CHAPTER 3

Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD

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INTRODUCTION

This article aims to trace the history of United Nations involvement in the issue of establishing a regime for the accountability of transnational corporations ('TNCs'). Much of this story is well known, especially as regards the negotiating history of the draft UN Code of Conduct for TNCs. However, a fresh look at this history is in order in the light of recent developments in the programme of the Division on Investment Technology and Enterprise Development ('DITE') of the United Nations Conference on Trade and Development ('UNCTAD'), the body currently responsible for TNC issues within the UN, and as a result of the recent failure of negotiations of a Multilateral Investment Agreement ('MAI') under the auspices of the OECD.

As will be shown the UNCTAD-DITE programme is significantly different from that followed by the UN in the days of the Draft Code, the days of the UN Commission and Centre on TNCs. Those differences broadly express a shift in priorities in the regulation of foreign direct investment ('FDI') from control to protection and promotion and towards helping to recognize the contribution to development that FDI can make. Thus the current policy shows an awareness that many of the problems of development and social justice that lay at the heart of the earlier programme on TNCs remain with us to this day. The crucial issue is how to pursue those

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objectives in a manner that is both sensitive to, and feasible within, the contemporary world order. That, in essence, is the task facing UNCTAD.

The paper is divided into the following sections: First, it begins with a brief recap of the original UN policy on TNCs, centred on the draft Code of Conduct. Second, the paper traces the demise of this policy, and its attendant institutional changes leading to the current institutional arrangements in UNCTAD. Third, this paper describes and assesses the current UNCTAD programme in light of the issue of TNC accountability.

1 THE EVOLVING UN POLICY ON TNCS: 1972-1992

1.1 The original UN policy on TNCs: 1972-1992

The original UN policy on TNCs has its origins in the decolonization process after World War II. This had a number of relevant political and economic effects. First, although the political sphere of influence of the old metropolitan powers diminished, their economic influence upon the newly independent States continued. This was interpreted by many of these States as evidence of continuing economic imperialism conducted not by colonial administrators but by private firms. Secondly, the newly independent States gained a voting majority in the UN, where they became an important pressure group, the so-called 'Group of 77'. That group, supported by the then socialist Eastern Bloc States, ensured that the UN would place the interests of the newly independent states at the head of its economic and social agenda. This resulted in the development of the concept of a New International Economic Order ('NIEO'),[1] and of the 'right to economic self-determination' which demanded the attainment of economic independence as a necessary aspect of political independence.[2] These developments may be seen as the main sources of the original UN policy concerning TNCs.[3] This

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1 The principal UN General Assembly Resolutions on the New International Economic Order are: GA Res. 3201 of 9 May 1974, UN GAOR Supp. (No. 1) 6th Special Sess., UN Doc. A/9559 (1974), *The Declaration on the Establishment of a New International Economic Order*; GA Res. 3202 of 16 May 1974, UN GAOR Supp., 6th Special Sess., *The Programme of Action on the Establishment of a New International Economic Order*, both reproduced in 13 *ILM* (1974) pp. 715-766. These were followed by GA Res. 3281 (XXIX) of 15 Jan. 1975, UN GAOR Supp. (No. 31), UN Doc. A/9631 (1975), *The Charter of Economic Rights and Duties of States*, reproduced in 14 *ILM* (1975) pp. 251-265.

2 See further P. Muchlinski, 'The Right to Economic Self-Determination', in: J.N. Adams (ed.), *Essays for Clive Schmitthoff* (1983) p. 73.

3 See further J. Robinson, *Multinationals and Political Control* (1983) pp. 163-166; F.I. Nixson, 'Controlling the Transnationals? Political Economy and the United Nations

would include *inter alia* the legal reaffirmation of the right of a State to control the activities of TNCs operating within its borders.

In 1972 the Economic and Social Council of the UN requested the Secretary General of the UN to establish a group of eminent persons to study the impact of multinational corporations ('MNCs') on world development and international relations. The Group reported on 24 May 1974.[4] The Group's report helped to lay down not only immediate UN policy in the field of MNCs, but also what could be described as the 'conventional framework' of issues generated by MNCs in their relations with developing countries. As regards the former, the Group recommended the setting up of a UN Commission on Multinational Corporations and a UN Centre on Multinational Corporations to oversee and develop UN policy in this area. These bodies were soon renamed the UN Commission on Transnational Corporations and UN Centre on Transnational Corporations ('UNCTC'), taking account of UN terminological changes in this field.

