The Emergence of an International Legal Framework for Transnational Corporations

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1. The need for an international framework

Foreign direct investment (FDI) increased dramatically after the Second World War and continued to grow through the 1960s, 1970s and 1980s. The average annual growth rate of global FDI flows during the second half of the 1980s was substantially higher than that of both international trade and global economic output. Total stock of FDI increased from $516 billion in 1980 to an estimated $1.5 trillion in 1989. Through their international affiliate networks, transnational corporations (TNCs) channel goods, services, finance, technology, know-how and other essential resources across national borders. As a result, TNCs have become major actors in the international economy.

The central importance of TNCs for the global economy raises a fundamental question: how should a governance system be constructed to facilitate the flow of productive investment across national borders while ensuring that TNCs are accountable to the public good? To put it differently: what framework should govern the worldwide activities of TNCs and define their rights and responsibilities in their relations to governments? Faced with this question, governments have turned to international cooperation as the most appropriate means for effectively addressing the impact of foreign direct investment, coordinating their policies in this area and resolving the complex issues that arise from the transnational nature of the activities of TNCs.

Indeed, intergovernmental co-operation regarding FDI has intensified over the years and resulted in a wide variety of international instruments and norms which deal with various aspects of FDI and the principal agents that undertake it, transnational corporations. Taken together, they constitute the international legal framework for foreign direct investment and transnational corporation activity. Unlike the cases of international trade and monetary matters, which are dealt with under the umbrella of GATT and the International Monetary Fund, respectively, no global instrument exists as yet in the area of foreign direct investment and transnational corporations.

TNCs are not recognized as independent subjects of international law; despite their international economic impact, in legal terms they remain under the sovereignty of the states in which they operate. Most governments have passed legislation to deal with the establishment and operations of these firms within their jurisdiction. But, owing to the transnational nature of these operations, national laws have often proven to be inadequate to address the full implications of TNC activity in such areas as, for example, taxation, restrictive business practices, consumer protection or the environment. Many of these problems are transnational in nature and, therefore, require a similar level of response. For instance, mergers between companies that are judged harmless in their home markets can arouse serious competition issues in other countries. Similarly, environmental pollution can spread quickly beyond national frontiers through the air and oceans. Or, the handling of hazardous products involves threats of destruction not only to humans but to the entire planet. These risks are not divisible along territorial lines, nor can they be left to the discretion of a single government to be resolved.

Furthermore, the activities of TNCs within a particular host country can lead to conflicts and frictions with respect to the rights and duties of each party in a TNC-host country relationship, or can be affected by political changes in that country. Questions such as the participation of TNCs in the domestic political process, or the renegotiation of contracts, or the decision to expropriate the assets of a TNC, can lead to bitter disputes which could perhaps be prevented if clear, mutually-agreed standards had been established. Thus, internationally agreed standards are needed that define the rights and responsibilities of TNCs and governments, and provide a climate of predictability, stability and transparency within which all parties can prosper.

The central reason for the need of an international framework for TNCs can thus be found in the nature of a transnational corporation as an enterprise comprising entities in two or more countries which operate under a system of decision-making permitting coherent policies, a common strategy and the exercise of significant influence over their activities. The dual nature of a TNC that is, a group of legally separate national enterprises subject to different national laws, on the one hand, and a group of entities that are part of a unified transnational structure with common control and strategy, on the other hand requires a system that can reach beyond national laws or unilateral actions and provide internationally agreed definitions, principles and standards, international mechanisms to implement these standards, and procedures to keep the standards under discussion and review.
2. The emergence of an international framework

Broadly speaking, the international framework for transnational corporations consists of conventional norms and customary rules. The formulation of customary international law rules on foreign investment can be traced back to the legal doctrine of state responsibility for injuries to aliens and their property that grew mainly between the eighteenth and early twentieth centuries along with the economic expansion from Europe and the United States into the developing world, mainly Latin America. Needless to say, it was inspired by the values and legal traditions of those countries. Based on that doctrine (which was originally created for the protection of individuals) traditional international law recognized that foreign investors (both individuals and corporations) operating in a foreign country are entitled to a minimum standard of protection for their persons and property by the host state. That minimum standard of protection is said to include the duty by the host state to accord non-discriminatory treatment under its laws (or in their application) to aliens operating within its territory, the duty to treat foreign investors in a fair and equitable manner, and the duty to provide minimum protection under the law, including due process.

