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Lessons from the negotiations of the United Nations Code of Conduct on Transnational Corporations and related instruments

KARL P. SAUVANT

Some 40 years ago, in 1977, the United Nations began negotiations on the United Nations Code of Conduct on Transnational Corporations (TNCs). It was the first effort to arrive at comprehensive and balanced rules governing the rights and responsibilities of governments and TNCs. The negotiations ended unsuccessfully in 1993, against the background of an accelerating trend to liberalize national foreign direct investment (FDI) regulatory frameworks to attract such investment and the proliferation of bilateral investment treaties to protect such investment. In parallel to these negotiations (and subsequent to them), successful negotiations were also undertaken in the Organisation for Economic Co-operation and Development (OECD) on Guidelines for Multinational Enterprises (adopted in 1976); in the International Labour Organization (ILO) on the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (adopted in November 1977); and in the United Nations Conference on Trade and Development (UNCTAD) on The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (adopted in December 1980); these instruments dealt with specific aspects of the activities of TNCs.

While not involved in the United Nations Code negotiations themselves, Professor Sornarajah did write about the Restrictive Business Practices Set.[1] Moreover, although the United Nations Code negotiations came to naught, they crystallized the basic configuration of interests of

[1] See, M. Sornarajah, "Towards an International Antitrust Law" (1982) 22 *Indian Journal of International Law* 1–29.

the principal stakeholders and the key issues associated with them. They also laid bare a number of the obstacles that governments seeking a multilateral investment instrument need to overcome. Many of these are still with us today and await an international solution.

This chapter distills the lessons learned from these negotiations.[2] The experience of these negotiations and the lessons learned from them are of immediate relevance to the current international investment negotiations.

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A global phenomenon requires a global response. Moreover, this response needs to reflect the principal interests of all the major stakeholders. The fundamental issues put on the international agenda some 40 years ago in the context of the United Nations Code negotiations have, if anything, become more salient, given the expansion of the number of TNCs and the rapid growth of FDI. To be sure, substantial progress has been made since then, not only in understanding the nature and impact of TNCs and their foreign investments but also through a proliferation of various instruments applicable to them. But, a comprehensive overarching framework has eluded us so far, a framework governing international investment as the most important vehicle for bringing goods and services to the foreign markets and integrating the production systems of individual economies.

What can we learn from the experience of the United Nations Code negotiations and the negotiations of related instruments for the establishment of such a framework?

The first lesson is that any effort to negotiate a binding comprehensive multilateral instrument, which defines in a balanced manner the rights and responsibilities of countries and TNCs on all important issues related to international investment, requires careful preparation before the actual negotiations begin. While the lack of such preparations was not decisive for the eventual failure of the United Nations Code negotiations (after all, the governments had largely agreed on the guidelines part of the

[2] The text that follows is the adapted concluding section of Karl P. Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 *Journal of World Investment and Trade* 11–87, available at: www.works.bepress.com/karl_sauvant/. That article also addressed the following questions: Why did these negotiations start and how did they unfold? What were the underlying interests? What were the OECD, ILO, and UNCTAD negotiating experiences on these issues? Why could negotiators not arrive at an agreement on a United Nations Code? Where do we stand today? What could bring about change?

draft, and they had reached consensus on the OECD, ILO, and UNCTAD instruments), it was an issue when it came to the more specific and technical treatment provisions. Negotiators need to be fully aware of the many difficult technical issues, the advantages and disadvantages of various trade-offs, the implications key provisions have for their national policy-making, the costs of violating provisions of any agreement, etc. A careful preparatory process is advisable for the negotiation of any international investment instrument, and it must be a process that is transparent and inclusive.[3]

Moreover, any effort of this complexity and magnitude presents a major challenge in today's environment.[4] While a comprehensive instrument provides more scope for trade-offs, it also requires that the interests of all the principal stakeholders need to be accommodated across a wide area of issues. Today, this is more difficult than it was 40 years ago. At that time, the principal stakeholders were governments, TNCs and trade unions. Today, one needs to add various vested interests, including practitioners of international investment law (i.e. the international investment arbitration profession), parliamentarians, and various non-governmental organizations. Important economic and political interests are at stake. Reaching consensus is also difficult, because new issues have arisen since the time of the United Nations Code negotiations, broadening the scope of negotiations and increasing the complexity of the subject matter on which agreement needs to be reached. These new issues range from such specific matters as abusive treaty shopping and whether state-owned enterprises need special rules; to the question of where the boundaries are of individual firms (especially in regard to supply chains) and the functioning of the ISDS mechanism; to such fundamental issues as to whether the purpose of the investment regime requires a reorientation toward sustainable international investment.[5] But, then, if a

[3] A prime example here is the process that led to the adoption of the "Guiding Principles for Business and Human Rights."