The Group further recommended that the Commission should set about the task of formulating a Code of Conduct for TNCs. This was made a priority objective of the Commission at its first session in March 1975.[5] At its second session, the Commission decided to establish an Intergovernmental Working Group which would prepare a draft text of the Code on the basis of proposals or views put to it by states.[6]

In relation to the principal substantive issues, the Group adopted a philosophy that was not opposed to investment by TNCs in developing countries, but which required their regulation so that they could become instruments of development. The vision was one of a co-operative, rather than an adverse, relationship, coupled, however, with a recognition that powerful foreign firms could act in an abusive manner towards a developing host State. To that extent they had to be controlled. In particular, the Group accepted that the global organization, size and technological superiority of TNCs could threaten the sovereignty of the host State through the ability of the TNC to evade national regulation and taxation, to abuse its compet-

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Code of Conduct', 11 *Int'l J .Soc. L.* (1983) p. 83; W.J. Field, *Multinational Corporations and UN Politics: The Quest for Codes of Conduct* (1980).

4 UN Doc. E/5500/Add 1 (Part 1) 24 May 1974. The Report is reproduced in 13 *ILM* (1974) p. 800.

5 See UN Commission on Transnational Corporations, *Report on the First Session*, 17-28 Mar. 1975 (E/5655; E/C.10/6 Economic and Social Council Official Records 59th Session Supplement No. 12.) para. 9 at p. 2.

6 See UN Commission on Transnational Corporations, *Report on the Second Session*, 1-12 March 1976 (Economic and Social Council Official Records 61st Session Supp. No. 5, May 1976) paras. 10-17 and 47-51; reproduced in 15 *ILM* (1976) p. 779 at pp. 782-783 and p. 790.

itive power by distorting market conditions, and to exploit the lack of technological know-how of the host where the latter needed modern technology to ensure the growth of its economy. Furthermore, certain undesirable non-economic abuses were singled out for control. These included subversive political intervention in the host State,[7] the introduction of alien cultural values and lifestyles and the generation of intergovernmental confrontations between home and host States. All these abuses were to be controlled through national regulation backed up by international controls, based on the contents of an internationally agreed code of conduct. This would lay down clearly what TNCs could and could not do, and also the principles upon which the host country should formulate its policy towards TNCs. The key concept from the beginning was balance – a balance between the rights and responsibilities of countries and firms.

From the outset, however, it was clear that major disagreements existed as to the nature and contents of the draft Code. The capital-exporting States were concerned to use the Code primarily as a means of protecting TNCs against discriminatory treatment contrary to the international minimum standards accepted by these States. The countries belonging to the Group of 77, supported by the then socialist countries, were concerned to use the Code as a means of subjecting the activities of TNCs to greater regulation, in line with the contents of the UN Charter of Economic Rights and Duties of States, so as to avoid the adverse effects of TNC activities on national economic objectives and political independence.

The Intergovernmental Working Group began work on a draft text of the Code in January 1977. An early disagreement occurred over whether the Code should be addressed only to TNCs, as desired by the Group of 77, or whether it should also extend to the treatment of TNCs by host governments, as desired by the major capital-exporting countries.[8] Ultimately the capital-exporting countries succeeded. Thus the Economic and Social Council, by Resolution 1980/60 of 24 July 1980, affirmed in paragraph 6(g) that the Code should, 'include provisions relating to the treatment of transnational corporations, jurisdiction and other related matters'.[9] Thereafter the draft Code would consist of two main parts: the first on the activities of TNCs, the second on the treatment of TNCs.

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7 This may be seen as a response to the interference of ITT in Chile which led to the downfall of Salvador Allende's government in 1973.

8 See S.K.B. Asante, 'United Nations: International Regulation of Transnational Corporations', 13 *J. World Trade L.* (1979) p. 55 at pp. 57-58. This article contains a useful summary of the issues surrounding the draft Code at its inception.

9 See UN Commission on Transnational Corporations, *Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations*, UN Doc E/C.10/-1983/S/2 of 4 Jan. 1983, para. 13, reproduced 22 *ILM* (1983) p. 177 at p.181.

