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On Domesticating Giants:

Further Reflections on the Legal Approach to Transnational Enterprise*

A. A. Fatouros**

Writing on transnational enterprise¹ has by now reached the proportions of a major flood. Although much of the recent literature debates the pros and cons of possible regulation, only a small part of it is specifically legal writing. The aim of the present paper is to inquire into some major problems that a legal approach to the subject must face; stopping short, however, of consideration of the actual possibilities of national and international regulation. These

*This article continues a line of inquiry begun long ago at the University of Western Ontario, at a time when transnational enterprise was dealt with under the heading of "direct private foreign investment." It picks up and develops certain points made in some relatively recent articles of mine, such as, *The Computer and the Mudhut: Notes on Multinational Enterprise in Developing Countries* (1971), 10 *Columbia J. Transn'l. L.* 325; *Multinational Enterprise and Extraterritoriality* (1972), 1 *J. Contemporary Business* (No. 4); and especially, *Problemes et methodes d'une reglementation des entreprises multinationales* (1974), 101 *J. Droit Int'l* (Clunet) 495.

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¹ The term itself is by no means well-settled. The two adjectives most commonly used are "multinational" and "transnational." Both are acceptable, although I now prefer the latter because it is least subject to misunderstanding and has, in addition, been adopted by the United Nations. The main difficulty in usage arises with respect to the noun. Either "enterprise" or "firm" is appropriate (although the former term is a little problematic outside United States parlance). European legal literature uses the equally acceptable — indeed slightly more accurate — term of "group of companies." But another noun is also in common usage, "corporation," and that unfortunately is both inexact and confusing. Since a multinational firm consists of several discrete corporations, it is by no means clear whether the term "multinational (or transnational) corporation" covers the entire complex of discrete "establishments" or solely (or chiefly) the parent, or headquarters, company. Unfortunately, this noun seems to have been adopted in the usage of official publications of both the United States and the United Nations. In this paper, I shall be using the term "transnational enterprise, keeping in mind that several of the authors mentioned or quoted may be using differing terms to refer to the same phenomenon.

should be the topic of a later companion study, once certain developments currently in process reach a stabler (and more visible) stage.

This paper will therefore start by briefly surveying some problems of definition, will proceed to a discussion of the specificity of transnational enterprise as a legal (and economico-political) phenomenon, and will then attempt an elucidation of the concept, which will include a consideration of the process of transfer of technology and its importance for our topic. The article will then discuss the issue of so-called "extraterritoriality" as an illustration of the complex manner in which the problems of transnational enterprise arise in law. It will conclude with a consideration of possible general goals and patterns of legal regulation.

The Definitional Maze

The term "transnational enterprise" is not a legal term of art; it has no established or necessary meaning in law. It is still largely a nonlegal term, somewhat apologetically used in legal discourse because of its current prevalence in other disciplines. Most definitions in use are derived from business literature and the extent to which they possess or can be made to have legal meaning is limited. According to the most prevalent among the various formulations, a multinational enterprise consists of a cluster of companies incorporated in several countries, joined together by ties of common control, with access to a common pool of human and financial resources and responsive to a common management strategy.² The definition is not inaccurate, but it is of little help in concrete legal contexts. The various "elements" of it, although listed *seriatim*, are in fact interconnected and overlapping. They have no clear borderlines and some of them have no definite core of meaning. A more legally-oriented definition has been given by Professor Berthold Goldman, according to whom the "multinational group of companies" is "a complex of legally discrete companies, linked to several countries, which form economically a single enterprise, or at least a closely coordinated enterprise, which

² R. Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (New York: Basic Books, 1970) at 4; Vernon, *Economic Sovereignty at Bay* (1968), 47 *Foreign Affairs* 110 at 114. And *cf.* D. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law* (1970), 83 *Harvard L. Rev.* 739 at 740 & 745-46.

exercises international activities under the direction of a parent company."³

Economic, business or political definitions of transnational enterprise follow a variety of approaches.⁴ Some stress quantitative tests: according to them an enterprise is multinational when its international operations (i.e. those outside the home state) are sizeable—in terms of total assets, sales, production or employees, or of the number of foreign-based affiliates. Other definitions look to the organization of the firm, its managerial structure, and the degree of centralization in decision making. Finally, others employ behavioural tests: the attitude of top managers, their perception of the firm and their consequent policies. This last approach often ends up with tripartite distinctions: ethnocentric, polycentric and geocentric enterprise (Perlmutter), national, multinational and global (or international) firm (Kindleberger and others).

There are as yet no authoritative legal definitions. A recent one is found in the *Guidelines to Multinational Enterprises* of the Organization for Economic Cooperation and Development, even though it is preceded by the assertion that "precise legal definition . . . is not required" for their purposes. According to the *Guidelines*, multinational enterprises

usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degree of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned.⁵

A single definition may be convenient and even useful in law, but it is not indispensable. It may be premature to attempt to establish a definition which would apply to all relevant legal situations. For the time being, several definitions differing from one another in some respects may be usefully

³ B. Goldman, *Cours de droit de commerce international 1972-1973* 102 (mimeo., 1973).

⁴ For an exploration of definitions, see Y. Aharoni, "On the Definition of a Multinational Corporation," in A. Kapoer and P.D. Grub, eds., *The Multinational Enterprise in Transition* (Princeton: Darwin Press, 1972) at 3.

⁵ Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises* (1976), Para. 8 of "Preamble to Guidelines".

employed, depending on the particular purposes of the legal text (or context). If, for instance, it is sought to regulate by national legislation the activities of transnational enterprise, a "normative" definition, that is to say, a definition founded on criteria which refer to an ideal (i.e., favoured) model of such enterprise, may have to be utilized. For the purpose of tax or antitrust laws, a different kind of definition, based on quantitative or structural criteria, may be more appropriate.

What is Specific About Transnational Enterprise?

Transnational enterprise is a recent phenomenon. In the nineteenth century, and even, with small change, until the Second World War, international investment was primarily indirect, portfolio investment (i.e., investment in bonds and securities, not involving direct control of involvement in operations abroad). A major exception was the United States. In American investments abroad, especially in Latin America, direct, equity investments (i.e., those involving control of the foreign enterprise's operation) played an important role. After 1950, transnational enterprise took off, because of a conjunction of several factors: United States technological lead, growth of new managerial techniques closely linked to new communication possibilities (computers, telex, air travel), significant liberalization of world trade and investment, development and importance of large oligopolistic firms (which have always dominated foreign investment).

