The Problem of the Enterprise and the Enterprise of Law: Multinational Enterprises as Polycentric Transnational Regulatory Space

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Abstract and Keywords

In the multinational enterprise (MNE) one encounters entity, connections, and linkages, and functionally differentiated production chains. Each aspect of the MNE is partially and simultaneously subject to layers of regulatory governance. This chapter explores the effects of these regulatory interventions on shifting constructions of the MNE. To that effect it examines first the relationship between emerging transnational law and an objectified MNE. It then considers the way that the focus and context of transnational law shifts as the regulatory focus moves from MNE as object to the MNE as a set of linkages and connections, and then to the regulation of production through which is itself the object of MNE function. This reconsideration of the character of the MNE produces a substantial effect on the way in which transnational law is understood and applied, matching polycentricity in the construction of law with polycentricity in the construction of the MNE itself.

Keywords: multinational enterprises, transnational corporations, veil piercing, corporate social responsibility, supply chains, OECD, human rights due diligence, disclosure, modern slavery, polycentricity, private law, responsible business conduct

I. The Conundrums of Polycentricity in Transnational Law and the Multinational Enterprise as Object, Linkages, and Process

ALMOST half a century ago, Detlev Vagts (1970), quoting the then well-known *linguis*t Noam Chomsky (1968, 24), noted the fundamental contradiction of the multinational corporation and its relations to transnational law:

> A noted linguist, seeking to exemplify “an arbitrary statement in a human language,” chooses: “the rise of supra-national corporations poses new dangers for

> human freedom." That choice may fairly measure the current intellectual impact of the multinational enterprise (hereafter referred to as the "MNE"), even though many would hold that institution in far higher esteem. As the literature about the MNE grows exponentially, the question arises whether the legal profession should not be developing responses to it. As yet it has not; statutory or case law reaction is virtually nonexistent and the secondary coverage is thin. (Vagts 1970, 739).

(p. 778) Vagts (1970, 745–755) built his analysis on the basic notion that the object of regulation was an enterprise—just one not recognized as a legal whole. He criticized (Ibid., 743–744) the state of the law, grounded in the preservation of the authority of states over their territories and contests over the assertion of extraterritorial authority as producing fragmentation of legal efforts. He decried a state of affairs in which clever lawyers for globally integrated economic enterprises could use territorially bounded legal regimes to fragment their respective authorities, always one step ahead of regulators when these were not tripping over themselves. He expressed some exasperation at a state of affairs in which whatever gains there might be in the form of case law or statutory advances were so "idiosyncratic that they do not provide the regularity and comparability needed for the growth of a normal body of law." (Ibid.). That idiosyncratic habit, in turn, reflected an unsophisticated approach to the regulation of these objects. Vagts proposed a number of innovations, none of which have yet to be implemented. These included a cocktail of methodologies, some of which reflected the age. Among them were legal disclosure obligations (Ibid., 776–777); improved regulation and good governance in host states (Ibid., 777–779); better negotiation by governments seeking inbound investment (Ibid., 780–781); the development of Indigenous companies in host states (Ibid., 781–82); national support for national enterprises (Ibid., 783); strategic joint ventures (Ibid., 783–785); licensing and management agreements that strip multinational enterprise (MNEs) of their technology while eventually rebuffing their investment (Ibid., 785); and a power rationale for US extraterritorial management of global trade through control of US apex enterprises (Ibid., 785–787).

Almost fifty years later one finds that little has changed in the approaches to MNEs within the conventional approaches of state-driven law. The conventional wisdom still obsessively embraces the principle of the supremacy of domestic legal orders as the basic building block for the global regulation of MNEs. Likewise, the MNE continues to sit at the center of the debate around the issue of the dangers it may pose for human freedom and the stability of states (even as these have changed in accordance with the standards of the times) (e.g., Rodriguez, Klaus, and Uhlenbruck 2005; Stephens 2002; Boddewyn 1988), or its power to enhance these freedoms (Agmon 2003). Even though the literature continues to grow exponentially (Held and McGrew 2003; Scherer and Palazzo 2011; Heinecke 2011, 13–62), much of it continues to ask the same question about the nature of extent of an appropriate legal response to the phenomenon of the MNE (Dunning 2000). And with some small though quite notorious exceptions (e.g., UK Modern Slavery Act 2015), the legal profession has failed to develop responses to the MNE and commentators continue to worry about the paucity of either statute or of case law (Zerk 2006). That exception, touching on issues of human rights and economic activity, has itself been limited

by courts at times (National Association of Manufacturers v. SEC 2015). The focus remains on the construction of an entity as the object to which law is to be applied within and across borders (OECD 2011 ("They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways." Ibid., 17)). Indeed, to a large extent, the current approaches to the legal regulation of MNEs have moved very little since the 1970s. This is ironic given the tremendous efforts over the last half century to produce effective legal regimes to govern these enterprises that do not, in reality, exist as a unified legal person (Robé 2016).

But Vagts also noted change on the horizon. He dreamed of the emergence of the "stateless, footloose MNE" (Ibid., 789), a transnational entity, freed of the regulatory peculiarities (p. 779) of any one state and beyond the contradictions of home-host-state divides (Ibid., 787–789). Alternatively, and perhaps more realistically for the times, he considered the development of a global law of MNEs overseen by a responsible intergovernmental organization (IGO) which might or might not hold "golden shares" (e.g., Szyszcak 2002; Grundmann and Möslein 2004; Backer 2008) in such enterprises and which might or might not assert substantial or supplemental regulatory authority (Vagts 1970, 789; cf. Backer 2011). And the last was a vision of the extension of a web of regulation through bilateral and multilateral agreements that would regulate MNEs through the management of their linkages and connections (Vagts 1970, 790–791). But there was a catch—the proposals all "presuppose[d] that economic pressures will keep governments, however reluctantly, progressing towards a more integrated world economy" (Ibid., 791), which might well be changing after 2016 (Backer 2018) and which remains controversial (Amon ed. 2014).