The Intergovernmental Working Group presented its report to the Commission at its eighth session in 1982.[10] Although the report had annexed to it a draft Code, this was still a rather incomplete document. No drafting had been done on the 'Preamble and Objectives', and major differences existed between States in the drafting of the substantive provisions, especially those dealing with the treatment of TNCs. Accordingly, on the recommendation of the Commission, the Economic and Social Council, in its resolution 1982/68 of 27 October 1982, decided that the Commission on Transnational Corporations should hold a special session, open to all States, early in 1983 for the purpose of concluding the Code.[11]

Since 1983, meetings of the special session were held on numerous occasions,[12] supplemented throughout the period by informal consultations. These meetings resulted in a number of revized drafts of the Code, culminating in the proposed text of 31 May 1990, submitted by the Chairman of the reconvened special session of the Commission to the Economic and Social Council.[13] This represents the last version of the draft Code. Despite continued efforts at revisions of the draft Code, negotiations were in effective deadlock for many years, reflecting deep-rooted disagreements between the developed capital-exporting States and capital-importing members of the Group of 77 over fundamental issues as to the content, legal status and relationship with general international law of the Code. Finally, in July 1992, negotiations over the Code were suspended.[14]

The period of negotiations was marked by a shift away from a strongly regulatory approach towards TNCs and its gradual replacement in success-

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10 See UN Doc. E/C.10/1982/6 of 5 June 1982.

11 See UN Commission on Transnational Corporations, loc. cit. n. 9 above para. 15 at p. 182.

12 Meetings of the special session were held on 7-18 Mar. 1983, 9-21 May 1983, 11-29 June 1984, 9-13 Nov. 1984, 17-21 June 1985, 20-31 Jan. 1986, 14 Apr. 1986, 6 Apr. 1987 and 24 May 1990.

13 The 1990 proposed text can be found in UN Doc. E/1990/94 of 12 June 1990 or in Annex IV of the UNCTC Publication, *Transnational Corporations, Services and the Uruguay Round*, UN Doc. ST/CTC/103 (1990). This text supersedes the 1988 text which can be found in UN Doc. E/1988/39/Add.1. of 1 Feb. 1988. The text of the Code as it stood in the Summer of 1986 can be found in Annex I to UNCTC Publication, *The United Nations Code of Conduct on Transnational Corporations*, UNCTC Current Studies (Series A) No. 4, UN Doc. ST/CTC/SER.A/4 (1986). Earlier formulations of the draft Code can be found in UN Doc. E/C.10/1984/S/5 of 29 May 1984, reproduced in 23 *ILM* (1984) p. 602 at pp. 626-640 and UN Doc. E/C.10/1983/S/2, loc. cit. n. 9, at pp. 192-206. This reproduces the first draft Code submitted by the Intergovernmental Working Group in 1982.

14 International Chamber of Commerce, *Annual Report 1992* (1992) p. 24.

ive drafts of the Code with formulations closer to those favoured by the capital exporting countries.[15]

It was generally agreed that States had the right to control the entry and establishment of TNCs within their territory, including the determination of the role that such corporations could play in economic and social development and the prohibition or limitation of their presence in specific sectors.[16] Equally, there was considerable agreement over the contents of the section entitled 'Activities of Transnational Corporations' which laid down the duties of TNCs towards host States.[17] The major disagreements arose in relation to the treatment of TNCs after they had been admitted into a host country. These centred around whether a reference to international law should be included in the Code, whether and to what extent national treatment should be protected and as to the precise extent of the right of expropriation and the levels of compensation payable in the event.

The history of the draft Code represents a growing compromise by those States advocating TNC control of their original objectives. It also reflects certain fundamental changes in the environment for FDI which were to render a blow not only to the draft Code but also to influence the re-organization of the institutional machinery set up by the UN to deal with TNC issues.

1.2 The Shift Away from TNC Control Towards Investment Promotion and Protection: 1990-93

By the early 1990s the UNCTC itself was beginning to have doubts about the initial calls for a universal code laying down obligations for TNCs. In its view the economic and political conditions which gave rise to those calls had changed.[18] Developing countries were now faced with an acute shortfall of investment by comparison to the days of the early 1970s. While investment by TNCs in developed countries had increased, it had stagnated

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15 See, e.g., the Preamble to the draft Code and UNCTC, *The United Nations Code of Conduct on Transnational Corporations,* op. cit. n. 13, at pp. 2-3.

