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The Computer and the Mud Hut: Notes on Multinational Enterprise in Developing Countries

A. A. FATOUROS*

The emergence of "multinational enterprise" has been enthusiastically hailed and assiduously discussed in business literature for more than a decade. Interest has spread to economists¹ and more recently to jurists.² For cogent reasons most studies deal with the problems of multinational enterprise in developed countries. Its actual and possible role in less developed countries is still rather neglected.³ In this

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This article is part of a larger study prepared under the auspices of the International Development Research Center at Indiana University. In my work on the topic at hand I have greatly profited from participation in a research project on the multinational corporation directed by Professors I. A. Litvak and C. J. Maule, of Carleton University, Ottawa.

1. It should be noted in fairness that a French "school" of economists, led by François Perroux and the late Maurice Byé, started studying the topic in the middle fifties. See especially Byé, *La grande unité interterritoriale dans l'industrie extractive et ses plans*, CAHIERS DE L'I.S.E.A. (Ser. F., No. 2, 1956); Byé, *L'autofinancement de la grande unité interterritoriale et les dimensions temporelles de son plan*, 67 REVUE D'ECONOMIE POLITIQUE 269 (1957), repr. in 2 ECONOMIES ET SOCIÉTÉS: CAHIERS DE L' I.S.E.A. 1745 (1968) (an interesting issue reprinting several early French articles on multinational firms) and in English transl. in 8 INT'L ECON. PAPERS 147 (1958); M. BYÉ, RELATIONS ECONOMIQUES INTERNATIONALES 177-179 (1959). And cf. note 16 *infra*.

2. The best recent manifestations of this interest are Vagts, *The Multinational Enterprise: A New Challenge For Transnational Law*, 83 HARV L. REV. 739 (1970) and Rubin, *Multinational Enterprise and National Sovereignty: A Sceptic's Analysis*, 3 L. & POLICY IN INT'L BUS. 1 (1971). For a perceptive earlier study, on a different tack, see Miller, *The Corporation As A Private Government in the World Community*, 46 VA. L. REV. 1539 (1960). Cf. also Baum, *The Global Corporation: An American Challenge to the Nation-State?*, 55 IOWA L. REV. 410 (1969). A valuable paper, I. Feltham & W. Rauenbusch, *Multinational Enterprises in Canada; Foreign-Owned Enterprises in Canada*, Aug. 1971 (mimeo.), reached me after this paper was completed.

3. But see Oliver, *Speculations on Developing Country Reception of Multinational Enterprise*, 11 VA. J. INT'L L. 192 (1971); Harry G. Johnson, *The Multinational Corporation as an Agency of Economic Development: Some Exploratory Observations*, in THE WIDENING GAP—DEVELOPMENT IN THE 1970's 242 (B. Ward, L. D'Anjou and J. D. Runnalls eds. 1971). Professor Johnson observes, *id.* at 242, that "both economic theory and economic policy have been slow in recognizing this phenomenon" How slow may be illustrated by a 1968 review of the WATKINS REPORT (*infra* note 49) which chides its authors for being "excessively impressed by the concept of the multinational corporation as a new and revolutionary entity . . . that has been propagandized in recent years by the International Chamber of Commerce and the Harvard Business School" and for their "excessive excitement about the novelty of the multinational corporation" Johnson, *The Watkins Report — Towards A New National Policy?* 23 INT'L J. 615, at 616, 622 (1968).

paper I attempt to study some of the definitional and conceptual problems of "multinational enterprise," review briefly the possible balance of benefits and costs for less developed countries, and examine the need and possible forms of legal regulation. The state of knowledge—as distinguished from guesses, hopes and fears—in this area is such that many questions and few answers are warranted.

Reading large doses of business writings on the multinational enterprise is liable to provoke what may be called the "Aristides syndrome."⁴ Enthusiasm is so unrestrained, praise so fulsome, self-satisfaction so evident in much of the literature, that it only takes normal human perversity to react negatively, making unkind comments and discovering faults in every argument and dark sides in every bright achievement. One must guard against such a reaction.

Definitions and Their Consequences

There is no generally accepted definition of "multinational enterprise." The very terminology is not yet settled and a plethora of words for either of the two components of the term is in use.⁵ The uncertainty is no doubt due, in part, to the relative novelty of the concept and of the type of industrial organization it refers to, but it should also be attributed to the multiplicity of uses to which the term may be and is put. In its origins, the term was rather tendentious, intended mostly to replace obviously derogatory terms or terms emphasizing a firm's "foreignness," and to thus induce a favorable (or avoid a negative) reaction. Frequent use has made its connotations more neutral; even

4. [A]s the voters were inscribing their *ostraka* [sherds, pieces of earthenware on which Athenians scratched the name of the person to be exiled — "ostracised"], it is said that an unlettered and utterly boorish fellow handed his *ostrakon* to Aristides, whom he took to be one of the ordinary crowd, and asked him to write *Aristides* on it. He, astonished, asked the man what possible wrong Aristides had done him. "None whatever," was the answer, "I don't even know the fellow, but I am tired of hearing him everywhere called 'The Just.'" On hearing this, Aristides made no answer, but wrote his name on the *ostrakon* and handed it back.

PLUTARCH, ARISTIDES, vii (Perrin transl.).

5. E.g., for the adjective: world, global, plurinational, transnational, international; and for the noun: firm, corporation, company, business. Compare Byé's term "grande unité interterritoriale," *supra* note 1.

This paper deals with "private" enterprise only, not with international public enterprise or nongovernmental non-profit organizations. For related discussions and distinctions, see Goldman, *The Law of International Companies*, 90 J. DROIT INT'L (CLUNET) 321 (1963); Kahn, *International Companies*, 3 J. WORLD TRADE L. 498 (1969); Harrod, *Non-governmental Organizations and the Third World*, 1970 Y. B. WORLD AFF. 170; Angelo, *Multinational Corporate Enterprise*, 125 HAGUE ACADEMY INT'L L., RECUEIL DES COURS 443, 467-472 (1968).

those not enamored of the development now freely use the term.⁶ Considerable ambiguity remains along with a degree of deliberate or unintended tendentiousness.

Several classifications and definitions have been proposed.⁷ Each in its own way contains two distinct elements. For an enterprise to be multinational, (a) it must operate in a significant manner in several national territories and (b) there must be unified management so that operations in any particular country are under the integrated direction of company headquarters. The two elements differ substantially from one another. The first is relatively objective; its presence can be determined by study of empirical, especially quantitative, data and its content is fairly clear. It corresponds, by and large, to established definitions of "direct private foreign investment." Normally, a company is multinational if it engages in production outside the territory of its home state. If its foreign activities consist exclusively of export sales it probably would not qualify. Some ambiguity still obtains with respect to various possible arrangements among firms, including licensing of industrial property and joint ventures, which might allow a significant degree of control over production. The second element of the definition is different in nature: it is "subjective," in the sense that it refers to matters of attitude and involves assessments of managerial policies for which no hard data are likely to be extensively available. Yet, it is indispensable for distinguishing between multinational enterprise and other forms of foreign investment.

While most writers insist on the importance of the second element, empirical discussions of the prevalence, distribution and importance of multinational enterprise are uniformly based on data reflecting the first element alone. This may be attributed, to some extent, to a plausible but unproven assumption: an enterprise engaging in significant multinational operations is likely to be managed on an integrated, global basis. There are serious problems with this assumption, especially with respect to less developed countries, but they will be

6. Cf., e.g., *Review of the Month — Notes on the Multinational Corporation*, 21 MONTHLY REV. 1-13 (esp. at 2-3) (Oct. 1969).

7. Good discussions of alternative definitions and classifications may be found in Litvak & Maule, *The Multinational Corporation: Some Perspectives*, 13 CAN. PUB. AD. 129 (1970); S. ROLFE, *THE INTERNATIONAL CORPORATION* 11-16 (Background Report, Int'l Chamber of Commerce, 1969); C. KINDLEBERGER, *AMERICAN BUSINESS ABROAD* 179-185 (1969). For useful illustrative descriptions, see L. TURNER, *INVISIBLE EMPIRES* 14-24 (1971); Houssiaux, *La grande entreprise plurinationale*, 17 *ECONOMIE APPLIQUÉE* 403, 424-436 (1965); F. DONNER, *THE WORLD-WIDE INDUSTRIAL ENTERPRISE* (1967). The historical record is comprehensively covered in M. WILKINS, *THE EMERGENCE OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM THE COLONIAL ERA TO 1914* (1970).

discussed later. At any rate, the criteria most often used are the presence of subsidiaries in other countries,⁸ the percentage of sales, assets, or employees outside the home country,⁹ and the quotation of shares in foreign stock exchanges.¹⁰ To bridge the gap between external criteria of size and location and the internal test of executive attitudes and policies it has been suggested that the firm's managerial structure and organization should be the main criterion.¹¹ However, this criterion too cannot be fully conclusive: formal organization often takes quite some time to catch up with actual policies; conversely, managerial attitudes can generally resist or overcome organizational restraints.

This is an area where statistics are supremely important. And available statistics deal in the main with United States-based firms. Indeed one writer has suggested that the visibility of United States-based multinational corporations is primarily due to the quality of American statistics.¹² The figures reflecting the foreign operations of United States-based enterprise are impressive. The most modest, but at the same time the best documented, are those in the Department of Commerce studies on the "international investment position" of the United States: at the end of 1969, the total book value of U.S. direct investments abroad stood at nearly \$71 billion.¹³ Particularly interesting are the calculations which focus on "international production," itself a novel concept: the total output of foreign subsidiaries of United States companies and of foreign firms partly owned by United States companies was in 1968 over \$200 billion, a figure to be compared to a United States Gross National Product (GNP) of over \$860 billion, a combined Western European (European Economic Community) GNP of \$360 billion, and total U.S. exports of \$33 billion. If to

8. Cf. UNION OF INTERNATIONAL ASSOCIATIONS, YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1968-69 (1969), repr. in Angelo, *supra* note 5, at 575-600; J. VAUPEL & J. CURHAN, THE MAKING OF MULTINATIONAL ENTERPRISE (1969) (by inference since no definition of the key term is given); M. WILKINS, *supra* note 7, at ix and *passim*.

9. Cf. S. ROLFE, *supra* note 7, at 13, 150-157; Robock & Simmonds, *International Business: How Big Is It — The Missing Measurements*, 5 COLUM. J. WORLD BUSINESS 6, 18 (May-June 1970).

10. Cf. Rolfe, *The International Corporation in Perspective*, in THE MULTINATIONAL CORPORATION IN THE WORLD ECONOMY 5, 23 (S. Rolfe & W. Damm eds. 1970).

11. See R. ROBINSON, INTERNATIONAL MANAGEMENT 151-156 (1967).

12. "[A] good part of *le défi américain* lies in *les statistiques américaines*." Rolfe, *supra* note 10, at 9.

13. Devlin & Kruer, *The International Investment Position of the United States: Developments in 1969*, 50 SURVEY OF CURRENT BUSINESS 21, 26 and *passim* (Oct. 1970). It is generally acknowledged that book value figures greatly understate the actual worth of foreign assets. By the end of 1970, total book value of foreign direct investments was reported to have reached \$77 billion.