Change has indeed come since 1970, but not quite the way then envisioned. To some extent change has undermined the old orthodoxies of law making contained within a state (Calliess and Zumbansen 2010; Michaels 2007). The premise of the supremacy of a state system grounded in the apex authority of the laws of domestic legal orders coordinated and constrained through voluntary adherence by states to the requirements of consensus based multilateral actions memorialized through international law, the old orthodox "gold-standard" of the law-state, is contested (Backer 2018b; Backer 2012). The constitution of governance entities has escaped the confines of the state (Kjear 2014; Grimm, 2005), as the logic of economic globalization has opened the possibility for governance beyond the state (Sassen 2003) that is functionally constituted (Scott 2010). Law itself can no longer be simply understood as the memorialization of the will of a polity autonomously produced (Calliess and Zumbansen 2010). It has become intermeshed in its own governance gaps (Fischer-Lescano and Teubner 2004) and no longer can be understood to occupy the entire field of regulation (Merry 1992). "In other words, under the spectre of globalization, law is faced with the prospect of its own demise." (Zumbansen 2013, 121). Regulatory management has displaced government in the economic sector, but regulatory management itself has produced a polycentric universe of actors (Zumbansen 2013; Backer 2016) and of governance instruments (Zumbansen 2012; Berman 2006; Teubner 1996), and of private law in the production and protection of global public goods (Cafaggi 2012). This "golden era of regulation" (Levi-Faur and Jordana 2005) is

both well known and deeply contested even as globalization deepens commitment to an integrated regime of economic activity (Levi-Faur 2005).

More importantly, since 1970 there has been an eruption of regulatory efforts that have arisen, both within and beyond law, the object of which is the MNE, understood as an object onto which law might be imposed (Muchlinski 2007). The MNE itself, however, has also lost its singular integrity as solely this body on which law can be imposed. It very much retains its identity as an object ("the enterprise") of regulation and management (Calzolari 2001). But it has increasingly also been understood as a conduit—a convenient intangible aggregation of the nexus points that together define the arc of its operation (Backer 2015), or even as the framework within which global production is coordinated (and with it risk allocated and the distribution of value added is directed) (Backer 2016). In either case, the reconceptualization of the MNE, as interlinkages or as the expression of global production, presents a conundrum for law. On the one hand, the polycentricity in the identity of the MNE (as object, linkage, or process) permits the possibility of self-constitution and self-regulation (Backer 2016c)—part of and apart from the state and domestic legal (p. 780) orders, which may affect its parts, or which may be consumed in the production of MNE objectives, even as the MNE so self-constituted resides and operates through and among these states (Teubner 2012). On the hand, the detachment of the MNE (as object, linkage, or process) from the state also detaches effective lawmaking over the MNE from the state, or reduces the reach of law to only parts of the MNE itself. To speak to the issues of transnational law and the MNE is to combine two questions in dynamic interplay: What is the MNE? What is law? The answer to both points to a substantial revaluation of values (Nietzsche 1895) that has reshaped our understanding of regulation for this century.

It is to a consideration of those changes as well as the strong underlying lines of continuity that this chapter will focus. Section II considers traditional approaches to the regulation of MNEs and its problems. These sketch out the evolution of law as a means to construct and then regulate the MNE as an entity and to manage the linkages and connections through which the MNE is constructed. Section III then exams emerging regulatory forms beyond the state and its domestic legal orders. The emerging techniques suggest both the evolution of law and its detachment form the state—that is, this evolution suggests the character of the transnational in regulation of which law (in its traditional sense) remains a part but no longer at the center of the regulatory project. Section IV then briefly considers the character of the object of regulation. Some elements of transnational regulatory structures appear to be moving from the objectification of the MNE as an entity and the management of its form through interventions in its linkages and connections, to the management of the production process which is itself the object of MNE function. It is here that one reaches the front lines of transnational law making (Backer 2016b).

And thus, the thesis of this chapter: transnational theory is comfortable speaking to polycentricity in regulation—the possibility of coherence in functionally differentiated spheres in which multiple layers of regulation from multiple rule producers' functions simultane-

ously on a stable object of regulation. But to limit the effects of polycentricity to regulation fails to account for half of the transformation inherent in globalization. Like regulation, the MNE itself has emerged as a great polycentric space, one which engages with and is embedded within the traditional polycentricity of transnational "law." The consequences are clearly seen but regrettably undertheorized—just as there is now a layering effect of regulation and governance on its objects, the objects of such regulatory governance are themselves layered aggregations of objects of regulation. In the MNE one encounters entity, connections, and linkages, and functionally differentiated production chains. Each aspect of the MNE is partially and simultaneously the object of layers of regulatory governance, the effectiveness of which is limited to that portion of the "idea" of the MNE to which it attaches. Understanding its form and structure—and its use—may drive truly transformative change.

II. Traditional Approaches to the Regulation of MNEs and Its Problems

The traditional approaches to the regulation of MNEs nicely describes the problem of MNE regulation and the limitations of traditional approaches, both within domestic legal orders and through traditional orthodox strategies of international law (Johns 1993; Backer 2015). (p. 781) It is marked, at points, by legal incoherence in the sense that no one jurisdiction can assert effective governance authority over the MNE entity (however defined) and regulatory approaches even within a jurisdiction may not be coordinated (e.g., Ruggie 2008, ¶ 3; Simons and Macklin 2014, 178–270; Faracik 2017, 20). It is also a law-centered project, in the traditional sense of deploying the conventional governance mechanisms of the modern state, to assert control over an MNE that is conceptualized as an entity onto which the commands of regulation may be attached. Alternatively, conventional approaches permit states to assert authority to the extent they can over portions of the MNE global complex by reaching those lineages and connections that structure MNEs.