The conventional international framework on FDI consists of a variety of instruments concluded mainly since the mid-1940s which differ considerably from one another in terms of their scope, coverage, approach, legal nature, philosophy and content, but coexist and interact in various significant ways. Consequently, this framework does not have a cohesive structure nor does it have a coherent philosophy. Rather, it is the cumulative result of a succession of attitudes, perceptions and expectations regarding TNCs and the role of governments in this area. Seen in chronological perspective, the emergence of international rules on FDI through the elaboration of instruments appears to have followed an evolutionary pattern that, roughly, can be divided into three phases (see table 1 and figure 1).

Between the mid-1940s and the end of the 1960s, when TNCs established themselves as major actors in the world economy, the need for an international framework to deal with this new phenomenon became clear. Two basic positions emerged. One held that the ability of TNCs to combine factors of production worldwide represented a new efficiency in world economic development that ought to be promoted and needed to be protected; for this approach, therefore, the international framework had to be of a liberalizing nature and focus on the protection of foreign property. For the other position, it was precisely the economic capacity of TNCs and its impact on national and international economic development which called for international guidelines for corporate behaviour and a strengthening of national regulations for foreign investors. During this period neither of these two positions gained the upper hand.
2.1 The mid-1940s through the 1960s: the emergence of competing positions

The first major effort to establish an international framework for FDI relations in the post World War II period was the draft Havana Charter (1948) proposing an International Trade Organization (ITO). Although it was aimed mainly at improving the international trade system through the removal of trade barriers, the charter included also important provisions for FDI, whose formulation reflected precisely the opposing positions regarding this subject. What survived from this project was the General Agreement on Tariffs and Trade (GATT) which, together with the International Monetary Fund and the World Bank, became the leading institutions to manage the international economy, thus leaving an important vacuum in the international system with respect to foreign direct investment.

The problems that emerged in the elaboration of global provisions for FDI in the Havana Charter reflected the dawn of a new era in North/South economic relations. Indeed, with the massive deconcentration process that took place since the late 1940s, mainly in Asia and Africa, the classical principles of customary international law relating to foreign investment suffered yet another important blow. Those countries questioned the traditional theories mainly on the grounds that they had been developed without their participation and were against their interests and legitimate aspirations. Developing countries initiated a number of international moves aimed generally at asserting their economic sovereignty and independence. The United Nations provided them the forum and the numerical advantage for the adoption of resolutions which reaffirmed their permanent sovereignty over natural resources. In 1952, the General Assembly adopted resolution 626 (VII) which among other things proclaimed the right of peoples freely to use and exploit their natural wealth and resources as inherent in their sovereignty. Then, in 1962 the General Assembly adopted resolution 1803 (XVII) by consensus stating the right of peoples and nations to permanent sovereignty over their natural wealth and resources. Subsequently, the principle of permanent sovereignty over natural resources was restated in various other United Nations resolutions. The recognition of that principle had considerable economic significance at that time, given the large concentration of natural resources in developing countries and the relevance of the primary sector in the world economy. In fact, most of the FDI to developing countries during that period was natural-resources-related.

The developed countries' search for an international framework that endorsed the principles of the free operation of market forces for FDI resumed in the early 1960s. This time, however, efforts focused first on the regional level, with the
by adopting binding inter-governmental agreements that are subject to international law and, unlike domestic laws or contractual agreements with private investors, could not be modified or repudiated unilaterally. Developing countries, on the other hand, concluded those treaties as one of the measures to attract foreign investors.