It is possible to visualize the growth of transnational enterprise in at least two schematic fashions, starting in both instances from a hypothetical small firm, producing only in the home country for the local market. One may then discuss the growth of exports (to foreign importers), increasing use of permanent non-productive facilities abroad (warehouses, agencies), then the establishment of processing (packaging, assembly) plants abroad and finally production abroad.⁶ Each stage raises different problems, many of which do not yet have any adequate legal formulation. The law tends to rely on certain basic concepts, or patterns, which may reflect economic and business reality in one stage, but not in

⁶ Cf. W.A. Dymsha, *Multinational Business Strategy* (New York: McGraw Hill, 1972) at 7.

another. Thus, all export (or import) transactions are modelled in law on the first of the stages just listed: the "arm's length" contract between an exporting firm and a foreign importer, over whom the seller has no control. The same model is by and large used even when dealing with a transaction between two affiliates of a transnational enterprise located in different countries.

The second approach to the growth of transnational enterprise stresses the changes in the firm's managerial structure. Starting with the early small firm model, with a single versatile manager-owner, it moves to the functionally specialized firm (with a president or managing director and managers in charge of production, marketing and finance divisions) and the firm whose production is diversified (with divisions devoted to each main category of products.) Expansion abroad leads to creation of an international division, at the same (managerial) level as the domestic product-oriented divisions. Further expansion, however, invites a geographical allocation of managerial responsibility (each division in charge of a region) or an international product-based allocation.⁷

It is clear that no exact correspondence exists between legal and managerial structures of organization. Each responds to different needs and influences. While we cannot refute an intuitive perception of some interaction, there is as yet no serious research, on a general enough level, concerning such interaction and the reciprocal influence of legal and managerial structures and forms.

For a specific, discrete, legal concept (or institution) to emerge, it must be distinguishable from other related concepts and there must be good reason to differentiate it. In terms of the instant case, the fundamental questions are, "Is it possible to separate transnational enterprises from other firms which are not transnational?" and "Is it appropriate, useful, to do so?" or, in other words, "What difference would such a differentiation make?" The brief discussion of definitions suggests that it is certainly possible to devise criteria for distinguishing transnational from non-transnational enterprises, keeping in mind, however, that,

⁷ Cf. J. M. Stopford and L.T. Wells, Jr., *Managing the Multinational Enterprise* (New York: Basic Books, 1972) at 9.

(1) certain important similarities continue to exist (e.g., all large firms, whether transnational or not, share certain characteristics), and (2) the borderlines between transnational and non-transnational enterprises are fuzzy and uncertain. (for example, should a firm that only exports abroad ever be called transnational? Is a firm that only licenses its patents or trademarks abroad transnational? Is a United States firm with a single subsidiary in Canada or in Mexico a transnational enterprise?)

The usefulness of the distinction is the most important test. In my submission, it is proper to separate transnational enterprises from other firms because the former exhibit certain traits which are peculiar to them, and may therefore require specific legal treatment. The ability of transnational enterprise to combine multiple identities (subsidiaries) with a single strategy makes it remarkably flexible and mobile. It can, if it is worth the effort, evade much governmental regulation; more important, it can in many instances take advantage of, and derive benefit from, the differences in economic and legal conditions prevalent in various countries. The legal rules established by positive law to govern private transnational relations and transactions are often inapplicable to transnational firms. The tests and criteria specified cannot be met, the purposes of the rules cannot be served. The problems of "nationality" of corporations in conflict of laws and, especially, in public international law, are a signal case in point. At the same time, the assumptions as to economic and other facts which underlie much of the law are no longer appropriate where transnational enterprises are concerned. Thus, the price agreed upon by the parties in a sales transaction may normally be considered as corresponding to market constraints, subject to exceptions in cases of collusion, etc. But the price in a sale between affiliates may have nothing to do with market forces; it reflects the internal needs and processes within the transnational enterprise, which may or may not correspond directly to market forces. Finally, through its transnational operations, its presence in many territories as a powerful actor, the transnational enterprise may be a significant underlying factor in creating or exacerbating (international) conflicts. And the vertical, hierarchical, relationships among the firm's several units, across national borders, compete with the equally vertical state-to-citizen relationships within each nation.

Some Difficulties of a Legal Approach

Given these elements of uniqueness, the question arises: why has law been so late in recognizing and accepting the reality of transnational enterprise? One must begin with the fact that if transnational enterprise is an important economic phenomenon, founded on new technological capabilities, it is also a legal phenomenon. More than that: transnational enterprise is a creature of law, national as much as international. Its legal aspects are not secondary or derivative; they are of the very essence of the phenomenon. The fundamental feature of transnational enterprise, the retention of unity within a flexible pluralist context, is only possible with the help of law.

The prevailing economic, legal and political systems, especially in the developed states, have made possible the growth of enterprises which transcend national borders while retaining their unity. The potential for transnational enterprise was thus already present, but it could not have become real without the efforts of a large number of jurists, mostly counsel to the enterprises in question, who managed to discover and utilize the pre-existing possibilities. Fashioning a new form of enterprise, on a plurinational legal and economic basis, was in the main a technical task, involving much work of detail, using already established methods and legal instruments. With these rather commonplace materials a novel legal phenomenon was constructed. Even if one has doubts as to the social utility of transnational enterprise, one must appreciate and even admire the talent and the accomplishment of its creators.

