the Philippines. Non-compliance with certain statutory requirements precludes foreign corporations from lawfully transacting business in the Philippines and also debars them from access to the courts, if found to be transacting business without such compliance. Since the concept of "transacting business" or "doing business," involves a question of fact,[84] and defies exact definition of universal application in view of the infinitude of possible permutations of fact situations,[85] Philippine statutes, as is usually the case in other jurisdictions, leave its delineation to judicial construction, in accordance with the circumstances of each case. In such judicial construction, the Philippine Supreme Court has leaned heavily on American precedents. The distinction is generally drawn between acts or transactions which are considered "isolated," "occasional," "incidental," "casual," and so forth,

[79] *Salonga v. Warner, Barnes & Co., Ltd.*, 88 Phil. 125 (1951); *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd.*, 87 Phil. 313 (1950).

[80] Sec. 14, Rule 14.

[81] FISHER, THE PHILIPPINE LAW OF STOCK CORPORATIONS 456 (1929).

[82] Secs. 68, 71, Act No. 1459.

[83] According to Rabel, the German General Commercial Code of 1862 implicitly assumes that foreign companies will be given civil recognition. *Op. cit. supra* note 5 at 130.

[84] *Pacific Microesian Line, Inc. v. Del Rosario and Pelingon*, 96 Phil. 23 (1954).

[85] STEVENS, *op. cit. supra* note 40 at 837.

and those which indicate "continuity of conduct and intention to establish a continuous business." [86] It has been held that whether a particular situation falls into the one or the other category turns on the character, rather than on the amount of business; that doing business within the meaning of the statutes consists of the performance of "some of the works, or an exercise of some of the functions for which the corporation was created." [87] Although, the taking of an isolated order for business from the Philippines, even if it relates to the purposes for which the corporation was created, may not bring the foreign corporation within the ambit of the statutory provision,[88] it is possible that a single act, in the character of doing that for which the corporation was created, may constitute doing business.[89] The true test is twofold: first, the nature of the transaction must relate to the ordinary business of the corporation or the social object for which it was created. Second, it must be shown clearly that there is an intention to carry on or engage in business within the country. Hence, "the term implies a continuity of commercial dealings and arrangements and contemplates, to that extent, the performance of acts or works, or the exercise of some of the functions normally incident to, and in the progressive prosecution of, the purpose and object of its organization." [90]

It is said that in their task of construing the phrase "doing business," United States courts have not adequately and properly taken into account the occasion which raises the necessity for determining whether the corporation comes within the purview of the applicable statute.[91] Now, the "doing business" in a country may be regulated for several, different purposes, with, accordingly, varied impositions and sanctions. The statutes basing regulation on "doing business" are generally of three types. The first type has for its purpose the amenability of foreign corporations to service of process in the country; the second type, the imposition of taxes on the carrying on of business within the country; the third type, prescribing conditions for the qualification of the foreign corporation to transact business within the country, such as the requirement of a license.[92] As to the character of the transactions which may be deemed to come within the purview of the phrase "doing business" as used in any of the statutes included in the foregoing classification, one writer states that "the least degree is that which will permit service of process in a suit against a foreign corporation. For this the business done must be of such a char-

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[86] *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd.*, 87 Phil. 313 (1950).

[87] *Pacific Micronesian Line, Inc. v. Del Rosario and Pelingon, supra* note 84.

[88] *Marshall-Wells Co. v. Henry E. Elser & Co.*, 46 Phil. 70 (1924).

[89] 17 FLETCHER, PRIVATE CORPORATIONS sec. 8466 at 474 (rev. perm. ed. 1933).

[90] *The Mentholatum Co. v. Mangaliman*, 72 Phil. 524 (1941).

[91] STEVENS, *op. cit. supra* note 40 at 843.

[92] CHEATAM, DOWLING & GOODRICH, CASES AND MATERIALS ON CONFLICTS OF LAW. 1067 (1936); see also 17 FLETCHER, *op. cit. supra* note 89 sec. 8465.

acter as to warrant the inference that the corporation is present in the jurisdiction where service is attempted. A higher degree is necessary to subject such a corporation to a tax on its activity, namely, continued efforts in the pursuit of profit and gain, and such activities as are essential to these purposes. A still higher degree is the standard for the application of statutes requiring qualification in the state, as where the activities of the corporation indicate a purpose to regularly transact business." [93]

However, the courts do not generally recognize the different purposes of the statutes, and more often than not, in fact, cite authorities indiscriminately, without attempting to distinguish the particular class of statute under which they were decided.[94] The same observation may be made of Philippine decisions. The same concept of transacting business is employed by the Supreme Court in a provision which is directed to the amenability to suits of foreign corporations in local courts,[95] a provision which establishes prerequisites for doing business in the Philippines,[96] and a statute which involves the imposition of taxes.[97] The distinction among the three types of statutes may have practical significance for as has been said, "it may be reasonable to hold that a corporation which has done but a single act in the state has not done enough to require that the state's citizens be protected by the filing of detailed information as to the corporation's charter and financial set-up. On the other hand, with specific regard to certain business, as, for example, of insuring or of lending money, it may not be unreasonable to require that a foreign corporation shall comply with the provisions as to financial security and shall appoint an agent for service of process before engaging even in a single transaction of that type." [98] In any event, the matter is largely one of ascertaining legislative intent.

Applying the general criteria for determining whether or not a foreign corporation is transacting business in the Philippines, the Supreme Court has ruled that the corporation is transacting business where it has an exclusive distributing agent in the Philippines for the sale and distribution of its products;[99] in the case of a foreign marine insurance company, where it regularly issues insurance policies abroad to cover foreign shipments to the Philippines, said policies being made payable here, and said insurance company appoints and keeps an agent in the Philippines to receive and settle claims flowing from said policies.[100] On the other

[93] Isaacs, An Analysis of Doing Business, 25 COL. L. REV. 1018, 1024 (1925).
[94] 17 FLETCHER, *op. cit. supra* note 89 sec. 8465 at 469.
[95] See sec. 69, Act No. 1459; *Marshall-Wells Co. v. Henry E. Elser & Co., supra* note 88.
[96] See sec. 68, Act No. 1459.
[97] See *Whittaker v. Rafferty*, 38 Phil. 508 (1918).
[98] STEVENS, *op. cit. supra* note 40 at 843.
[99] *The Mentholatum Co. v. Mangaliman*, 72 Phil. 524 (1941).
[100] *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd.*, 87 Phil. 313 (1950); *Salonga v. Warner, Barnes & Co., Ltd.*, 88 Phil. 125 (1951).

hand, the corporation is not transacting business where the contract of sale was entered into in the United States and was agreed to be consummated there, as when the goods are to be delivered from the Philippines "c.i.f. Pacific coast;" [101] where the foreign company was exclusively engaged in the busines of carrying goods and passengers between foreign countries and had neither property nor office in the Philippines, and its sole contact with the Philippines had consisted of hiring the services of a Filipino to serve as chief steward on board one of its vessels;[102] or where the transportation of merchandise to the Philippines by sea is deemed the first business transaction undertaken by the foreign corporation, notwithstanding the previous charter of its vessels by a Philippine government corporation for a similar purpose.[103]

Whether the following acts constitute transacting business or not maybe of interest to investing foreign corporations, depending on the form and manner of its investment arrangements; the control or management within the Philippines of the internal affairs of the corporation, or the acquisition and ownership of stocks of domestic corporations and the exercise within the Philippines of the incidents of such ownership. These possible issues have not been actually decided by Philippine courts. American authorities, however, agree that activities of a foreign corporation which relate to the management of its internal affairs, such as the holding of corporate meetings, issuance of stock certificates, authorization of issue of bonds, making of calls on stock and such other acts as are merely incidental to its corporate organization and the ownership of corporate assets, do not constitute doing business.[104]

There is less agreement as regards the acquisition and ownership of stocks of domestic corporations. It is sometimes merely stated that the holding of stock in domestic corporations do not constitute doing business.[105] Where the ownership of stock of a domestic corporation gives the foreign corporation the controlling interest in the former corporation, there is an apparent variance among the court decisions in ruling whether such controlling interest will constitute doing business by the foreign corporation. The weight of authority seems to hold that the mere fact that a foreign corporation acquires or holds stock of a domestic corporation does not of itself constitute doing business in the state, even though such ownership gives it control over the latter corporation.[106] A close

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[101] *Pacific Vegetable Oil Corp. v. Singson*, G.R. No. L-7917, April 24, 1955.

[102] *Pacific Micronesian Lines, Inc. v. del Rosario and Pelingon*, 96 Phil. 23 (1954).

[103] *Eastboard Navigation Ltd. v. Juan Ysmael & Co.*, G.R. No. L-9090, Sept. 10, 1953.

[104] 17 FLETCHER, *op. cit. supra* note 89 sec. 8472; Uniform Foreign Corporation Act cited in STEVENS, *op. cit. supra* note 40 at 841.

[105] See 8 THOMPSON, CORPORATIONS sec. 6627 at 849, sec. 6631 at 858, 859 (3d ed. 1927), and cases cited therein; MURFEE, FOREIGN CORPORATIONS 68 (1893).