The essence of the power of states to regulate MNE is tied to the superiority of their regulatory authority within their territories. But some states, especially developed states, have sought to extend the reach of that power through its projection beyond national borders. The surest way to do that is to apply the domestic legal order to persons over which the state has authority (by reason of citizenship, residence, or creation) where ever they happen to be. The effect is to reconceive territorial borders—not solely as a matter of geography bit also intangibly on the bodies of its subjects. The United States has been a pioneer and one of the most aggressive states to employ this technique in ways that others now imitate, for example, with respect to bribery by persons subject to their jurisdiction (e.g., Foreign Corrupt Practices Act), and the European Union has followed suit (Scott 2014). These efforts are premised on the existence of an object through which territory can be extended—the MNE as an entity. Yet these are extensions of the territorial principle with limits: "the position articulated by the UNGPs, that states may be entitled, but

are not obligated as a matter of human rights law, or indeed public international law, generally to regulate their companies' extraterritorial activities or human rights impacts, today remains a correct one." (Methven O'Brien 2016, 39).

But even as states have sought to extend their borders (abstractly through a variety of traditional devices, e.g., citizenship, effects tests, contacts, and the like) to manage transnational enterprises, states have also used their traditional power over their borders to seek to regulate MNEs by denying them entry (Wallace 1983, 84), by developing regimes of sectoral exclusions (Blumberg et al. 2005, 4:ch. 152), or by developing screening laws that permit conditioning MNE entry on administrative review and approval (Sornarajah 2010, 88–142). These approaches permit states to preserve a measure of control over their domestic macroeconomic policy by ensuring that, at a minimum, the state serves as a gatekeeper or partner to MNEs with aspirations of activity within a state. Total exclusion tends to isolate states form global economic activity and has withered as a viable strategy for states (Muchlinski 2007, 180). Sectoral exclusions remain viable and can be used to protect sensitive areas of economic activity (e.g., industries with national security implications (US Defense Production Act 1950)). These provisions have sometimes been used to block foreign state-owned enterprises from projecting public-private power outbound (Graham and Krugman 1995, 111–113, 130–32). But they have also been used to product industries that states which to strengthen protection for local industry and thus as a means of indirect subsidy (Bailey 2003; Adler 1986), though the trend has been away from this policy. The same applied to what had once been a popular method of managing the penetration of MNEs in developing states—indigenization schemes (Biersteker 1987). But here again, the extent of direct control is limited and indirect control subject to the intervening actions of states and other regulatory orders. At their best, these approaches protected states against some form or another of interconnected economic activity controlled ultimately by foreign entities. But it did little to (p. 782) control or manage the worldwide activities of those entities; nor could these manage the ways in such interconnections could be effectuated or the extent to which they produce risk, obligation or liability.

Yet at least in the management of the anticompetitive activities within a state, states—principally the most powerful global economic actors—have managed to use national law to significantly affect the operation of MNEs (OECD 1998). States have used the same techniques in other fields of law; Germany, for example, with respect to its competition laws (e.g., Gerber 1983). But states have also sought to extend the reach of their domestic legal order through rather "effects tests" (F. Hoffmann–La Roche v. Empagran 2004; U.S. v. Alcoa 1945). Indeed, the litigation suggests the need for courts to assign responsibility for the effects of a process of production to one or more entities on risk and liability can be assigned. This is clearly visible in the European Union's abuse of dominant position jurisprudence. In those cases, EU courts have sometimes determined that international economic integration (even in the absence of legal integration) may be sufficient to raise concerns in claims touching on the activities of the apex firm in markets in which they compete (United Brands v. EC Commission 1978). These actions may be grounded in

global activity, but they tend to be focused on in state effects and thus are of limited (though within those limits important) value in regulating MNE behaviors.

But it is in the area of approval of mergers and acquisitions that national competition law schemes tend to have particularly relevant to the outbound regulation of MNEs. In China, for example, "MOFCOM has imposed both structural and behavioural conditions on merging parties. In appropriate cases, companies are able to propose behavioural remedies to address MOFCOM's competition concerns as an alternative to structural remedies which tend to be preferred by the EU and US antitrust agencies" (Anonymous 2016; ¶ 6.23). And yet the cumulative effect of such authority can be polycentric and uncoordinated. Where multiple large states have significant differences in approach, MNEs may be faced with an accumulation of requirements with respect to which they might be able to comply (e.g., General Electric v. EC Commission 2006 ("That the competent authorities of one or more non-Member States determine an issue in a particular way for the purposes of their own proceedings does not suffice per se to undermine a different determination by the competent Community authorities." ¶ 179)). Worse, because it is really only the competition authorities of the most powerful states that have power to affect MNE behaviors, it is possible that while these states might be able to protect their own interests they do so to the detriment of the national interests of the potentially large number of states in which the downstream operations of the MNEs are located who are less able to protect their own interests (e.g., Caves 1996, 100–101). And, of course, it is not always clear that the conditions to approval imposed by competition authorities are not imposed merely to protect national interests as against those of competitor states (UNCTC 1989, 24–25). This is especially possible where states operate large portions of their domestic economies through state owned enterprises (SOEs) whose positions may be threatened by companies whose merger activities are under review. Yet as a regulatory device, this method has weaknesses. First it can be invoked only in the face of merger or acquisition activity. Second, can only affect the operations of the MNE at the time of the transaction. Third, conditionality does not have long-term regulatory effects except with respect to the structure and operation of the affected entity. It has little to say about production processes or the development of linkages that do not undermine the formal conditions imposed whether to structure or operations.