[4] See in this context the failed negotiations within the OECD of a Multilateral Agreement on Investment and the unsuccessful effort to deal with international investment in the WTO.

[5] Defined as FDI that makes a maximum contribution to the economic, social, and environmental developments of countries and takes place within mutually beneficial governance mechanisms (e.g. in the case of contracts) while being commercially viable. For an early effort to reorient international investment treaties toward sustainability, see the model treaty prepared by the International Institute on Sustainable Development: Howard Mann, Konrad von Moltke, Luke Eric Peterson, and Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development* (IISD, 2006), available at www.iisd.org/pdf/2005/investment_model_int_handbook.pdf. More recently,

comprehensive multilateral agreement is too difficult to achieve, a plurilateral or regional approach could be pursued, an approach in which a significant number of committed key players begin negotiations and invite others to join if and when they are ready to do so.

On the other hand, the rapid adoption of the OECD Guidelines, the ILO Tripartite Declaration, and the UNCTAD Restrictive Business Practices Set – all three negotiated in the shadow of the beginning United Nations Code effort – suggests that it may be easier to focus on specific aspects of the *problematique*, with a manageable agenda. This would involve negotiating issue-specific instruments, be they focused on treatment issues, guidelines, or any other aspect related to international investment. In such circumstances, a more limited range of interests is typically involved, and stakeholders may be more forceful and focused in moving the negotiations forward.[6] However, all the three instruments mentioned at the beginning of this paragraph are voluntary. Still, these three instruments represent the principal concrete legacy of the United Nations Code effort, apart, of course, from having brought the issue prominently and permanently on the international agenda and having helped to clarify many of the key issues involved.

The OECD, ILO, and UNCTAD instruments also show the importance of mutual self-interest, pressure that "something needs to be done" and political will. In the case of these three instruments, there was initially considerable pressure on governments and common self-interest (even if for different reasons) to take action, creating the political will to enter negotiations. Even then, however, there needs to be sufficient overlap of interest between key players in order to move the process forward and to a successful conclusion. However, as the United Nations Code negotiations showed (which also began under conditions of overlapping interest, pressure, and political will), it is difficult to maintain political will and overlapping interest over time, especially when circumstances change, pressure dissipates, and the general consensus about the overall objectives of the negotiations (guidelines and treatment) is fragile.

UNCTAD has pursued this issue through its Investment Policy Framework for Sustainable Development; see UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policy* (Geneva: UNCTAD, 2012), ch. IV.

[6] Specific issues addressed in the United Nations Code later became the subject of separate instruments; see, e.g. the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"* (United Nations Human Rights Office of the High Commissioner, 2011).

The iron needs to be struck while it is hot – which was done in the case of the instruments mentioned at the beginning of this paragraph.

Furthermore, even if an instrument is voluntary, its scope, content, implementation mechanism, and standing can be strengthened over time. This was the case for the OECD Guidelines, through the availability of a clarification mechanism, the strengthening of the implementation mechanism, the opening up of the implementation mechanism to other interested parties (especially, nongovernmental organizations), and the expansion of the topics covered. In the case of the ILO Declaration, an implementation mechanism was agreed upon after the original instrument was adopted and cross-references to new instruments negotiated in the framework of the ILO (e.g. on core labor standards) were added, expanding the reach of this particular instrument. (In the case of the UNCTAD Set, however, these possibilities were not utilized.) While this does not change the voluntary character of an instrument, it can make it more effective. Moreover, even voluntary instruments can be strengthened, for instance, by referring to them in binding international agreements. Finally, standards agreed to at the international level, even if voluntary, can become hard law in a national context, as happened, for example, with the Dodd Frank due diligence process provisions on conflict minerals in the United States,[7] which are based on the OECD voluntary due diligence instrument. This also suggests that, to whatever extent voluntary instruments exist, they should be used to the fullest extent possible.

The availability and strength of an implementation (or follow-up) mechanism becomes, therefore, crucial to making an instrument effective, as absent such a mechanism, a text alone risks becoming worthless. Follow-up can consist of a review of an instrument in regular intervals, as in the annual discussions of the ILO Tripartite Declaration and the review conferences of the UNCTAD Set that takes place every 5 years. The follow-up is stronger if a dedicated body has been established with the mandate to clarify issues that arise under the instrument, as was done in the case of the OECD and (although less effectively) in the cases of the ILO Tripartite Declaration. Moreover, an implementation mechanism can be upgraded over time, as in the case of the OECD Guidelines through the strengthening of the role of the National Contact Points. It was their implementation mechanisms, developed over time in the case

[7] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (21 July 2010), Section 1502.

of the OECD Guidelines and the active work of the ILO and UNCTAD secretariats, that made these instruments relatively effective by establishing forums for discussion and creating institutional homes and self-interest on the part of the organizations involved, including to promote the use of the respective instruments.