Capital exporting countries and foreign investors clearly consider bilateral investment treaties an important ingredient of a favourable investment climate, although the actual effects of these treaties on the volume of FDI flowing towards the capital importing country are difficult to assess, as this is determined by a number of factors, including the size and growth of the market, proximity to other important markets, the quality of the infrastructure, etc. But, clearly, capital exporting countries and foreign investors alike do consider them an important ingredient of a favourable investment climate.22

To summarize, since the mid-1940s, and throughout the 1950s and 1960s, the growing expansion of transnational investment led to several initiatives aimed at filling gaps in national legislation and customary international rules in this area. The aspirations of the newly independent developing countries for a more equitable world order were reflected in the elaboration of such new notions and principles as the principle of permanent sovereignty over natural resources and the right to development, with potentially important practical repercussions for TNC/host country relations, especially in the area of State contracts and nationalization-expropriation. Consequently, one of the central investment issues at the multilateral level was the protection of foreign direct investment, particularly from expropriation, though the positions of governments on this issue - even among industrialized countries were too far apart to permit clear formulations of international standards. Thus, most attempts to secure multilateral commitments in this area during this period, either through insurance schemes or through the elaboration of international standards, failed, except for the adoption of the Convention on the Settlement of Investment Disputes Between States and Private Investors from Other States. To fill the legal void, bilateral investment treaties were concluded in increasing numbers; they prescribe on a reciprocal basis general treatment standards for foreign investors and more specific protection rules on expropriation, transfer of payments and settlement of disputes. Questions of entry and establishment for foreign investors remained outside the scope of the treaties and also of the multilateral agenda; those were left to be regulated by national laws, pursuant to the customary law principles flowing from national sovereignty. But in the more narrow context of the OECD, the concept of progressive liberalization of capital flows was introduced during this period and, through it, the issue of entry and establishment of investment began to emerge, thus setting the stage for more ambitious initiatives yet to come.

With a comprehensive agreement on the protection of FDI proving elusive at the multilateral level, the search for binding instruments for this purpose shifted to the bilateral level and led to the conclusion of a growing number of bilateral treaties for the protection and promotion of investments.

Bilateral investment treaties for the promotion and protection of foreign direct investment23 were initiated by the Federal Republic of Germany and other major western European capital exporting countries as part of their efforts to safeguard the investments of their nationals, mainly in developing countries, where the danger of expropriation and other non-commercial risks was highest. Faced with the uncertainty about the content of customary international law on FDI as well as the difficulty to conclude multilateral instruments in this area, capital-exporting countries sought to reinforce a number of guarantees for their investors.

With respect to relations with developing countries, the main preoccupation of the western countries was the conclusion of binding instruments to codify customary international law on the protection of foreign property (thus far the only aspect of foreign direct investment relations covered by customary international law), particularly from expropriation by the host country. Efforts to adopt a multilateral convention for that purpose failed,17 as did attempts by the World Bank, the Council of Europe, the OECD, the Inter-American Development Bank and the European Community to establish multilateral insurance schemes to cover political risks involved in foreign investments.18 But there was an important breakthrough during this period with the adoption, in 1965, of the International Convention on the Settlement of Investment Disputes (ICSID) under the auspices of the World Bank.19 The Convention provides for conciliation and binding arbitration for the resolution of disputes between foreign investors and their host countries. Its provisions are remarkable for the manner in which they succeeded in accommodating the concerns of developing and developed countries as well as investors in this controversial area.20

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OECD taking the lead. In 1961, that organization adopted two significant instruments which, over subsequent years, increasingly facilitated the flow of FDI in the industrialized world: the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations.14 The codes are binding for the countries members of the OECD.15 Progressive liberalization in the context of the codes means that the member states undertake a commitment towards a steady elimination of existing restrictions to the free circulation of capital and payments through stand-still and rollback actions. But the pace of implementing these goals varies among countries, depending on their particular level of development.16

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2.2 The 1970s: standards of corporate behaviour

