INTRODUCTION

On the eve of a new World Trade era, foreign direct investment (FDI) is high on the agenda of the international economic law and policy debate and has taken its place as a leading priority in global economic integration issues. The current 'globalization' process has been called "one of the most pronounced phenomena of the last decades";[1] and the multinational enterprise (MNE), as the primary vehicle for foreign direct investment, has been widely recognized as a major player in this process, if not "*[t]he primary* agent of globalization".[2] Indeed, it has been said that "[t]he significant increase in international transactions has led to the establishment of multinational corporations as perhaps the most important actors in the world economy,"[3] and that "[f]oreign direct investment by multinational enterprises has overtaken international trade as the most important force for global integration".[4]

Investment crossflows are today being affected both directly and indirectly by new bilateral and multilateral trading bloc arrangements. In addition to the enhanced European economic integration under the Single Market Act, trading partner responses to NAFTA also have an impact on bilateral as well as on mutilateral investment relationships. Similarly, current investment activities on the part of central and east European countries – relative newcomers to today's international economic and financial system, who are opening up their own markets for the first time in a generation to wholly owned foreign investments – are further contributing to an invigorated trade and investment environment. A whole new playing field is taking shape.

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[1] Blankart, "The World Trade Organization: First Achievements and Remaining Challenges After Singapore", 52 *Aussenwirtschaft* (1997), at 335.

[2] Ostry, "The domestic domain: The new international policy arena", in United Nations Conference on Trade and Development, Division on Transnational Corporations and Development, *Companies Without Borders: Transnational Corporations in the 1990s* (New York: International Thomson Business Press, 1996), p. 317, *reprinted* from 1 *Transnational Corporations* (1992), p. 7.

[3] Levarda, "A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery", 18 *Fordham International Law Journal* (1995), at 1344.

[4] "Foreign Investment Surpasses Trade as Force for Global Integration", 3 *IPS Daily Journal,* 15 December 1995, at 5 (discussing UNCTAD report prepared by Karl Sauvant).

We have entered an era characterized by a near complete reversal of the "Yankee Go Home" syndrome, an era in which nearly every nation around the globe – particularly those 'emerging' or developing from an economic point of view – is competing actively for foreign direct investment, with programmes and schemes and offices abroad to promote and attract private investment capital.

We live in a world where the internationalization of production has reached such proportions that the origin of a product is barely – if at all – discernable, and the "Who is Us?" question is truly without clear-cut reply. The very internationalization of production, accompanied by (1) the vast 'information superhighway', enabling a yet wider integration – and heightened ease – of cross-border data flows and capital and technology transfers; (2) the deregulation of service industries in the United States, Europe and Japan, providing a further stimulus to foreign direct investment, primarily through the multinational enterprise, and (3) the fever for the creation and expansion of economic trading blocs, motivating further harmonization of laws and regulations for the facilitation of trade and investment flows, have all served to heighten the focus on the MNE.

The present work addresses itself to legal and pragmatic aspects of control surrounding MNE operations. The primary focus is on legal and administrative techniques and measures practised by host states to control – transparently or less so – foreign MNE activity within their respective territories, or even extraterritorially when *effects* are felt within national boundaries. Any non-territorial aspects of control are relevant, in this context, only where the exercise of 'extraterritorial' jurisdiction relies on the multinationality (i.e. the presence of an entity of the MNE) in the host territory, though contemporary expressions of a 'pure' effects doctrine are also considered.

In reviewing the relevant host-state law and policy by which 'external' (governmental) control over foreign-based local corporate entities is exercised, the critical role of 'internal' (managerial) control relationships becomes evident. In the exercise of external control, internal control and 'effective' control in intra- and inter-enterprise relationships as a critical ingredient have long overtaken ownership considerations in assessing liability and jurisdiction in legal applications involving interrelationships between home state, host state and MNE.

It is the six most investment-intensive industrialized states (namely, Canada, France, Germany, Japan, the United States and the United Kingdom) that comprise the major focus of the present work, as these countries are currently both the primary source and the principal recipients of most foreign direct investment, as well as collectively accounting for more than three-quarters of the total stock of foreign assets held among all industrialized countries. The same states have also been identified as those where the most influential economic forces at work are located. Perhaps the single most important consideration in this geographic focus is the simple fact that both the greatest corporate growth and the most active legal developments have taken place in the industrialized economy context. The fact that most of the legal innovations in the area of foreign direct investment emanate from these nations, along with the fact that they are both the major source and ultimate target of MNE investment, as well as of MNE controls, make them particularly suitable for such an analysis.

Through the analysis of the industrialized countries' experience, there are critical lessons to be learned by those countries of central and eastern Europe which for a generation were virtually excluded from this form of capital transfer and severly limited as to the transfer of managerial and technical know-how. There are lessons too for those of the developing world which, having reversed its earlier restrictive posture, may welcome added encouragement and guidance, along with additional legal models and 'pitfall'-avoidance insights, in their pursuit of freer investment flows for accelerated economic development and fuller participation in the global marketplace.

Indeed, an important message of the present study is precisely the implications for the developing countries as well as for the emerging market economies of central and eastern Europe, and not least for the Asian nations, many of which were generally more investor-friendly in the past than some of their Latin American counterparts, and in general – arguably not in small part for that very reason – led the 'Third World' in catching up with the economies of the industrialized world. The interests of the developing nations and transition economies are thus consciously and deliberately addressed in this work through the 'message' it conveys by means of a comprehensive review of the areas in the most developed economies from which a continuity of legal practice best enables coverage of the principal areas of concern. It is precisely in the juridical area where the relatively stable political structure and reasonably open economic climate of the industrialized states have a long enough history to provide meaningful observations for governmental policy and legal solutions concerning foreign direct investment. The historic development of legal means of dealing with the concerns of both host and home state as regards MNEs are clearly more easily traceable and more juridically significant in such a context. This in turn serves to benefit the developing and emerging economies, as the experience of years can facilitate the entry of those countries into the same marketplace.