A crucial ingredient making the voluntary OECD – and ILO – instruments relatively effective was that key constituencies, in these cases, particularly, trade unions, had access to the implementation mechanisms of both the organizations in order to present cases/issues that involved possible violations of what had been agreed upon. In the case of the ILO Tripartite Declaration, workers' representatives played the key role. In the case of the OECD Guidelines, the majority of cases/issues initially brought for clarification were tabled by trade unions. Moreover, eventually, nongovernmental organizations obtained access to the OECD's implementation mechanism and used this access fully. Nongovernmental organizations made these two instruments, and especially the OECD Guidelines, "living instruments." Hence, access by key stakeholders to the implementation mechanism of any voluntary instruments agreed upon is likely to help ensure the effectiveness of these instruments.

It appears appealing to seek to negotiate a binding comprehensive multilateral instrument that, in a balanced manner, addresses the rights and responsibilities of all the major stakeholders on all important issues related to international investment, contained in a rational structure. But, absent a catalytic event, a grand design of this nature may be a bridge too far in the foreseeable future. The more likely approach to succeed – already successfully pursued at the beginning of the United Nations Code negotiations – may be an issue-specific approach, a pragmatic approach to seek agreement on aspects of the regulatory framework governing TNCs and their activities for which there is shared self-interest, pressure, and political will, in whatever forum that is most promising. Progress could be sought both regarding the treatment and guidelines aspects of a comprehensive regulatory framework. Part of such an approach could also be to seek a "hardening" of soft law (i.e. voluntary) instruments; the OECD Guidelines are a case in point, covering, as they do, over four-fifths of the world's FDI stock. Even if the resulting instruments are not perfect, they provide a platform on which further agreement can be built, especially, if there is a strong implementation mechanism that also provides access to nongovernmental groups.

Such an approach can also benefit from what appears to be a somewhat cyclical nature of rulemaking regarding international investment, with the pendulum swinging sometimes in favor of one type of instrument and at other times in favor of another type. Thus, during the 1970s and at the beginning of the 1980s, the watchword was "control," while during the later 1980s and the 1990s, the watchwords were "liberalization" at the national level and "protection" at the international level. Since 2000, national policies have become more nuanced,[8] while international instruments consisting of guidelines have been strengthened and new ones have been added, and some international investment agreements have become more cautious while also aiming for more liberalization.

Rulemaking may, therefore, be haphazard, messy, and uneven, depending on what is needed and what is feasible in a given constellation of interests and forces. But, hopefully, an overall regime is put in place over time that, through the combination of various instruments, becomes a regime that covers, comprehensively and in a balanced manner, the various aspects of the relationship between the governments and TNCs.

The international investment regime is in constant flux, but its evolution does not follow a preordained trajectory.[9] It should be helpful that the positions of key stakeholders – host and home country governments – have become less confrontational today than they were when the United Nations Code negotiations took place, and when the debate was essentially along North–South lines. Most importantly, a great number of developing countries and economies in transition are today themselves outward investors, and a number of them are among the most important home countries. As a result, especially the biggest among them define their own position in international investment agreements no longer solely (or primarily) as host countries interested in preserving their policy space, but increasingly also as home countries seeking to protect the investments of their firms abroad. Conversely, developed countries have "discovered" that they are important host countries – including for investments from emerging markets – and, in that position, seek to protect their policy space.

[8] This is reflected in the number of national policy changes related to foreign direct investment that make the regulatory framework less welcoming for such investment, as reflected, e.g. in the creation of screening mechanisms for national security purposes.

[9] On the evolution of the regime, *see* Jose E. Alvarez and Karl P. Sauvant, with Kamil Gerard Ahmed and Gabriela P. Vizcaino (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: OUP, 2011).

Still, the basic challenges that the United Nations Code negotiators faced remain. They include bridging the basic interests of key stakeholders, reconciling the application of national and international investment law governing foreign investment, finding the right balance between the rights and responsibilities of investors and governments, and having a dispute-settlement mechanism that is acceptable to all. Added to that is the challenge to make the international investment regime supportive of sustainable development, the world's most important economic policy challenge for the years ahead.

Improving the regime requires great effort, a considerable amount of time, and even more patience. Above all, improvements in the international investment regime need to be in the interest of governments, both in their capacity as home and host countries, and other key stakeholders, to give it the legitimacy and robustness that every international regime requires to be viable in the long run. While Professor Sornarajah's first choice may not be to have an international investment regime in the first place, such considerations might well find favor with him as a basis for improving the current regime. The experience gained during, and the lessons learned from, the negotiations of the United Nations Code and related instruments should be of help in reaching this objective.

ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT

Essays in Honour of Muthucumaraswamy Sornarajah

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