A second roughly delineated period began in the early 1970s, when concern over the economic power and influence of TNCs continued in developing countries and spread among developed countries as well. Many developing countries remained largely dependent on foreign capital and technology and lacking the capacity to deal with foreign investors effectively, they often viewed themselves as victims of TNC exploitation, a view that expressed itself in a spate of nationalizations. They persisted in their efforts at the United Nations to adopt resolutions aimed at countering some of the traditional rules of custom, international law. The proclamation of the principle of permanent sovereignty was followed by the call for the establishment of a New International Economic Order. In particular, resolution 3201 (S-VI) called for the regulation and supervision of the activities of transnational corporations in the interest of the national economies of the countries in which such transnational corporations operate on the basis of the full sovereignty of those countries. Concerns were raised also in Europe, mostly about the growing presence and control of United States TNCs in the recovering economies of that region, and in the United States, mainly because of fears regarding job losses and export replacement. These concerns were articulated by a number of scholars and led to increasing public interest in TNCs in general. But many of the concerns of the developing countries were also shared by a number of developed countries, the trade-union movement, consumer groups and corporate-ethnic activists.

As regards non-governmental actions, the International Chamber of Commerce adopted in 1972 the Guidelines for International Investment and, in 1978, issued the Rules of Conduct on Extortion and Bribery in International Transactions. In addition, a great number of corporate codes of conduct were adopted by individual firms, particularly in the United States. While limited in scope and objectives (they usually dealt with employee activity, accounting standards, conflicts of interest and anti-trust behaviour), these codes reflected the interest of the business community in being regarded as responsible corporate citizens. On the trade-union side, the International Confederation of Free Trade Unions (ICFTU) adopted in 1975 the Charter of Trade Union Demands for the Legislative Control of Multinational Enterprises. In addition to stating the trade union movement objectives and policies with respect to transnational corporations, the charter included seven substantive areas dealing with such a variety of aspects of TNC accountability as short-term capital movements. In general, trade unions have maintained that, in order to deal with the transnationality of firms, discussions on them should be conducted within the framework of the United Nations.

These non-governmental initiatives were certainly very important, as they were the expression of a general sense that something ought to be done. But the focus of action shifted to intergovernmental organizations. Thus, through the establishment of advisory committees and other means of representation, non-governmental actors obtained access to them and, consequently, were able to participate and exert considerable influence in the elaboration of international standards on FDI. Thus, the convergence of various streams of recognition of the importance of TNCs gave birth to intensive intergovernmental activity aimed at the elaboration of international standards for the conduct of TNCs, a movement typical of the 1970s.

The first successful intergovernmental attempt to regulate the activities of TNCs took place in the context of the Cartagena Agreement, also known as the Andean Pact, a regional integration scheme subscribed by five Latin American countries (Bolivia, Chile, Colombia, Ecuador and Peru). This group adopted in 1970 Decision 24 (better known as the Andean Investment Code) which was the most comprehensive and stringent effort to adopt the activities of TNCs to the development needs and objectives of host countries.

While Decision 24 was a model to which many developing countries looked for inspiration for the formulation of national and global standards for the activities of TNCs, the countries members of the OECD decided to formulate their own standards, partly to create their own framework for the activities of TNCs, partly to reinforce their negotiating position in TNC matters at the multilateral level in general, and in the negotiations on the United Nations Code of Conduct in particular. The adoption in 1976 of the OECD guidelines for Multinational Enterprises marked another successful codification attempt of general standards of corporate behaviour for TNCs by a regional organization. The guidelines were adopted by a ministerial declaration which also included, as a quid pro quo, decisions on specific areas of treatment of TNCs by the host countries (i.e., on national treatment, incentives and disincentives and intergovernmental consultations). Among these, the decision on national treatment was particularly important because it codified a principle central for the facilitation of FDI. In this manner, the OECD complemented and expanded its earlier FDI-related measures contained in the Liberalisation Codes. The decisions are binding upon signatory countries. The guidelines are voluntary standards directly addressed to foreign investors and cover a wide range of issues from general policies to competition, disclosure of information, taxation, financing, employment and industrial relations and transfer of technology.
The adoption of the OECD declaration, and its comprehensiveness, put the industrialized countries in a good position to negotiate matters related to TNCs at the global level. At that level, efforts focused on more specific aspects of the activities of TNCs, typically dealing with subjects of particular concern to governments at that time: employment and labour relations, restrictive business practices, illicit payments and transfer of technology.