[106] See 17 FLETCHER, *op. cit. supra* note 89 sec. 8490, and cases cited thereunder.

analysis of the cases upholding the foregoing rule and of those establishing the contra proposition may reveal some ground for reconciling the apparent inconsistency: What is perhaps decisive in resolving the issue whether a foreign corporation is or is not doing business, is the fact that either the domestic corporation is deemed to be a mere agent of the foreign corporation, or the foreign and domestic corporation have *bona fide* separate existence, in spite of the controlling interest of one in the other. The writer of this paper did not undertake such analysis; however, some of the cases which have held that control of a domestic corporation through stock ownership is not doing business, evidently also base their conclusion on the further finding that the corporations involved do have separate existence.[107] Where, however, the foreign corporation dominates and controls the domestic corporation, through the ownership of the latter's stock, in such a manner as to make the domestic corporation a mere agent of the former, there is no reason why the foreign corporation should not be deemed to be doing business.[108] It cannot be allowed to evade appropriate, legitimate regulation by the state by the interposition of an agent. Another criterion for determining whether ownership of stock of a domestic corporation is doing business is whether the purchase or ownership of such stock is one of the very objects for which the corporation was organized.[109] If it is, then the foreign corporation should be regarded as doing business, following the general principles established to determine what is doing business.

Relying on American court decisions, the Philippine Securities and Exchange Commission has held that neither the possession by a foreign corporation of a controlling interest in a domestic corporation through ownership of the latter's stock, of itself, nor the act of soliciting subscriptions to its capital stock, brings the foreign corporation within the purview of the law laying down certain conditions precedent that a corporation must fulfill before doing business in the state. Such a foreign corporation is allowed, therefore, to sell its own shares of stock to Philippine residents, without necessity of complying with these condition precedents to doing business.[110] The sale of securities in the Philippines is regulated by the Securities Act.[111] It is said that a foreign corporation

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[107] See *Cannon Mfg. Co. Cudahy Packing Co.*, 267 U.S. 333, 69 L. Ed. 634, 45 Sup. Ct. 250, aff'g 292 Fed. 169; *People ex rel. Studebaker Corp. of America v. Gilchrist*, 244 N.Y. 114, 155 N.E. 68; *Texas Co. of Mexico, S. A. v. Roos*, 43 F. (2d) 1; *State v. Humble Oil & Refining Co.* (Tex. Civ. App.), 263 S. W. 319.

[108] *Bankers' Holding Corporation v. Maybury*, 161 Wash. 681, 297 P. 740, 75 A.L.R. 1237. The American Uniform Foreign Corporation Act includes in its enumeration of activities not considered as doing business in a state, the ownership of stock of domestic corporations and the exercise within that state of the incidents of such ownership, unless through such stock ownership the domestic corporation is controlled by the foreign corporation and is in reality acting as agent of the foreign corporation and doing business in the state for it and in its behalf. Cited in STEVENS, *op. cit. supra note* 40 at 842.

[109] 17 FLETCHER, *op. cit. supra* note 89 sec. 8490 at 534.

[110] *Securities of the San Jose Petroleum, Inc.*, S. E. C. Case No. 952 (1958).

[111] C.A. No. 83 (1936) as amended.

which does business in the state, but does not sell its shares, comes under the Corporate Act, whereas a corporation which sells its shares but does not do business falls under the Securities Act.[112]

No foreign corporation may lawfully transact business in the Philippines until after it shall have obtained a license for that purpose from the Securities and Exchange Commissioner.[113] The license is issued upon order of the Central Bank in case of banks, savings and loan banks, trust corporations, and all other banking institutions, and upon order of the Secretary of Commerce and Industry in case of all other foreign corporations.[114] However, in addition to the license prescribed by the Corporation Law, foreign insurance companies must secure a certificate of authority to transact business from the Insurance Commissioner,[115] and foreign banking corporations desiring to open a branch or branches in the Philippines must secure the written approval of the Superintendent of Banks, which shall be given by him unless he has evidence to show that the establishment of such bank or branches will be prejudicial to the public interests.[116] The foregoing order for the issuance of a license shall not be given except upon a sworn statement of the managing agent of the corporation showing to the satisfaction of the proper authority the corporation's sound financial condition and setting forth its resources and liabilities. Further evidence of the solvency and fair dealing of the corporation may be required if the authority concerned, in its or his judgment, deems such further information essential.[117]

A primary inquiry, in this connection, is the extent of administrative discretion exercisable with respect to the granting of an order for the issuance of a license to a foreign corporation to transact business in the Philippines. In the case of foreign banking corporations and foreign insurance companies, it is clear that the permission to transact business rests on a wide discretion, respectively, of the Central Bank and Insurance Commissioner. It is expressly provided that the giving of an order for the issuance of a license to foreign banking corporations is discretionary on the Central Bank.[118] The wide latitude allowed for the exercise of

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[112] *Edward v. Ioor*, 25 Mich. 617, 172 N. W. 620, 15 A.L.R. 256.
[113] Sec. 68, Act No. 1459 (Corporation Law).
[114] *Ibid.*
[115] Sec. 176, Act No. 2427.
[116] Sec. 68, Act No. 1459.
[117] *Ibid.* The sworn statement, under this section, must contain the following data: (1) The name of the corporation; (2) the purpose for which it was organized; (3) The location of its principal or home office; (4) The capital stock of the corporation and the amount thereof actually subscribed over and paid into the treasury; (5) The net assets of the corporation against above all debts, liabilities, obligations, and claims outstanding against it; (6) The name of an agent residing in the Philippines authorized by the corporation to accept service of summons and process in all legal proceedings against the corporation and of all notices affecting the corporation.
[118] *Ibid.*

that discretion may be seen in the injunction that no order for the license shall be issued unless and until the Central Bank's Monetary Board is convinced that the public interest and economic conditions, both general and local, justify the issuance of an order.[119] The foregoing is in addition to the necessary finding that the corporation is solvent and in sound financial condition, and that it has duly appointed an agent in the Philippines authorized to accept summons and legal processes.[120]

As for foreign insurance companies, the law provides that the Insurance Commissioner may refuse to issue a certificate of authority to any insurance corporation, if, in his judgment, such refusal will best promote the interests of the people of the Philippines.[121]

No such discretion seems to have been vested on the Secretary of Commerce and Industry with respect to all other foreign corporations, except such only as may relate to the investigating of corporate solvency and fair dealing.[122] Once the order for the issuance of a license has been granted by the proper authority and filed with the Securities and Exchange Commission, together with the sworn statement required and a certified copy of the corporation's charter, the issuance of the license becomes merely ministerial on the part of the Securities and Exchange Commission.[123]

The privilege, however, to carry on certain commercial and economic activities are curtailed, restricted, or regulated by constitutional or statutory provisions inspired by various reasons, among which are a strong spirit of nationalism, national security, the desire for a balanced economic development, the necessity for foreign exchange conservation, or just simply the notion of reciprocity or retaliation. Thus the Philippine Constitution provides that the disposition, exploitation, development or utilization of "all agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines . . . shall be limited to citizens of the Philippines, or to corporations or associations at least sixty *per centum* of the capital of which is owned by such citizens . . ."[124] Also, "no franchise, certificate, or any other form of

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[119] Sec. 14, Rep. Act No. 337 (The General Banking Act).
[120] *Ibid.*
[121] Sec. 172, Act No. 2427.
[122] See sec. 68, Act No. 1459.
[123] "Upon filing in the Securities & Exchange Commission the said statement, a certified copy of its charter and the order of the Central Bank or of the Secretary of Commerce & Industry, as the case may be, for the issuance of a license, the Securities & Exchange Commission *shall* issue to the foreign corporation as directed in the order a license to do business in the Philippines, and for the issuance of said license the Securities & Exchange Commission shall collect a fee in proportion to the corporate capital of such corporation, to be fixed in accordance with the schedule established in Section eight of this Act." (Underscoring supplied.) Sec. 68, Act No. 1459.
[124] Sec. 1, Art. XIII.

authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines, sixty *per centum* of the capital of which is owned by citizens of the Philippines. . . ." [125] Nationalism and, in some cases, considerations of national security are the moving spirits behind these constitutional,[126] as well as statutory limitations.[127]

As a concession to the need for economic development, the rights reserved, under the Constitution, to Philippine citizens or corporations predominantly owned by such citizens, with respect to natural resources and public utilities, have been extended by an ordinance appended to the Constitution to citizens of the United States and to all forms of business enterprises owned or controlled, directly or indirectly, by such citizens "in the same manner as to, and under the same conditions imposed upon, citizens of the Philippines or corporations or associations owned or controlled by citizens of the Philippines." This very broad grant of parity rights have been subsequently scaled down by the implementing provisions of the Philippine-United States Executive Agreement of July 4, 1946, as revised by the Laurel-Langley Agreement of September 6, 1955, first, by limiting the exercise by United States citizens of parity rights in respect of natural resources through the use only of the corporate form of business organization incorporated under the laws of the Philippines, and at least sixty *per centum* of the capital of which is owned or controlled by citizens of the United States:[128] and, second, by introducing a clause in

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[125] Sec. 8, Art. XIV.

[126] See *Krivenko v. Register of Deeds*, 79 Phil. 461 (1947).