United States investments abroad are added foreign investments of other developed countries, in one another and in the United States, we reach a total for "internationally tinged product . . . close to \$500 billion out of \$1800 billion—some 28%."¹⁴ Such rough figures are valuable indications of the orders of magnitude involved. But available data remain inadequate and fragmentary. Professors Robock and Simmonds point out, for instance, that, if the specificity of multinational enterprise is to be taken seriously, then, to reach an understanding of the amount of "international business" being conducted, we must add together not only direct foreign investment, to and from the United States, and the related product, but also the domestic production of multinational companies in their home countries, as well as the international trade in goods and services among the companies concerned.¹⁵ The two authors insist further on the necessity for a revised understanding of international economics, centered around the firm rather than the nation ("countries do not export, firms do"), and covering trade of tangible and intangible goods, sale of services, investment and related operations, all seen as alternative options for particular firms. This is indeed a direction in which theoretical international economics has been expanding in the past decade.¹⁶

Putting economic theory problems on one side, it is quite obvious that what available statistics describe is "private foreign investment" as it used to be called, not "multinational enterprise" as such. For it is the second element in the latter's definition that gives to that concept, and to the phenomenon it refers to, its novel and peculiar character. It is its centralized direction, the ability to bring together in a single integrated process operations in many different countries, that marks

14. J. Polk, *Economic Implications of the Multinational Corporation*, in *The Multinational Corporation. Highlights and Background Papers* [for a] Conference Held at the Department of State, Feb. 14, 1969, at 15 (mimeo). Approaching these figures from yet another angle, Dr. Polk estimated that such "internationally-tinged" production represented about one sixth (\$450 billion) of Gross World Product, calculated at \$3,000 billion. See *Statement of J. Polk, in A Foreign Economic Policy for the 1970's—Part 4—The Multinational Corporation and International Investment, Hearings Before the Subcommittee on Foreign Economic Policy, Joint Economic Committee, 91st Cong., 1st Sess., at 770, 776 (1970).*

15. Robock & Simmonds, *supra* note 9.

16. See especially Bertin, *La morphologie des relations internationales (Essai d'une présentation intégrée)*, *ECONOMIES ET SOCIÉTÉS: CAHIERS DE L'I.S.E.A.*, 128 ff (May 1967). And cf. Caves, *Foreign Investment, Trade and Industrial Growth*, in *ESSAYS ON ECONOMIC DEVELOPMENT 9* (J. Bain ed. 1970); Caves, *Industrial Economics of Foreign Investment — The Case of the International Corporation*, 5 *J. WORLD TRADE L.* 303 (1971); Vernon, *International Investment and International Trade in the Product Cycle*, 80 *Q. J. ECON.* 190 (1966); Hymer, *La grande "corporation" multinationale*, 19 *REVUE ECONOMIQUE* 949 (1968); C. KINDLEBERGER, *supra* note 7. For a comprehensive and readable survey of developments and problems, see R. BARBER, *THE AMERICAN CORPORATION* 233-285 (1970).

the modern multinational enterprise as a new phenomenon, infrequent and indeed unlikely under past conditions. The relative liberalization of international trade, the quantitative and qualitative changes in international communications, the boom in technologically sophisticated production (which is primarily involved in multinational enterprise activities), are factors which have determined the development of modern multinational enterprise by making possible continuing and effective managerial control from a single center of decision. Managerial techniques, including use of computers and mathematical formulas, developed in response to needs have further enhanced the control's effectiveness. The comprehensiveness of the central management's involvement is stressed in most of the business literature. Despite variations of degree and kind in the manner and extent of centralized decision-making, central management is generally described as retaining extensive control over the planning of the subsidiaries' operations.¹⁷ Although financial considerations and strategies play an important, perhaps preponderant, role, they are not, according to these views, the sole concern of central management. In this respect, business descriptions contradict those Marxian discussions which insist on the purely financial role of central management.¹⁸

The combination of centralized management and geographically widespread operations endows multinational enterprise with a singularly expanded horizon of activities in time as well as in space. It possesses the capability selectively to utilize resources located in several territories, to transfer, or withhold, resources from country to country, and to choose appropriate modes and degrees of operation, in accordance with the management's perception of company interest. It is thus able to take advantage of the conditions—natural, financial, political, and legal—prevailing in any particular country, and to evade, when necessary, some of the effects of such conditions. Compared to other business firms, the multinational corporation possesses an enhanced relative ability to shape its own environment and an increased relative freedom from external constraints.

The discrepancy between accepted definitions and the criteria on the basis of which data are compiled allows certain fundamental uncertainties to persist at the core of all discussions of multinational enter-

17. See, e.g., the detailed discussions in M. BROOKE & H. REMMERS, *THE STRATEGY OF MULTINATIONAL ENTERPRISE* 21-124 (1970); J. FAYERWEATHER, *INTERNATIONAL BUSINESS MANAGEMENT — A CONCEPTUAL FRAMEWORK* 133-207 (1969).

18. See *Review of the Month — Notes on the Multinational Corporation*, MONTHLY REVIEW 1, 6-7 (Nov. 1969). To a layman it would seem that this is a point on which empirical research could provide significant clarification.

prise. A necessary precondition for further serious study is the formulation of an operational definition combining both objective and subjective elements with the help of which empirical data can be collected. Even then some difficulties will persist. As in all cases where theoretical models are placed against fluid realities, distinctions between enterprises engaging in international operations are very much a matter of degree. The extent and the quality of integrated management may differ from firm to firm. Even where firms meet all related criteria, generalizations on that basis alone may not be warranted for every purpose. The significance of differences between kinds of multinational enterprise must be acknowledged: Standard Oil (N.J.), General Motors and IBM are all multinational corporations, no doubt, but in many respects their differences are more important than their similarities. Moreover, potential as well as actual policies must enter into the picture: even though at any given time there may be no effective centralized management, an enterprise's foreign ownership may represent a possibility of future influence on the strategy and attitudes of individual national components.

The Non-International Multinational Enterprise.

It must be kept in mind that the multinational character attaches to the enterprise's operations alone, not to its legal or political status. Legally, the term "multinational" is meaningless; of the other adjectives proposed only "international" normally has legal connotations, but it is generally agreed that it is not intended to invoke them. The legal structure of multinational firms may or may not reflect their managerial structure. The relationship between the two is often a persuasive illustration of the irrelevance of legal form for much of business practice. Elaborate, and sometimes quite ingenious, legal formulas have been devised to allow firms to operate efficiently across national borders, but these are responses to strictly legal (i.e., technical legal) rather than economic or managerial problems and needs.

To determine the nationality¹⁹ of corporations nations employ several criteria: place of incorporation, of headquarters or of principal operations, nationality of shareholders.²⁰ No single criterion is accepted in all national legal systems; indeed, no country appears to rely

19. Use of the term "nationality" involves, of course, application by analogy of certain concepts which obtain with respect to individual human beings. While at first blush the analogy may appear convenient and plausible, it may ultimately create more problems than it resolves, because it distorts reality and induces misperceptions.

20. For an excellent brief review of the whole area in the context of the multinational enterprise, see Vagts, *supra* note 2, at 740-743.

for all purposes on a single test. Such multiplicity and ambiguity of criteria are not necessarily to be regretted. There is no absolute value in total consistency: it may be quite appropriate to treat a company as foreign for some purposes and as domestic for others. The demand for total clarity and consistency in the application of criteria for the nationality of corporations often hides an attempt to serve the (financial) convenience of companies by giving legal sanction and effect to their forum-shopping.

Similar considerations apply in public international law where the strict legal status of corporations and especially their effective nationality are obscure and confused. The recent *Barcelona Traction* case,²¹ for all its faults, may be seen as a denial of the right of shareholders to shop around for a convenient state of incorporation as well as a friendly protector state. Other developments may point to new possibilities. An example is found in the World Bank-sponsored Convention on the Settlement of Investment Disputes which provides for the possibility of determining, by agreement between a host country and a foreign corporation, the latter's effective legal nationality for particular purposes (e.g., concerning conciliation or arbitration proceedings under the convention.)²²

In terms of the legal nationality and political allegiance of top level management, multinational corporations are hardly multinational, either. Kenneth Simmonds' excellent study has shown that, in overwhelming majority, United States-based multinational corporations are managed by American nationals; the proportion of high-level foreign managers is minimal.²³ There is no indication that the situation is significantly changing or that, apart from a few well-known exceptions, it is at all different in corporations based in other developed nations. Whether and to what extent legal nationality reflects political loyalties is a highly speculative question, but common sense and what little empirical evidence there is suggest that there is a close connection between the two. It is more of an open question how, and how far, national loyalties affect business decisions. A person may be loyal to his nation without subordinating his firm's interests to specific

21. *Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain)*, [1970] I.C.J. 3.

22. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25(2) (b). For an inquiry into this and other possible devices and methods, see Kahn, *La détermination de la qualité de commerçant étranger dans les accords de commerce international*, in HAGUE ACADEMY INT'L L., COLLOQUIUM 1968 — INTERNATIONAL TRADE AGREEMENTS 235 (G. Kojanec ed. 1969).

23. Simmonds, *Multinational? Well, Not Quite*, in WORLD BUSINESS — PROMISES AND PROBLEMS 43 (C. Brown ed. 1970). And cf. Thackray, *Not So Multinational, After All*, 2 INTERPLAY 23 (Nov. 1968).

governmental policies. Certain pervasive fundamental biases may well persist.

On another level, the ability of top executives of multinational firms to act in an "international" manner, or to see themselves as so acting, is predicated on acceptance of a political ideology which posits a rigid distinction between public and private policies and actions. In a characteristic sentence, a perceptive analyst points out that "the companies themselves are not 'multinational' in a political sense, though they are trying to be so commercially."²⁴ His discussion of the difficulties of that attempt illustrates the impossibility of the distinction between political and commercial policies at the level at which multinational enterprise operates. It is a philosophical commonplace that freedom of trade and investment are essentially political positions; they reflect the extent to which freedom serves the political and economic systems prevailing in the countries involved.²⁵ Finally, the size and importance of most multinational firms make it likely that, whatever the intentions of their executives, the companies' home government will be interested in them and will seek to strengthen their loyalty and, on occasion, influence their policies. Whatever its vicissitudes after the *Barcelona Traction* case, the whole institution of diplomatic protection, on the virtues of which the legal spokesmen for multinational enterprise have often insisted with vigor and eloquence, is a refutation of the non-national character of the enterprise and of its effective internationalization.²⁶

Multinational Enterprise In Developing Countries

The significance of debates concerning definition becomes evident when it is attempted to determine the extent of multinational enterprise activities in less developed nations. The fact is that, with very

24. J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE 8 (1970) [hereinafter cited as NATIONAL INTERESTS].

25. American insistence on an "open door" policy by host countries, by no means merely a historical memory, illustrates clearly the connection. Demands directed at imposing an "open door" policy are still made. See the brief critique of recent efforts in Goldberg & Kindleberger, *infra* note 53, at 297, note 3.

26. Following the logic of this proposition the director of the most comprehensive study of multinational enterprise has suggested the necessity for adopting internationally a variant of the Calvo clause ("the principle that foreign-owned subsidiaries were foreclosed from appealing to the diplomatic support of the governments of their parents on pain of losing their rights as nationals") coupled with an effective grant of national treatment. See *Statement of R. Vernon, A Foreign Economic Policy for the 1970's — Part 1. Survey of the Issues, Hearings Before the Subcommittee on Foreign Economic Policy of the Joint Economic Committee*, 91st Cong., 1st Sess. (Dec. 4, 1969), at 150 (1970); and Vernon, *The Role of U.S. Enterprise Abroad*, 98 DAEDALUS 113, 132 (1969); Vernon, *The Multinational Enterprise: Power versus Sovereignty*, 49 FOREIGN AFFAIRS 736, 748-749 (1971).

few exceptions, we only know about "direct private foreign investment" in these countries, not about multinational enterprise. The vague presumption that the two may largely coincide is not a sufficient basis for quantitative evaluation.