With regard to potential international solutions, there is a decided shift in emphasis since the 1970s. The earlier fervour for restrictive regulation of MNE activities has all but died out. The 'loss of steam' over the U.N. Code of Conduct, for example, was only symptomatic of the shift in attitude on the part of the developing world – at that time the chief protagonists – which had meanwhile begun actively to seek foreign investment capital in a concerted effort to capture the benefits which have since become widely recognized.

International solutions have now come to emphasize the positive role of the MNE in facilitating economic integration. The MNE has been recognized as a powerful engine of private sector development and an important vehicle for the transfer of technology, as well as a potential stimulator of host-country efficiency through the introduction of globally competitive standards, and a facilitator in gaining access for local products into world markets, through its familiarity with worldwide distribution channels and procedures. Yet when all is said and done about highly competitive investment promotion and protection, for the benefits that foreign direct investment brings, the host state still has a pronounced interest in what that MNE does within its borders.

The question of 'control', if anything, is even more complex and critical than it was at the height of the 'codes' era. Not only have we witnessed the most comprehensive negotiations toward a legally binding multilateral instrument for the overall regulation of foreign direct investment, as embodied in the OECD-initiated Multilateral Agreement on Investment, and the first investment-related international agreement in the GATT/WTO context as embodied in the 1993 Agreement on Trade-Related Investment Measures (TRIMs), but we are seeing renewed legislative activity at the level of national regimes, both as national expressions of international harmonization efforts and as assertions of sovereign powers, even in a period of diminishing economic and political sovereignty in the classic sense.

Not only are host-state laws and practice seeking to keep pace with the realities of global production, but investing firms themselves must deal with the fact that host-country investment climates may fluctuate. Not only are new laws being enacted by host governments, but new administrations reinterpret old laws to suit new policies and practices. Investing enterprises are aware that shifts in host-country attitudes toward incoming direct investment do not always show up as overt legal responses. Restrictions often come through more subtle non-legal control techniques or administrative policies or strategies limiting investor freedom in foreign markets.

Just as it was a gross exaggeration, in the 1970s, that the MNE was running about the globe, unfettered and irresponsible, escaping the control of any single nation-state by simply surfacing in another, in some Houdini-like fashion, so is it facile at the beginning of a new millenium to attempt to 'cover a multitude of sins' by alleging the national identity of a given product to be so obscured by the fact that its components, labour, or value-added may be identified with any number of different countries of origin, that it somehow cannot be pinned down when a question of jurisdiction or liability arises.

It is certainly true that the MNE continues to possess a comparative advantage in its range of mobility. And for export, import and other economically indicative statistics vital to policy formulation and enforcement, as well as for the application of certain 'state-aids' or 'national subsidy' programmes, the nationality/liability/control question truly can pose a dilemma. Yet unlike trade, foreign direct investment, with the MNE in its multiple parts as a vehicle, still has a tangible 'physical presence' in readily identifiable geographic territories, with all the answerability of any 'legal person', though it may well challenge the courts to a greater degree than ever before to discern effective control and control relationships.

The organizational structure, as well as decision-making responsibilities of the MNE, may also be more widely dispersed and more geographically balanced than previously. There may even be several 'headquarters'. But this in itself causes the control aspects of MNE activities to take on greater significance for, and to pose an even greater challenge to, both the municipal and the international lawyer.

A better assessment of the current domestic legislative framework for host-state control techniques over MNEs provides a sound basis for weighing the merits of some form of international regime. Twenty-five years ago, the proliferation of international codes and guidelines for the regulation of MNEs was largely generated out of fears of excessive power on the part of these entities, for which protection of the (in most cases developing) host country was the primary motivation. In a sense we have now come full circle, except that this time around we are in the process of considering a legally binding international instrument to *facilitate* investment flows and MNE operations for their contribution to global economic integration, lending a broader perspective than that in the last generation of non-legally-binding codes.

In order to better appreciate the value and function of an international regime for foreign investment in any form, it is appropriate to review the control mechanisms existing at the national and supranational, the bilateral and multilateral levels. This enables a more balanced assessment of the proper role of a truly international and possibly binding instrument. Indeed it is the very questions raised by extraterritorial reach of national laws that has highlighted the 'modern-day' home-state/host-state 'struggle' for control, and that has been perceived as a major force behind serious moves for bilateral and multilateral solutions.

It should be kept in mind that, while new and amended legislation continues apace, it is not the purpose of the present work to examine every new amendment or new municipal law that may affect the MNE. The focus remains on major legal and administrative techniques – exercised through various areas of national legislation – whereby host countries maintain sovereign control over their internal economies while at the same time participating in international comity and cooperation in finding solutions to new jurisdictional challenges from transactions extending beyond national territories. The very rules on the exercise of a state's jurisdiction demonstrate the extent to which national sovereignty is still at the core of a government's preoccupations when considering any international framework for foreign direct investment.

It is to these and related issues that the present work addresses itself, through an examination of the complexity of historical and contemporary legal interrelationships among governments and internationally investing business enterprises. The two-pronged purpose is first to assess the status, extent and effectiveness of host state controls over MNE activities and then to consider the feasibility and practicability of a possible multilateral instrument or framework for foreign direct investment and MNE operations. It is hoped that the cumulative result will constitute a modest contribution to a vast, absorbing and manifestly timeless subject.