Finally, the recent development of transnational enterprise must also be attributed to certain changes in the structure and principles of the international legal order. International agreements, multilateral and bilateral, from G.A.T.T. to treaties of friendship, commerce and navigation, have combined with the action of international organizations, such as the International Monetary Fund and the O.E.C.D., and with unilateral state practice, to bring about an increased acceptance of freedom of movement for capital, commodities and persons, an increase of communication among states, and an advanced degree of international legal security. While total freedom of movement of the factors of production has by no means been established, it is enough to compare the present situation with that of thirty or forty years ago to perceive the extent of the change. Internationalization of

production became possible only when the legal obstacles to the movement of factors of production became fewer and less important.⁸

The relative lack of interest on the part of legal scholars in the emergence of transnational enterprise is thus more paradoxical than it would appear at first blush. One should insist, moreover, that it is a lack of interest on the part of legal scholars that is involved here, not neglect by the "law" — at least not when by "law" we refer to the entire complex process of authoritative decision-making. If we consider the responses of national legal orders in their entirety, we find that the phenomenon of transnational enterprise has not been totally disregarded. Legal practice, whether legislative, judicial or administrative, has dealt with the principal manifestations of the phenomenon in concrete context and has managed in the main to deal successfully with it.⁹ Company law, to varying extents, has taken into consideration the structural relationships between companies. In German law an entire chapter of company law deals with the *Konzern*, that is to say, the enterprise composed of several companies. The concept of "group of companies" has been proposed or established in several other European legal systems and is included in the project of a "European corporation". Antitrust law has dealt with the concept of "enterprise", as distinguished from corporation, in a variety of contexts. "Lifting the veil" of corporate personality is by no means an exceptional or surprising feature in several areas of law. In other branches of the law, specific provisions dealing — solely or primarily — with transnational enterprise are not uncommon. In tax law relations among affiliated corporations are often dealt with specifically, as under Article 482 of the United States Internal Revenue Code, or under provisions of bilateral agreements, or in a variety of other manners by other legal systems.¹⁰ The extraterritorial reach of certain laws, especially antitrust laws, which will be discussed later, must be seen in several cases as an effort on

⁸ No inference of a one-way causal connection should be drawn. In broader perspective, it would be equally true (indeed, more so) for an economist or a historian to say that, when other objective conditions for the internationalization of production were ripe, the legal obstacles to it were gradually removed. The pertinent point here is not the identity of the ultimate cause, but the significance of legal developments.

⁹ See Y. Hadari, *The Structure of the Private Multinational Enterprise* (1973), 71 Mich. L. Rev. 729; and Vagts, *supra* n.2.

¹⁰ On the complexities of this type of measure, see H. LaMont, *Multinational Enterprise, Transfer Pricing, and the 482 Mess* (1975), 14 Columbia J. Transn'l L. 383.

the part of courts and administrative authorities to take into consideration and to give effect to the reality of the multinational expansion of enterprises.

The neglect of transnational enterprise by the law is thus limited in actuality to a relative neglect on the part of legal scholars. What has not yet been done, or not yet been done well, is to construct appropriate legal doctrine taking into account in ordered fashion the multiple manifestations of transnational enterprise. Such a delay on the part of scholars in dealing with reality is not unique: economists, too, did not recognize the existence of transnational enterprise until quite recently. Doctrinal delay in the case of law may be attributed to a number of causes: the fast pace of the growth of transnational enterprise in recent years; a certain conservative tendency on the part of legal thinking, which makes dealing with novel concepts more difficult; from a political or sociological viewpoint, a certain reluctance on the part of lawyers to examine critically the foundations of the economic and political system which they serve.

Another cause is what may be called the "binary bias" of legal thinking: there is a tendency in law to articulate problems in terms of bilateral relationships, on a two-pole continuum or on a two-party basis. A traditional method of legal analysis, when faced with complex legal situations, is to isolate the several pairs of possibly pertinent parties and then proceed to examine each pair of legal relations by itself. (Witness the sometimes excessive usage of the "-or" and "-ee" terminology.) The usefulness and practical applicability of this method cannot be denied. Nevertheless, when dealing with complex phenomena it has definite limitations. In the case at hand, the main trouble seems to be that this manner of thinking deprives the legal manifestations of transnational enterprise of any originality. A study of the various relationships, within or with a transnational enterprise, solely in bilateral terms often yields banal findings, not significantly differing from those of other relationships of the same general legal category. The peculiar character of transnational enterprise is primarily manifested in interactions within a total system, in the contemporaneous interrelationships of several kinds and levels of entities. The specificity of such a total interaction is not perceived when it is studied as an aggregate of several binary relationships.

Toward an Elucidation of the Concept

To elucidate, rather than rigorously define, the concept of transnational enterprise, it is necessary to stress its inherent duality, the tension between its two basic elements, each corresponding to one of the words composing the term. The transnational enterprise is an enterprise; that is to say, an organizational complex, a highly complex organization. Its basic characteristic is unity: unity of action, unity of strategy, unity of decision, unity of technical, financial and human resources. The reference to "common strategy," in the usual definitions,¹¹ may be misleading in one respect: it seems to suggest (although this implication is clearly rejected in some of the writings using that definition) that the relations between the separate constitutive units of the transnational enterprise are on an equal, horizontal, basis. In fact, the transnational enterprise, like most business enterprises, is fundamentally hierarchical. The principal relationship among its units is a vertical relationship, a relationship of subordination. Despite several qualifications, necessary to account for modern practices of management, the fundamental model of the decision-making process in the enterprise remains the pyramid. Thus, the unity of the enterprise is manifested primarily by the presence of a decision making centre, a single centre, the commands of which determine the behavior of the separate units and of the various agents of the enterprise. The common strategy of the enterprise is in fact that aggregate of the decisions coming from that centre.

The actual degree of centralized control and of intensity of interactions (integration) among affiliates varies widely among transnational enterprises. To some extent, this reflects differences in policies and in approach to management. It also frequently reflects economic and business factors. Professor Jack Behrman has distinguished in this connection three broad categories of companies: those that are oriented toward resources (whether minerals and fruit, or cheap labour), those that are market-oriented, and those that are governed in their world-wide operations by considerations of efficiency.¹² The greatest degree of centralized integration is found in the last category; it varies considerably

¹¹ See, e.g., text accompanying note 2, *supra*.