[127] Statutory exceptions to the conducting of business by aliens are as follows: (a) *In the field of retail trade*—The Retail Trade Law (Rep. Act No. 1180) provides for the gradual elimination of aliens from all types of retail trade. American citizens and business entities however, are exempt from the provisions of this law. (b) *Public Services*—The Public Service Law (C.A. No. 146) provides that certificates of public convenience may be issued only to citizens of the Philippines or of the United States, or business entities at least 60% of the capital of which is owned by such citizens. (Sec. 16). *Domestic air commerce and/or transportation*—The Civil Aeronautics Act (Rep. Act No. 776) provides that authority to engage in domestic air commerce and transportation shall be limited to citizens of the Philippines, subject to existing treaties and rights granted by the Constitution (Sec. 12). (d) *Banking*—Under the General Banking Act (Rep. Act No. 337), no bank which may be established and licensed to do business in the Philippines shall receive deposits, unless incorporated under the laws of the Republic of the Philippines (Sec. 11). At least 60% of the capital stock of any banking institution which may be established after July 24, 1948 shall be owned by the citizens of the Philippines (Sec. 12). At least two-thirds of the members of the board of directors of any bank or banking institution which may be established after July 24, 1948 shall be citizens of the Philippines. (e) *Coastwise ship ping*—The right to engage in coastwise shipping trade is available only to corporations, associations or firms wherein the controlling interest or capital held either by Philippine or United States citizens, or both, shall be 75% of the capital investment. (Sec. 1172, Act No. 2711, Rev. Adm. Code). (f) *Building and loan associations*—No foreign building and loan association shall be permitted to transact business in the Philippines (Sec. 15, Rep. Act No. 337).

[128] Secs. 2, 3, Art. VI.

the nature of a retaliatory provision.[129] In no case shall the effectivity of the grant of parity rights extend beyond July 3, 1974.

In the past, restrictions and control of business, trade, and other economic ventures appear in virtue of the Philippines' economic development and foreign currency conservation programs.[130] For instance, remittances abroad of profits and dividends, and repatriation of capital are regulated and approved by the Monetary Board of the Central Bank. In granting approval it is the avowed policy to give priority to "dollar-earning" or "dollar-saving" enterprises. All proposed investments are reviewed in the light of their potential contribution to the economy of the country. Under the Three-Year (FY 1960-1962) Social and Economic Development Program, it has been recommended that foreign investments should be limited to "dollar-earning" industries in which Philippine citizens are reluctant or unable to engage, and that control of aliens in any essential or strategic productive or distributive industry be reduced to not more than twenty-five per cent.[131] Many of these controls have since been removed.

What would be the effect and consequences of non-compliance with the requirement of obtaining a license by a foreign corporation transacting business? The Corporation Law provides that such corporation shall not be permitted to "maintain by itself or assignee any suit for the recovery of any debt, claim or demand whatever, unless it shall have the license prescribed,[132] and "any officer, or agent, of the corporation or any person transacting business for any foreign corporation not having the license prescribed shall be punished by imprisonment for not less than six months nor more than two years or by a fine of not less than two hundred pesos nor more than one thousand pesos, or by both such im-

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[129] Art. VII (2) of the Agreement reads: "The United States of America reserves the rights of the several States of the United States to limit the extent to which citizens or corporations or associations owned or controlled by citizens of the Philippines may engage in business activities. The Republic of the Philippines reserves the power to deny any rights to engage in business activities to citizens of the United States who are citizens of States, or to corporations or associations at least 60% of the capital stock or capital of which is owned or controlled by citizens of States, which deny like rights to citizens of the Philippines or to corporations or associations owned or controlled by citizens of the Philippines. The exercise of this reservation on the part of the Philippines shall not affect previously acquired rights, provided that in the event that any State of the United States of America should in the future impose restrictions which would deny to citizens or corporations or associations owned or controlled by citizens of the Philippines the right to continue to engage in business activities in which they were engaged therein at the time of the imposition of such restrictions, the Republic of the Philippines shall be free to apply like limitations to the citizens or corporations or associations owned or controlled by citizens of such States."

[130] Both these programs actually cover inter-related problems in view of the fact that the entire Philippine economy is inextricably tied to international receipts and payments which are dominated by trade transactions. See U.S. DEP'T OF COMMERCE, INVESTMENT IN THE PHILIPPINES 65 (1955).

[131] NATIONAL ECONOMIC COUNCIL, 3-YEAR SOCIAL AND ECONOMIC DEVELOPMENT PROGRAM (1959).

[132] Sec. 69, Act No. 1459.

prisonment and fine, in the discretion of the court." [133] It is clear that under the foregoing provision of law just quoted, the corporation is denied judicial remedy in the forum on any cause of action whatsoever. This was the firm ruling in the leading case of *Mentholatum Co v. Mangaliman* where a foreign corporation doing business in the Philippines, through an exclusive distributing agent, was precluded from bringing suit, either by itself or through the agent, for violation of trademark and unfair competition.[134]

Not as clear, is the effect on the contracts entered into by the defaulting foreign corporation. The matter has not received uniform treatment in the United States, where the decisions are in many respects in irreconcilable conflict ranging, as it were, from one end of the spectrum of consequences—the contract is regarded as void *ab initio* and gives rise to no rights to either party, to the other end—the contract is completely valid and enforceable.[135] In any event, whatever may be ruled by the courts in any jurisdiction to be the effect on corporate contracts of non-compliance, the particular rule results from some express statutory provision or from judicial construction. The Corporation Law itself does not state whether the contract entered into by the non-complying foreign corporation shall be valid but unenforceable, or void *ab initio.* It does provide, however, as stated above, a criminal sanction in the form of imprisonment or fine, or both, against the corporate official or representative responsible. It is said that the prevailing rule is, in the absence of an express statutory provision, that contracts of foreign corporations which have not fulfilled the conditions precedent to doing business in the forum are valid and enforceable.[136] Also, in many courts of the United States it has been held that the provision for a criminal sanction (usually a fine or specific pecuniary penalty), without more, manifests the intention of the law-making body to consider contracts made by defaulting foreign corporations valid and enforceable,[137] or at least not invalid.[138] On the other hand, other courts construing similar statutes have reached the opposite result by reasoning that the attachment of the penalty to the doing of acts shows the intention to make the acts unlawful and therefore, unenforceable.[139] According to the Philippine Civil Code "acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity." [140]

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[133] *Ibid.*

[134] *Supra* note 108. See also *Marshall-Wells Co. v. Henry E. Elser & Co., supra* note 27; *Pacific Vegetable Oil Corp. v. Singzon, supra* note 58; *Eastboard Navigation Ltd. v. Juan Ysmael & Co., supra* note 58.

[135] See 17 FLETCHER, *op cit. supra* note 89 secs. 8503-8513.

[136] 8 THOMPSON, *op. cit. supra* note 105 sec. 6659 at 894-895.

[137] 17 FLETCHER, *op. cit. supra* note 89 sec. 8506 at 565.

[138] See STEVENS, *op. cit. supra* note 40 at 845.

[139] *Ibid;* 17 FLETCHER, *op. cit.* supra note 89 sec. 8506 at 568-570.

[140] Art 5.

Obviously, the above rule that the prescription of a fine or similar penalty is deemed exclusive and leaves the contract whole and enforceable cannot be applied under the Philippine Corporotion Law. For section 69 thereof, aside from imposing individual criminal responsibility for the failure to obtain a license, enjoins the foreign corporation transacting business without the license from maintaining "any suit for the recovery of any debt, claim or demand whatever." Are the contracts of such foreign corporations, therefore, void on that account and in the light of the provision of the Civil Code, as well? Under statutes similar to section 69, the general rule in the United States is that the contracts do not become void or illegal, but that judicial remedy in favor of the offending corporation is merely withheld for as long as the corporation does not comply; once compliance is effected, it may sue thereon.[141] There is no direct ruling in the Philippines on this point but it seems that the inclination of the Supreme Court is to follow the aforesaid general rule. In *Marshall-Wells Co. v. Henry E. Elser & Co.*,[142] it said that what the section means is that "until (the corporation) complies with the law it shall not be permitted to maintain any suit in the local courts." Again, in the dispositive portion of the judgment in *Mentholatum Co. v. Mangaliman*[143] it said: "The right of the petitioner conditioned upon compliance with the requirement of Section 69 of the Corporation Law to protect its rights, is hereby reserved." Furthermore, if what the Supreme Court stated in the Marshall-Wells Company case, to the effect that the object of the section is to subject the foreign corporation doing business in the Philippines to the jurisdiction of and to render it amenable to suit in, the local courts,[144] is correct, then there is no strong reason for holding the contracts of such foreign corporations void *ab initio*. Under Section 14, Rule 7 of the Rules of Court, the local courts, in case the suit is brought by the other contracting party, may acquire jurisdiction over the foreign corporation even if it transacts business without a license, and may render against it a judgment *in personam*.[145]

As a matter of fact, if all there is to section 69 is the assurance of the foreign corporation's amenability to suits before the courts of the forum, there is not much point in depriving the corporation, the ordinary business corporation at least, of the right to sue. Under existing law the degree of judicial protection to citizens of the Philippines is no less in a case where the corporation is transacting business without a license than in one where it is transacting business with such license, even if in the former case the right of the corporation to sue were not

141 See 17 FLETCHER, *op. cit. supra* note 89 sec. 8507 for cases cited.
142 *Supra* note 27.
143 *Supra* note 90.
144 See pp. 458-460, *supra*, for quoted extract of ruling.
145 See FISHER, *op. cit. supra* note 81; *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd., supra note* 79 citing Justice Fisher.

suspended. The offending corporation is nonetheless liable to suit by the other contracting party and by third parties,[146] and under the principle of estoppel, the foreign corporation cannot plead its own failure to comply with statutory requirements as a means of avoiding its contracts and obligations[147] In the one case as in the other, the corporation is just as amenable to the jurisdiction of the local courts and the judicial relief afforded to the plaintiff is the same.[148] The prohibition to the foreign corporation to sue, as one of the penalties for non-compliance with the statutory requirements for doing business, has been compared to the denial by French courts of the right to judicial remedy to foreign corporations not recognized through administrative decree or treaty, a denial strongly criticized by French legal scholars.[149] Inconsistency in the development of the law is inevitable. As has been observed with respect to the French system; "A (foreign) corporation has no capacity to contract and may not sue third parties but, if sued, is not allowed to defend on the ground of its own irregularity because domestic creditors should be protected. The incoherence of this system is increased by the consideration that the entity may function as a *de facto* corporation under domestic law and in such quality can engage in contracts and maintain branches, as well as be subject to bankruptcy proceedings.[150]

The purpose of section 69 which, in effect, as shown by its wording, makes the foreign corporation transacting business without a license a complete outlaw is, it is submitted, unreasonable and deserves little sympathy. At the very least, judicial remedy should not be denied to protect rights connected with the exercise of what has been termed civil capacity, and unconnected with the transaction of business done by the corporation without satisfying statutory requirements.[151]

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[146] *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd., supra* note 79; *Salonga v. Warner, Barnes & Co., Ltd., supra* note 79.