Apart from these issue-specific efforts to establish a framework for FDI, negotiations began in the United Nations in 1977 to formulate a comprehensive and global code of conduct for TNCs. The initial efforts concentrated on the formulation of standards for the behaviour of TNCs in host countries. That task encountered little difficulties and by 1981, most of the provisions of the code dealing with the activities of TNCs had been drafted. These standards covered a host of legal, economic, political and social aspects, including issues such as host countries' sovereignty and jurisdiction over TNC operations; non-interference in internal affairs of host countries by TNCs; review and renegotiation of government contracts; illicit payments, respect for human rights and sociocultural values of host countries; adherence to national objectives of host countries with respect to local ownership participation and control; access to managerial posts by local personnel; cooperation with local authorities with respect to balance of payments, financing, export and import objectives, local content, etc.; transfer pricing and tax avoidance; competition and restrictive business practices; transfer of technology; labour relations; consumer and environmental protection; and disclosure of information. All these provisions shared a common goal, namely, to maximize the contributions of TNCs to the economic and social development of the countries in which they operate. However, it soon became apparent that for the code standards of corporate behaviour to be finally accepted, they would have to be complemented with standards aimed at providing basic guarantees and freedom for the operation of transnational corporations (an objective the developed countries had pursued since the beginning of the negotiation). Thus, with the beginning of the 1980s, the negotiations on the code entered a new and far more complicated phase, as they began to focus on the formulation of standards for the treatment of transnational corporations by their host countries.

2.3 The 1980s: promotion and protection

In the early 1980s, the trend began to shift again. The weakening of the international bargaining position of developing countries and the realization of the possible contributions of FDI to their economic development through the transfer of capital, technology, know-how and access to markets, made developing countries change their policies towards TNCs. Severe capital shortages in these countries made the attraction of foreign investment a national priority and, with it, much of the earlier reservations lost strength. National investment regimes became more open and liberal, and restrictions focused more on specific sectors and activities, often bundled with performance requirements and incentives.

This new attitude created also a different climate in international fora where the traditional concerns of capital-exporting countries regarding the promotion and protection of FDI began to dominate the agenda of negotiations, complemented by continuing efforts to formulate standards for TNC behaviour. Many of these latter efforts were in fact carried over from the 1970s, although new concerns began to emerge, e.g., in the area of the environment.

The renewed emphasis on the facilitation of foreign investment flows towards the developing countries found expression in the Third Lome Convention between a group of African, Caribbean and Pacific States (ACP) and the European Community (EC), signed in 1984. That convention sought to promote development by granting preferential treatment to these countries, using most methods of co-operation to that effect, including a detailed enumeration of measures for the protection and promotion of investments. Under the convention, it was agreed to accord fair and equitable treatment to investors and to create clear and stable conditions conducive to maintaining a predictable and secure investment climate.

Another document characterized by the same approach which was started during this period (1984) is the Euro-Arab Convention on the reciprocal promotion and protection of investments. The draft convention follows the structure of bilateral investment treaties but, in this case, investment is expected to flow in both ways. In Latin America, the Andean Pact adopted Decision 220, and later Decision 291 which effectively dismantled most of the principal restrictions on foreign investments imposed by Decision 24 and ushered in an era of liberalization of FDI flows in that region. Regional economic integration schemes began to flourish in virtually all parts of the world, which encouraged intra-regional investment.