(p. 783) In addition, states have sought to create functional regulatory effects through the management of national laws where their internal markets are sufficiently large to permit national regulation to have a coercive effect on production. Among the most well known is the European Union's so-called "Brussels Effect" (Bradford 2012). Here, again, the premise is that the object of regulation is an entity—but the mode of regulation seeks to affect its form indirectly by exercising oversight over its connections and linkages—at the time these are proposed to be made. The United States and China are also well positioned to produce corresponding "Beijing Effects" or "Washington Effects." Related to those efforts, at least in terms of the focus of the regulation, are efforts to tax MNEs. In one sense, the issue of MNE taxation centers on the construction of an enterprise bound to a taxing jurisdiction through which a state may claim a "fair share" of the profits of production. That is, in essence a key factor in the battle over transfer pricing and taxa-

tion; MNE power to effectively treat its production chain like an autonomous economy within which it controls intra-MNE pricings undermines state power (OECD 2001). Better put, perhaps, it sharpens the transformation of states from regulators to the providers of public services that must compete on price, quality, and so forth with other states. On the other hand, what appears to be the functional effect of cumulative efforts to tax among multiple jurisdictions are multilateral efforts by states to share in the profits of production. This objective is furthered by whatever means states might agree that production can be cobbled together through the linkages and connections that form a legal basis for the operation of production chains, and thus cobbled together tax apportioned (Picciotto (ed) 2017). This indirect regulation, through market power and effects comes as close as states appear to get to a regulatory approach grounded in production rather than in entities or in entity interrelations. But the cumulative effect is polycentric in the absence of multilateral coordination and compromise. Where the largest states compete, it is possible to confront a market in which multiple uncoordinated rules may have to be navigated but in which no state has enough power to effectively regulate the MNE itself as an entity, much less the production process for which they are operated.

The grounding premise of national regulation is that an MNE is an entity. That premise gives rise to a way of looking at the issue of MNE regulation as a species of corporate or more generally of enterprise regulation. The “trick” for those who adhere to this way of understanding the “reality” of MNE is to first construct an entity that may be the object of a single source of law and then to constrict a legal edifice large enough to regulate the entity thus constructed (OECD 2011). But both premise and method has produced a century or more of failure, at least with respect to the objective of creating a national legal order for the regulation of MNEs. The essential failure of the entity approach is the well-known governance gap, understood as the fundamental inability to create a functional identity between the jurisdiction of the state and the operation of the enterprise (Simons and Macklin 2014; Ruggie 2008). What emerges from this failure are the partial measures that character national law—efforts to capture regulatory control of activity within national territory and efforts to extend the notion of national territory (and control) on the backs of those entities with respect to which states might assert authority. Effectively, the basic limitations of state-based legal regimes from a regulatory approach targeting an entity to one targeting the management of its internal connections or the processes of production that served as the objectives of MNE operation, even as formal adherence to an MNE-as-entity premise continued unabated. Given this fundamental limitation of the power of a state within regimes of open borders, however, it was also inevitable that legal regimes would themselves require (p. 784) transnationalization if there was going to be even the semblance of identity between the scope of regulation (and the institutions that implemented them) and the objects of regulation (be they entity or production itself). The regulatory focus of MNE regulation shifted in part from the state and the enterprise to the international sphere and the regulation of the linkages and connections that form the MNE. And that shift also transformed the meaning and sources of law from one produced by and for a domestic legal order to governance and regulation with sources beyond the

state (Zumbansen 2011), though some might argue still connected to states (Halliday and Shaffer 2015).

III. Emerging Regulatory Forms beyond the State and Its Domestic Legal Orders

Especially since the beginning of this century, the project of MNE regulation has also acquired an international dimension. That approach is made necessary because there is no single or comprehensive international law of MNEs (Cohen 2007). The path toward internationalization has not been straightforward. The most direct approach to the regulation of MNEs—as transnational entities—might have been through the establishment of an international regulatory regime through treaty. But there has not been anything approaching a comprehensive international law of MNEs (Cohen 2007). For a while it appeared that there was some movement toward a broad regulatory approach in international law. That was made clear by the quite distinct agendas and approaches of two intergovernmental organizations created at about the same time. One was generated in the context of calls by developing states for a New International Economic Order (NIEO) (Laszlo, Baker, and Eisenberg 1978, ch. 4), whose members were deeply suspicion of MNEs. A UN Commission on Transnational Corporations was established in 1974, which began working on a Code of Conduct for MNEs (UN Commission on Transnational Corporations 1975; ¶ 9(2)). This Code of Conduct was a first effort to develop a conventional international law framework for the comprehensive regulation of MNEs. Negotiations proceeded from the late 1970s until the production of a draft in 1990 (UNCTC 1990), which was met with substantial opposition from business and developed states and negotiations were ultimately abandoned in 1992 (International Chamber of Commerce 1992). The move toward a conventional international law–based regulatory framework for MNE governance was taken up with the effort to produce a Norms on the Responsibility of Transnational Corporations and Other Business Enterprises (Norms) (Weissbrodt and Kruger 2003), which was ultimately abandoned after the unsuccessful negotiation of a final draft in 2005 (Weissbrodt 2005; Weissbrodt 2014).

These actions were viewed as threatening by developed states and the business community. To meet the challenge of the NIEO and its dominance within the UN system, these states focused their transnational efforts on soft law developed through the OECD, which in 1976 developed the first of the great transnational instruments, the Guidelines for Multinational Enterprises (OECD 2011). These served to provide a nonbinding set of normative approaches to the self-regulation of MNEs that satisfied the need of developed states for a coordinated regulatory framework for the business behaviors of MNEs that did (p. 785) not either threaten national sovereignty or the distinction between economic regimes of production through MNEs and legal regimes of risk management and liability through interlocking systems of national law (Sagafi-nejad 2008). To counter the Norms, the United Nations appointed John Ruggie as UN Secretary-General Special Representative who, over the course of a six-year mandate, produced another soft law framework for

regulating the human rights behaviors of enterprises, the UN Guiding Principles for Business and Human Rights (2011).