[147] See secs. 14, 16, 17, Rule 14, Rules of Court.

[148] *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd., supra* note 79; *Salonga v. Warner, Barnes & Cos, Ltd., supra* note 79; sec. 14, Rule 14, Rules of Court.

[149] II RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 147 (2d ed. 1960).

[150] *Id.* at 141.

[151] "The nature of the public policy or enactment which prohibits the exercise of certain functions by a foreign juristic person is to prohibit certain acts in respect of a certain quality which they possess; and that being so they leave unaffected other acts of the foreign juristic person which do not possess that quality, including acts in the exercise of the prohibited functions outside the territories of the prohibiting state, and acts in the exercise of civil capacities only even with those territories, although the general functions of the juristic person performing them may be prohibited. In accordance with this view, it has been held in the United States that a foreign company, which has no right to carry on business because it has not complied with certain statutory conditions precedent to the right, is nevertheless not an outlaw. It may sue for and recover property and insure it, foreclose a mortgage, sue upon a note, and recover taxes overpaid." YOUNG, FOREIGN COMPANIES AND OTHER CORPORATIONS 85-86 (1912).

Statutes similar to section 69 have been considered to be procedural.[152] According to the Supreme Court the violation of the section by a foreign corporation is a matter of affirmative defense which should be pleaded.[153] If the provision is then merely one of procedure, it stands to reason that the foreign corporation may recover on the contract in the courts of a different forum; under the rules of private international law, matters of procedure are governed by the *lex fori*.[154]

As under common-law principles but not under civil law principles, the element constitutive of jurisdiction *in personam* over a defendant, under Philippine law, is service of process.[155] Whether a foreign corporation may be reached by process within the Philippines, thereby vesting in Philippine courts jurisdiction *in personam* over it, depends on whether the corporation locally "transacts business" or not. In the case of a foreign corporation not transacting business within the meaning of the law, it may be held to answer for any subsisting cause of action against it only by proceedings *quasi in rem*, the judgment reaching its real or personal property situated in the Philippines. This is the strong implication of the ruling in *Marshall-Wells Co. v. Henry E. Elser & Co.*,[156] and the substance of the decision in *Pacific Micronesian Line, Inc. v. Del Rosario and Pelingon*.[157]

A foreign corporation doing business in the Philippines "will be amenable to process and the jurisdiction of the local courts . . . for the protection of the citizens." [158] The manner of service of process differs according as the foreign corporation transacts business with or without the necessary license. The Corporation Law requires the corporation securing the prescribed license to name an "agent residing in the Philippines authorized by the corporation to accept service of summons and process in all legal proceedings against the corporation and of all notices affecting the corporation;" summons and legal process served the agent so designated "shall give jurisdiction to the courts over the corporation." [159] The designation when made is exclusive and service of summons is without force and effect unless made upon him.[160]

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[152] See STEVENS, *op. cit. supra* note 40 at 846.

[153] *Marshall-Wells Co. v. Henry E. Elser & Co., supra* note 27. "Thereafter, it must appear from the evidence first, that the plaintiff is a foreign corporation, second, that it is doing business in the Philippines, and third, that it has not obtained the proper license as provided by statute." *Ibid.* See also *In re Liquidation of Mercantile Bank of China, The Fletcher American Nat'l Bank of Indianapolis v. Ang Cheng Lin*, 65 Phil. 385 (1938).

[154] GOODRICH, CONFLICT OF LAWS 227 (3d ed. 1949).

[155] *Banco Español Filipino v. Palanca*, 37 Phil. 921 (1918).

[156] 46 Phil. 70 (1924).

[157] 96 Phil. 23 (1954); see sec. 17, Rules 14, Rules of Court.

[158] *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd.*, 87 Phil. 313 (1950).

[159] Sec. 72, Act No. 1459.

[160] *Poizat v. Morgan and the Negros Philippine Lumber Co.*, 28 Phil. 597 (1914).

Should such agent become mentally incompetent or otherwise unable to accept service, it shall be the duty of the corporation to promptly name and designate another agent upon whom service of summons and process may be made. Should there be no person authorized by the corporation to accept legal process, the same may be made on the Superintendent of Banks in case of foreign banking corporations, and upon the Secretary of Commerce and Industry, in the case of all other foreign corporations, and such service shall be as effective as if made upon the corporation or upon its duly authorized agent.[161]

Where, however, the foreign corporation transacts business without the required license, service of process will be sufficient if made upon any officer or agent of the corporation in the Philippines.[162] In brief, "if (the) foreign corporation has a license to do business, then summons to it will be served on the agent designated by it for the purpose, or otherwise in accordance with the provisions of the Corporation Law. Where such foreign corporation actually doing business here has not applied for license to do so and has not designated an agent to receive summons, then service of summons on it will be made pursuant to the provisions of the Rules of Court, particularly Rule 7, Section 14, thereof." [163]

On the whole the rules of law in the Philippines regarding jurisdiction of courts over foreign corporations reflect the results arrived at by the courts in the United States through the "consent" doctrine. When the theory that corporations cannot exist outside the limits of its native sovereignty conjoined with the concept of the "eternal principle of justice" on jurisdiction to the effect that "jurisdiction cannot be justly exercised by a state . . . over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits," [164] it was inevitable that the courts in dealing with suits against foreign corporations found themselves in a sort of checkmate so to speak. Hence, the idea prevailed for a while that foreign corporations may be proceeded against on the basis of foreign attachment only. But this method was

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[161] Sec. 72, Act No. 1459. This section further provides, "In case of service for the corporation upon the Superintendent of Banks or the Secretary of Commerce & Industry, as the case may be, the proper official shall register and transmit by mail to the president or to the secretary or clerk of the corporation at its home office or principal office a copy, duly certified by him, of the summons, or notice. The nsending of such copy of the summons, process, or notice shall be a necessary part of the service and complete the service. The registry receipt of mailing shall be conclusive evidence of the sending."

[162] Sec. 14, Rule 14, Rules of Court.

[163] *General Corp. of the Philippines v. Union Ins. Soc'y of Canton, Ltd., supra* note 158. Rule 14, section 14 of the Rules of Court provides for three modes of effecting service upon a private corporation, *viz.*, (1) by serving upon the agent designated in accordance with law to accept service of summons; (2) if there be no special agent, by serving on the government official designated by law to that effect; (3) by serving on any officer or agent within the Philippines.

[164] *Mills v. Duryee*, 7 Cranch 481 (1813).

not of course satisfactory; it did not fully subserve the principle of justice which also dictates that foreign corporations should not be permitted to evade their legal liabilities and obligations. Through ingenious logic an avenue of escape from the dilemma was found in the "consent" theory: Since foreign corporations transact business in a foreign state only by the grace of such state, they will be presumed to have asserted to do so upon such terms and conditions as the state may see fit to impose, including, as to causes of action against them, the manner prescribed by the laws of the state by which they are judicially held accountable.

How ever much practical benefits may be derived from the theory, it has been justly criticized as being artificial and cumbersome. As it was pointed out, "it leads the courts into fruitless and unprofitable speculation as to the extent of 'presumed' consent, and diverts attention from those considerations, relating to the presence of the active group and the representative character of the agent served, which alone are relevant to the problem of constitutional jurisdiction." [165] In the Philippines, to satisfy the constitutional principle of "due process," the factor relevant in determining whether a court ought to exercise jurisdiction *in personam* against a foreign corporation should be the fact alone of the corporation's "presence" in, or better still sufficient contact with, the country, irrespective of any consent that may be deemed elicited.

The skein of technicalities which binds Philippine rules on jurisdiction over foreign corporations may be traced to the consent theory; but these rules no matter how technically just or logical can hardly be expected to subserve the wider interests of justice. It is on this basis that the decision in *Pacific Micronesian Line, Inc. v. del Rosario and Pelingon* [166] is open to criticism. The foreign corporation, in this case, secured through an agent in the Philippines the services of a Filipino to serve as chief steward on board one of its vessels. The steward died while serving as such, and his widow filed a claim for compensation against the foreign coporation under the Workmen's Compensation Law. Reliance having been put on the provisions of the Rules of Court,[167] service of process was caused to be effected on the agent of the petitioner in the Philippines, but the Supreme Court, on appeal, ruled that since the foreign corporation was not "doing business" in the Philippines the service was ineffectual and jurisdiction over the corporation was never acquired. In effect what was held was that a corporation not deemed transacting business cannot be reached by a judgment *in personam*. But

[165] HENDERSON, THE POSITION OF FOREIGN CORPORATION IN AMERICAN CONSTITUTIONAL LAW 172 (1918). For a critical analysis of the development of the theoretical basis of jurisdiction of American courts over foreign corporations see the work cited at pp. 77-100, 170-172.

