PREFACE
TO THE SECOND EDITION

One could well ask whether a second edition of a book on "legal control" issues surrounding the multinational enterprise (MNE) is not something of a paradox given the present favourable environment for foreign direct investment. What are we doing still talking about "legal control"? The answer is less enigmatic than it might at first appear.

The fundamental approach of both editions is actually largely the same. The importance of the controversies surrounding issues of 'control' and host-state jurisdiction has in fact not diminished, despite a certain shift in emphasis. Indeed, the growing attention to jurisdictional questions called for the addition of two new chapters on jurisdictional reach and 'extraterritoriality'. The two new chapters (Chapters XII and XIII) stem from the earlier edition's chapter on "Control Through Merger Legislation" (now Chapter XI) which, along with a greatly expanded chapter on the extraterritrial aspects of antitrust-related discovery (Chapter XIV), attests to the fact that antitrust is the most prominent area in which conflicts over extraterritorial jurisdiction arise.

As in the first edition, the relevant laws and practice of the six most highly investment-intensive and/or investment-conscious industrialized nations, namely: Canada, France, Germany, Japan, the United States and the United Kingdom, are drawn upon, and their respective case law discussed, where appropriate. These countries were for one brief moment in history known as the 'G-6', before Italy took its place as the 'G-7th' and more recently Russia as the 'G-8th'. Not even the 'G-5' had been formed at the time of the first edition, and for this second edition there seemed no merit in expanding the geographic scope simply to mirror the membership in this potentially further expanding Group, since it played no part in the original selection and, more importantly, since the subsequent additions do not represent investment-intensive countries. It should indeed come as no surprise that there is such a parallel, or that, additionally, the so-called 'quadrilateral powers' are precisely Canada, Europe, Japan and the United States, and the so-called 'Triad' comprises North America, Europe and Japan. The EC[1] and NAFTA have, on the other hand, been added in this

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[1] The European Economic Community (EEC) in 1993 became the European Community (EC), a constituent part of the political union known as the European Union (EU) from the coming into effect of the Maastricht Treaty. "EU" and "EC" will both be used in the text, as appropriate; and "EEC" will be used where necessary for historic accuracy. In addition, the

second edition, owing to their obvious direct interface with the target countries.

It would have been illusory to attempt to cover, within the scope of a single work, both the highly industrialized and the developing or other rapidly emerging regions of the world. In the first place, the investment problems of the less developed countries and those of the more recently free-market-oriented nations differ substantially in kind – on the one hand, from one another, and on the other hand, from those of the advanced industrialized states. Those of the developing and former state-run economies tend to fall under various aspects of the politico-socio-economic spectrum, while those of the highly developed nations in general arise largely in the legal arena, which is where the concentration of this work lies.

Secondly, despite a notable increase in recent years, only a small percentage of all foreign investment is now carried out in developing and transition economies, and such investment is of a limited nature. Nevertheless, in recognition of the important role that other regions play in the overall investment picture, another new chapter has been added (Chapter II) to briefly survey the wider implications of MNE operations in these other parts of the world, including Asia, and to show where these other regions of the global trading community fit into the overall investment landscape.

Focussing on the most investment-intensive countries at the same time carries with it the inherent danger that accompanies entering in any detail into the legal regimes of modern highly legally active industrialized states. In view of the constantly evolving legislation, sometimes coupled with supranational influences, one runs the risk of shortening the 'shelf-life' of a given scholarly work where current legislation is included. The present writer nonetheless consciously chooses to take this risk for the greater aim of exemplifying, by specific legal and extra-legal mechanisms, the differences in approach and in techniques used by the target countries in their pursuit of national goals. As time passes, the reader may wish to consult the most current literature for the latest developments. Yet the examples given in the following pages are in a sense 'timeless', in that they clearly demonstrate that the legal tradition and policy in any given state exhibit a strong continuity of underlying national policy *vis-à-vis* foreign direct investment and MNEs. This remains true in spite of temporary fluctuations through change of government or special economic circumstances. Each country under study displays an internal continuity from which certain assumptions regarding future practice can reasonably be inferred. Moreover, it becomes clear that however the laws may change or undergo amendment, the basic techniques of control tend to remain tenaciously intact.

Rome Treaty article numbers were changed by the Amsterdam Treaty (e.g. article 85 became "article 81 (ex 85)"). In order to maintain consistency with the contemporary literature of community documentation corresponding to the time of the events described, the original Rome Treaty article numbers will normally be retained, unless a post-Amsterdam or timeless reference is made. Resort will also, where appropriate, be made to the formula above.

There is always a need for periodic in-depth legal studies aimed at re-identifying, re-defining and analyzing each of the many-faceted issues revolving around multinational corporate operations. To attempt to deal in comprehensive detail with each of the highly dynamic cross-sectoral areas pertinent to a subject so vast and complex, particularly among those countries most intensively active in the field, is a formidable undertaking. To do full justice to the task would necessitate a multi-volumed work, and the present writer does not pretend to furnish such exhaustive coverage. The difficulty has already been in trying to limit the present work to one volume.

The concentration has therefore centered on control aspects of MNE operations involved in manufacturing production facilities, where benefits to the local economy in terms of local employment and training opportunities, local research and development, export enhancement and import substitution for the host country, transfer of technological know-how and management skills, additional tax revenues and the like are now universally recognized. Outside the manufacturing sector, foreign direct investment serves less as a means of trade substitution than as a means of trade itself. Direct investment in such areas as real estate and in other non-manufactures will therefore not be addressed. This limitation largely extends to services. Despite – or because of – the enormity of this relatively new and vital sector as an investment source, services simply cannot be properly and comprehensively addressed within the present work. This writer recommends perusal of parallel literature on the subject, much of which is still under preparation. This being said, some landmark cases involving services are discussed herein where they have specifically contributed to the development of investment-affecting international law and comity or other international practice, as in the leading banking and insurance cases. Services is also briefly discussed in Chapter I, subsection 4(d) as an important modern-day stimulus to foreign direct investment.

The current legal trends and directions, which furnish the basis for the present analysis, are first set in their historical perspective, with considerable attention given to terminology, classification schemes and organizational forms (Part I). Fundamental to the ensuing analysis is a review at the national level of the techniques used by the host government at all stages of the investment process – entry and establishment (Part II), operations (Part III) and disinvestment (Part IV) – to control the power and influence of the MNE. Once some of the more fundamental control issues at the national level are clarified, the questions pursued are those related to whether an international code or regime of regulation is the optimal solution, or whether the legal problems that invariably arise are more effectively resolvable within the domestic legal framework and institutions currently available (Part V). Is 'control' (in the sense of 'regulation') of the MNE in itself a 'problem' requiring an international collective response, or is 'control' of the individual corporate entities of the enterprise through national regulation a more effective means of deriving the benefits of MNE investment while guarding against possible excesses or abuses? Or might there even be a role for both national and international solutions, in order to strike a proper balance between regulation, where necessary, and facilitation, where desirable, thus meeting both national concerns and international objectives?

It is owing to the systematic and progesssive treatment of these and related questions, including four new introductory chapters (Chapters I-IV), that the present work lends itself well to use in academic courses on international business law and economics, the later chapters being of particular relevance as well to corporate managers and international economic lawyers and policymakers who should find, *inter alia*, the expanded discussion on jurisdictional reach timely and, it is hoped, thought provoking.