The responses to the NIEO inspired regulatory efforts now set the framework for transnational approaches to MNE regulation—technocratic, market-driven, and disciplined by stakeholders beyond the principled frameworks of legitimacy built into the liberal political state (Everson 2014). It is bound up in soft law, in the recognition of the regulatory authority of private actors, and in the reliance on transnational governance to manage MNE behaviors. The resulting system is polycentric in the sense that it accepts a framework in which multiple sources of regulation with distinct characteristics can simultaneously manage or affect MNE behaviors by imposing responsibility social and legal risk. But it is also grounded in the assumption that those regulatory frameworks will apply to a singular enterprise or to the linkages and connections among enterprises that constitute the MNE as an organism of economic production. It is especially in this context that the contemporary forms of transnational law can be most easily discerned as they are applied to the MNE. These forms, though rooted in traditional regulatory approaches, and their techniques (Post 2001, 327–328), are distinguished by their detachment from the state itself (Backer 2102). “In the EU and elsewhere, we have witnessed the power and enormous effect of free floating evocations of the rule of law.” (Post 2001, 335). This has produced a set of new approaches that sometimes supplement and sometimes supplant traditional state-based techniques (Calliess and Zumbansen 2010). And it is here that one sees emerging more clearly the project of regulating not merely the MNE as an entity but also the regulation of *MNEs through the interconnections and linkages that give structure to their coordinated economic operations*.

These approaches are transnational (Backer 2016b) in the sense that they seek to regulate conduct and entities across and beyond national borders, that they do not source their regulatory authority primarily or solely on one or more states, and that the object of regulation is itself not entirely subject to the control of any one state. There are a number of international efforts (in law and norms) that seek to impose obligations on MNE conduct, but these touch either on the allocation of responsibility within linked and connected enterprises (linked for the purpose of production) or seek to impose standards on the production process itself (allocating risk, responsibility, and sometimes liability to that end). Among the most important elements are the internationalization of extraterritoriality, the rise of corporate codes, third-party certification regimes as global private regulation, hybrid disclosure regimes that are transnational in operation though national in conception, and the emergence of a patchwork of international norms and principles along with a skeleton of their attached remedial mechanisms.

A. The Internationalization of Extraterritoriality.

At times these emerging forms of regulation extend state-based concepts to the transnational sphere. For example, the methodologies of extraterritoriality find a comfortable conceptual home in transnational MNE regulation, but now implemented to serve global (p. 786) interests. For example, internationalist extraterritoriality can be achieved by

reconceiving the state as the organ through which international law is enforced. This approach starts with the traditional assumption of state-based projections of power abroad, but instead of projecting a domestic legal order, states are projecting international norms now incorporated into their domestic law (Seck 2011). One sees an excellent example of this in the context of sovereign investing, especially by European Sovereign Wealth Funds (Backer 2013). But internationalist extraterritoriality has proven to have weaknesses as well, especially in the context of the regulation of MNEs. States have not agreed on either the canon of international law to be applied through domestic legal orders (Helfer 2006), nor have they been content to let the courts of foreign states interpret those rules to enterprises over which they might have authority (Adams v. Cape Indus., Ltd., 1991). In the latter case, blocking statutes have been enacted especially by developed states (UK, Protection of Trading Interests Act 1980) reducing regulation to a patchwork of political accommodation grounded on principles of reciprocity (Zenith Radio Corp. v. Hazeltine Research Inc. 1969; Curran 2016). As among the most traditional of the nonstate approaches to MNE regulation it also tends to be quite conventional in its regulatory object. Extraterritoriality focuses on entities onto which obligations may be imposed. It is as much about the construction of such entities as it is about the specific legal obligations sought to be applied. And again, there is nothing that approaches an all-around effort at regulation. States reach through MNEs to apply a hodgepodge of regulation that touches on economic activity but not on the MNE itself. The MNE is an object of regulatory convenience rather than a transnational object of law.

B. Corporate Codes

Corporate self-regulation has proven to be an emerging though controversial means of MNE regulation. The self-constitution of the global enterprise (an entity theory of governance unit) is now better understood (Teubner 2011). Corporate codes suggest the way that enterprises can constitute themselves, and also consequentially, develop a domestic legal order to govern its internal relations among all of its constituent parts, however constituted in the local laws of the states in which they are located or operate (Backer 2007). They have become important means through which MNEs govern their enterprise corporate social responsibility (CSR) or responsible business conduct (RBC) obligations (Murphy 2005). They are also increasingly viewed as a means through which states may leverage their enforcement authority (Beckers 2015), though in the United States that connection continues to be problematic (e.g., Doe v. Wal-Mart Stores, Inc. 2009). In a sense, corporate codes can be understood as a means of governmentalizing the private sector through the constitution of a transnational territory in the form of a body corporate into which state power is delegated down and obligation (along with risk and liability) continues to be tied in some measure to the state that regulates the apex entity of this governance MNE entity. The technique is quite sound—the state mimics in its relationship to the apex entity in an MNE its relations with its administrative organs. Effectively, the *functional* difference collapses between an administrative organ into which regulatory authority is devolved from the political organs of state and the MNE to which such authority is also transferred. *Formally*, of course, there is all the difference in the world.

That is the basis for the criticism of the corporate code as a regulatory mechanics (Deva 2012). It is also the basis for the constitution of the entity within (p. 787) which regulatory authority is delegated and within which regulatory authority is asserted. That approach itself has been criticized for ignoring the potential for new approaches to liability grounded in the network of linkages and connections that make the structure the MNE itself (as opposed to the invocation of hierarchy systems) producing apex enterprises with apex liability (Teubner 1990, 87–92, suggesting shared liability along networks constituting the economic aggregation that is the MNE).