16 1990 Draft Code para. 48; UNCTC 1990 loc. cit. n. 13, at p. 180.

17 Ibid. This section is divided into three parts. The first deals with general obligations of TNCs (paras. 7-20). The second part deals with economic, financial and social obligations of TNCs (paras. 21-46). The third deals with disclosure (paras. 47-58).

18 See UNCTC, *The New Code Environment* (1990); summarized in UN Doc. E/C.10/1990/5 of 29 Jan. 1990. See also Report of the Secretary-General, *Transnational Corporations in the New World Economy: Issues and Policy Implications*, UN Doc.E/C.10/1992/5, 5 Feb. 1992; Report of the Secretary-General, *International Arrangements and Agreements Relating to Transnational Corporations*, UN Doc. E/C.10/1992/8, 18 Feb. 1992. This paragraph and the next are adapted from Muchlinski, op. cit. n. 2, at pp. 596-597.

in developing countries.[19] According to the UNCTC, this raised new policy questions, leading to what it called a 'New Code Environment', an environment in which a code of conduct that reflected those questions would be more relevant than ever. No longer was the control of the potentially negative impacts of TNCs the major issue; rather it was how best to re-integrate developing countries into the global economy in a manner that ensured inflows of new investment capital. Given that TNCs were a primary vehicle for such integration, any future Code should be geared to the realisation of this goal.[20]

Furthermore, certain fundamental disagreements were becoming increasingly irrelevant given the logic of the 'New Code Environment'. Thus the debates over nationalization and a reference to international law or obligations assumed equity ownership structures that were now less frequently used, being increasingly replaced by reduced equity and non-equity forms of investment structures by firms.[21] Moreover, local ownership as evidence of control had also diminished as an objective for host States. They, 'may aim instead at capturing a larger share of the economic benefits that derive from a transnational corporation's non-equity competitive advantages'.[22]

These changes in attitude can be attributed to changes in the economic and political climate during the 1980s and to increased knowledge about TNC operations.[23] On an economic level, the 1980s marked a slowing down of growth in the world economy, especially in the manufacturing sector, combined with an increased scarcity of financial capital, especially for developing countries, in the wake of the 'debt crisis' of the early 1980s. This led to greater competition between States for FDI. On a political and ideological level a number of States, notably the US and UK, underwent changes in government resulting in influential administrations that were sympathetic to neo-classical political economy and its liberal approach to FDI. A similar development could be traced in the European Commission with the coming of the European Single Market programme. In addition, the formerly socialist States of the Eastern Bloc abandoned command economy structures and began moving towards free-market economies. Moreover, in developing countries, external economic forces caused a rethinking of earlier political commitments to nationalistic and State-led economic policies. Increasingly, the problem of economic efficiency challenged governments to work out new approaches. As a consequence many States

19 E/C.10/1990/5, paras. 16-20 at p. 8.
20 Ibid., paras. 39-41.
21 Ibid., para. 45.
22 Ibid., para. 47.
23 See Muchlinski, op. cit. n. 2, at pp. 10-11.

attempted the privatisation of State-owned companies, some of which were previously foreign-owned, and the introduction of more competition into the economy.

In the international arena, the fears generated by calls for a NIEO on the part of developing countries, led to a reaction by developed countries. They were moved to use their leverage with the weaker developing countries not only to limit the scope of the proposed UN Code of Conduct but also to bring about a new regime of bilateral investment protection treaties coupled with action aiming to establish new international institutional structures for investor protection through the World Bank and, more recently, through the Uruguay Round negotiations under the General Agreement on Tariffs and Trade ('GATT') which resulted in the first multilateral disciplines concerning FDI in the fields of services, intellectual property and performance requirements, to be administered by the World Trade Organization ('WTO').

In light of these changes in environment and perception, and as a result of the restructuring of the UN administrative bureaucracy under the former UN Secretary-General Boutros Boutros-Ghali, in 1992, the UNCTC was reorganized and renamed as the Transnational Corporations Management Division ('TCMD'), one of eight divisions of the United Nations Department of Economic and Social Development. Its task was to act as the secretariat to the UN Commission on TNCs. In 1993 the UN programme on TNCs was transferred from the UN Department of Economic and Social Development in New York to UNCTAD in Geneva. This relocation is significant, not only as it places responsibility for TNC issues in the hands of that part of the UN system directly responsible for economic development issues, but also as Geneva is the home of the WTO.