Professor Jack N. Behrman has observed that multinational corporations, properly so called, operate almost exclusively among the developed, North Atlantic, countries.²⁷ Operations in developing countries, according to him, conform in the main to one of two models, neither of which can be considered truly multinational. First is the traditional ("classical" or "colonial") model of direct foreign investment, especially in extractive industries (mining, oil, plantations), where the operation in the host country is intended exclusively, or nearly so, to serve the markets of the home country or third countries through exportation of raw materials. The second model, the "international holding company," is that of a company controlling, within several foreign countries, firms whose operations are directed at the local market; such subsidiaries normally have a high degree of autonomy, the parent company retaining an essentially inactive, rentier-like interest.

Although certain qualifications are called for, Professor Behrman's basic point is very well taken. It is probable that a considerable number of foreign-owned firms in the less developed countries operate on the "international holding company" model. It is particularly likely that this managerial structure obtains in many (but not all) instances where foreign firms have entered into joint ventures with the local government or with local private interests. Moreover, the very old-fashioned kind of foreign investment cannot be totally excluded: the case of the individual foreigner in a less developed country who owns plantations, mines, or even factories and becomes a major economic power in the host state is admittedly rarer nowadays than it once was, but it is by no means extinct.²⁸

On the other hand, it is by no means clear why most foreign companies engaged in extractive industries and exploitation of natural resources should not be considered multinational in the strictest sense

27. Behrman, *Can Governments Slay the Dragons of Multinational Enterprise?*, 1971 *EUROPEAN BUSINESS* 53-55 (Winter 1971). See also J. BEHRMAN, *SOME PATTERNS IN THE RISE OF THE MULTINATIONAL ENTERPRISE* xiii (1969).

28. A related sub-category of cases, which creates serious problems in many of the new countries of Africa and Asia, is that of the presence of ethnically distinct classes of small business men and middlemen, often established in the host country during colonial times. For a comprehensive exploration of related problems, see F. GOLAY ET AL., *UNDERDEVELOPMENT AND ECONOMIC NATIONALISM IN SOUTHEAST ASIA* (1969).

of the term.²⁹ Oil companies are the prototype of the multinational company, not merely in terms of size and geographic expansion but particularly in view of their managerial policies.³⁰ The amount of production, the direction of sales, the prices and terms of payment, the employment policies and transport tactics, are all centrally determined with a view to maximizing the profits of the enterprise as a whole and not those of each unit. It is undeniable, on the other hand, that the external constraints on extractive firms differ significantly from those on manufacturing firms. The degree and quality of the flexibility they dispose is correspondingly different.

The conclusion at this point can only be that we lack the systematic data to provide any quantitative description and breakdown of multinational enterprise activities in the less developed countries. Much essential factual information is unavailable. We need to know more about the number and size of such firms, their incidence in the various industries and countries, the degree and variations of their managerial centralization (with probable differentiations according to industry, size, home nationality and other variables). We need to know more about the actual consequences of centralized management, not only from the standpoint of the firm's profits or smoothness of operation, but in its impact on the industry and the national economy. Better to understand its role and importance it will be useful to study cases of real or imagined conflicts (and their resolution) within joint ventures.

The Impact of Multinational Enterprise

An attempt to study the benefits and costs of multinational enterprise operations in less developed countries meets the same problem. To the limited extent that the relevant literature refers to these countries, it largely deals with private foreign investment in general, not with issues peculiar to multinational enterprise.

While it is convenient to speak of benefits and costs as if they were discrete quantities, it is clear that they are both aspects of (better yet, they represent judgments concerning) the effects of multinational

29. A high proportion of United States and Western European private foreign investments in developing countries is indeed in petroleum and mining. At the end of 1969 \$10.15 billion out of \$20 billion U.S. private direct investment in such countries was in petroleum, mining and smelting. Devlin and Krueger, *supra* note 13, at 28 (table 6).

30. Cf. the two articles by Byé, *supra* note 1; E. T. Penrose, *THE LARGE INTERNATIONAL FIRM IN DEVELOPING COUNTRIES — THE INTERNATIONAL PETROLEUM INDUSTRY* (1968); Adelman, *The Multinational Corporation in World Petroleum*, in *THE INTERNATIONAL CORPORATION* 227 (C. Kindleberger ed. 1970).

enterprise operations.³¹ They can be separately discussed only with the understanding that in reality they are closely tied to one another.

A list of the benefits would include the same things often mentioned in connection with private foreign investment in general: capital, foreign exchange, managerial and technological skills, export channels, willingness and ability to take initiatives. There may be slight differences in degree. Technological expertise and the ability to establish export channels are enhanced.³² On the other hand, claims that multinational enterprise executives are peculiarly sensitive to the interests and sensibilities of less developed countries are of highly dubious validity. Evidence to support or to invalidate them is lacking and one falls back on inferences of ambiguous import and on contradictory individual cases and anecdotes.

The disadvantages of multinational enterprise are also in major part those of private foreign investment although some may be more acute because of specific features of multinational enterprise. The likely size of the firm may be a significant factor,³³ especially when seen in the context of oligopolistic industries where a few large internationally-operating firms dominate and where few choices are open to prospective host countries. Since multinational corporations general-

31. In this sense, Professor Johnson correctly criticizes the by now widespread host country demand for "maximizing benefits and minimizing costs" of foreign investment. It is net benefit, or the balance of benefits and costs, that must be considered. See Johnson, *The Efficiency and Welfare Implications of the International Corporation*, in *THE INTERNATIONAL CORPORATION* 35, 45 (C. Kindleberger ed. 1970). However, since many of the costs, and even some benefits, are intangible, unquantifiable and inherently fuzzy, such expressions must be understood as metaphors, rather than as strict economic propositions.

32. Concerning the latter, see De La Torre, *Exports of Manufactured Goods From Developing Countries: Marketing Factors and the Role of Foreign Enterprise*, 2 J. INT'L BUS. STUDIES 26 (1971).

33. A recent study raises interesting questions as to the extent to which large firms are truly multinational. Professor R. B. Stobaugh distinguishes between small, medium-sized and large firms operating internationally and finds that the medium-sized firms "have a greater tendency than the other enterprises to attempt an over-all systems optimization approach and more nearly approach the economists' concept of one 'economic man' running the enterprise from headquarters." Small firms do not possess the resources for such an approach and they tend therefore to allow a greater measure of independence to their subsidiaries. Larger firms are too complex for precise centralized management; their home offices prefer to use "rules of thumb," instead of examining each situation by itself, and to issue "guidelines" rather than definite instructions. Stobaugh, *The Multinational Corporation: Measuring the Consequences*, 6 COLUM. J. WORLD BUSINESS 59, 62 (Jan.-Feb. 1971); Stobaugh, *Financing Foreign Subsidiaries of U.S.-Controlled Multinational Enterprises*, 1 J. INT'L BUSINESS STUDIES 43 (1970). These findings, however, speak to the effectiveness and precision of centralized management in large firms rather than to its existence. The autonomy of the foreign subsidiary is still restricted; the relative uniformity of the policies dictated by central management may indeed increase the firm's rigidity and lack of adaptability.

ly tend to be larger and wealthier,³⁴ the inequality in bargaining capability between the two parties in interest, the firm and the host government, may be more pronounced. Moreover, the presence of foreign firms imports a bias in favor of a certain kind of development which may be particularly significant in the case of multinational firms: the complexity of their operations may make them more rigid in their responses to conditions in each host country while, because of their size, overall strength, and flexibility in evading restrictions, they can better afford such rigidity. Recent signs of dissatisfaction within the now developed countries have made us more aware of the limitations and disadvantages of the type of economic development prevalent in them.³⁵ The multinational enterprise may be an institution well adapted for transmitting the benefits (and disadvantages) of that kind of development. By doing so, however, and precisely because of its efficiency and effectiveness, it may restrict the host countries' options; ³⁶ it may tend to bring about excessive uniformity and reinforce homogeneity to the sacrifice of at least potential pluralism and local variations in culture and life style.

All these are features common to most private foreign investment, rendered more acute by the structure and size of multinational enterprise. The possible consequences of the latter's special features raise even more difficult problems. The most fundamental of these is the firm's centralized management, which enhances the flexibility of the firm in its international operations.

The multinational firm's vaunted flexibility may be understood as the ability to avoid the effects of economic and other conditions prevailing at a particular time in a particular national territory by relying on resources available in other nations and on an expanded time-horizon of activities. In other words, the firm is able extensively to avoid (or seriously to lessen the effects of) market conditions prevailing in a particular territory by operating in a more broadly delim-

34. In 1957, according to the last comprehensive U.S. Department of Commerce census, forty-five firms accounted for nearly 60% of all U.S. foreign direct investments; less than a hundred firms accounted for over 70%; and a total of 163 firms accounted for over 80% of foreign direct investments; U.S. OFFICE OF BUSINESS ECONOMICS, U.S. BUSINESS INVESTMENTS IN FOREIGN COUNTRIES at 74-75, 144 (U.S. Dept. of Comm. 1960).

35. For an exploration in depth of these issues, see D. GOULET, *THE CRUEL CHOICE* (1971). And cf. Illich, *Outwitting the "Developed" Countries*, 13 N.Y. REV. OF BOOKS, Nov. 6, 1969, at 20, repr. in I. ILLICH, *CELEBRATION OF AWARENESS* 151 (1970).

36. This is forcefully asserted in Professor Johnson's article, *supra* note 3, the clearest statement yet, from a neoliberal standpoint, of the incompatibility of public goals such as "social justice" and "balanced growth" with "a profit-motivated development process" which relies on multinational enterprise. For succinct formulation of the problem see Lyman, *Aftermath: The Multinational Corporation*, 3 CENTER MAGAZINE 76, 77 (Sept. 1970).

ited environment. There is considerable irony in this: a most persuasive argument in defense of a role for private enterprise (including private foreign investment) in economic development is that the discipline of the market is indispensable for the economically appropriate allocation of resources. Governmental administrative processes and planning calculations, it is argued, do not ensure sufficient discipline; they allow the managers of the economy to disregard reality, to depart considerably from economic constraints and thus allocate the country's resources in an uneconomic fashion. The irony lies in that when the less developed countries turn to foreign investors they are confronted with the multinational corporation, the principal characteristic of which is precisely the ability to ignore concrete national market constraints, even though remaining subject to broadly conceived market considerations in its global operations.³⁷ The objective criteria of market performance (prices, costs, profits) can be disregarded, with respect to operations in any specific country, in order to enhance the corporation's global success. The company managers' work becomes thus similar to that of planning authorities in a governmental bureaucracy.