¹² See the most recent formulation in J.N. Behrman, *Decision Criteria for Foreign Direct Investment in Latin America* (New York: Unipub., for Council of the Americas, 1974)

in the other two. At the same time, a single enterprise may combine in its operations more than one of the above orientations. Yet, the role and the extent of centralized decision making should not be underrated. Several recent studies stress the drive toward and the actual degree of centralization in transnational firms.¹³

In legal perspective, it is the possibility rather than the actual utilization of centralized integration that is significant. The relationship between centre and periphery is a fundamental feature of transnational enterprise. In law, as in economics, this relationship is expressed by the notion of control. Control denotes a relationship where the decisions of one party determine the behaviour of the other, or in legal terms, where one party has the (legal) authority to decide concerning the behaviour of the other. The advantage of this notion (over that of "common strategy", for instance) is that it suggests a hierarchical relationship, not an egalitarian one. At the same time, it allows some differentiation between the two parties (especially when it is perceived as a matter of degree); it does not lump them together as a single entity. The importance of this concept becomes clearer when the second constitutive element of the transnational enterprise is considered.

The transnational, or multinational, character of the enterprise refers to its presence within the territories of several sovereign states. The transnational enterprise is thus marked by a dual plurality: first, it consists of several corporations whose legal personalities are distinct; second, these corporations are established by virtue of several national laws, thus having *prima facie* different nationalities.¹⁴ It is true that this plurality is in a way a mere appearance: it is the transnational enterprise itself, as an enterprise, that is present within more

¹³ See M. Z. Brooke and H.L. Remneis, *The Strategy of Multinational Enterprise: Organization and Finance* (Ann Arbor: University of Michigan Press, 1970) at 64-124; A.S. Golbert and J.J. Wilson, *Centralizing the International Operations of Multinationals* (1973), 11 San Diego L. Rev. 70. And cf. R.S. Newfarmer and W.F. Mueller, *Multinational Corporations in Brazil and Mexico: Structural Sources of Economic and Noneconomic Power* (Report to the Subcommittee on Multinational Corporations of the U.S. Senate Committee on Foreign Relations: Washington, 1975) at 145-153.

¹⁴ The issue of corporate nationality is, of course, more complicated than that. For a useful brief review of the problems and the alternative criteria used, see, D. Vagts, *supra* note 2, at 740-43. And see, for more extended treatment, Note, *The "Nationality;" of International Corporations under Civil Law and Treaty* (1961), 74 Harvard L. Rev. 1429; K. Ginther, *Nationality of Corporations* (1966), 16 Oesterreichische Zeitschrift fuer Oeffentliches Recht 27.

than one territory. Yet the plurality retains, nevertheless, a certain reality: in addition to formal legal responsibility, each corporation often retains a partial identity.

The concept of presence within a territory is not as simple as it appears at first blush. Several of the definitions of transnational enterprise insist on the serious and clear cut character which the presence of the enterprise must have within a given territory. Such presence must be manifested by establishments having a distinct personality and by operations of production, not merely marketing (exports). To understand better the meaning of presence we must again refer to the notion of control, which thus becomes the dialectical link between the two fundamental and at first glance opposed features of the transnational enterprise. An enterprise is present within a territory whenever there are distinct establishments in that territory which are under the effective control of the enterprise's decision-making centre.

The modalities of presence of transnational enterprise correspond then to the modalities of control. For there are several manners and instruments of control. The principal one, often treated as the paradigm of control, is the wholly-owned subsidiary. A similar modality is that of majority shareholding by a parent company in a subsidiary. In both cases the fact of control is easy to perceive, although the particular manners of exercise of this control are many and sometimes complex. Shareholding on a 50-50 basis or on a minority basis constitutes another method of control. The reality of control becomes then a question of fact. The forms of exercise of the control may be found in the structure of the enterprise—for instance, in the particular provisions of the charter of the joint venture — they may exist *de facto*, as in cases of overwhelming technological dependence, or they may be established by contractual devices. The direction of the operations of the subordinate corporation may be assured by means of transfer of technology contracts. To insure execution of a common strategy, it is not necessary for the parent company to control all operations of the subordinate unit. It is enough if it has the power to determine the operations deemed important, that is, those operations which are relevant to the global activities of the transnational enterprise. A company which is legally independent may therefore be part of a transnational system of control by a transnational enterprise. Long term contracts involving both

transfer of technology and sales of products may often establish such relationships.

Transfer of technology contracts are frequently utilized between parent and subsidiary companies, not only between a transnational enterprise and a company that is more or less independent. Such use is due to a number of practical considerations: need to protect patents and trademarks, desire to establish uniformity of practice, utilization of such contracts as instruments of tax evasion or for avoidance of foreign exchange regulations, etc. Thus the contracts of transfer of technology, which are the legal form of the access of affiliated establishments to the transnational enterprise's common resources, are at one and the same time a consequence of the control exercised by the decision-making centre of the enterprise and one of the principal means for acquiring and exercising this control. Their role is particularly important from a legal point of view, since those contracts are much more visible and therefore more capable of being analyzed (and regulated).

Transnational Enterprise and the Process of Technology Transfer

The process of transfer of technology, although not necessarily or solely linked to the activities of transnational enterprises, is of particular significance and deserves further attention. It is increasingly being recognized as a most important (if not the most important) facet of the resource transfers which affect economic growth and development. Under the generic term, "transfer of technology", are nowadays subsumed all the processes whereby knowledge, experience and skills, applied to production of commodities (and services) are transmitted across national borders. The concept includes transfers of knowledge by means of books, magazines, transnational professional associations, etc., although, for our purposes, only the commercial modalities will be discussed. These include transfers of technology which is already "incorporated" in machinery and equipment, transfers of information and know-how (patents, blueprints, etc.), and transfers of skills through training or through services of highly skilled persons. In terms of the legal instruments involved, we are dealing with contracts of sale of equipment (often containing provisions for installation and initial operation), patent and trademark licensing agreements, and agreements for transfer of know-how, provisions of technical assistance, and management.

As several studies (in particular by regional Latin American organizations and by UNCTAD)¹⁵ have made apparent, the transnational market for technology exhibits several serious imperfections. There is an inherent lack of equality in bargaining power between the parties, since by definition the technology supplier is better informed about the features of the "commodity" at issue than the technology buyer. It is, moreover, rarely a perfect competition market; the suppliers are sometimes monopolists, most often oligopolistic. Linked to the differing bargaining position of the parties is the "packaging" issue. A given technology, perceived as a complex process of production, may be transferred in one single transaction or it may be broken down into as many of its elements as is reasonably feasible and the elements transferred one by one. While "packaged" transfers are often necessary and sometimes useful to both parties, they frequently present serious disadvantages for the recipient. The total cost is usually higher, often through the operation of hidden elements of cost; the adaptation of the technology to local needs and resources is more difficult; and the transfer may not improve the recipient country's (or firm's) autonomous capacity for technological growth.