A new Division on Transnational Corporations and Investment ('DTCI') was established. This has since been re-named the Division on Investment, Technology and Enterprise Development ('DITE'). In the meantime, the UN Commission on TNCs was wound up and replaced by the Commission on Investment Technology and Related Financial Issues (the 'Commission') which reports to the Trade and Investment Board of UNCTAD as the body supervising the development of the UN TNCs programme. The Board is ultimately responsible to the UNCTAD Conference itself.

According to the UNCTAD *World Investment Report 1995*, 'DTCI seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. The work of the Division is carried out through intergovernmental deliberations, policy analysis and research, technical assistance activities, seminars, workshops and

conferences'.[24] Thus DITE can be seen as a high powered 'think tank' with the aim of helping developing countries to get good quality FDI that will assist in economic development. In this regard the current institutional aims are not very different to those envisaged by the original Group of Experts in 1974. Nonetheless an important policy-making function has been taken away. No longer are negotiations over a code of conduct or other normative instruments within the remit of the current intergovernmental machinery. This is significant in view of more recent developments in relation to the future of a MAI, which include calls for negotiations to be resumed in the UN system. Finally, it is important to distinguish clearly between the Commission and the Secretariat, which is embodied in DITE. The Commission consists of representatives of the governments that comprize the membership of UNCTAD. Thus it reflects the majority opinion of those representatives. By contrast the Secretariat has to serve all members and is therefore always more likely to take a more 'centrist' view of investment issues.

2 CONTEMPORARY UN POLICY: FDI PROMOTION AND PROTECTION AND 'FLEXIBILITY FOR DEVELOPMENT'

The process of change described above has resulted in a new policy orientation at the UN. This is to be found in the mandate given to UNCTAD at the Ninth Session of the Conference held in Midrand, South Africa, in 1996.[25] Its principal features can be summarized as being: first, a stronger emphasis on factual and policy analysis and wider policy discussion; secondly, technical assistance to developing countries in response to a growing demand for inward investment; thirdly, and, for the purposes of this paper, most importantly, the development of a programme concerning a possible multilateral framework on investment ('PMFI'), which will be considered in detail in the next section of the paper.

The 'think tank' function of DITE is perhaps best exemplified by the annual World Investment Reports ('WIRs') produced by TCMD, DTCI and DITE since 1991. Each Report contains an annual update on FDI trends

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24 UNCTAD, *World Investment Report 1995* (1995). In the *World Investment Report 1996* the reference to policy analysis and research was dropped and the reference to DTCI was replaced by a reference to UNCTAD, thereby emphasizing the actual source of the UN TNCs programme as the Conference itself.

25 See the Midrand Declaration of 11 May 1996 adopted by the 9th Session of UNCTAD. para. 89 (a)-(g), <http://www.unctad.org/en/special/u9midra.htm>, accessed on Sept. 20, 1999. See further UNCTAD, *Report of the Proceedings of the United Nations Conference on Trade and Development Ninth Session Midrand, South Africa, 27 April - 11 May 1996* (Geneva: UN, Sales No.E.97.II.D.4).

both globally and by region, and a section analyzing a topical issue in FDI regulation. Each report is compiled by members of the DITE Secretariat working with a global network of scholars and practitioners specializing in FDI issues. Among the pages of the WIRs, issues relevant to corporate liability have been addressed including *inter alia*: employment and the workplace and corporate social responsibility in 1994, the problems relating to a multilateral agreement on investment in 1996, competition regulation of FDI in 1997 and double taxation agreements and impacts on FDI of international investment agreements in 1998. These Reports, though not immune from criticism, have become an authoritative source of data and of balanced debate on FDI related issues.[26]