The enterprise's flexibility puts it in a position of greater freedom from direct and indirect governmental action than other enterprise, foreign and domestic, in the host state. In the developing nations as elsewhere, governments attempt, in varying manners and degrees, to coordinate and direct their national economies with a view to promoting and accelerating their economic development. In dealing with the private sector, they try through their measures—express incentives and restrictions as well as indirect burdens and inducements—to channel development in desired directions, to limit “inappropriate” activities and to increase the degree of certainty in governmental prediction. The presence and possible activities of multinational enterprise seriously disturb this process³⁸ and may detract from the carrying out of

37. The extent to which multinational corporations are subject to any real market constraints is a matter of considerable controversy. For strong affirmation of the large firms' ability to control their environment see J. K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); and compare Caves, *Uncertainty, Market Structure and Performance: Galbraith as Conventional Wisdom*, in *INDUSTRIAL ORGANIZATION AND ECONOMIC DEVELOPMENT: IN HONOR OF E. S. MASON* 283 (J. Markham & G. Papanek eds. 1970). For present purposes it is enough to note that the multinational firm's ability (and intent) to operate in a world-wide market is an essential part of its “nature” (i.e., its accepted definition).

38. For a good discussion of the possible, “disturbance to economic plans,” caused by multinational enterprise, see J. BEHRMAN, *NATIONAL INTERESTS*, *supra* note 24, at 80-84. He concludes that its presence “increases the uncertainty facing the host government,” and that overall “the ability of the host government to carry out its economic plans is circumscribed by the spread of the multinational enterprise . . .” *Id.* at 82.

other, more traditional, state functions such as the collection of revenue. It is probably true that by and large multinational firms routinely comply with the legal regulations and national policies of the states in which they operate. They still retain a choice, however, which neither domestic enterprise nor private foreign investment in its traditional forms possesses to the same degree: to evade such regulation, especially by means of action by the parent or by foreign affiliates.

Financial and other relationships between subsidiaries and parent or among subsidiaries are frequently determined on the basis of centrally determined policies calculated to serve overall corporate objectives. Fees and royalties paid for patents and trademarks licensing and for technical assistance may be determined, not on the basis of an assessment of the value of the services or knowledge transferred, but according to tax or foreign exchange considerations. A recent study concludes: "on balance, it was our impression that most companies consider royalties, fees, and other types of payments to be either a substitute for, or supplement to, dividends as a means of remitting earnings."³⁹ Payment of dividends is itself manipulated for various purposes:

[W]hen in 1964 it was felt that the risk of devaluation had become serious, the parent company directed [a wholly-owned subsidiary in Britain] to pay interim dividends. These, added to the subsequent year-end remittance, totalled about 130% of that year's earnings⁴⁰

Transfer pricing, the setting of special prices for goods sold by one affiliate to another, is also widely used to similar effect:⁴¹ to reduce the income tax paid by the firm, to cope with import duties, to increase the liquid funds available to an affiliate, to hedge against devaluation or other currency changes. Terms of payment, as well, can be manipulated. To hedge against devaluation, for instance, the subsidiary in the country likely to devalue its currency may be required to prepay or pay upon delivery for goods provided by subsidiaries in

39. M. BROOKE & H. REMMERS, *supra* note 17, at 162.

40. *Id.* at 168.

41. See *id.* at 172-176; J. Shulman, Transfer Pricing in Multinational Business (D.B.A. Diss., Harvard, 1966); Shulman, *When the Price Is Wrong — By Design*, 2 COLUM. J. WORLD BUSINESS 69 (May-June 1967), repr. in READINGS IN INTERNATIONAL FINANCIAL MANAGEMENT 184 (A. Stonehill ed. 1970); L. TURNER, INVISIBLE EMPIRES 75-82 (1971); Rose, *The Rewarding Strategies of Multinationalism*, 78 FORTUNE, Sept. 15, 1968, at 100; J. GREENE & M. DUERR, INTERCOMPANY TRANSACTIONS IN THE MULTINATIONAL FIRM: A SURVEY (Conference Board study, n.d. [1969?]).

other countries, while the latter may be allowed lengthy delays in making their payments to the former.

The variety and ingenuity of these methods and devices should not obscure the fact that they are calculated to evade although not necessarily to violate, in the strict sense, the laws and policies of the host countries. Such practices may also have other consequences.⁴² For instance, most investment incentive legislation in less developed countries provides for repatriation of foreign investors' earnings up to certain limits, frequently determined as a percentage of the capital brought into the country. If, through its pricing of the capital equipment imported, the investing corporation is able to inflate the apparent value of its initial investment, it is in a position to increase correspondingly its remittance of earnings. Not only are the host country's exchange reserves affected, but, as a side-effect, the statistical picture of the economy's performance is falsified, thus making planning and other calculations more difficult. In cases of monetary crisis, too, the multinational enterprise frequently uses its resources to protect itself against changes in currency values. While company executives insist that their manipulations of currency are purely defensive and not speculative, the distinction between defense and speculation is not always easy to make. One major company found this out when it made "by miscalculation" a profit of over a million dollars by hedging against devaluation of the British pound.⁴³ Whatever the precise motivation, such protective activities, conducted on an enormous scale, are likely to bring about the events they are defending against.⁴⁴

42. Their effects on the enterprise's own workings should not be underestimated. One way or another, they involve dual bookkeeping practices, with all their complications. For a critique, from a management viewpoint see Shulman, *When the Price Is Wrong — By Design*, *supra* note 41. Several observers report that, quite frequently, managers of affiliates whose "profits picture" is adversely affected by such manipulations are, illogically but predictably, chided or penalized by central management. *Cf. id.*; M. BROOKE & H. REMMERS, *supra* note 17, at 117-121.

43. See 84 FORTUNE, July 1971, at 37; Ulman, *Corporate Treasurers Make Moves That Shake World Monetary Scene*, Wall St. J., May 29, 1969, at 1, col. 6.

44. On the activities of American multinational firms during recent monetary crises see Stabler, *How Multinational Firm Protects Its Flanks in Monetary Dealings*, Wall St. J., Aug. 20, 1971, at 1. And *cf.* Kraus, *New York Letter—Whose Crisis?* EUROMONEY, June 1971, at 44. Professor Stobaugh has again pointed out that the willingness, if not the ability, of multinational firms to expend efforts in such financial dealings has been much exaggerated.

To be sure, important savings can be made by financial manipulations, but such savings are small in relation to the earnings received from capitalizing on a firm's special strengths, such as technical know-how, managerial and marketing expertise, or a capacity to raise large sums of money.

Stobaugh, *The Multinational Corporation: Measuring the Consequences*, 6 COLUM. J. WORLD BUSINESS 59, 62 (Jan.-Feb. 1971).

Government authorities in the countries of operation of multinational firms are, of course, aware of the possibility of such practices. Customs and tax officials are often authorized to refuse to accept a firm's declared prices and to assess taxes or duties on the basis of alternative calculations.⁴⁵ Considerable complications often follow. The situation is much worse, for both parties but especially for the government, in less developed countries, where the governmental machinery is often defective and civil servants lack many of the skills and expertise required to properly review the companies' declarations.⁴⁶

Multinational enterprise may have difficulty in becoming an integral part of the national economy of host countries. The very sophistication in production and management which makes it efficient may condemn it to an enclave status, especially where the rest of the economy in the host country is not at the same level of technological and managerial skills. The centralization of its management, moreover, goes counter to the widespread desire of host governments to encourage joint ventures between foreign and domestic firms.⁴⁷ To the extent that joint ventures place a degree of real control and genuine decision-making power in the hands of local partners, they tend to reduce the power of central management; they thereby decrease the operative integration of the multinational firm and contradict the logic of its existence. Similar problems arise with respect to research and development activities, which normally tend to be concentrated at headquarters.⁴⁸ The home country's technological lead is thus strengthened, the host's scientific and technological development is slowed down and a relationship of long-term technological dependence is likely to come about.

All these factors tend to exacerbate the multinational firm's foreign character. It is a principal actor in the host society and economy but it pointedly remains an alien actor. Its presence and growth are thus perceived as bringing about a shifting of effective decision-making capacity from persons and institutions located within the territory to

45. See, e.g., INT. REV. CODE of 1954, § 482, authorizing the Internal Revenue Service to reallocate, for tax purposes, income among members of a corporate family; cf. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 996-999 (1968) and citations therein.

46. See Seers, *Big Companies and Small Countries: A Practical Proposal*, 16 *KYKLOS* 599 (1963).

47. See W. G. FRIEDMANN & J.-P. BEGUIN, *JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES* (1971).

48. For a recent study see M. DUERR, *R & D IN THE MULTINATIONAL COMPANY: A SURVEY* (Conference Board, n.d. [1970?]).

"centers of decision" outside it.⁴⁹ In the weak and vulnerable societies of less developed countries, such a shift may bring about a gradual distortion of the entire economy. In terms not only of economic structures but also of population attitudes and skills, the host countries may evolve in the direction of increased dependence—to a capitalism of "foreign capitalists and local workers."⁵⁰ In the view of some Latin American economists, the expansion of United States multinational enterprise in the most dynamic sectors of their economies frustrates the Latin American countries' potential for autonomous national development and leads to a condition of long-run dependence.⁵¹

At this point the much-disputed question of "extraterritoriality" must be broached. Host countries, especially developed ones, bitterly complain of the efforts of United States administrative and judicial authorities to extend the application of some United States laws and policies to activities of multinational enterprise units located outside the country. This has been the nearly exclusive area of legal concern among the problems relating to multinational enterprise. The issue is

49. See FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY: REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY 27 (Ottawa, 1968) (hereinafter cited as WATKINS REPORT).

Foreign control means the potential shift outside the country of the locus of some types of decision-making. The extent to which decision-making within the host country is eroded varies with circumstances, and basically depends on the power of the foreign firm and its government relative to the government of the host country. To the extent decision-making is eroded, national independence—being, in a broad sense, the ability to make decisions in the national interest—is reduced. But the effects on independence are not solely in the direction of reduction. Foreign ownership opens up new channels of communication, public and private, which are, in principle, two-way. Hence foreign ownership may increase national independence in some respects . . .

50. "A workable capitalist system is one which is made up of local capitalists, not foreign capitalists and local workers." Felipe Pazos, *Discussion of the Papers*, in CAPITAL MOVEMENTS AND ECONOMIC DEVELOPMENT 205 (J. Adler & P. Kuznets eds. 1967).

51. See C. FURTADO, OBSTACLES TO DEVELOPMENT IN LATIN AMERICA 29-37, 58-64 (1970); Ferrer, *Industrias Básicas, Integración y Corporaciones Internacionales*, in H. JAGUARIBE ET AL., LA DEPENDENCIA POLITICO-ECONOMICA DE AMÉRICA LATINA 87 (1969); Galeano, *De-Nationalization and Brazilian Industry*, 21 MONTHLY REV. 11 (Dec. 1969). The recent Latin American literature on the phenomenon of dependence is, of course, closely related to these problems; see Dos Santos, *The Structure of Dependence*, 60 AM. ECON. ASS'N, PROCEEDINGS 231 (1970) and the contributions by Helio Jaguaribe and others in the volume cited above.