[166] *Supra* note 157.

[167] See note 162, *supra*.

the Supreme Court, in determining whether or not the Corporation was transacting business, used the same standards that are applicable to require the corporation to obtain a license and submit to regulation as regards its operation. Yet, circumstances that may not be sufficient to require the corporation to secure a license and submit to administrative regulation, may be enough to subject the corporation to suit in the forum.[168] As has been said, "the state's citizens may be as much in need of the ability to sue the foreign corporation when it has incurred a single liability as when it has incurred many." [169] The decision in question is indicative, if anything, of the tendency sometimes to follow rigid, technical deductions so closely as to veer from the underlying considerations of policy which are, as pointed out above, sufficiency of contact with the state and of the representative character of the agent served, making it fair to compel the defendant to stand suit there and allowing reasonable opportunity to defend, thereby losing sight of the wider interests of justice, in this particular case—social justice so emphatically avowed in the Constitution and legislation. Under the decision, the course available to the claimant is to either sue the foreign corporation in its domicile, or proceed against its property within the Philippines, which, presumably, it does not have.

Just as in the development of the law on the jurisdiction of courts over foreign corporations, the territorial theory of the treatment of foreign corporations has had its mischievous influence on the juridical concept of the power of a state to exclude foreign corporations. The theory, in fact, has left its significant and prevalent imprint mostly in connection with the exercise by the state of its prerogative to grant permission to a foreign corporation to engage in business within its territory. Having started off from the premise that corporations are but the creations of sovereign power and cannot, therefore, migrate to another sovereignty, the inexorable path of logic led the development of the theory to the doctrine of unlimited state power to refuse recognition to a corporation and prevent it from engaging in any business whatsoever; and the corollary doctrine that since the state may exclude, it may, if it chooses to admit, impose restrictions and conditions. The force of these arguments are, of course, irresistible to states which, prompted by political, economic or other reasons, become concerned with controlling corporations. But the premises of these doctrines, particularly the theoretical notions of the nature of corporations and the territoriality of sovereignty, can neither truly serve as the basis for nor explain the behaviour of states toward foreign corporations. The metaphysical concept that a corporation is but an artificial being (fiction theory) which may be created only by grant from the sovereign authority (concession theory)—doctrines no

[168] See pp. 470, 471, *supra.*
[169] STEVENS, *op. cit. supra* note 40 at 844.

longer accepted by modern jurisprudence—serves only as a poor form of juristic rationalization to set the imprimatur of legal validity on any hostility to corporations.[170]

Even the attempt to justify the international or liberal theory of incorporation with the "realists" doctrine is, it is submitted, unnecessary.[171] A country will adopt a restrictive or liberal attitude towards foreign business corporations according only as the exigencies of the country's political, social, or economic complex may require. There is no legal theory which can remain intransigent against the countervailing necessities of the state's practical interest. Thus the principal reason for the opposition to foreign corporations in the early United States was the identification of a corporation with exclusive privileges, monopolies and other valuable prerogatives, and the concomitant conception of a corporation as an encroachment on the "natural rights" of citizens.[172] These were one class of socio-economic conditions that inspired a hostile philosophy on the recognition of foreign commercial entities. But this philosophy had to yield, in actual result if not in external form, to a more liberal view when that country began building its economy and found itself "as a great and growing community having need of and employing large amounts of combined capital." [173] Perhaps there is no more plausible reason for the liberality of New York courts toward Delaware-chartered corporations than that it was the upshot of the conscious de-

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[170] "The doctrine that . . . a grant from the king was a necessary prerequisite to corporate existence did not obtain currency until the fourteenth century. Prior to that time there were no creative words in the characters. . . . Such (sovereign) intervention was dictated not by any 'juristic necessity,' any theory of personality, but by political expedience and financial needs." I POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 669-670 (2d. ed. 1911).

"The notion that a corporation is created by sovereign authority was born of at least two practical reasons appreciated by the sovereign: First, the need of entrenching itself against the power and arrogated authority of existing group units; and, second, the need of safeguarding social interests against the dominance of unfair practices by them. The sovereign prerogative of granting incorporation was not originally offered as a means of encouraging association; on the contrary, it was asserted as a means of bridling and subduing group units that had already grown to threatening stature." STEVENS, *op. cit. supra* note 53 at 6. "Another phase of public policy was controlled by the royal power as a consequence of the legal theory of corporate capacity. In its various forms of ecclesiastical bodies and foundations, guilds, municipalities, trading companies, or business organizations, the corporation has always presented the same problem of how to check the tendency of group action to undermine the liberty of the individual or to rival the political power of the state." FREUND, STANDARD OF AMERICAN LEGISLATION at 39.

[171] See pp. 451-453, *supra.*

[172] See HENDERSON, *op. cit. supra* note 44 at 10-35. "Among persons who thus identified incorporation with monopoly and exclusive franchises the law of foreign corporations must have been most simple. It hardly needed argument that one sovereign could not give a monopoly in the territory of another sovereign. And as long as these corporate monopolies were looked upon with such a jealous eye —the power rigidly confined to what the charter expressed, and its language strictly construed against them—international comity could hardly expect the courts of the foreign sovereign to admit them without express legislative mandate." *Id* at 21.

[173] *Demarest v. Flack,* 128 N.Y. 214 (1891); *Christian Union v. Yount,* 101 U.S. 352 (1879).

sire, at the early stages of American economic development, to facilitate industrialization through the instrumentality of the corporate device.

The similar desire to give impetus to the growth of their national economies, through more vigorous commercial activity, is the motivation behind the adoption by other countries of a liberal attitude in the recognition of foreign corporations. In Switzerland, for instance, the only requirement for a foreign corporation to carry on business is the appointment of a local agent and registration at the commercial register.[174] It has, moreover, the singular law, intended primarily for foreign holding-companies, of allowing a foreign corporation to "immigrate," i.e., transfer completely, into the country without loss of its legal status or identity. This display of exceptional liberality is actuated by the desire to encourage foreign capital influx.[175]

The "close-door" policy rigidly maintained against foreign enterprises by Soviet Russia, especially since 1928,[176] and by Germany prior to her defeat in the Second World War, are not explained by any abstract speculation about the nature of corporateness, but rather by the political and socio-economic complexion of these countries. Complete control and domination of the sources of production by these states, political necessity, and xenophobic nationalism combine to repel foreign business ventures.

The comparatively recent emergence of nationalism, varying in degree of intensity and form in which manifested, as a distinctive pulse with which to measure a state's treatment of foreign business entities, show, if any thing, the intimate connection of the problem of recognition with pragmatic considerations. In the countries of Latin America, Asia, and the Middle East, the upsurge of nationalism has brought about various forms of prohibition, control, and supervision over foreign business activities. This is the case in the Philippines, as seen earlier. Historical events, it is said, occur in cycles. Be that as it may, the causes responsible for the early hostility to foreign corporations, namely, the identification of corporations with monopolistic and other exclusive privileges and the view of their being an encroachment on the "natural rights" of citizens find their parallel in the forces that have generated today's reactive nationalism [177] in countries, especially, which have just been freed

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[174] NUSSBAUM, AMERICAN-SWISS PRIVATE INTERNATIONAL LAW 34 (BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW No. 2, 2d ed. 1958).

[175] *Id.* at 25.

[176] In October 1928, the Soviet Union entered a regime of completely state-planned economy with the first of a series of its Five-Year Plans, putting to an end its New Economic Policy under which a limited concession was open to foreign capital in industry and mining.

[177] Prof. Rostow uses the term reactive nationalism to denote national aspirations reacting against intrusion from more advanced nations. THE STAGES OF ECONOMIC GROWTH, 26 (1960).

from their colonial status or condition of economic dependence. The historical experience of these countries, wherein the major economic activities, especially with respect to natural resources, were in the hands of aliens, deeply ingrained in their national consciousness the symbolism for economic exploitation and foreign political domination of foreign business ventures. Particularly is this true as regards large foreign corporations or large domestic corporations predominantly owned or controlled by aliens. Indeed, the hostility and suspicion toward foreign interest in corporations are accentuated by the very capability of corporations for enormous concentration of economic power and by the vastness of its reach into a country's economic life.[178] In place of the belief on the encroachment of the "natural" rights of citizens, is the present day's fear that unrestricted foreign corporate activities will deprive the native citizenry of the base to certain desired social values, such as prestige, power, wealth, and so forth.

So, also, is the seemingly austere attitude towards foreign corporations, reflected in French laws and decisions, a form of nationalism. But for the protection of national interests,[179] the rule that foreign corporations have no legal existence in France and are not, therefore, even allowed to bring suit unless recognized through a treaty or administrative decree,[180] has no justification. And the often stringent decisions of French courts find their rationale in the protection of French stockholders and creditors.[181]

However that may be, these problems must be considered in the larger context of the country's whole range of interests and entire legal

[178] Justice Field, in *San Mateo County v. Southern Pacific R. R.*, 116 U.S. 138 (1885). vividly describes the role of corporations as a source of every enterprise of note, thus: "And, as a matter of fact, nearly all enterprises in this state, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water to our cities; they erect railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theatres; they set up manufactories and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean."

[179] See *Societe West Canadian Collieries v. Vanverts,* Civil Tribunal of Lille, May 21, 1908 (1910), Dalloz Jurisprudence, II, 42.