C. Third-Party Certification Regimes as Global Private Regulation

Unlike corporate codes, third-party certification focuses on production rather than on either the constitution of an MNE entity or on the linkages and connections that together constitute the complex of relationships that form the MNE as an economic actor. In this sense third-party certification is meant to indirectly regulate MNE entities or their relationships by regulating their production through monitoring and inspection regimes tied to substantive standards either proprietary to the certifying agency or developed by states, or by international public or private organizations. There is both a public and private dimension to this mechanism. States have used third-party certification to delegate governmental oversight of standards; for example, the US Food and Drug Administration through the US FDA Food Safety Modernization Act (2011) that permits establishment of a voluntary program of accrediting third-party certification organizations to conduct food safety audits. MNEs, however, have used third-party certification either as a supplement to their own internal regulations or to monitor and supervise MNE compliance with those international standards to which it wishes to adhere (Cashore et al. 2005). Yet at its core it represents a movement of regulatory power from states to private actors, and from the confines of territory to the boundaries of economic activity with respect to which it is applied (Meidiger 2002), the consequence of which is to contribute to the establishment of ensembles of transnational, transgovernmental regulatory institutions (Meidiger 2006). Yet again, note that this effort does not mark the emergence of a regulatory framework for MNE governance: it does no more than to establish a means—quite effective in its own way—of regulating an aspect of quite specific modes of production, whose norms and enforcement are sourced in institutions other than the state. Each individual certification program is important, to be sure, but quite limited in its application and quite contextually constrained. Third-party certification acquires its power as a regulatory device not in its individual manifestation but in the aggregate. And yet that power is dissipated to some extent because there is no structuring rule for such certification regimes—here one again encounters both polycentricity and anarchy.

D. Hybrid Monitoring and Disclosure Regimes; Some Transnational in Operation though National in Conception

Regulation through disclosure has become increasingly popular both as a part of a shift of national law from command to compliance and regulatory governance approaches to managing behavior (Backer 2018b). Its connection to regulatory governance derives from

its character as a market enhancing form of regulation—as a means of enhancing the enforcement (p. 788) mechanisms of the societal sphere by giving investors, consumers, creditors, employees, and the state information they need to make decisions about their connection with the enterprise. To that end disclosure does not advance a normative agenda directly (though clearly the choices of information to disclose and the disclosure mechanism are heavily dependent on underlying normative choices) (e.g., United Nations 2011 and human rights due diligence ¶¶ 16–22). National approaches include three influential recent efforts. The US Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) require public companies that manufacture products for which certain minerals are necessary to make disclosures related to their source in their public filings under the federal securities law, a portion of which was invalidated by the courts (National Ass'n of Manufacturers v. SEC). The UK Modern Slavery Act (2015, ¶ 54) requires that every qualifying organization carrying on a business in the United Kingdom must produce a slavery and human trafficking statement for each financial year of the organization. The French Supply Chain Due Diligence Law (2017) comes closest to international monitoring and disclosure frameworks. It requires certain French parent companies to identify and avoid adverse human rights and environmental impacts of their own activities and the activities of enterprises they control or with whom they have an established commercial relationship. International efforts follow similar approaches of monitoring, disclosure, and remediation, a model of which is the human rights due diligence mechanics of the United Nations Guiding Principles for Business and Huan Rights (UNGP) (2011). Another is connected to the OECD Guidelines (2011).

Moreover, disclosure is a gateway obligation. Inherent in disclosure is the consequential obligation to correct wrongs, remediate damage, and reform practices. Disclosure is a mechanism of enterprise governance—and in that sense, constitutes a means of regulating MNEs. The governance logic of enmeshing disclosure with management is as old as current efforts to seek transnational regulatory structures for MNEs (Lichtenstein 1977). These efforts privatize the governance of MNEs by investing apex companies with the obligation to undertake the regulation of its production chains through the exploitation of its control of the entities through which it manages production. They are not so much efforts to regulate MNEs as they are efforts to privatize regulation by governmentalizing the operation of MNEs and locating that power in one portion of the MNE. But apex enterprises managing MNEs (understood either as a web of linkages and connections or as the production therein undertaken) have also developed their own monitoring and disclosure efforts, especially in the traditional areas of CSR—charity, sustainability, and human rights. While these vary in quality, they represent an additional vector for governance, but one in which the disciplinary power is in consumers and investors rather than in the state (e.g., Jitaree 2015; Gamerschlag 2010; generally Beckers 2015). This applies whether the disclosure is entity created or undertaken by third-party certification entities.

E. The Emergence of a Patchwork of International Norms and Principles along with a Skeleton of Their Attached Remedial Mechanisms

Disclosure regimes serve no purpose unless they are used to advance specific normative agendas and the principles of behaviors they embody. But rather than moving toward singularity in normative approach, there has been a move toward fracture and multiplicity. (p. 789) Fracture and multiplicity of standards affect not just the source of normative codes (states, enterprises, public and private international organizations), but their application and character. The cumulative effect of this proliferation of codes is to create markets for compliance. Compliance becomes both a mandatory of mandatory norms usually confined to specific states and a host of transnational norms. In both cases, MNEs may shift their operation strategically to maximize its interest in the choice of the aggregate bundle of regulation to which it will subject itself. The consequence is the MNE, and its parts, become consumers of regulation that may be offered up by states and other (non-state) producers. But for those producers the complication is that that the generators of standards may now need to manufacture regulation that “fits” MNEs as entity, or which are centered on the connections and linkages that gives MNE content, or on the production process which drive MNE operations.

IV. Shooting at a Moving Target in Transnational Space: The MNE as Polycentric Space

The regulatory techniques that are centered on the state, or internationalized and privatized through the structures made possible by economic globalization define both the scope of approaches to regulation and the somewhat narrow conception of the object of regulation. It is hard to get away from the ordering premise of regulation around the concept of the MNE as an entity. It is this single-minded and stubborn conception—perhaps born of the reflex to understand the institutionalization of power within notions of legal personality (and thus a mimicry of the incarnation of the state)—that tends to define the character of and limits the reach of such regulatory governance. Most regulatory efforts at both the national and international level focus on the apex corporation of the MNE group. Extraterritoriality follows the control relationships down from the apex entity through its operations, indirectly nationalizing the linkages and connections that hold the MNE together as an operating unit. International norms are based on the idea that obligations can be imposed on the entirety of the MNE through the delegation of governance responsibility on the apex enterprise with the further obligation of that enterprise to embed those obligations within their “domestic legal orders” and enforce them through their contractual relations throughout their operations. The French Supply Chain Due Diligence Law (2017) and the UK Modern Slavery Act (2015) operate in that way; but so do disclosure rules. Together these approaches attempt control of MNE operations to the extent they may reach the linkages and connections that bind the MNE group together, or by investing the apex entity with the power to implement legal obligations through their

own privatized and internally binding corporate governance and regulatory institutions and rules.