As regards technical assistance, the Midrand mandate specifies a number of policies which can enhance the capacity of developing countries and countries in transition to benefit from FDI. These include: investment policy reviews with member countries aimed at familiarizing other governments and the private sector with that country's investment environments and policies; enhancing the overall investment climate, obtaining information and formulating policies to attract, and benefit from, FDI; assistance in the area of accounting standards and accounting education and related activities; exchanging experiences on investment promotion and the benefits of FDI among host countries; promoting investment among developing countries; and investigation of how to mobilize the private sector in order to encourage investment flows into the least developed countries.[27]

3 THE POSSIBLE MULTILATERAL FRAMEWORK ON INVESTMENT

The Midrand mandate in this area requires UNCTAD to identify and analyze the implications for development of issues relevant to a PMFI, 'begin-

26 For reviews of the WIRs see: on the 1998 *WIR*: B. Sutcliffe 'Development: Capitalism sans frontiers?', *South-North Development Monitor* (1998) no. 4321; on the 1997 *WIR*: R. Vernon, 'World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy', 47 *Economic Development and Cultural Change* (1999) no. 2; on the 1996 *WIR*: E. Safarian, 'Wold Investment Report 1996: Investment, Trade and International Policy Arrangements', 5 *Transnat'l Corp.* (1996) p. 163; on the 1995 *WIR*: L. Eden, 'World Investment Report 1995: Transnational Corporations and Competitiveness?', 5 *Transnat'l Corp.* (1996) p. 145; on *WIR 1994*: P.J. Buckley, 'World Investment Report 1994: Transnational Corporations, Employment and the Workplace', 3 *Transnat'l Corp.*, (1994) p. 91; on *WIR 1993*: J. Behrman, 'World Investment Report 1993: Transnational Corporations and Integrated International Production', 2 *Transnat'l Corp.* (1993) p. 149.

27 UNCTAD, *Midrand Declaration*, op. cit. n. 25.

ning with an examination and review of existing agreements, taking into account the interests of developing countries and bearing in mind the work undertaken by other organizations'.[28] The PMFI has been interpreted as encompassing all international investment agreements ('IIAs'), be this at the bilateral, regional or multilateral levels. Furthermore, the mandate to deal with 'existing' agreements can be seen as a compromize act to deal with the MAI which was under negotiation then. According to UNCTAD, its prime objective in this area, 'is to help developing countries and economies in transition participate as effectively as possible in international discussions on investment rule-making, be it at the bilateral, regional, plurilateral or multilateral level. This reflects the need for greater information, transparency and proper economic and legal analysis'.[29]

Thus the approach focuses on international developments in rule-making. As such the resulting programme has been criticized by NGOs, from both developing and developed countries, for having been set not so much by the needs of developing countries but by the structure and content of the MAI negotiations and the investment promotion and protection agenda upon which these were based.[30] Indeed, UNCTAD has been perceived as being in favour of a MAI, an impression said to have been reinforced in the *WIR 1996*, which contains a section seemingly advocating the conclusion of a multilateral framework for investment as a development friendly policy.[31]

At the outset it should be stressed that UNCTAD was never in favour of the OECD's MAI. That was an OECD initiative upon which UNCTAD had no official position. UNCTAD has, rather, concentrated on the more general issue of a multilateral framework for investment. However, even in this wider context, as a close reading of the *WIR 1996* shows, UNCTAD has never advocated the adoption of a multilateral framework for investment as a cure-all for developing country economic development. Indeed the stress is on proceeding with bilateral and regional arrangements and on the importance of the development dimension, which requires *inter alia* safeguards for developing countries by way of transitional periods, advancement through special measures to be taken by developing countries to increase benefits from FDI and home country support for development friendly FDI.[32]

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28 See UNCTAD, 'UNCTAD's work programme on a possible multilateral framework on investment: an update', *UNCTAD Issues Note* (18 Feb. 1999).

29 Ibid., at p.1.

30 See especially the views of the Third World Network summarized in 'No MAI, but MFI with GATS approach, says Fortin', *South-North Development Monitor* (Geneva, 17 June 1998).