[180] See II NIBOYET, TRAITE DE DROIT INTERNATIONAL PRIVE FRANCAIS, secs. 778, 779 at 402, secs. 797-799 at 439-444, secs. 804, 805 at 446-449 (2d transl. ed. 1951).

[181] See *Weber v. Societe Generale Anglaise et Francais,* Nancy Tribunal Commercial, Feb. 18, 1907 (1907) Journal de Droit International Prive 765. *Bonvet, Laubier et Richard v. Societe Anonymie Francaise des Mines de Fer,* Court of Appeals of Angers, 1913, (1913) Gazette du Palais (2c Sem.) (Fr.); *Societe dite Construction Ltd. v. Brown et Autres* (1896) Journal dec Droit International Prive 364 (Fr.); *Societe Joltaia-Ricka v. x,* Court of Appeal of Paris, 1909, 30 Journal des Societes 268.

system, including constitutional principles. In the Philippines, notwithstanding the apparent suggestion in one case,[182] as has been seen, that the state, in its sovereignty and as it deems it, may completely refuse to recognize foreign corporations and to allow them to transact any kind of business whatsoever in the Philippines, or may exact as the price for the privilege of carrying on activities locally all sorts of terms and conditions, the power to exclude, restrict or regulate must admit of certain constitutional limitations, primarily those expressed in the "due process" and "equal protection" provisions.[183] In a case [184] involving a domestic corporation the Supreme Court recognized the right of the corporation to both these constitutional guaranties, albeit only by way of dictum. There is no cogent reason for not extending the rule to domestic as well as foreign corporations. There is not much vitality in the argument that the constitutional protection extends only to persons within the territorial jurisdiction and foreign corporations have no existence beyond the limits of its native sovereignty. The modern and, it may be added, correct trend of jurisprudence is to adopt a more reasonable view on the foreign corporation's presence within the state. When the constitutional protection is held applicable to domestic corporations, what are actually safeguarded are not the rights and property of a mere legal fiction or creature, but the more important rights or interests ultimately vested in the tangible group—the individual human beings composing and running, at any and all levels, the corporation. The rights and duties of the tangible group in a foreign corporation are as much entitled to protection from oppressive and arbitrary legislation. Looked at from this point of view, which is the only relevant point of view in any effort to bring to bear on foreign corporations the state's legal system, corporations ought to enjoy the same rights and prerogatives granted to natural persons, whether these be expressed in the Constitution, legislation, or treaties, unless from the nature of things the intendment to exclude corporations clearly appears therefrom.

This does not mean that a state should be shorn of its power to regulate or control foreign corporations when strong public interests are involved; neither is it necessary nor desirable that they be accorded equal treatment in any and all cases. No one will seriously deny the right of the state to wield that "most essential, insistent, and illimitable of powers, the sovereign police power," if the promotion of the general welfare de-

[182] *Marshall-Wells Co. v. Henry E. Elser & Co., supra* note 37. Note that reliance was primarily made on the case of *Paul v. Virginia* (8 Wall, 168) which upholds to its full extent the doctrine that a state has the absolute power to exclude any foreign corporation and to impose any and all conditions and restrictions on them, however hard and arbitrary.

[183] The Bill of Rights of the Philippine Constitution provides, *inter alia*: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." (Sec. 1(1), Art. III).

[184] See *Smith Bell & Co., Ltd. v. Natividad,* 40 Phil. 145 (1919).

mands it. Corporations have permeated practically every strata of the economic and commercial structure of most states where private enterprise prevails. They operate the means of production, employ millions, set wages and conditions of labor, influence prices, amass wealth, incur substantial liabilities; in short, they affect to a very great degree the national economy, a legitimate sphere for regulation by the state. And thus the state may bid these corporations to comply with its fiscal, health, labor and other similar laws of a public and administrative character, and to submit to the judicial power of the forum. Again, if strong public policy dictates that aliens to be excluded from certain activities or that only a limited number of corporations be permitted to operate in certain fields of activity in the Philippines, foreign corporations cannot cavil against the prohibition. But any legislative inequality, any uneven prohibition, regulation, or exaction must bear reasonable relation to the goals wished to be attained by promoting the commonweal. "Classification with the end in view of providing diversity of treatment may be made among corporations, but must be made upon some reasonable ground and not be a mere arbitrary selection." [185] It is on this principle alone that exclusionary and regulatory laws directed against foreign corporations may be justified.

Under modern business conditions, the resort to that oftentimes vague and unchanging concept known as "comity," on which is based the power to impose conditions and restrictions, is completely indefensible. The judicial reaction towards foreign corporations as manifested in the dicta of the early American cases may be understandable in the light of the circumstances existing during that period, when the dominant conception of a corporation was that it was a franchise for the enjoyment of exclusive and peculiar privileges, to be conferred only by specific grant of the state. At the time the case of *Bank of Augusta v. Earle* [186] and *Paul v. Virginia* [187] came up, the undertaking of banking and insurance business was one such valuable and exclusive prerogative granted to the favored few by special legislation.[188] Hence, it is not at all surprising if, out of fear that a state might be deprived of the "control over the extent of corporate franchises proper to be granted therein," [189] the courts,, as a result, dispensed the invidious principle that it was within a state's unlimited power to refuse recognition to foreign corporations and to prevent them from transacting business within its territory. In their view, the adoption of a contrary position would result in states not being able to "charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from

185 *Smith Bell & Co., Ltd. v. Natividad, supra* note 184.
186 *Supra* note 9.
187 *Supra* note 28.
188 HENDERSON, *op. cit., supra* note 161 at 45, 67.
189 *Paul v. Virginia, supra* note 28 at 179.

other states to engage in the same pursuits." [190] Whether such apprehension was justified or not, or exaggerated or not, it is obvious that decisions whose rationale stemmed from the notion that a corporation is a special and exclusive privilege cannot be considered authorities to a court functioning in the era of freedom of incorporation. Since an association of individuals formed under general incorporation laws, and the Philippine Corporation Law, Act No. 1459, is such a general law, differs in nature and legal standing from one createl by special act, as an unusual and exclusive franchise, the former requires consideration in a different legal context; the legal measure appropriate for one is inapplicable to the other. As pointed out, "it seems utterly inconsistent with the fundamental policy of the Constitution that a state which grants complete freedom of incorporation within its borders, in a given field and under given regulations, should be allowed to refuse to corporations of other states, formed under similar conditions and complying with substantially similar standards, the right to carry on business within the state, and should be free to subject them to arbitrary exactions on the theory that all their rights grow merely out of comity." [191]

In some countries the inconsistency arises in part from nationalistic tendencies. Nationalism, of course, has its legitimate aspirations, and, in the Philippines, will continue, as it does now, to wield much influence in the making of policy and even perhaps in the rendering of judicial decisions on foreign corporations. The just as strong, rival desire for faster economic development, however, leads to conflicting policies of encouragement to foreign investment and enterprise and policies of hostility. The task of reconciling these competing impulses is often difficult. As was correctly admonished, no equitable compromises between the interests of invested capital or skilled techniques and those of the native citizenry can be reached by artificial theories or by ignoring the existing international connections.[192] Viewed from a broader perspective, it is clearly in the economic interests of most if not all states, because of the increasing tempo of international trade, investment and other economic activities, to make for an international legal system on corporate affairs, free from the impediments of vexations and unwarranted domestic laws. The Philippines shares in those interests, as well as in the responsibility for making such a legal system possible. It would be to its own benefit, if the Philippines, apart from reasons of constitutional restraints which must be observed, adopted a more judicious position towards foreign corporations, unburdened by any unwonted "sentimental provincialism."

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[190] *Id.* at 173.
[191] HENDERSON, *op. cit. supra* note 161 at 177.
[192] II RABEL, *op. cit. supra* note 149 at 27.

III. PERSONAL LAW OF FOREIGN BUSINESS CORPORATIONS

When a foreign corporation has been recognized and privileged to transact business in the state, primary inquiry is on what is its personal law. Two dominant legal philosophies have respectively emerged from the two principal, extant legal systems in the world, the Anglo-American common law and the civil law. Under the former system, the law of the state of incorporation constitutes the corporation's personal law.[193] On the other hand, under most civil law countries, it is the law of the state where the corporation was created or organized and where it has its "siege social" or head office that serves as its personal law.[194] These two principles are extensively discussed in legal literature [195] and need not be delved into at any length in this paper. Suffice it to say that the common-law doctrine has its greatest virtue in the simplicity of its application but, otherwise, has proven unsatisfactory. On the other hand, while the civil law doctrine gives rise to several difficulties in its operation, primarily in connection with the location of the corporation's "siege social," [196] it nonetheless has much to recommend. The difference between the two doctrines has perhaps been aptly summarized by one American writer, when he said that the civil law doctrine "is more penetrating than ours: it invariably looks beyond the mere shell of formal incorporation to the core of business reality." [197]

It is not, however, the thesis of this paper to hold out for any theory on personal law, not even the civil law theory. The nature of the problem militates against the rigid adherence to any particular doctrine. What is essentially at the heart of the problem involved in the subject of a foreign corporation's personal law is the determination of what phases of corporate affairs ought to be governed by the law of the native state and what by the territorial law or *lex fori.* Acting upon said determination of the appropriate law is a wide group of interests which, not infrequently, collide with each other. These interests include those of management, stockholders, and creditors, any or all of which groups,

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193 See RESTATEMENT, CONFLICT OF LAWS, sec. 152, 154.