At the same time, developed market economies continued to pursue the conclusion of bilateral treaties for the promotion and protection of foreign investment, and new countries joined in these efforts. In fact, the rate at which these treaties were concluded accelerated during the 1980s, with some 200 treaties concluded during the 1980s, as compared with approximately 90 during the 1970s and 80 during the 1960s.
Comparing the new bilateral investment treaties with those signed in the 1960s and 1970s, they seem to have changed very little over time.37 This may be due in part to the manner in which these treaties are usually negotiated, that is, on the basis of prototypes prepared by the capital-exporting country. Some of the most recent bilateral investment treaties, particularly those concluded by the United States, have been to regulate the question of entry and establishment of investments which is to take place on the basis of most-favoured-nation treatment and national treatment and the operational conditions of the investments, notably the abolition of performance requirements. Those new features in bilateral treaties correspond to similar efforts to liberalize FDI at the multilateral level.

The emphasis on the protection and facilitation of FDI culminated with the adoption of the Multilateral Investment Guarantee Agreement (MIGA) in the middle of the decade.38 MIGA is principally an international insurance mechanism offered by the World Bank which, on the international level, supplements the insurance mechanism established in most of the major capital-exporting countries. It is intended to promote FDI flows to and among developing countries by issuing guarantees against non-commercial risks and also by providing support through consultations on investment policies and advisory and technical co-operation programmes. MIGA does not enunciate substantive standards; but its underwriting decisions draw from international standards of behaviour and treatment to determine both the contribution of the investment to the development of the host country and the standards of protection offered by that country. Conversely, MIGA is expected to contribute to the elaboration of international standards by developing criteria for appraising the soundness of specific investment projects, through its claims' adjustment practice, and with the formulation of terms and conditions of guarantees.39

But perhaps the most significant step towards building an international framework for FDI was initiated in the framework of the Uruguay Round of Multilateral Trade Negotiations, launched in 1986 under the aegis of GATT. The goal of the Uruguay Round was to expand and strengthen the open international trading system; the resulting instruments would be legally binding upon states. Having failed to reach agreement by the end of 1990, the envisaged target date for completion of the round is now expected to end in December this year.

As already indicated, efforts to specify the responsibilities of foreign investors did not abate during the 1980s. Negotiations continued throughout the 1980s on the United Nations Code of Conduct on TNCs and UNCTAD's Transfer-of-Technology Code. Furthermore, agreement was reached during the 1980s on how to regulate the impact of TNCs in a number of areas. In 1981, the Governing Body of the World Health Organization (WHO) adopted the International Code of Marketing of Breast Milk Substitutes40 recommending restrictions on the promotion of infant formula through advertising, sale incentives, etc. In 1985, the General Assembly adopted a set of Guidelines for Consumer Protection41 which included a series of basic principles and measures dealing with physical safety and protection of consumer interests. Also in the same year, a Code on the Distribution of Pesticides was adopted which, while not specifically addressed to TNCs, it is also particularly relevant to the operations of TNCs in their host countries, particularly in those countries which do not have adequate mechanisms to control the use of pesticides.42

In the area of environment, the Commission on Transnational Corporations prepared a set of Criteria for Sustainable Development Management which were endorsed by the Economic and Social Council at the end of the decade. The criteria are a collection of fourteen mind-setting ideas that aim at encouraging TNCs to include environment and development considerations into their investment decisions. Thus, for example, the criteria require that TNCs carry out their business decisions in a manner compatible with the rights of the local people and nature.43 The growing concern about environment found also expression in the 1990 review of the OECD guidelines which lead to a substantial expansion of the chapter dedicated to environmental protection. It is likely that this area will receive increasing attention in the future.

These developments reflect the changes that have taken place in attitudes towards TNCs during the 1980s. The emphasis clearly shifted towards defining the responsibilities of countries vis-a-vis foreign investors, with a view towards facilitating their expansion and protecting their assets. At the multilateral level, this culminated in the establishment of MIGA and the inclusion of certain FDI aspects in the Uruguay Round negotiations. At the regional level, this trend was reflected especially in the strengthening of the OECD Liberalisation Codes. And at the bilateral level, the rapid spread of bilateral investment treaties has led to a network of investment protection in all parts of the world.