The three considerations just mentioned predominate in the recipient (especially developing) countries' concerns about technology transfers. Costs are often too high and too uncertain. Transfers of technology involve for recipients direct and indirect financial costs (royalties and fees as well as charges resulting from "overpricing" of equipment, of "tied" intermediate goods, and of raw materials, and from capitalization of technology); they also have broad indirect effects on the economy (constraints, distortions, bottlenecks) which may be seen as a kind of cost. Use of appropriate technology and adaptation of technology to the needs and conditions of the recipient country are important considerations. They involve the need for freer choice between alternative technologies (e.g., labor-intensive vs. capital-intensive) but also a degree of "unpackaging" of technology which makes possible changes and adjustments of the processes and equipment used to local conditions and capabilities. Finally, the most significant long-run objective

¹⁵ UNCTAD, *Guidelines for the Study of the Transfer of Technology to Developing Countries* (1972); UNCTAD, *Major Issues Arising From the Transfer of Technology to Developing Countries* (1975); UNCTAD, *An International Code of Conduct on Transfer of Technology* (1975).

of technology-receiving countries must be attainment of an independent capability for technological growth. This involves elimination (or decrease) of long-term technological dependence and development of indigenous scientific and technological capabilities. Constant learning through trial and error becomes necessary as well as utilization of local scientific resources to generate technological change. (As some economists have noted, science in developing countries is generally unrelated to production and to productive technology, thus becoming for the national economy an element of consumption rather than, as in developed countries, investment.)¹⁶

The relationship of these three objectives to one another is complex and sometimes paradoxical. For instance, a significant lowering of transfer of technology costs might constitute a disincentive for the growth of autonomous technological capabilities. As with all social issues, relations are dialectical and neither simple nor unilinear.

From a more narrowly legal point of view, the main legal instruments employed with respect to technology transfers are contracts: patent and trademark licensing agreements, management contracts, agreements for the transfer of know-how, etc. There is an important legal distinction between agreements relating to legally protected industrial property—patents and trademarks—and those which relate to unpatented technology, which acquires legal protection solely on the basis of the agreements itself. Transfer of technology agreements determine, usually in considerable detail, the rights and obligations of the two parties.

The role of transnational enterprise in the transfer of technology process is generally acknowledged as most important, although its exact form and dimensions are by no means clear. Very broadly it may be suggested that transnational enterprises have increased power and flexibility to impose their conditions on licensees, especially in developing countries. Their concern for long-run stability, their relative rigidity toward variations (in other words, their propensity to uniformity), the centralization of their research and development activities and of their management, as well as the relative scarcity of one major resource they provide, innovative managerial talent, all these combine to cause a relative lack of responsiveness on their part to local condi-

¹⁶ See, C. Cooper, *Science, Technology and Production in Underdeveloped Countries: An Introduction* (1972), 9 J. Development Studies 1 at 5.

tions, in terms of adaptation of technology (and products) and use of appropriate technology (e.g., use of labor-intensive rather than capital-intensive methods of production). The domination of transnational enterprises in consumer industries where marketing and advertising considerations predominate (cigarettes, soft drinks, etc.) suggests that in many arrangements no basic technology and no new skills are transferred.

Problems are compounded by the relative lack of awareness, until recently, of the need for the legal regulation of transfer of technology in most developing countries. Basic patent and trademark laws, modelled on those of developed countries, are often unrelated to developmental considerations. They may even constitute impediments to a country's development efforts. Other policies based on fears of abuse or fraud, such as those discouraging licensing or the use of second-hand (or not "up-to-date") equipment, may also tend to impede efforts for adaptation of technology. In recent years, however, many countries, particularly Latin American ones, have started to regulate specifically and stringently the technology transfer process.¹⁷

The Extraterritorial Reach of National Laws

Of the legal problems which arise in connection with or as a result of transnational enterprise, the question of so-called "extraterritoriality" has received the most attention, especially in Canada. This may or may not reflect its real significance. The term itself, "extraterritoriality", is not neutral or value-free. It implies an unwarranted extension of jurisdiction or an attempt at enforcement beyond the (by implication normal and proper) territorial jurisdiction of a state. It reminds us unavoidably of the privileged "extraterritoriality" of Europeans, and whites in general, under the "capitulations" regime in China, Egypt, Turkey and other Third World countries (to use the current term) which happened to remain independent during the European imperialist-colonial expansion of the last century. The term implies therefore privileged and oppressive extension of a dominant state's jurisdiction. As such, it does not merely point to a problem or identify a factual situation; it expresses a derogatory conclusion. It is, however, of sufficiently established usage that it would be cumbersome to attempt to replace it here with another.

¹⁷ See the surveys in the UNCTAD documents cited *supra* note 14.

In international law, extraterritoriality is seen as an aspect of the general problem of allocation of jurisdiction in a world of many formally equal nation-states. Jurisdiction, as is well known, is a government's authority and ability to prescribe and enforce rules of law. Given the plurality of governments, jurisdiction may, in any particular instance, be either exclusive, when only one government possesses the authority and ability mentioned, or concurrent, when two or more governments possess them. Conflicts arise when several states claim exclusive jurisdiction over a person or event or when their claims to concurrent jurisdiction are incompatible. In this context, issues of extraterritoriality arise whenever the judicial, administrative, or legislative authorities of one state seek (or appear to seek) to extend application of its laws to events and activities in the territory of another state.

Any time an act occurs with legal consequences which cut across national borders, there may be problems of extraterritoriality. In the more traditional areas of law (private law, criminal law) few serious difficulties have been encountered in recent years. Conflicts or potential conflicts are dealt with under fairly well-established doctrines, principles and rules of jurisdiction and conflict of laws. The more controversial recent conflicts occur where economic regulation, in whatever precise form, is involved. In such cases, the policy principles prevalent in each state may differ or the acts involved may affect the national interest of several states in differing manners. In three major areas, the efforts of home countries—especially but not solely the United States—to apply their laws to foreign business operations of transnational enterprises based in their territory have created difficult problems. These are the areas of export controls, antitrust, and securities regulation.