Nonetheless, there appear to be emerging new approaches to MNE regulations that move beyond these traditional and formally constrained approaches. These new regulatory initiatives appear to refocus regulation from the entity either to its linkages and connections with respect to specific substantive obligations, or increasingly *to the processes of production for which they were created and are operated* (Backer 2016). The shift of regulatory focus to the process of production has been evidenced in international soft law (OECD 2017). The shift (p. 790) also appears in the way in which apex enterprises have begun to fashion their own internal governance orders (Social and Economic Council of the Netherlands 2016). The sought for result is an avoidance of at least some of the difficulties of coordinated regulation across borders. In the process, however, the traditional structures of law may be inverted from a "regulatory apparatus regulating multiple actors—to one in which multiple actors regulate one system" (Backer 2016, 57; World Economic Forum 2015, 4). This movement underlies recent efforts to shift from regulation to the regulatory governance of risk management (Manuj and Mentzer 2008) and emphasizes a shift from a traditional and narrow legal transnationalism to disorder, governance rather than legality, and national supranationalism (Walker 2008). This section considers the evidence of the changes and what they promise for MNE regulation going forward. The focus will be on the transformations of veil piercing of entities, the management of linkages, and the focus on supply chain regulation.

A. The New Veil Piercing and the Emergence of Supply Chain Liability

For advocates of the use of national law to develop a "law" of corporate groups, a proactive and very broadened application of traditional veil-piercing rules appeared to hold much promise. It offered a traditional means of avoiding the core principle of corporate law—the autonomy of corporate legal persons. But the traditional approach had a number of drawbacks. First it was an all-or-nothing proposition—veil piercing represented a judicial determination that what appeared to be two separate entities were in fact one for all purposes. Second, at least in the United States it depended in large part on a finding of inequity, of deception and the ill use of the corporate franchise. Veil piercing served as a judicial recognition that the appearance of multiple entities worked a deception on those who relied on the verities of those distinct relations in interacting with them. Yet a jurisprudence grounded in the exceptional deception was no way to build a consistent and coherent jurisprudence of risk and liability allocation. And indeed, the exceptional character of veil piercing tends to better serve the protection of the underlying principle of respect for the autonomy of legal persons—veil-piercing cases provide the sort of training that other enterprises incorporate into their behaviors to ensure that the principle does not apply to their operations. In that sense veil piercing has the opposite effect of those who sought to use it to weaken traditional principles of autonomy. This has been the case especially where litigants sought to impose liability on upstream entities (whether on a veil piercing or agency principles) on the basis of the extent to which the linkages and connections among entities in an MNE group effectively shifted liability upstream. Courts

have been quite reluctant to embrace this approach in the absence of the more conventional markers of veil piercing (e.g., Doe v. Walmart 2005; Loomis Cabinet Co. v. OSHRC 1994).

And yet veil-piercing principles (and their analogous agency principles applicable to the aggregation of entities bound by contract rather than ownership ties) have recently been deployed in new and interesting ways. These may suggest the ways that the principles themselves may become more useful in allocating liability based on control in specific relations among members of a corporate "group." At their limit, they may suggest the way that these principles may be forging a new basis for supply chain liability within MNEs. Consider (p. 791) *Chandler v. Cape PLC* (2012), where the court applied the notion of assuming responsibility to parent-subsidiary constellations with the result that a duty of care was established of parent toward employees of a legally separate subsidiary with respect to health and safety measures. The parent had developed a group policy on health and safety standards that it had organized at the parent company level, including the provision of extensive technical assistance. The court found that might be sufficient to shift liability for the failures of that program at the subsidiary level up to the parent. The court was quick to distinguish its approach from common veil piercing. First this touched on and was limited by the specific control relationships around health policy—there was no general imposition of upstream liability. And second it was grounded on the extent to which shifting control also necessarily shifted the local of liability. Similar approaches were adopted by courts in other cases (Lubbe v. Cape Plc 2000 (Mining subsidiary: negligent control and supervision of its South African subsidiaries); Chevron Corp. v. Yaiguage 2015 (Environmental pollution and other harms (executing of foreign judgment)); Choc v. Hudbay Minierals 2013 (considering whether a duty of care exists between Canadian companies and the foreign workers who produce their product)).

The shift from a veil-piercing framework to a supply chain liability standard emerges more distinctly in *Lungowe v. Vedanta* (2017). In that case, Zambian citizens brought proceedings against the controlling corporate shareholder of a corporation defendant alleging personal injury, damage to property, and loss of income, amenity, and enjoyment of land due to alleged pollution and environmental damage caused by discharges from the Nchanga copper mine. At issue was the extent to which "a duty is owed by a parent company to those affected by the operations of a subsidiary." (Ibid.). The court avoided the template of veil piercing in favor of a three-part test of foreseeability, proximity, and reasonableness. But such a test is applied on a case-by-case and relationship-by-relationship basis—the extent of liability may be limited to specific classes of relations between the entities, but each must be proven in its own right. A party must show first that the parent has taken direct responsibility or control the operations that give rise to the claims. Such proof "requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary." (Ibid.). Yet that duty, if proven, may extend not just to subsidiary employees but also to those affected by the operations of the subsidiary (Ibid.). Consider the result—with respect to all aspects of MNE operation for which the apex entity asserts a sufficient level of oversight (including, for exam-

ple, responsibilities for oversight and control required under the French supply chain due diligence law (2017) or under the principles of UNGP human rights due diligence programs), the apex enterprise may also be deemed to assume liability for the consequences of damages that may result from the operations of the subsidiary. These principles might also extend via agency principles to the relationship between entities within production chains over which the apex MNE entity exercises authority under terms of contract rather than through ownership relations.