Still, efforts to define the responsibilities of TNCs continued, but at a slackened pace. And the two major projects in this area the United Nations Code on TNCs and the Code on Transfer of Technology did not come to fruition. It should be noted, however, that the learning that took place in the context of the negotiations of these instruments did percolate to the national level and exerted a significant positive influence on TNC/host country relations.44 Thus, despite not being formally adopted, by 1982 about thirty states had adopted national control mechanisms for technology transactions styled after the draft Code on Transfer of Technology.
3. Conclusion

At first sight the foregoing review of international instruments will probably leave most observers with the impression of a confusing, overlapping and even contradictory set of norms scattered in a number of documents, with the only common denominator being that they relate, in one manner or another, to transnational corporations. One may well ask whether these instruments add up to a coherent regime, and, if so, what is the content and nature of that regime; how it interacts with national laws and, ultimately, how it affects TCN operations. In particular, governments, tribunals, corporate executives and lawyers would have to scan through a large number of materials, select among the relevant instruments, determine the various kinds of obligations they impose and establish their status vis-à-vis other instruments before deciding with a certain degree of precision what are the specific international rules that apply to a particular transaction involving a transnational corporation.

This underlines the need for a comprehensive, clear and stable international framework for TNCs and FDI. Indeed, recent developments in international economic relations increase the need for strengthening intergovernmental cooperation on FDI to face the challenges and opportunities that are being presented as a result of the increasing transnationalization of the world economy and of the realization of the central role of FDI in economic growth and development. In these circumstances, the completion of a global instrument addressing both the rights and responsibilities of States and TNCs could make a significant contribution to the consolidation and clarification of the international framework for TNCs, could help avoid conflicts between foreign investors and governments and, consequently, could help promote the growth of FDI in the interest of both investors and states.

While consensus in some areas of TNC law remains elusive, the formulation of voluntary standards through guidelines or codes of conduct would seem to be the most effective option for the elaboration of international norms on TNCs, at least at the multilateral level. The actual legal effect of these instruments could vary within wide limit, depending on the intent of the parties involved. The resulting soft law would emphasize the transnational character of the law of TNCs and the strong interrelations between national and international norms in this area.

Indeed, international soft law is more than anything a creative process of elaborating TNC law, through the formulation and adoption of voluntary standards and through their follow-up mechanisms and procedures. Obviously, states are free to comply with the provisions of non-binding instruments. Beyond this, states often feel it appropriate not to act inconsistently with instruments that they have formally accepted. The circumstances of adoption of the relevant instrument would also largely determine the degree of effective respect it will receive.

In that sense, it is important to note that codes of conduct and guidelines often represent solemn declarations of policy of the states concerned, and reflect the firm convictions and expectations not only of the governments but also of the non-governmental actors involved. It is perhaps this aspect of codes more than their form of adoption that lend them their authority and legitimacy and provide the bases for their effectiveness.

The follow-up mechanisms and process of voluntary instruments are essential elements for the formation of soft law on TNCs. These mechanisms serve to ensure the continuous adoption of soft rules to changing conditions and relations, so that they faithfully reflect the status of state practice and, thus, are the best guarantee for maintaining a creative and dynamic system of transnational law in the rapidly evolving area of TNC/state relations.
References

(1) For the most recent data on FDI, see UNCTC, World Investment Report 1991: The Triad in Foreign Direct Investment (United Nations publication, Sales No. E.91.II.A.12).

(2) Thus, Baade explains that despite an increasing recognition of a certain international subjectivity for private natural and legal persons, TNCs are still denied full international personality as they lack at least one of the main attributes conferred by that status, namely, the power to participate directly in the international law-making process. (See, Hans W. Baade, "The legal effects of codes of conduct", in Norbert Horn, ed., Legal Problems of Codes of Conduct for Multinational Enterprises (Deventer, Kluwer, 1980), p. 8.

(3) For an assessment of the policy issues raised by current TNC operations in relation to the need for elaborating international standards, see generally, UNCTC, The New Code Environment, UNCTC Current Studies, Series A. No. 16 (United Nations publication, Sales No. E.90.II.A.7).