The historical experience of Latin American countries is particularly relevant. Charles Anderson has observed that foreign investors were the primary political constituency of Latin American governments in the late nineteenth century; the nation-state system, transplanted across the ocean in the absence of the conditions that had led to its creation in Western Europe, found function and legitimacy in its dealings with foreign traders and investors and its integration into the "international system of liberal economics." See C. ANDERSON, POLITICS AND ECONOMIC CHANGE IN LATIN AMERICA 18-36 (1967).

complicated by the obvious fact that in this respect the companies' interests and preferences (i.e., to be left alone) appear largely to coincide with those of the host states. Accordingly, we are treated to the moving spectacle of eminent lawyers, closely associated with multinational firms, engaging in vigorous and eloquent defense of the host countries' sovereignty against infringement by the United States.⁵²

The chief areas of conflict have been those of antitrust law, securities and exchange disclosure requirements, export controls, and, in a somewhat different manner and to a more limited extent, balance of payments policies.⁵³ The doctrinal posture of the issues has differed from case to case and, in a rough manner, from area to area. In antitrust and securities regulation, courts and administrative agencies have relied mainly on the so-called "objective territoriality" principle as the ground for claiming jurisdiction,⁵⁴ while in the case of export and investment controls, they have relied on the parent firm's nationality.⁵⁵

The problems caused by "extraterritoriality" are the consequence of unequal structural relationships between the principal home country, the United States, and the host states. Traditional international law relies on reciprocity to induce symmetrical resolution of such conflicts. In the presence of radical inequality, however, reciprocity is of no avail: Canada is not interested in applying its anticommon laws on United States subsidiaries of Canadian parents (or even on parents of Canadian subsidiaries). Even if it did, it is unlikely that such action would seriously affect the United States economy. Proper analysis of the extraterritoriality issue must distinguish between the various areas in which it can be found as well as the kinds of conflicts that have arisen or may arise.⁵⁶ It should further consider the interests affected on

52. It seems unnecessary, but prudent, to add that not all opponents of "extraterritoriality" fall in this category.

53. Peculiar problems of quasi-extraterritorial application of U.S. direct foreign investment controls appear to have occurred only in Canada, whose government, in exchange for partial exemption from the restrictions, undertook to enforce on its own substantially similar measures. See K. LEVITT, *SILENT SURRENDER: THE MULTINATIONAL CORPORATION IN CANADA* 9-15 (1970); WATKINS REPORT, *supra* note 49, at 263-266, 336-338; Litvak & Maule, *Conflict Resolution and Extraterritoriality*, 13 J. CONFLICT RESOLUTION 305, 317-318 (1969). United States balance of payments controls have had a less direct but significant impact elsewhere, as well; see Goldberg & Kindleberger, *Toward a GATT For Investment: A Proposal For Supervision of the International Corporation*, 2 L. & POLICY IN INT'L BUS. 295, 306-310 (1970). And cf. J. BEHRMAN, *NATIONAL INTERESTS*, *supra* note 24, at 88-100.

54. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS §18 (1965).

55. For other cases where the parent's nationality was deemed of controlling importance, see Vagts, *supra* note 2, at 741, note 11.

56. For an analysis applying Kenneth Boulding's model of conflictual situations see Litvak & Maule, *supra* note 53.

each side (economic, political, other; common, special; exclusive, inclusive, etc.), the identity and character of decision-makers (courts, administrative officials, etc.), the degree of governmental involvement on each side, and other concrete factors of this type. In the absence of such detailed scrutiny, it can only be said that a simplistic geometrical conception of national jurisdiction will not suffice.

The importance of the whole issue is a matter of continuing dispute. It was repeatedly asserted in the *Watkins Report* that "the most serious cost to Canada of foreign ownership and control results from the tendency of the United States government to regard American-owned subsidiaries as subject to American law and policy" in the areas of antitrust and export and investment controls.⁵⁷ On the other hand, it has been cogently argued that the real significance of the problem has been much exaggerated: in fact, few cases of conflict occur, and these are relatively unimportant and can be adequately dealt with by normal diplomatic and other methods.⁵⁸ These positions are not as contradictory as they may look. Conflicts between home and host states over extraterritoriality are real, even though they may not directly involve vital interests. Their importance lies in what they reveal about the host country's condition. Such conflicts, like other, equally infrequent, personal and collective crises, are "the tip of the iceberg;"⁵⁹ they serve to illuminate obscure aspects of pre-existing reality—namely, the extent of the host country's penetration by and dependence on persons, institutions and forces whose loyalties (and interests) lie outside the host nation.

The argument thus reaches a fundamental theoretical question: the relationship between multinational enterprise and nation-state. The basic problem remains that the growth of multinational enterprise takes

57. WATKINS REPORT, *supra* note 49, at 360; *cf. id.* at 48, 345, 407. The chairman of the Task Force, however, has significantly qualified his own present position on this point: "One does not have to believe that [extraterritoriality] is 'the most serious issue'—it is not: The economic and political disintegration of Canada consequent on pervasive American economic penetration ranks higher . . ." Watkins, *Canada Can't Wish Away Legal Imperialism*, in GORDON TO WATKINS TO YOU 204, 205-206 (D. Godfrey and M. Watkins eds. 1970).

58. See, e.g., Rubin, *The International Firm and the National Jurisdiction*, in THE INTERNATIONAL CORPORATION 170 (C. Kindleberger ed. 1970). Qualifications to this view, already present in this article, were later given greater emphasis by the author; *cf. Statement of S. Rubin, in A Foreign Economic Policy for the 1970's—The Multinational Corporation and International Investment, supra* note 14, at 921; Rubin, *supra* note 2, at 21.

59. See Watkins, *Preface* to K. LEVITT, *supra* note 53, at xiii-xiv, quoting Professor A. Rotstein. And *cf. A Foreign Economic Policy for the 1970's—Part 4—The Multinational Corporation and International Investment, supra* note 14, at 915 (Watkins), 920 (Rubin).

place in spite of, and therefore potentially in opposition to, the exercise of authority by nation states. Most economists and business experts acknowledge this basic contradiction, although the lessons they draw from it differ. In the guise of proposals for a "reconciliation," many have suggested that the multinational enterprise should and will eventually prevail; a few expect the nation-state to win, while still others conclude that a compromise between the two institutions must eventually be worked out. This is a very large problem, but no discussion of multinational enterprise can totally ignore it.

The argument on behalf of the multinational enterprise's eventual triumph usually has two limbs: one extols the virtues as well as the inevitability of multinational enterprise; the other denigrates the nation state, especially in its economic functions. Multinational enterprise is seen as a constructive and beneficial institution, which makes possible a more efficient allocation of world resources by transcending national frontiers, while the nation state is depicted as an archaic institution, governed by narrow-minded and incompetent bureaucracies and overtaken by economic and technological development.

Both limbs of the argument may be contested. The first is at best inadequate. There is a strong flavor of economic (and technological) determinism in much of the writing in support of multinational enterprise. It is apparently assumed that what the economic and productive forces command (*i.e.*, internationalization of markets and production) the legal and political institutions must eventually carry out.⁶⁰ Or, in a different jargon, that changes in the economic-productive infrastructure will directly and necessarily determine relations in the legal and political superstructure.⁶¹ In reality, it is by no means certain that economic and technological forces will continue to spur the growth of multinational enterprise.⁶² Moreover, the latter's proponents appear to

60. See, *e.g.*, G. W. Ball, *Cosmocorp: The Importance of Being Stateless*, in *WORLD BUSINESS—PROMISE AND PROBLEMS* 330 (C. Brown ed. 1970); Fayerweather, *19th-Century Ideology and 20th-Century Reality*, in *WORLD BUSINESS—PROMISE AND PROBLEMS* 85 (C. Brown ed. 1970); Jacoby, *The Multinational Corporation*, 3 *CENTER MAGAZINE*, May 1970, at 37.

61. To make explicit what the reformulation implies, there is in some of these writings a remarkable flavor of what Marxian theorists would call "vulgar Marxism", that is oversimplified, unilinear economic determinism. Another apposite analogy looks to the free-trade controversies of the mid-nineteenth century, when "many prominent Britons expected free trade to tame the nation-state." See Stevens, *Scanning the Multinational Firm*, 14 *BUSINESS HORIZONS*, June 1971, at 47, 53.

62. Hymer & Rowthorn, *Multinational Corporations and International Oligopoly: The Non-American Challenge*, in *THE INTERNATIONAL CORPORATION* 57 (C. Kindleberger ed. 1970), contest the validity of both the description of the past and the predictions for the future. They observe, *inter alia*, that technological growth in

place inordinate emphasis on economic criteria. Values and preferences not founded on economic efficiency, alternative orderings of priorities on the basis of political, social, moral or cultural considerations are in their view to be effectively disregarded, in the name of welfare and internationalism.⁶³ But it is not self-evident that efficiency, determined as it is by reference to a narrow range of "economic" criteria, should have in all cases pride of place among possible criteria.

The second limb of the proposition, the condemnation of the nation state, is also far from persuasive. For all its failures and problems, the nation is probably the single most powerful social institution; it commands intense loyalty and respect from its subjects. Far from being on the decline, national autonomy, the ability of territorial communities freely to decide matters affecting their fate, lies at the core of a whole constellation of legal concepts and institutions (sovereignty, independence, self-determination, equality of states) and constitutes the focus of human aspirations in new countries and old. It would not do to disregard the failings and inadequacies of the notion (and the reality) of nation; and it is certainly possible to imagine other principles and methods of ordering human affairs and relationships on the planet. At this moment, however, none of these methods is or has a chance of being operative. National autonomy remains the principal legal (as well as political and moral) concept which serves to defend (although by no means wholly effectively) the weaker members of the international community from the overreaching of the more powerful. It is not without significance that the calls for the disappearance or downgrading of the nation state come most often from representatives of (or citizens in) the most developed and most powerful nations.

In a more narrow context, it is useful to remember that national governments carry out functions which no other institution performs. Some of these functions are economic in character: as Professor

the near future could well work against the multinational enterprise. Alternatively, Richard N. Farmer shows persuasively that the past two decades' expansion is not likely to be repeated in the coming decades. Farmer, *Where Does Business Go From Here?*, 23 TEMPLE U. ECON. & BULL. *See*, in agreement, Robinson, *The Future of International Management*, 2. J. INT'L BUSINESS STUDIES 60, 67 (Spring 1971).

63. Mr. Ball did acknowledge, in a statement before a committee of the Canadian House of Commons, that "Compelling considerations that relate to spiritual and cultural needs . . . should take high priority." This led him to raise the question of "the extent to which those needs can be met with minimum sacrifice to the objective of efficient resource use" which is best served by multinational enterprise. STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENSE, CAN. HOUSE OF COMMONS, 28th PARL., 2D. SESS. PROCEEDINGS No. 33 (REPORT OF SPECIAL COMMITTEE RESPECTING CANADA-U.S. RELATIONS) 54 (1970),

Hymer has noted, modern national government is expected to utilize fiscal and monetary policies as instruments for assuring full employment and price stability. "If national power is eroded, who is to perform the government's functions?"⁶⁴

The argument is sometimes couched in slightly different terms: the growth of multinational enterprise is seen as a benign manifestation of growing international interdependence; to reject its claims in favor of an illusory national independence would be retrogressive. But the assertion of national autonomy does not necessarily imply a denial of the fact, or of the desirability, of increasing interdependence. It only seeks to shape its particular form. A relation of interdependence may exist between equals as well as between unequals. In the former case the parties retain their independence; in the latter, the relationship is one of domination, from the stronger party's viewpoint, and dependence, if not oppression, from the point of view of the weaker party.⁶⁵ It is far too easy—and the powerful have sought to do it ever since the days of Menenius Agrippa⁶⁶—to invoke interdependence as an excuse for domination.