The case, though, exhibits an Achilles heel that may eventually undo the project of developing global supply chain liability standards, and thus a means of developing principles of MNE liability even in a context where the legal personalities of its component parts remain respected. Implicit in that case was the issue of the inferiority of Zambian courts as against the courts of England. The court was sensitive to the issue even as they indicated a willingness to assert jurisdiction (Ibid. ("There must come a time when access to justice in this (p. 792) type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally.")). This raises the possibility that courts of host states may view this development as yet another form of extraterritoriality in which the courts of the home-state jurisdiction will seek to project their authority outward at the expenses of the prerogatives of the judicial system of the host state.

B. Transforming the Regulation of Linkages and Connections

Here the principal innovation arises from the traditional need to distinguish between cartels from the sort of cooperative behaviors that are at the center of MNE behavior efforts, especially in the context of CSR. For example, in the aftermath of the Rana Plaza factory building collapse virtually all of the major MNEs with operations in Bangladesh banded together in two organizations, the purposes of which were to develop uniform building-inspection standards and uniform standards for downstream producer conduct and to provide subsidies and guidance for downstream factory operation (Backer 2016). Yet might it be possible to see in these necessary cooperative arrangements elements sufficiently well developed to suggest forbidden cartel behaviors?

What result? Liability (and the framework of MNE regulation perhaps) appears to shift to become a function of control—which has the effect of deconstituting the legally constituted enterprise and to reconstitute it as an enterprise. The "Control-liability nexus fractures legal solidity of corporation in favor of a-la-carte reconstitution. Corporate personality shifts its center from the internal stakeholders and the state, to the objects of a control relationship within which the legal relationship becomes irrelevant. But corporate personality becomes unstable as well, as the control relationship attaches only to particular events and particular relationships. In this it is quite distinct from agency and veil piercing that was meant to protect the integrity of legal personality; control relationships are meant to destabilize that integrity." (Backer 2018b). And therein lies its power and its weakness. It suggests a move toward regulation through the linkages that constitute enterprises. But at the same time, it threatens the integrity of the legal autonomy of juridi-

cal persons and further destabilizes the power of states to manage the economic activities within their territory.

C. From Supply Chain Liability to the Regulation of Global Production

I have noted in connection with an analysis of the regulatory response to the collapse of the Rana Plaza factory building revealed a move toward the regulation not of the entities involved in the production process but the production process itself "shifting focus from regulatory objects to regulatory systems as the better means of avoiding the difficulty of regulating actors across borders." (Backer 2016). The OECD has been a leader in the move toward what for the moment is a tentative development of supply-chain-centered regulation. It has sought to develop what it calls a project of responsible business conduct by sector as a companion to its Guidelines for Multinational Enterprises (2011). These include (p. 793) Agricultural supply chains, Extractive sector stakeholder engagement, Financial sector due diligence, Mineral supply chains, and Textile and garment supply chains (2017). The object is to embed within the cluster of entities that are organized for production in a specific sector, those elements of operational risk relevant to that sector and to suggest joint responsibility (however coordinated) among all of the entities to comprise an MNE (OECD Guidance for Textile and garment supply chains 2017 ("Relevant for enterprises operating at various points along the supply chain including global commodities merchandisers, buying agents, distributors, etc." Ibid., 18)). The Guidance is divided into two sections. The first speaks to the implementation of the guidance within an MNE. The second speaks to specifically identified sector risks with respect to which the MNE shares responsibility (Ibid., Section II). Taken together one can begin to see the decentering of the institution of the MNE as the object of regulatory activity in favor of *the regulation of production through the MNE*. It is not the MNE that is being regulated, it is the MNE that serves as the institution creating governance structures through which production itself can be regulated according to the normative standards set out in the Guidance, and through the Guidance to international substantive norms for the conduct of economic activity. And for the MNE a substantial benefit: "increased ability to manage global operations consistently across a single set of RBC standards and across offices, sites, countries and regions, thereby supporting greater uniformity of operational outcomes and efficiency and effectiveness of compliance and in some cases leading to cost savings" (Ibid., 20).

V. Conclusion

The emergence of transnational regimes of MNE regulations reflects the way that transnational law has reshaped the way in which regulators have come to understand the content of their regulatory toolkits. MNE regulation moves governance well beyond the well-worn and ultimately unsatisfactory traditional tools of law deployed by and within domestic legal orders. The misalignment of state and MNE makes such approaches unsuitable to attain goals of regulating MNEs. And yet the continued robust initiatives of state-based regulation suggest that there is a place, and an important one, for state regu-

lation (by traditional means) of MNE operations. But that role is substantially more modest than a role as the apex regulator of the complex amalgamation of ownership and contractually based relations with a host of entities (and states) that constitute an MNE devoted to production in more or more economic sectors. That potent but reduced role was considered in section I. Section III then turned to alternative frameworks for MNE regulation. It is here that the analysis entered the heart of conventional contemporary transnational law and theory. And again, that examination determined that the mechanisms for MNE regulation provided partial, albeit powerful, mechanisms for regulations of part so MNE operations or relationships among clusters of entities that form an MNE. At the same time, we encountered in sections II and IV not just the transformation of law and governance form the national to the transnational—and its fracture along functional lines. These sections also uncovered the complication of the fracture and multiple characteristics of the regulatory object—the MNE itself. MNEs could be understood, and regulated, as entities, or as the linkages and connections among entities that together formed the MNE, or as the production with (p. 794) respect to which this collection of entities coalesced as an MNE unit. The effectiveness of law and other regulatory forms shifted as the object of that regulation changed. Lastly, with section IV, the emerging regulatory context was explored briefly. MNE regulation as transnational law is moving away from a centering focus on MNE as entity to the management of the relationship of MNE and production through the regulation of the conditions under which the linkages and connections necessary for the constitution of MNEs may be developed and maintained, and operation of the production sector for which the MNE is constituted. This reconsideration of the character of the MNE then may have a substantial effect on the way in which transnational law is understood and applied, that is that transnational law produces polycentricity in governance but that its object also acquires a polycentric character that shapes its amenability to regulation by law.

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(p. 800)

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