(6) Ibid. This standard of treatment appears to go beyond the requirement of compliance by the state with its own laws and principles to provide a basis for determining whether or not the application of legal rules to particular situations does result in the foreign investor being unjustly treated. In that sense, it has been suggested that the standard of fair and equitable treatment is a safeguard against arbitrariness by the host State.

(7) Most aspects of the duty to provide minimum legal protection under the law, including due process, have been incorporated into the Universal Declaration of Human Rights, and, as such, are now recognized by the constitutions and basic laws of most countries.

(8) For a review of international instruments on FDI, see also P. Hansen and V. Aranda, "An emerging international framework for transnational corporations", Fordham International Law Journal, 14 (1990-1991), p. 881. The texts of most of the international instruments discussed in this article have been reproduced in UNCTC, Transnational Investments and Operations: A Compendium of Selected Multilateral and Regional Instruments (New York, UN, forthcoming).


(10) The GATT became effective in 1948. It is both a set of rules and an institutional structure to govern world trade.


(13) In particular, resolutions 3201 (S-VI), 3202 (S-VI), 3362 (S-VII) and 3281 (XXIX). The last one, however, known as the Charter of Economic Rights and Duties of States, was not accepted by some major developed market economies.


(15) The Codes are binding for the countries that have accepted them; today, all OECD members, but for a long time with major exceptions on significant parts.


(17) The OECD Draft Convention on the Protection of Foreign Property was, however, quite influential as an informal model for the preparation of subsequent bilateral investment treaties. The text of the Draft Convention is reproduced in International Legal Materials, 7 (1968), p. 117.

(18) In addition, most industrialized countries established national insurance schemes under which TNCs could insure their investments in developing countries against a number of risks.

(19) The text of the Convention has been published by the International Centre for Settlement of Investment Disputes as document IC/ISD/2.

(20) The Additional Facility approved by the Centre's Administrative Council on 27 September 1977 makes the Centre available, beyond what is foreseen
in the Convention: (a) in cases where one of the parties is not a contracting State or a national company of a contracting State; (b) for conciliation or arbitration of disputes not directly linked to an investment; and (c) for fact-finding procedures.

(21) For a detailed analysis of bilateral investment treaties, see UNCTC, Bilateral Investment Treaties (United Nations publications, Sales No. E.88.II.A.1); see also UNCTC and ICC, Bilateral Investment Treaties 1959-1991 (forthcoming), and UNCTC, Negotiating Bilateral Investment Treaties (New York, United Nations, forthcoming).

(22) On the potential impact of bilateral investment treaties, see also OECD, Intergovernmental Agreements Relating to Investments in Developing Countries (Paris, OECD, 1985), p. 32.


(30) See footnote 14.

(31) The formulations of a United Nations Code of Conduct on Transnational Corporations was given the highest priority in the work of the Commission on Transnational Corporations upon its creation in 1974. The origins of the Code can be traced back to a report of a Group of Eminent Persons appointed by the United Nations Secretary-General to study the impact of multinational corporations on world development and international relations. See United Nations, The Impact of Multinational Corporations on Development and on International Relations (United Nations publication, Sales No. E.79.II.A.5).


(35) For a comprehensive survey of policy changes in the early 1980s, see UNCTC, Transnational Corporations in World Development: Trends and Prospects (United Nations publication, Sales No. E.88.II.A.7).


(38) The text of the MIGA Convention is contained in International Legal Material, XXIV (November 1985), p. 1605.


(42) The International Code of Conduct on the Distribution and Use of Pesticides was adopted by the FAO Conference on 28 November 1985 under resolution 10/85.


(45) For an in-depth discussion of the legal effects of codes of conduct, see Hans W. Baade, "The legal effects of codes of conduct for MNEs", in Norbert Horn, ed., Legal Problems of Codes of Conduct for Multinational Enterprises (Deventer, Kluwer, 1989), pp. 3-38. See also A.A. Fatouros, ed., UNCTC Library on TNCs: Codes of Conduct (London, Routledge, forthcoming), which includes a comprehensive treatment of the international regulatory framework on TNCs.