An Agenda for Research

At this stage we can only state issues and ask questions. Not only are empirical data lacking but so are adequate interpretations of their meaning, the fruits of close analysis of positions, concepts and arguments. We shall never find out all we should know, but we should at least be aware of the extent of our ignorance.

A *caveat* is needed: this whole essay has been couched in terms of possible and probable actions and effects; at this level of generality, one can only discuss what may happen, at most what is likely to happen. The actual behavior and impact of multinational enterprise in any particular country, however, can be studied with much greater precision. It is only on the basis of such concrete, specific (although perhaps never fully exhaustive) findings that proper measures and policies may be undertaken.

64. Hymer, *The Efficiency (Contradictions) of Multinational Corporations*, 40 AM. ECON. ASS'N, PROCEEDINGS 441, 448 (1970); and cf. Hymer & Rowthorn, *supra* note 62; Roistein, *Binding Prometheus*, in CLOSE THE 49TH PARALLEL, ETC.—THE AMERICANIZATION OF CANADA 209, 222 (I. Lumsden ed. 1970).

65. See F. PERROUX, "INDEPENDANCE" DE L'ECONOMIE NATIONALE ET INTERDEPENDANCE DES NATIONS 133 ff. (1969). In the context of multinational enterprise, see, in essential agreement, Mason, *The Corporation in the Post-Industrial State—II. The Corporation Abroad*, 12 CAL. MANAGEMENT REV. 15 (Summer 1970); Waltz, *The Myth of National Interdependence*, in THE INTERNATIONAL CORPORATION 205 (C. Kindleberger ed. 1970).

66. Cf. W. SHAKESPEARE, CORIOLANUS, ACT. I, SC. I; PLUTARCH, CORIOLANUS. vi.

A first area of inquiry is that of the role of multinational enterprise in the economy of developing countries and in the world economy. Behavioral as well as quantitative data are needed. It is plausible that the role will vary with the industry, as well as with such factors as the degree of control over the industry, the size of the firms, the nationality of the parent. Our information on the actual conduct of multinational firms often consists of anecdotes and fragments. We need to know more about their relationships with other firms, domestic and foreign, their role in trade associations, their routine contacts with home and host governments, the ways in which they behave—in the same manner as, or differently from, domestic firms, large and small, and government-owned corporations. We need to learn more about their transnational operations: more evidence of their vaunted efficiency, their ability to mobilize resources; more information on the criteria—"guidelines" and "rules of thumb"—they use in making their choices. Transfer pricing and other transactions between affiliates have yet to receive the serious legal study they deserve. They raise important and difficult problems for legal theory and the law of contracts, problems strangely reminiscent of those arising in connection with the "planned" contracts between state enterprises in socialist law.⁶⁷

A second area, closely linked to the first, is that of the multinational enterprise's actual and potential impact on the national interests of the host (and home) countries. It is no longer a matter of collecting data, of course. The firm's behavior, its patterns of practice, its processes of decision-making may involve largely the collection of factual data, although these are neither rigid and inflexible "things" nor always clear, precise and uniform. To articulate the operative forces in, and values and interests of, the host country, however, different methods are needed. Total precision and unanimous agreement are improbable. In the past decade, the debate over the role of multinational (United States-based) enterprise in Canada has resulted in considerable research and study of the related issues. There is probably no other country in the world today where the extent of foreign ownership and the behavior of foreign-owned firms have been studied as thoroughly. Although the quality and relevance of discussion have undoubtedly improved, the intensity of the controversy is higher than ever.

In studying these questions, differentiations between industries,

67. On the latter see J. HAZARD, *COMMUNISTS AND THEIR LAW* 326-28, 353-64 (1969); J. HAZARD, I. SHAPIRO & P. MAGGS, *THE SOVIET LEGAL SYSTEM* 261-89 (1969).

firms and kinds of firms, will probably be necessary. Which particular interests (national, however defined, or factional) are affected in each category of cases? What kinds of decisions, within the multinational firm, are taken outside the country?⁶⁸ On the other hand, the most basic, and most important, of the terms currently used have yet to be adequately elucidated: What is the meaning of "national interests" in each particular context? What is meant by such terms as "infringement of sovereignty," "increased uncertainty," "loss of control," "dependence?" Complete and final clarity is no doubt impossible, but some further precision is indispensable.

A third area of exploration is that of the possible forms and degrees of coexistence of state and multinational enterprise. Hymer and Rowthorn most appositely juxtapose the *laissez faire*-multinational enterprise trend toward worldwide integration across national frontiers on an industry by industry basis to the socialist conception of the centrally planned state integrating all industries within one territory. In response, Robert Heilbroner stressed the myriad other possibilities lying somewhere between these two extremes.⁶⁹ The degree of autonomy and internal coherence a state needs to survive does not have to coincide with comprehensive central planning. The search for international allocation of resources may not require absolute freedom from state-imposed restraints. This is not a call for a checklist of formal devices; what is needed is identification and analysis of possibly separable functions and operations and detailed exploration of likely combinations.

The absence of reasonably settled conclusions concerning the specific effects of multinational enterprise in developing countries does not make necessary a policy of general abstention from action. It is possible to fall back, for the time being, on certain assumptions concerning private and public interests and activities. Within national societies, even in states which consider themselves capitalist, a private firm's judgment of efficiency and of the necessities of optimum operation, being founded on criteria of private advantage, is not accepted as necessarily coinciding with national interest, economic and other, which is judged on the basis of criteria of public advantage. The possibility of a divergence between the two is admitted, and it is further accepted that, in at least some cases of conflict between private and public advantage, government has the duty to take legal action to

68. For an attempt to answer this particular question, in specific context, see K. LEVITT, *supra* note 53, at 77 ff.; cf. WATKINS REPORT, *supra* note 49, at 191 ff.

69. Hymer & Rowthorn, *supra* note 62, at 86. Heilbroner, *The Multinational Corporation and the Nation-State*, 16 N.Y. REV. OF BOOKS 20, 24-25 (Feb. 11, 1971).

ensure that public advantage will prevail. It seems reasonable to make the same assumption in matters international. It is true that the lines of authority concerning the determination of common international interests are by no means clear, but this does not mean that such interests do not exist or should not be respected. Nor is it reasonable to assume that whenever the interests of an international actor clash with those of nation states, the former necessarily coincide with the interests of the international community. We are left with certain facts: multinational enterprise is a powerful international actor, successfully operating in an environment which does not much resemble the free and perfect market of classical economics and where effective public controls appear to be lacking. It cannot be assumed, under these conditions, that no possibility of abuse of power exists or that actions inconsistent with the public interests are unlikely. Legal regulation in one form or another is indicated.

Company Policies and Structures

Before reviewing the possible forms of legal regulation, it is useful to consider some possible attitudes and policies of multinational firms which are likely to temper or avoid conflicts with nation states. This is a topic on which business writers and economists have made significant contributions.

Starting with a useful distinction between valid conflicts, which cannot be resolved by mere accommodation, and pseudo-conflicts, based on misconceptions and prejudice, Professor Fayerweather suggests that while the latter can be minimized by an "effort to achieve maximum accommodation among the interests of the parties," the former can only be resolved "through negotiation based on relative economic and political power relationships."⁷⁰ Continuing flexibility concerning the "terms of its relationships in a host country" is the appropriate attitude for the firm. Focusing more concretely on the modalities of a multinational firm's relationship with the host government, Professor Raymond Vernon has stressed the multiplicity of choices open to the parties: from wholly-owned subsidiary to joint venture to coproduction agreement to technical assistance (and management) contract.⁷¹ Alternatives to equity control have been persuasively supported by Richard

70. J. FAYERWEATHER, *supra* note 17, at 87-132 (quoted material at 131, 132).

71. See Vernon, *Conflict and Resolution between Foreign Direct Investors and Less Developed Countries*, 17 PUBLIC POLICY 333 (1968).

D. Robinson,⁷² while the time dimension of control has been imaginatively explored in a recent essay by Albert O. Hirschman.⁷³ Yet, "where inherent conflicts of interest exist between the economy of the host country and foreign investor," such devices may prove ineffective.⁷⁴

Increasing internationalization of multinational enterprise, in outlook, management and ownership, is frequently seen as the most promising avenue for the elimination of its conflicts with the nation states. Several writers favor a tripartite classification, in which the basic test is the extent to which company management adopts and implements attitudes and policies oriented toward the home country alone, toward each of the several host countries, or toward the international economy as a whole.⁷⁵ It is the firm at the third stage, the most international in character, that business writers appear to prefer; others point to the advantages of the second stage, where each component of the firm is primarily oriented toward the host country in which it is located. Bringing into focus both company and host country attitudes, Professor Perlmutter has pointed out that while conflict may be avoided when either side acquiesces to the predominance of the other's approach, such situations are unstable and economically less beneficial. Where both parties adopt a global view of business methods and attitudes (a "geocentric" approach) not only is conflict avoided but benefits to both are maximized.⁷⁶

72. Robinson, *Who Needs Equity?*, in *WORLD BUSINESS—PROMISE AND PROBLEMS* 268 (C. Brown ed. 1970); R. ROBINSON, *INTERNATIONAL BUSINESS POLICY* (1964); Robinson, *Joint Ventures or Transnational Business?*, 6 *INDUSTRIAL MANAGEMENT REV.* 59 (Fall 1964). And cf. W. FRIEDMANN & G. KALMANOFF, *JOINT INTERNATIONAL BUSINESS VENTURES* (1961); W. FRIEDMANN & J.-P. BEGUIN, *supra* note 44. These questions have been extensively studied and discussed in recent years in UN and UNCTAD documents, under the general rubric of "transfer of technology to developing countries."

73. A. HIRSCHMAN, *HOW TO DIVEST IN LATIN AMERICA AND WHY* (ESSAYS IN INT'L FINANCE, No. 76. 1969), repr. in *THE WIDENING GAP: DEVELOPMENT IN THE 1970s* 252 (B. Ward, J. Runnals, & L. D'Anjou 1971).

74. Vernon, *The Role of U.S. Enterprise Abroad*, 98 *DAEDALUS* 113, 123 (1919).

75. The three types (or stages) of multinational enterprise are variously named "ethnocentric," "polycentric" and "geocentric" Perlmutter, *The Tortuous Evolution of the Multinational Corporation*, in *WORLD BUSINESS—PROMISE AND PROBLEMS* 66, 69 (C. Brown ed. 1970); and Perlmutter, *L'entreprise internationale—Trois conceptions*, 23 *REV. ECONOMIQUE ET SOCIALE* 151 (1965), "national," "multinational" and "international" (C. KINDLEBERGER, *supra* note 7, at 179-85), or "national," "multinational" and "global" (WATKINS REPORT, *supra* note 49, at 33). Use of the term "multinational enterprise" in this essay does not follow any of these taxonomies.

76. Perlmutter, *Problèmes d'architecture sociale des entreprises multinationales*, 25 *REV. ECONOMIQUE ET SOCIALE* 167 (1967).