194 II RABEL, *op. cit. supra* note 149 at 38, 63. The terms "siege social," "head office," "seat," "domicile," "central office," "place of central control," "center of management" are oftentimes interchangeably used and have become practically synonymous.

195 See YOUNG, *op. cit. supra* note 151 Ch. 4 at 110-168; II RABEL, *op. cit. supra* note 155 Ch. 19 at 31-68; WOLF, PRIVATE INTERNATIONAL LAW 300-304 ((1945); ARMINJON, NATIONALITY OF CORPORATIONS (Spear's transl.); see BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS 617, for a bibliography on the subject.

196 The difficulties have partly been resolved by the auxilliary principles that the "siege social" or head office must not only be "real," i.e., not fictitious or simulated, but must also be "serious," meaning that there ought to be substantial reasons for the corporation having its head or central office in the particular state in which the same is actually found, and should not have been resorted to "in fraud of," or to "evade" the domestic laws of the forum. This last principle has been primarily contrived by French courts.

197 Latty. Pseudo-Foreign Corporations, 65 YALE L. J. 171-172 (1955).

wholly or partially, may be severally composed of citizens from both states of competing laws. In deciding which law should apply, all the particular interests affected ought to be weighed in the balance. As advocated, the decision should be made in terms of considerations of convenience rather than logic.[198] Even so, as shall be seen shortly, the standard of convenience is not always proper or adequate.

Following the Anglo-American rule, Philippine law resolves the question of personal law in this wise:

> "Any foreign corporation or corporation not formed, organized or existing under the laws of the Philippines shall be bound by all laws, rules, and regulations applicable to domestic corporations of the same class, save and except such only as provide for the creation, formation, organization or dissolution of corporations or such as fix the relations, liabilities, responsibilities, or duties of members, stockholders or officers of corporations to each other or to the corporation." [199]

Under this provision a corporation is domestic with respect to the state of incorporation and foreign with respect to all other states.[200] The personal law is the law of the state of incorporation. The above formulation of the rule on personal law has been known in the United States as the "internal affairs" doctrine.[201] This doctrine, however, has lost much of its vitality due to the several inroads on its that the courts have made.[202] Under present conditions, it would be more realistic to regard the matter as merely one of *forum non conveniens* based particularly on the principles of effectiveness of judgment, which means that a court srould not be empowered to render a decision it cannot enforce within its own territory.[203]

The orthodox interpretation that may be given to the above statutory provision is that the territorial law (Philippine law) shall govern those aspects of corporate affairs which are within the state's competence to regulate, particularly those that, for reasons of strong public policy, are designed to protect the local citizens, and the law of the state in respect of which the corporation is native or the personal law, shall govern those which relate to corporate existence, dissolution, articles of

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198 II RABEL, *op. cit. supra* note 149 at 32.

199 Sec. 73, Act No. 1459, Corporation Law. (Similar provision exists with respect to banks under the General Banking Act (sec. 18, Rep. Act No. 337).

200 To the same effect are secs. 68, 69 and 70.

201 See 17 FLETCHER, *op. cit. supra* note 89 sec. 8425, 8445.

202 Beale observes a tendency of courts to take jurisdiction over matters unquestionably involving the internal management of the corporation where the business is carried on within the state and all parties to the dispute are within its boundaries. He concludes that it is "possible to induce a court today to proceed against a foreign corporation unless it is asked to dissolve the corporation and wind up its affairs, to interfere with its policy as to the declaration of dividends, or to interfere with the election of officers or the meeting of shareholders or directors. *Op. cit. supra* note 74 at 891-893.

203 The "foundation of jurisdiction is physical power," Mr. Justice Holmes said in *McDonald v. Mabee*, 37 Sup. Ct. 342 (1917).

incorporation and bylaws, capital structure, division of shares into different classes, declaration of dividends, external relations, and the jural relations among management and the stockholders or members *inter se.*

More precisely, the law of the state of creation answers the question whether the entity seeking recognition and the privilege to carry on business in the Philippines is a corporation. Once incorporation has been properly effected in accordance with the law of any state, the corporation shall endure to exist as such, even if the requirements under the law of the state of incorporation fall short or are not consistent with the Philippine Corporation Law. Conversely, if legal personality is not acquired in the place of attempted creation, it canot be considered a corporation elsewhere.[204]

Would mandamus lie against the proper government official to compel him to grant the permit to do business locally to a foreign corporation, even if the corporation's stock structure or organizational steps are not such as would be appropriate for a domestic corporation? Under the rule of personal law, and on the authority of *Commonwealth Acceptance Corp. v. Jordan,*[205] *State ex rel. Fiberboard Products, Inc. v. Hinkle,*[206] *North American Petroleum Co. v. Hopkins,*[207] *State ex- rel. Standard Tank Car Co. v. Sullivan,*[208] the answer is in the affirmative. These cases involved foreign corporations with different classes of shares having distinct voting rights not contemplated by the local law. Section 5 of the Corporation Law provides, *inter alia,* that the shares of any domestic corporation may be divided into classes with such rights, voting powers, preferences and restrictions as may be provided for in the articles of incorporation.[209] Under this provision, directors may be elected by cumulative voting, but even if the personal law of the foreign corporation recognizes "straight" voting only, it should nevertheless apply, where the only issue involved relates to the right of the corporation to transact business.

In view of the principle of limited liability of stockholders, corporation laws usually impose a requirement regarding subscription and payments for authorized capital stock or shares to protect creditors. The strength of this requirement as an expression of policy differs among countries. Some do not have any such requirement at all, while in others, particularly in Continental Europe,[210] such a feature of the cor-

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[204] See Comments on sec. 155, RESTATEMENT (Conflicts of Law).
[205] 198 Cal. 618, 246 Pac. 796 (1926).
[206] 147 Wash. 10, 264 Pac. 1010 (1928).
[207] 105 Kan. 161, 181 Pac. 625 (1919).
[208] 282 Mo. 261, 221, S.W. 728 (1920).
[209] Banks, trust companies, insurance companies, and building and loan associations are not permitted to issue no par value shares of stock (sec. 5, Act No. 1459). See also sec. 8, The General Banking Act.
[210] Spanish law requires full subscription of all shares and 1/4 payment before the corporation can be formed. Law of July 17, 1951 (Ley de Regimen Juridico de

poration law is viewed as an essential safeguard against irresponsible enterprises, and in many cases require full subscriptions. The position of the Corporation Law of the Philippines lies somewhere between these two extremes. It requires subscription of at least twenty per cent of the entire number of authorized shares of capital stock and payment, in actual cash or property, of at least twenty-five per cent of the subscription.[211] This is, however, a requirement for domestic corporation; the statutory provisions specifically intended for foreign corporations do not contain the same requirement.[212] Under section 73 of the Corporation Law,[213] which formulates the rule on personal law, any inconsistency between the law of the state of creation and the aforementioned requirement for domestic corporations will not preclude the application of the former law. Still, there are well-taken exceptions to the rule, as where the personal law would have to yield to the territorial law, because of the nature of the business undertaken by tre foreign corporation. Thus in the case of foreign insurance companies, Philippine law explicitly provides that, "no foreign insurance corporation shall engage in business in the Philippines unless possessed of paid-up unimpaired capital or assets and reserve not less than that required of domestic insurance corporations, namely, the sum of ₱500,000; and no foreign insurance corporation shall engage in insurance business in the Philippines until it shall have deposited with the Insurance Commissioner, for the benefit and security of its policy holders and creditors in the Philippines, securities, satisfactory to the Insurance Commissioner, consisting of bonds of the Government of the Philippines or of any of the branches or political subdivisions of the Philippines authorized by law to issue bonds, or of the government in which such corporation is organized, or other good securities to the actual value of ₱250,000.[214] In the case of foreign banking institutions, the law merely provides that they "shall be bound by all laws, rules, and regulations applicable to domestic banking corporations of the same class, except such laws, rules and regulations as

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las Lociedades Anominas), Art. 8, BOLETIN OFICIAL Aug. 6, 1951. French law establishes the same requirement. Law of July 24, 1867, Arts. 1, 24 (under Code de Commerce, Art. 64). Italian (Codice Civil Art. 2329 (1942) and German laws are to the same effect (Law of Jan. 23, 1937 Aktiengesetz) sec. 82(2), (1937) Reichsgetzblatt I. 107).

211 Sec. 6, Act No. 1459.

212 See sec. 68, Act No. 1459 (Corporation Law).

213 See note 209, *supra.*

214 Sec. 178, Act No. 2427, as amended by Rep. Act No. 488. Moreover, "Every foreign insurance corporation doing business in the Philippines shall set aside at least 30% of the legal reserves of the policies written in the Philippines and invest and keep the same therein in accordance with the provisions of the Insurance Law: *Provided, however,* That in determining the amount to be invested and kept in the Philippines under the law, a corporation shall be given credit for the amount of securities of the Philippines deposited by such corporation under section 178 of the Insurance Law, as amended: *And, provided, further,* That the securities purchased and kept in the Philippines under the above provisions shall not be sent out of the territorial jurisdiction of the Philippines without the written consent of the Commissioner. *Id.* sec 178-A.

provided for the creation, formation, organization, or dissolution of corporations or as fix the relation, liabilities, or duties of members, stockholders, or officers of corporations, to each other or to the corporation." [215] In spite of the foregoing provision, the failure to meet the required minimum subscription and payment set by the territorial law may presumably be used as a basis by the local authorities to refuse to the foreign bank the right to transact business, in view, as has been seen,[216] of the wide discretion lodged in the latter.