The specific legal problems of the extraterritorial reach of United States law in such cases have been discussed at length in the legal literature.¹⁸ It seems more useful, at this point, to approach the issues in more abstract fashion and to seek to summarize, more or less schematically, the channels or manners in which home states, particularly the United States, have sought, or may seek, to apply their laws or administrative regulations outside their territory.

¹⁸ For an excellent recent brief survey, see S.J. Rubin, "The Multinational Enterprise and the "Home" State," in G.W. Ball, ed., *Global Companies: The Political Economy of World Business* (Englewood Cliffs: Prentice-Hall, 1975) 42 at 45-56.

A first method, simple although difficult to detect and describe, is the manipulation of facts. Courts and administrative authorities may formally find that the activities involved have taken place in part within the territory of the United States, thus falling within the territorial jurisdiction of the United States authorities. No novel or controversial doctrinal basis is necessary; it is merely a matter of perception, expressed in an authoritative finding as to a factual situation. Considering the intangible character of the events and acts involved in contemporary business activities, such a finding of fact can often be made on the basis of otherwise ambiguous or equivocal facts. A close reading of the cases leads to the conclusion that this method has been applied fairly frequently in antitrust law and in securities regulation.

A second, somewhat related approach, is to stress the unity of parent and subsidiary, when only one of them is within the state's territorial jurisdiction. The activity of a subsidiary in the host (forum) country may be imputed to the parent, located by hypothesis in some other country. The court (or administrative official) may find that the parent and subsidiary corporations are, for business and economic purposes, a single unit; the subsidiary's activity within the territory is therefore the equivalent of the parent's activity—or, indeed more frequently, vice versa. Whereas United States authorities have tried to reach a foreign-based subsidiary by exercising jurisdiction over a United States-based parent, the reverse is relatively rare. States appear reluctant to use their jurisdiction over the subsidiary as a means of extending their reach over the parent.¹⁹ Cases falling under this general approach would also include the numerous instances where United States courts and administrative authorities have sought evidence (documents, business books, etc.) from subsidiaries or branches of United States-based corporations.

A third manner, closely related to, and perhaps in part identical with, the second, is by way of control over the home country's nationals. A state has jurisdiction over its nationals wherever they may be; it may impose on them obligations even when they are in foreign territory. Thus, some regulations under the United States Trading with the Enemy Act define the term "United States national" (to whom the

¹⁹ But note the *Dyestuffs* case, where the European Court (and Commission) were able so to do: *Imperial Chemical Industries, Ltd. v. Commission of EC*, Case 48/69, Ct. J.E.C., noted by E. Stendorffin (1972), 9 Common Market L. Rev. 494.

Act applies) as including any corporate entity, incorporated in the United States or abroad, which is beneficially owned by a United States national.²⁰ A company incorporated in Canada, but owned by a transnational enterprise based in the United States, would thus be covered by the Act. It is true, and interesting, that United States authorities rarely if ever utilize this particular provision. They prefer to deal with the parent company and hold it responsible for any sale without a proper license by its subsidiary (thus essentially reverting to the second approach described).

A fourth method applies similar reasoning to commodities and products, tangible or intangible: a country allows the export of certain goods only to certain countries and under certain conditions; it may thereafter follow the goods, wherever they may be, seeking to ensure observance of the conditions under which they were exported. This is the method used by the United States under the Export Administration Act, which prohibits the "transshipment", without a license, of United States-produced goods which have been exported lawfully to another country.²¹ Difficult problems may arise when the United States-made goods have been incorporated in the second country into finished (or more complex) products. The prohibition of export to Cuba of United States-produced goods may then become a ban on the export to Cuba of largely Canadian-made products.

Finally, the fifth possible approach follows the principle known as "objective territoriality" (or the "effects" doctrine). According to it, a state has jurisdiction to prescribe over acts committed abroad which have substantial effects within its territory. There is long-standing controversy concerning this doctrine; while it is generally accepted in the case of traditionally criminal acts, it is frequently opposed when applied in the context of economic regulation. In reality, and despite inclusive language in its support in some decisions and discussions, it has been quite rarely applied outside traditional criminal law.

²⁰ See 31 CFR sec. 500.329 (1975), implementing 50 U.S.C.A. App. sec. 1 ff (1968). And cf. Comment, *The Trading with the Enemy Act of 1917 and Foreign-Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining* (1973), 11 S. Dakota L. Rev. 206; J.I.W. Corcoran, *The Trading with the Enemy Act and the Controlled Canadian Corporations Owned by Americans* (1970), 16 McGill L.J. 460.

²¹ 50 USCA App. sec. 2401 ff. (1976), replacing the Export Control Act, of 1949, 50 USCA App. sec. 2021 ff. (1964). See generally, H.J. Berman and J.R. Garson, *Export Controls-Past, Present, and Future* (1967), 67 Columbia L. Rev. 791.

An additional problem, which has arisen in particular in connection with the extraterritorial reach of antitrust law, concerns the role of the foreign law or government. The foreign government in whose territory the alleged criminal act occurs may often tolerate the acts concerned. Indeed, tolerance may shade into various degrees of approval; it may well be that the foreign government (or more generally the foreign law) positively and affirmatively approves of or even compels the acts in question. This additional problem confuses the issues; the United States law on the subject is still fairly unclear. It seems certain that if the foreign government expressly orders the acts involved this will be an adequate defense for the enterprises concerned. But other kinds of approval, permission, or tolerance by a foreign government may well be disregarded. This line of reasoning seems to ignore the extent to which allowing certain activities is a policy decision as significant, and sometimes as deliberate, as that of prohibiting or compelling them. The possibility of various kinds of manipulation are not excluded; an enterprise may seek to have itself "compelled", by the foreign government, in order to escape liability in the United States.