However promising this approach may be for the distant future, it is hardly realistic under present conditions. Few firms can be said to be significantly "internationalized" or "denationalized" as yet. From the point of view of less developed countries, moreover, such companies remain alien, even after some evolution toward internationalization, since management and effective control remain in the hands of nationals of developed countries. For a firm to become truly international, much more is needed than some diversity of nationality among shareholders and managers. The host countries' participation in the company's operations must be genuine; the whole structure of the enterprise must be altered better to serve the host states' needs. The late Karl Lachmann made the point clearly a few years ago:

[A]s long as ownership and management control remain centered in the company's country of origin . . . and as long as the bulk of the company's profits continues to originate in this country, it will be hard to convince the governments of the subsidiaries' host countries of the truly international inspiration of the company's business policies

It is only when all three factors—ownership, management and income—are truly internationalized that one could expect even the more susceptible of these governments to accept control of domestic enterprises by such international companies as the price of securing continued access to the latest technological advances

To be acceptable and effective, international cooperation of the kind contemplated will require above all a judicious international division of functions. It would indeed not be enough for the "parent" company to grant unrestricted access to its financial and technological facilities to all foreign member companies. This would neither free the latter from a position of foreign dependency nor would it satisfy the former that it was receiving adequate consideration for its largesse.⁷⁷

77. Lachmann, *The Role of International Business in the Transfer of Technology to Developing Countries*, 60 AM. J. INT'L L. (PROC.) 31, 36-37 (1966). The modalities of this "division of functions" are further articulated in a United Nations Secretariat report prepared under Lachmann's direction:

[E]nterprises in developing countries . . . may, for example, take over the production for export to the other member companies of products under . . . voluntary transfer arrangements; they [may] also establish special research facilities addressed to the particular adaptation problems of developing countries which can serve the needs of component enterprises in the other such countries; they could also offer jointly with member

Moreover, the multinational firm remains a private institution, however international in outlook. Considerations concerning the control by the state of the power of "private governments" obtain in its case with particular force. Some of the more speculative essays transcend this problem by predicting for the near future a radical increase in the political and social commitment of business in general, and international business in particular. Losing much of its private-economy-based autonomy, multinational enterprise would then become integrated in a world-wide welfare state process.⁷⁸

The effort to find modes of conflict settlement through adaptation of the multinational enterprise rather than through state action is necessary and important. The enterprise is a principal actor in international economic relations. To ignore its possibilities for change and for adjustment not only to economic and physical conditions but to legal and political ones, as well, leads to a partial and defective picture of reality. The explorations of economists and management experts in this direction are therefore useful and proper. Yet they do not render unnecessary further inquiry into the possibilities of action by the states concerned. National or international action may better clarify the policies and preferences of individual states and the world community. Through information, promises of rewards and threats of sanctions, states may help to induce company action in appropriate directions. As a general rule, complex situations demand simultaneous action on many fronts and by many actors. An additional consideration obtains in the case of less developed countries. Promotion of their development is today a fundamental goal of the international legal order. All activities of transnational actors that seriously impinge upon it, therefore, are proper subjects for international legal regulation designed to ensure conformity with the goals of the international legal order.

The Forms of Legal Regulation

Conflicts arising out of the existence and activities of multinational enterprise may involve two or more of three basic parties. There may be conflicts (of interests or policies) between a multinational firm and its home country, a multinational firm and a host country, and be-

companies in developed countries special training facilities for technical staff at certain levels for the entire group.

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 19 (1968).

78. See, e.g., Crozier, *A New Rationale for American Business*, 98 DAEDALUS 147 (1969); Robinson, *supra* note 62. On a closely related but more general issue, that of the "social responsibility" of business, cf. Bell, *The Corporation and Society in the 1970's*, THE PUBLIC INTEREST 5 (No. 24, Summer 1971).

tween home and host countries because of the firm's operations. Assuming that in the first two situations the other country in each case (host and home, respectively) is not involved, *e.g.*, because its interests are not affected, a fourth situation may also be posited, of likely incidence and importance in the future, where both host and home countries are in conflict with a multinational firm. The typical legal discussion until recently has focused on the conflicts between host and home countries, arising largely because of the latter's efforts to regulate some of the multinational firm's activities outside its territory. The cases where the multinational firm's interests are in conflict with those of the home or the host state are equally, if not more, important. The activities of American multinational corporations during several recent monetary crises are one case, among many, where the interests, or at least the policies, of the home country did not coincide with those of multinational enterprise based in it.⁷⁹ Yet the likelihood of a conflict between host country and multinational enterprise appears by and large greater than that between home country and multinational enterprise. The latter's executives are less likely to disregard or deliberately injure the interests of their home nation. On the other hand, the home country's government often perceives (by and large rightly) the foreign activities of companies based in its territory as being in its own national interest.

The listing of possible conflict situations indirectly indicated the possible forms the legal regulation of multinational enterprise activities may take. They are: unilateral action (1) by the host country or (2) by the home country; bilateral action (3) by two host countries or (4) by the home and a host country; and multilateral action (5) on a universal, or nearly so, basis, including both host and home countries or (6) on a non-universal basis, by particular groups of countries. Some of these categories of measures have been in extensive, sometimes controversial, use; others have been used little or not at all. None can be deemed wholly effective by itself. While unilateral state measures may be tailored to fit particular cases and may be enforced specifically and directly, they remain subject to avoidance by manipulation of extranational resources. Bilateral arrangements can deal effectively with specific problems with good chances for subsequent unilateral state action in implementation. Universal or near-universal arrangements offer useful possibilities for collecting data and for broad debate on principles, while action by smaller groupings of states may

79. See *supra* note 44.

be effective in bargaining situations, whether among states or between states and multinational firms.

Unilateral action by host countries is the most common form of deliberate legal regulation of multinational enterprise. Such action is properly seen as primarily national in character, internal rather than international; at the same time it is a most efficacious mode of international lawmaking. Through such measures states attempt to establish acceptable ways of dealing with other international actors, whether other nations, international organizations or multinational corporations. These measures, together with the concurrent or divergent actions of the other actors, may eventually create relatively stable expectations as to what is and is not internationally required or acceptable. Unilateral state action toward multinational enterprise is thus an indispensable part of the international lawmaking process in this area. In economic terms, too, the policies of host countries are all-important. Many of the most vocal critics of multinational enterprise have unequivocally emphasized that the manner and extent of its penetration of host country economies are directly attributable to specific policies of host governments (for instance, the imposition and administration of tariff protection).⁸⁰

The first and most fundamental choice a prospective host state may exercise is that of allowing or refusing entry to multinational enterprise. The state's authority to make such a determination is undisputed in terms of law and nearly undisputed in terms of policy. A state may refuse to allow any foreign investment, may allow it only in selected fields or it may indiscriminately permit it; it may condition its entry and establishment on several possible criteria, such as local participation in ownership and management, employment of local personnel, production of import substitutes or export goods; it may require special permission for acquisition of already established local firms. Because the flexibility of multinational enterprise greatly reduces the impact of indirect governmental action (i.e., action through influence on market conditions), the host government may be led to take more direct measures, the effectiveness of which is often doubtful. At the very least, the feasibility of direct restrictions and conditions varies depending on the particular industry; even developed countries, with skilled and well-organized civil services, are reluctant to engage in

80. See, e.g., WATKINS REPORT, *supra* note 49, at 18, 115-120, 225-226; K. LEVITT, *supra* note 53, at 135-136; W. H. POPE, THE ELEPHANT AND THE MOUSE: A HANDBOOK ON REGAINING CONTROL OF CANADA'S ECONOMY 20 ff. (1971).

supervision and control of the day-to-day operations of manufacturing enterprises.

Particular measures and devices may be used to ensure some control over activities of local affiliates of multinational firms. Canada is considering creation of a special administrative tribunal to deal with company mergers, especially those involving foreign takeovers.⁸¹ Both Canada and Australia have established government-controlled "development corporations" whose precise functions and modes of operation are rather uncertain but which are clearly intended in major part to counteract activities of foreign-controlled firms in the two countries.⁸² More generally legislative and administrative measures designed directly or indirectly to strengthen domestic enterprise and thus allow it to compete with or resist foreign-owned firms are often in order.⁸³ Revision of company and securities laws or of other branches of business law may be necessary to remove burdens and restrictions on domestic enterprise which may, unintentionally, work to the benefit of multinational firms and to impose publicity and disclosure requirements covering the activities of foreign parent and affiliate firms.

The actual effectiveness of such measures by host governments is seriously limited by two basic constraints: first, the multinational enterprise may still have a choice, either before entry or in its operations after establishment, to counteract and nullify the host government's measures by actions outside the particular host country; second, in many if not most of the less developed countries the economic and business administrative expertise required for applying sophisticated and elaborate controls over multinational enterprise is lacking or in short supply. These constraints tend to reduce the actual choices open to host governments to the initial either/or proposition of permitting or forbidding entry. The temptation is then great to let predictions be determined by wishes; hard decisions can be avoided by reliance on intangible hopes or by insistence on theoretically possible but improbable future decisions. But there is no way to escape the necessity for concrete, painful choices. Evasion ultimately creates worse problems.

81. See N.Y. Times, July 6, 1971, at 47, col. 3. These and other proposed Canadian measures are critically discussed in detail in I. Feltham & W. Rauenbusch, *supra* note 2.

82. For a critical discussion of the history of the Canadian case, see Pattison, *The Canada Development Corporation*, 5 J. WORLD TRADE L. 461 (1971). And cf. WATKINS REPORT, *supra* note 49, at 274, 407-08; N.Y. Times, Jan 26, 1971, at 43, col. 2. On the Australian case see 82 FORTUNE, Oct. 1970, at 48.

83. See J. BEHRMAN, NATIONAL INTERESTS, *supra* note 24, at 152-75.

The home country may also exercise control, through unilateral measures, over operations of multinational enterprise based on its territory. When such measures are directed at activities outside the home territory, they may lead to jurisdictional conflicts between home and host countries. Nevertheless, in view of the general lack of effective instruments for the control of multinational enterprise, it would be improvident to ignore the possibilities of control offered by home government action. Such action is not in all cases objectionable, nor does it have to be exercised in an objectionable manner. To a significant extent, it is up to the host country's legislature, if it considers the matter serious enough, to enact the measures necessary to block extraterritorial enforcement of another country's laws.⁸⁴ The home government for its part must act with great restraint, care and, indeed, humility. It must make difficult distinctions between its own special interests and policies and those more widely shared by the host country and the international community. When possible it must seek to cooperate with the host state's authorities. The task is difficult and it involves serious risks of conflict. Yet to suggest its wholesale abandonment is too easy a solution and, in a way, a defeatist one.

From the point of view of the multinational enterprise, the application of both home and host country laws raises problems. The firm may sometimes be faced with inconsistent laws which result in additional burdens. It has a legitimate interest in the establishment of internationally accepted jurisdictional principles which would allow it prudently to plan to avoid such conflicts. On the other hand, this argument should not be carried too far. The successful operation of multinational enterprise is largely predicated on taking advantage of differences between national laws and policies. It does not seem extraordinary that these advantages may sometimes be turned against it.

The case of bilateral action by two host countries was listed chiefly to complete the circle of permutations. Theoretically it is possible, although no examples are known. Apart from very special cases, it is difficult to imagine how such action could impose significant restraints on multinational enterprise.

Bilateral measures by host and home states have been most effective in the field of taxation. Bilateral agreements for the avoidance of

84. The WATKINS REPORT at 408-409 recommends three kinds of measures to this end: prohibition of removal of business records in response to foreign court orders, prohibition of compliance with foreign antitrust orders and judgments, and collection of information concerning the impact of foreign antitrust law. A special committee of the Canadian House of Commons Standing Committee on External Affairs and National Defense recommended some of the above as well as several additional measures; PROCEEDINGS No. 33, *supra* note 63, at 140-142.

double taxation and tax evasion are now in effect among most of the developed countries. The instruments follow a common model and are therefore fairly uniform. As a "network" of bilateral agreements, they represent a special case falling in between the traditional categories of occasional bilateral agreements between particular countries, on the one hand, and multilateral agreements, on the other. Such agreements can help to neutralize the effects of taxation as an inducement or obstacle to investment and business activity and they may at the same time help in allocating the revenues generated from multinational activities.