In connection with this phase of the discussion it should also be noted that the Central Bank or the Secretary of Commerce and Industry, as the case may be, with the approval of the president of the Philippines, may revoke the license to transact business in the Philippines of any foreign corporation should they find the condition of the corporation to be one of insolvency or that its continuance in business will involve a probable loss to those transacting business with it; in case of revocation of license, the Solicitor-General shall take such proceedings as may be proper to protect creditors and the public.[217]

On one aspect of the stockholders' relation *vis-a-vis* the corporation, it was held that the right of a stockholder to inspect the books of a corporation organized under New York laws but licensed to engage in business in the Philippines is determined by New York law.[218]

The application of the law of the state of incorporation in defining the relations of stockholders to third parties is interestingly illustrated by two decisions, one Philippine, the other English, both involving the same law of California. In the former case, a creditor of a corporation incorporated under California law was allowed to maintain an action against its stockholder residing in the Philippines, and the court rendered a judgment in accordance with the law of California, which makes a stockholder liable for corporate debts in proportion to his stock holdings, and rejected the defendant's contention that the law of California is unjust, different, and inconsistent with the Philippine Corporation Law.[219] The English case, on the other hand, involved a limited company incorporated under British laws and doing business in California. Under a similar action against the shareholders, the English court denied judgment.[220] Both cases, of course, are correct.

When a foreign corporation is recognized or privileged to do business by the state within its territory, the rule is that it has been so recognized or privileged with such rights or powers only as the law considered

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215 Sec. 18, Act No. 337 (The General Banking Act).
216 See pp. 474-475, *supra*.
217 Sec. 71, Act No. 1459 (Corporation Law).
218 *Gray v. Insular Lumber Co.*, 67 Phil. 139.
219 *Williamette Iron & Iron Works v. Muzzal*, 61 Phil. 471 (1935).
220 *Risdon I. & L. Works v. Furness*, (1906) 1 K. B. 49.

to be the personal law may have conferred. Under the doctrine followed by Philippine law, the law of the state of charter defines the extent and limits of these rights and powers. If allowed to operate without exception, the doctrine may well produce iniquitous results as regards third parties dealing with the corporation in good faith. Obviously, if the law of the incorporating state were to be always held out as decisive of the issue of corporate capacity, then the corporation may disengage itself from liability by the plea that the particular transaction is *ultra vires* the corporation. In support of the doctrine, it is asserted that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation with whom he voluntarily contracts as that government authorizes." [221] The argument ignores realities and puts too much of an imposition on the public. Cognizant of the harshness of the doctrine if pursued to the limits of its logic, Rabel suggests that the same must be reasonably construed to mean that "the compass of the powers of a corporation is determined by the law of the incorporating stat, but the effect of an act beyond such powers is determined by the local law." [222] It is submitted that the same result is reached by Philippine law when it provides that a foreign corporation "shall be bound by all the laws, rules and regulations applicable to domestic corporations of the same class, save and except such only as provide for the creation, formation, organization or dissolation of corporations or such as fix the relations, liabilities or duties of members, stockholders or officers of the corporation to each other or to the corporation." [223] The effect of a transaction *ultra vires* the foreign corporation is determined by Philippine law.

Conversely, not all powers and rights that a foreign corporation may enjoy by virtue of its charter and the laws of the state of incorporation are exercisable by it within the territory of the forum. These must give way to considerations of public policy; but, as previously discussed, the curtailment of powers and rights ought to be made only for strong, proper reasons. The rule then is that a foreign corporation possesses in the forum those rights (a) which may have been conferred upon it by its personal law, and (b) which are not prohibited or restricted by the *lex fori*. The limitations on said rights may either be of general application to all persons and aliens, or specifically directed at certain corporations of the same class.

With respect to the delimitation of authority of corporate agents, as distinguished from the powers (capacity) of the corporation itself, distinction is usually made between two classes of corporate representatives, namely, the officers or directors on the one hand, and all other

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221 *Canada Southern R. R. v. Gebbard* 109 U.S. 527 (1883).
222 *Op. cit. supra* note 149 at 163.
223 See pp. 65, 69, *supra*.

persons acting in the name of the corporation, on the other.[224] Since the latter group act by virtue of contractual relationships only, as "mere agents," the conflicts rules applicable to their acts predicates that the extent of their authoriy is determined by the law of the place where the agents act upon their authority. On the other hand, the authority of directors is referred to the personal law. The reason advanced is that, as the corporation's principal functionaries, their powers are defined for all individuals holding the same position and brought to the public knowledge by the articles of incorporation or bylaws, so that a third party dealing with them are charged with notice of the existence and extent of their authority.[225] It is submitted, however, that the situation of the directors' authority, and of the powers of the corporation itself are almost identical, in so far as they operate upon the public; therefore, the above conflicts rule is open to the same criticism made against the rule as regards the latter.

Since share certificates have to do with rights of membership, their creation, nature, and transfer to a purchaser are governed by the law of the state of incorporation, under the Philippine rule. Bonds, debentures, promissory notes and other corporate instruments of like nature are governed by the proper law of the contract.[226] Other matters ruled over by the law of the state of charter are annulment of the charter; its expiration by lapse of time; transformation; merger, dissolution, whether voluntary or involuntary, its method and cause; in states recognizing the extraterritorial effect of foreign adjudications in bankruptcy, the effect of such adjudication on the existence and representation of the corporation; and its continuation after a certificate of dissolution for purposes of winding up or actions of debt.[227] Residents and citizens of the Philippines who are creditors of a Philippine branch or agency of a foreign banking institution or foreign insurance company shall have preferential rights to the assets, respectively, of such branch or agency.[228]

A state may have very strong policy views, expressed in its corporation law, on the regulation of the affairs of a corporation for the particular protection of local stockholders and creditors. At this juncture, a serious shortcoming of the incorporation principle becomes apparent. From the standpoint of effective regulation, it is unwise and undesirable to give to the promoters of a corporation the almost unrestricted freedom to choose the law that shall govern the life of the corporation, irrespective of the stake or lack of it, which the state of the governing law may have in the actual operation of the corporate enterprise. The instances are not rare where the issues affecting matters that need regulation to safe-

[224] II RABEL, *op. cit. supra* note 149 at 165.
[225] *Ibid.*
[226] WOLFF, *op. cit. supra* note 196 at 308.
[227] II RABEL, *op. cit. supra* note 149 at 85-86.
[228] Sec. 19, Rep. Act No. 337; secs. 178, 179, Act No. 2427.

guard important rights of the investing public of the forum are resolved, under the incorporation doctrine, by reference to the laws not of the domestic state which has the more compelling claim to such regulation, but rather to those of a state which has little, if at all, any such claim. Thus the policies of the domestic state, no matter how strong, are thwarted, and the interests of its resident or citizen stockholders and creditors prejudiced. The perpetration of the unwarranted situation is enhanced by the pronouncement to the effect that there is nothing illegal or against public policy in a group of persons incorporating themselves in one jurisdiction and transacting its main business in another, and is aggravated by a strict adherence to the "internal affairs" doctrine, inviting circumvention of precisely those provisions of the local corporation law designed to protect stockholders and citizens.

A very strong case has been made out against the application of the principle of non-interference in internal corporate affairs, with respect to a pseudo-foreign corporation, that is, one which is incorporated in one state but conducts all or principally all its business in another state, in such a manner that it is to all intents and purposes a local corporate entity.[229] The thesis propounded is that where the corporation is essentially local in character, and the domestic corporation law contains protective measures that are an expression of strong policy, and local residents predominate among the interests sought to be protected thereby, then the law of the chartering state shall be disregarded in favor of the application of said protective features of the domestic law. These features are those that indicate strong legislative policy and intended to protect corporate creditors, parties dealing with the corporation, shareholders or classes of division of shareholders, including minority shareholders. "There is, in sum, no cogent reason why vigorous community policies expressed in particular portions of a modern corporation law should not outweigh considerations of mere certainty and ease of application. There is no justification for immunizing local corporation from such policy-laden law simply because the corporation was chartered in another state. [230]

The point seems to be well taken. The adoption of this policy would enable the state with which the corporate enterprise has the most real and substantial connection to effectively regulate matters within its sphere of competence. It certainly leads to no unwarranted usurpation of personal law. The Philippine Corporation Law, like the state statutes in the United States, is not so worded as to aid courts in making the needed distinction between real and pseudo-foreign corporations. But certain American courts have worked out of the difficulty by ruling, when faced with a pseudo-foreign corporation, that the corporation is not strictly a foreign corporation and will not be so considered with respect to certain

[229] See Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137 (1935).
[230] *Id.* at 143.

provisions of the local corporation law expressive of strong public policy.[231] It is also suggested that courts could reach the desired result under statutes similar to section 73 of the Philippine Corporation Law,[232] by construing the same as merely enunciating the general principle that the law of the state of incorporation governs the organization and the internal affairs of a corporation together with the implicit *exceptions* to the principle.[233]

Whether the Philippine Supreme Court will take such or similar steps is a matter of conjecture. Whether it does or not, the nature of the problem underscores an aspect, among others, where Philippine corporation law calls for reform.

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[231] *Toklan Royalty Corp. v. Tiffany*, 193 Okla. 120, 141 P. 2d 571 (1943). The court supported its decision by reference to a provision for foreign corporation in the Oklahoma Constitution which states that "no foreign corporation . . . shall be relieved from compliance with any requirements made of a similar domestic corporation. . . ."

[232] See pp. 67-68, *supra*.

[233] Latty, *op. cit. supra* note 229.