There will be no attempt to review here the doctrinal subtleties of extraterritoriality problems. One question must be raised, however; this is, in a way, the ultimate one: how obnoxious are such incidents and possibilities of extraterritorial enforcement of another country's law? The more or less traditional response, in terms of infringement of the sovereignty of the foreign government, is inadequate. It is, to begin with, too abstract; there are degrees and kinds of infringement which must be distinguished. Secondly, it assumes that in a situation where there may be concurrent jurisdiction over certain acts or events, enforcement of the law of one of the states possessing jurisdiction is necessarily an infringement of the other's sovereignty, disregarding, for instance, the possibility of a lack of policy conflict. Finally, the argument may be reversed: a home state may justifiably argue that the legal claim by a host country that its tolerance or encouragement of certain practices (which adversely affect the home state's economy) must be respected by the home state, constitutes an extraterritorial extension of the *host* state's jurisdiction. It is not that such an argument is more persuasive than the other. It is simply that very broad principles, at a high level of abstraction, can often be applied in reversible manner.

It seems more appropriate to differentiate among the various areas where extraterritorial enforcement may be attempted. The most obnoxious area is certainly that of trade controls. While the attempt by the home state (more specifically the United States) to protect the integrity of its policies and avoid their evasion cannot be considered as illegitimate, the enforcement of policies of such a purely political character within a foreign country's territory infringes on fairly well-defined interests and policies of the host government. It extensively limits the latter's ability to develop and apply its own economic and other policies. It is obvious, however, that what makes the problem important is the extent of domination of the host country's economy (or a sector thereof) by enterprises having their headquarters within the home country, in particular the United States. If a single company, out of several of equal importance, happens to be owned by United States interests and therefore refused to sell goods to Cuba, this does not seriously affect the host country's interests. But where an entire sector, or a major part of it, is in the hands of United States-owned subsidiaries, then the problem of extraterritorial application of United States law acquires practical importance. It is the extent of the domination of the economy of a host country by enterprises from the home country that determines the degree of obnoxiousness of this most political case of extraterritorial application.

The case of controls over anti-competitive practices (antitrust) and securities and exchange operations is more ambiguous. The home country's interest in protecting its economy or the persons active within it are quite legitimate; and the host country's willingness to allow anti-competitive or quasi-fraudulent practices does not always make for a very persuasive case on its behalf.

In the final analysis, an answer must be given with respect to each particular country and each kind of problem. Probably the country that has been most concerned with the question of extraterritoriality in recent years has been Canada, in view of the widespread operations in it of subsidiaries of United States-based multinational enterprises. Even there, however, it would seem that few important cases have arisen; several possible cases were settled without much dispute between the two countries.²² Cana-

²² See the useful review of the record by J.N. Behrman, *National Interests and the Multinational Enterprise* (Englewood Cliffs: Prentice-Hall, 1970) at 101-113.

dian emphasis on the obnoxiousness of extraterritorial enforcement has considerably abated in recent years. Compare, for instance, the repeated assertion, in the Watkins Report, that "the most serious cost to Canada of foreign ownership and control results from the tendency of the U.S. government to regard American-owned subsidiaries as subject to American law and policy",²³ with the way in which the task force's chairman formulated his position a few years later:

While extraterritoriality is an issue in its own right, its real importance lies in the fact that being . . . "the tip of the iceberg" it can alert us to the unseen nine-tenths. What is presumably going on beneath the surface is an insidious tendency for foreign direct investment to result in a shift of the focus of decision-making from Canada, as host country, to the United States as imperium. To imagine that eliminating extraterritoriality would remove this political cost is similar to believing that removing iceberg tips would make shipping less hazardous.²⁴

In the past two years, however, the issue has flared up again. In early 1974, the United States-based parent of a Canadian company applied on behalf of its subsidiary to the Treasury Department, seeking a license for the sale of twenty-five locomotives to Cuba. There was apparently considerable reluctance on the part of the United States authorities to grant the license and the matter reached the Secretary of State for final decision. The Canadian Government protested to the United States, insisting that the United States regulations should not apply to subsidiaries in Canada. The Canadian subsidiary's board of directors voted to proceed with the sale (with one of the two United States nationals on its board voting against, and the other being absent).²⁵ Another case came to the surface in late 1974, involving the sale of furniture to Cuba. In this instance, the United States parent company had initially merely "asked the Treasury Department informally whether the Trading with the Enemy Act applied". On the Treasury's affirmative response, they ordered their subsidiary not to proceed with the sale. When the matter became public, the company

²³ *Foreign Ownership and the Structure of Canadian Industry* (Report of the Task Force on the Structure of Canadian Industry, 1968), at 360.

²⁴ M. Watkins, "Preface", in K. Levitt, *Silent Surrender. The Multinational Corporation in Canada* (Toronto: New Press, 1970) at xiii-xiv.

²⁵ The case is reported in detail in successive issues of (1974), 5 *International Canada* at 21 and 45.

proceeded to file formal application for a license which was eventually granted.²⁶

The second case illustrates another important aspect of the problem. It is highly likely that the principal impact of extraterritorial application of United States export controls occurs not through the denial of licenses applied for but through United States Government "suggestions" to parent companies or through the latter's reluctance to take any initiative that might be regarded unfavorably by American authorities. The known number of incidents provides therefore no adequate indication of the extent of the problem. Moreover, legal measures by the host country to compel locally incorporated companies not to comply with foreign laws in such matters would frequently face enormously difficult issues of evidence and proof.²⁷

A last note on this issue. The involvement of transnational enterprises in such problems is neither accidental nor exceptional. The possibility of interstate conflicts of this sort is inherent in the very nature of transnational enterprise, since one of its principal characteristics is precisely the ability to derive benefits from its presence in the territory of several states, through the manipulation of each country's laws and policies.

At the Threshold of Regulation

That the states themselves, by their actions and inactions, have been in great part responsible for the spectacular growth of transnational enterprise does not necessarily mean that they are also capable of regulating it. Putting to one side the "apprentice sorcerer" syndrome, a creator's inability to control the forces he has set loose, there is a fundamental distinction between eliminating and regulating a social institution. States may be able, if a sufficient number so wished, to make transnational enterprise disappear. But it is far more difficult for them to regulate it effectively. There is too much we do not know concerning the exact consequences of various possible measures. And governments are unwilling to risk the cost of error.

²⁶ See (1974), 5 *International Canada* 230-32; (1975), 6 *International Canada* 5 and 31-32.

²⁷ The recent amendments to the *Combines Investigation Act*, R.S.C. 1970 c. C-23, as amended by S.C. 1974-75, c.76 attempt to overcome this problem by broadening the scope of their prohibition of compliance with foreign government directives (see, sec. 31.6 (a)). It is doubtful that they can be successful in more than a handful of cases.