Several problems remain. The agreement models in use are not directed specifically at multinational corporations, as distinct from the more traditional types of transnational economic activity (trade, traditional foreign investment, transportation, etc.). Since the operations of multinational enterprise often involve essentially arbitrary (*i.e.*, not determined by traditional external economic criteria) determination of prices and remittances between affiliates, the incidence of income or profits for any unit may be manipulated by the firm. Obviously, this can be of great concern to governments, but it has not been effectively dealt with through bilateral arrangements. It is conceivable that nations might agree eventually to tax the total profits of a multinational enterprise and allocate the revenue among themselves on the basis of some acceptable principle.⁸⁵ Increased cooperation in collection of information, and even perhaps in enforcement, between tax authorities of various states as well as some harmonization of tax laws would also be useful.

International regulation is still largely missing in the area of tax relations between developed and less developed countries. It is by now familiar learning that the model agreements evolved to govern tax relations between developed countries do not fit the situation where one of the parties is developed and the other less developed. In the past few years considerable international concern has been directed to this problem and some patterns for possible actions are slowly emerging.⁸⁶

85. For a succinct discussion of possibilities and problems, see Vernon, *The Multinational Enterprise: Power Versus Sovereignty*, 49 FOR. AFF. 736, 746-748 (1971).

86. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *FISCAL INCENTIVES FOR PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: REPORT OF THE FISCAL COMMITTEE* (1965); UNITED NATIONS, *FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* 21-23 (1968); UNITED NATIONS, *TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES* (1969); UNITED NATIONS, *TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES: SECOND REPORT* (1971).

Bilateral measures by host and home states may also be appropriate in certain other situations. One illustration is the establishment of machinery for consultations concerning application of antitrust laws between the United States and Canada.⁸⁷

The last two sets of possibilities in our list involve multilateral state action. The possible forms such action may take are too numerous to rehearse in detail. Moreover, multilateral action by nongovernmental agencies is possible and, in some areas, potentially highly effective. Labor unions appear to be already involved in such action, to a limited, as yet, but fast growing extent.⁸⁸ Unilateral or multilateral state measures could well facilitate, or impede, labor cooperation and action across state borders.

At first glance, intergovernmental arrangements in which both host and home countries participate would appear needed to establish the necessary symmetry between private (multinational enterprise) and public (governmental) action and institutions. Further reflection suggests that such symmetry may be in large part illusory, because the degree and manner of actual integration of the two "sides" differ radically. At any rate, truly universal arrangements of this type are highly unlikely: while socialist countries may nowadays be interested in the problems of multinational enterprise, their involvement in such a scheme is improbable. Still, a large number of other countries—for instance, most members of the International Monetary Fund or the World Bank—could conceivably be interested. There have been some recent suggestions for an international arrangement of this type.

One position is bottomed on total acceptance of the beneficial and progressive nature of multinational enterprise. In a widely cited speech, Mr. George W. Ball complained that conflicts with nation states obstruct and slow down the growth of multinational corporations, thereby limiting the benefits they could confer on mankind. Accordingly he suggested that multinational enterprise should be effectively "denationalized," by means of

87. This is the so-called Fulton-Rogers agreement (January 29, 1959), between the then Minister of Justice of Canada and the Attorney-General of the United States, reaffirmed by Messrs. Basford and Mitchell in November 1969. The only undertaking of the parties is to hold "discussions" whenever related problems arise in order to "explore ways and means of avoiding the sort of situation which would give rise to objections or misunderstandings." See Litvak and Maule, *Conflict Resolution and Extraterritoriality*, *supra* note 53, at 316; Stevenson, "Extraterritoriality" in *Canadian-United States Relations*, 63 DEP'T STATE BULL. 425, 427 (1970).

88. See L. TURNER, *INVISIBLE EMPIRES: MULTINATIONAL COMPANIES AND THE MODERN WORLD* 90-103 (1970); Jager, *Multinationalism and Labor: For Whose Benefit?*, 5 COLUM. J. WORLD BUS. 56 (Jan.-Feb. 1970); Barovick, *Labor Reacts to Multinationalism*, 5 COLUM. J. WORLD BUS. 40 (July-Aug. 1970).

... the establishment by treaty of an international companies law, administered by a supranational body, including representatives drawn from various countries, who would not only exercise normal domiciliary supervision but would also enforce antimonopoly laws and administer guarantees with regard to uncompensated expropriation. An international companies law could place limitations, for example, on the restrictions nation-states might be permitted to impose on companies established under its sanction. The operative standard defining those limitations might be the quantity of freedom needed to preserve the central principle of assuring the most economical and efficient use of world resources.⁸⁹

If any attempt were made to implement this proposal, serious problems of legal and economic policy would arise.⁹⁰ Consideration of such problems, however, may well be beside the point, since the clear intent behind the proposal is fully to liberate, not better to regulate, multinational enterprise. One must be profoundly convinced of the inevitability of the growth of multinational enterprise and have no doubts whatsoever as to its benevolent character to accept Mr. Ball's position.

A more reasonable recent suggestion envisions a limited "General Agreement for the International Corporation," modelled on the General Agreement on Tariffs and Trade. This would be "an international agreement based on a limited set of universally accepted principles" concerning those areas (taxation, antitrust, foreign exchange, export controls, and securities regulations) where the conflicts arising from private corporate decisions are creating, or are perceived as creating, conflicts between governments.⁹¹ The authors of the proposal believe that "all that is called for is a forum for the problems related to the international corporation and some procedures which could enhance dispute resolution in the two- or two plus-country case. This means agreement on only the most fundamental of levels and a willingness to work toward global solutions to a global problem."⁹²

89. G. W. Ball, *supra* note 60, at 337. For other versions of the proposal see Ball, *The Promise of the Multinational Corporation*, 75 FORTUNE, June 1, 1967, at 80; Ball, *Making World Corporations Into World Citizens*, 8 WAR/PEACE REP., Oct. 1968, at 8.

90. See the most effective discussions of the proposal by Seymour Rubin, *supra* note 2, at 33-35, and Detlev Vagts, *supra* note 2, at 787-89.

91. Goldberg and Kindleberger, *supra* note 53, at 321-323.

92. *Id.* at 322. Burchill, *The Multi-National Corporation: An Unsolved Problem in International Relations*, 77 QUEEN'S Q. 3 (Spring 1970) offers a similar proposal, formulating a set of related principles and linking them with the creation of U.N.-chartered multinational corporations.

A subsequent proposal criticizes the GATT analogy as "misleading," arguing that "there is surely no near prospect of an organization that will administer an international agreement or agreements" concerning multinational enterprise.⁹³ The author proposes instead "something like [an] International Corporation Consultative Center," which might be associated with the Organization for Economic Cooperation and Development or the World Bank. But this proposal is more ambitious than the preceding in that it would, most appropriately, distinguish between the problems that multinational enterprise poses to developed and to developing countries. The proposed Center seems clearly not a decision-making, or even in any effective sense a recommendation-making, institution, comparable to any of the existing specialized agencies of the United Nations. Its purpose would be chiefly if not exclusively analytical and advisory: "to provide a means of encouraging and sponsoring objective and careful analysis, and to establish a forum for regular and informed discussion."⁹⁴

The authors of both proposals are fully aware of the narrow limits of what is realistically possible today. Other observers, too, have stressed the necessity for such arrangements and the difficulty of their realization. An effective decision-making international institution in this area would have to resolve exceedingly complicated and cumbersome questions and would have to be based on previous agreement among a great number of states on many acutely controversial policy issues, where conflicts of national interests are real and not easily reconcilable. Without such prior agreement, states would not grant decision-making power to an institution they did not control. However, there is today such a compelling need for more information, for intelligent collection and analysis of data, for harmonization of statistical, administrative and legal classifications and taxonomies, for more study on a broader basis, that even a study center with a predominantly informational function would be most useful. The World Bank, with its well-earned reputation for expertise and painstaking precision, appears the most appropriate institution for taking the initiative for the international meetings and studies that would be needed. Action in this domain would indeed serve to complement and perhaps balance its activities in the area of investment dispute settlement. At the same time, other international agencies might consider the possibility of extending their technical assistance activities in the area of advice

93. Rubin, *supra* note 2, at 36-40.

94. *Id.* at 40.

and aid to prospective host countries in their negotiations and other dealings with multinational firms.⁹⁵

Multilateral arrangements among "like-minded states" with no claim to any degree of universality are another most interesting possibility. A few such arrangements are already in existence. Perhaps the best known, and up to now perhaps the most successful, is the Organization of the Petroleum Exporting Countries, which has established itself as a significant factor in world petroleum arrangements. An analogous organization bringing together the principal copper producing countries which has been in formal existence for some years may now be starting to have a life of its own.

The states that might join together in such groups would presumably share certain important common interests. This criterion is an obvious one, but raises at the same time complex problems of perception and interpretation. A more immediately useful test may be that of potential competition. Collective action by individually weak and potentially competing units is after all a common pattern of industrial relations. In the current context it is evident that the developed host countries (*e.g.*, Canada, Australia, France), while themselves concerned with the control of multinational enterprise, are in quite a different position, in terms of interests as well as resources, than the countries of Africa, Latin America or Asia. An international organization which would attempt to unite countries in such differing circumstances is likely to become a forum for bargaining and debate rather than a bargaining unit.

An illustration of the type of action under discussion is an agreement among less developed countries concerning the maximum tax concessions and other incentives they offer to investors. The beginnings of "cutthroat competition" in this area are already apparent and joint action would seem to be in the interest of all participants (assuming that few or no potential competitors would be left out of the arrangement). The Central American Agreement on Fiscal Incentives to Industrial Development ⁹⁶ is a well-drafted specimen of such action. Countries in a single region, or part of a region, are indeed more likely to come together for the purpose of bargaining with multinational enterprise. Particularly interesting in this respect is the recent Decision Concerning Treatment of Foreign Capital of the Andean

95. See Seers, *supra* note 46.

96. Central American Agreement on Fiscal Incentives to Industrial Development, signed July 31, 1962 (entered into force March 1969).

Commission.⁹⁷ Whether the decision's objective of national control over foreign enterprise is realistic and can be substantially realized is at this point an open question. The reaction of multinational firms and their future relations with the Andean states should provide some important, and sorely lacking, indication of concrete possibilities of action in similar directions.

97. Andean Commission, Decision No. 24, Standard Regime for Treatment of Foreign Capitals and for Treatment of Marks, Patents, Licenses and Royalties (Dec. 31, 1970), transl. in 10 INT'L LEGAL MATERIALS 152 (1971). For some first comments and analyses, see Schliesser, *Restrictions of Foreign Investment in the Andean Market*, 5 INT'L LAW, 586 (1971); Diaz, *The Andean Common Market: Challenge to Foreign Investors*, 6 COLUM. J. WORLD BUS. 22 (July-Aug. 1971); Petersen, *ANCOM—An Andean Paradox*, *id.* at 29; Florez, *ANCOM—A Peruvian Viewpoint*, *id.* at 35.