Yet, there is no doubt that regulation of transnational enterprise is, and increasingly will be, a major task of governments in the 'seventies'. They can no longer ignore the concentration of power, economic and noneconomic, in the hands of a small number of corporate managers. Governments (and peoples) have been alerted to the potential (and sometimes actual) danger of control over the national economy and indeed over the cultural and political life of host countries by centralized foreign bureaucracies, whose sole institutional concern is the maximization of profit on a global scale. As a result, attempts at regulation of transnational enterprise have started, at various levels, in a great variety of manners, and with uneven success.

At the national level, it has been the developed host countries (Canada, Australia, to a lesser extent Western Europe) as well as the larger, semi-developed countries among the developing (especially in Latin America) that have started to build legal and administrative structures designed to supervise and control the activities of transnational enterprises. At the international level, proposals for the drafting of "codes of conduct" for transnational enterprises are fast becoming reality: the Organization for Economic Cooperation and Development (OECD) has accepted a set of voluntary guidelines; the United Nations Centre on Transnational Corporations (itself a recent product of concern over the impact of transnational enterprises) is taking the lead in the preparation of a world-wide code of conduct on transnational enterprises; the United Nations Conference on Trade and Development (UNCTAD) is well-advanced in the preparation of an international code of conduct on the transfer of technology; the International Labor Organization has conducted a number of studies on transnational enterprise and social policy and is considering the preparation of guidelines on the subject.

It will be quite interesting to examine the result of all this frantic activity. At this point, however, it may be more useful to stay at a high level of abstraction and briefly examine the possible legal patterns of transnational enterprise regulation and their problems.²⁸

²⁸ For a useful study of approaches to regulation, from a different perspective, see, P. A. Tharp, Jr., *Transnational Enterprises and International Regulations: A Survey of Various Approaches in International Organizations* (1976), 30 *Int'l Organization* 47. And see also J. N. Behrman, "Supernational Control of the Multinational Enterprise," in D. Wallace and H. Ruoff-Koch, eds., *International Control of Investment* (New York: Praeger, 1974).

The multitude of measures, national and international, directed at the control of transnational enterprise may be seen as ultimately converging on two fundamental goals — or perhaps a dual goal: on the one hand, the elimination of the transnational enterprise's multiple legal personality, and on the other, the isolation of each transnational enterprise unit, that is to say, the severance (or restriction) of each unit's transnational linkages. These two patterns point at antithetical directions: the former affirms, and gives legal effect to, the enterprise's global unity; the latter tends to break up the enterprise into its constituent units. The one tends to give legal recognition to economic reality; the other tends to adapt economic reality to the legal form. If any of the measures or series of measures taken were to be wholly effective, the contradictory nature of these two goals might create problems. Since we are far from certain of the ultimate effectiveness of any measure the two patterns may coexist and indeed reinforce one another.

We noted earlier that the legal fiction of the separate personality of each corporation-member of a "group of companies" (whether transnational or not) was never fully adhered to by the courts and other authorities. The possibility of "piercing the corporate veil" has existed and has been used whenever the appropriate decision-makers found it useful to do so. But this should not blind us to the fact that, for a broad range of purposes and legal acts, not all of them trivial, each corporation's separate legal personality is normally accepted; it becomes indeed something like a fact in the eyes of the law.

Many of the measures, proposed or taken, for the control of transnational enterprise deliberately disregard, or for legal purposes eliminate, the fictional separation of personalities. The imposition on an affiliate of obligations of disclosure concerning the enterprise's global activities clearly points in this direction. The revenue services' assessment of taxes on the basis of their own reallocation of the transnational enterprise's global income among the various affiliates operates in a similar manner. The provision recently enacted in some Latin American countries, that royalty payments for technology transfers between affiliates of the same transnational enterprise are treated as part of the parent's "profits" (and are thus subject to any overall limits on profit remittance that may exist), does the same thing, perhaps more clearly.

The possibilities for legal action in this direction are legion. The question ultimately raised is whether the corporate form has reached the limits of its usefulness, whether perhaps the passage from corporate capitalism to some other economic system—capitalist or not—will occur through the undermining of the corporate form.

As for the isolation of transnational enterprise units, there is perhaps less evidence of a trend, but there still seems to be one. The efforts on the part of governments to exercise control over the flow of resources through the enterprise's transnational channels and to compel each affiliate to comply fully not only with the laws of the host country but with its policies and political or cultural preferences, lead ultimately to a denial of the transnational enterprise's transnational identity and to an affirmation of the separate identity of each affiliate. There is logic to this movement. In the last analysis, the conflict between the transnational centralization of transnational enterprises and the decentralized international legal order can be resolved either through the creation of an effective centralized world public order or through the dismantling of the transnational enterprise. The former seems highly unlikely at this point.

Both legal patterns of regulation would lead ultimately to the demise of the transnational enterprise, as it exists today. Moderate advocates of its regulation are aware of this and seek so to balance their measures as to change the patterns of allocation of power and benefits between transnational enterprise and state to the advantage of the latter, but without reaching the point of endangering the existence of transnational enterprise. It is a fine line to draw. In practice, such concern, coupled with fear of retaliation by the transnational enterprises, often leads governments to measures of mild and ineffectual regulation—increasing at best tax revenues but not diminishing the transnational enterprises' power. It is, of course, a settled feature of legal thinking to avoid deciding issues by reference to "ultimate" questions or by pushing criteria and arguments to their "logical conclusion". Yet, political rhetoric, or even the "law in the books", generally fails to reflect reality as far as transnational enterprises are concerned. To coin a phrase, the rumours about the death of transnational enterprise seem at the moment exaggerated.²⁹

²⁹ For a pessimistic assessment of the transnational enterprises' present situation, see S. J. Rubin, *The Multinational Enterprise at Bay* (1974), 68 *Am. J. Int'l L.* 475. L. 475.

Other points of view are possible. The prospect of radical decentralization, on a national and international scale, may not be as utopian (or "romantic") as government and corporate managers believe. A decentralized world community may choose to function at lower levels of productivity in order to maximize other values and other goods. In such a world, transnational enterprises would probably have no place. But this is a topic for another, very different, essay.