31 UNCTAD, *World Investment Report 1996* (1996), ch. VI.

32 Ibid., at pp. 195-196.

Furthermore, UNCTAD has always included in the agenda issues that go beyond the narrow investor protection agenda pursued in the MAI negotiations.[33] These points are reinforced by the way in which the PMFI policy has evolved, especially as regards the range and scope of the IIA Issues Papers discussed below. UNCTAD's work in this area involves a 'two-track' process: first, substantive support is given to the intergovernmental debate in various intergovernmental bodies, especially the Commission, and its expert meetings on the subject and, secondly, the secretariat's work.[34]

3.1 Substantive Support to the Intergovernmental Debate

The Commission is one of the three subsidiary bodies of UNCTAD's Trade and Development Board. It holds annual meetings that draw on the findings of expert meetings whose task is to exchange experiences and to debate existing investment agreements and their implications for development. The most recent of these meetings was held between 24 and 26 March 1999 and dealt with the issue of flexibility for development in international investment agreements. This followed on from two earlier meetings in May 1997 on bilateral investment agreements ('BITs') and on regional and multilateral IIAs and their development dimension.[35]

The discussions at the most recent expert meeting have made more explicit the need for development needs to direct the formulation and implementation of IIAs. Discussion was based on a Secretariat Note entitled 'International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development'.[36] The Note stresses that IIAs need to be flexible in the interests of developing countries. This is especially important in view of the fact that while the parties to an IIA may be formally equal, resulting in 'legal symmetry', they may be at different levels of economic development, resulting in 'economic asymmetry'.[37] The Note suggests that a degree of flexibility in IIAs, as they

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33 These include restrictive business practices, transfer pricing, technology transfer, employment, environment and illicit payments. Ibid., at pp. 184-189. See further the discussion of the Issues Papers on International Investment Agreements *infra* Section 3.2.1.

34 *UNCTAD Issues Note*, loc. cit. n. 28, at p. 1.

35 See *Report of the Expert Meeting on Existing Agreements on Investment and Their Development Dimensions* (Geneva 28-30 May 1997) UNCTAD Doc.TD/B/COM.2/5 TD/B/COM.2/EM.1/3, 18 June 1997. The discussions of the expert meeting on BITs are reflected in the final version of the *UNCTAD Publication Bilateral Investment Treaties in the Mid-1990s* (1998) (UN Sales No.E.98.II.D.8).

36 UNCTAD Doc.TD/B/COM.2/EM.5/2, 5 Feb. 1999.

37 Ibid., at para. 11, p. 6.

apply to participating developing countries, can be achieved through the following techniques:

(i) Objectives: typically, the preamble of an agreement is the repository of its aims and purposes. It can spell out specific objectives that elaborate on general development themes or it can introduce development concerns for the first time in an agreement;
(ii) Substantive provisions: development concerns can serve to determine which issues are included in an IIA and which are not, as well as the manner in which the issues included are dealt with;
(iii) Modalities of implementation and technical assistance: these relate to the ways in which agreements operate to further development objectives. This can include technical assistance, not only as regards the implementation of agreements but also beyond. Development-oriented considerations can, furthermore, be the basis for exceptions and derogations as well as transitional periods for compliance by developing countries;
(iv) Overall structure: here it is the very design of an agreement, not merely its substantive content, that can further development.[38]

Thus, the Note suggests that the outcome of negotiations for an IIA, regardless of whether it is bilateral, regional or multilateral, can take account of the special concerns of developing countries thereby ensuring that they are not exposed to the risk of radical liberalisation and/or obligations to protect foreign investors where they may not be in an economic position to deal with them.

This approach should not be misread as a means of 'massaging' developing countries into regimes that are beneficial to foreign investors only. The failure of the MAI negotiations shows that the conclusion of IIAs is a very complex process in which full consensus, even among developed countries, is hard to achieve. As the Secretary-General of UNCTAD, Rubens Ricupero, has stressed on a number of occasions, the failure of the MAI is not a 'North versus South' issue. It shows difficulties that all countries will have with unconditional and unqualified liberalisation of investment regimes. However, it also shows that, to be useful, IIAs must be sensitive to the real needs and interests of the various types of countries that participate in them. Thus the stress on 'flexibility for development' is an important way in which the debate on a useful approach to IIAs can evolve.

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38 Ibid., at para. 12, p. 6. Recently, at the request of a group of delegates from both developed and developing countries, the WTO has asked UNCTAD to submit this paper to the WTO Working Group on the Relationship Between Trade and Investment.

Perhaps the one area that is missing from UNCTADs deliberations in this field, is an express acknowledgement that, at its heart, the debate on flexibility is a debate about the permissible limits of host country discretion at the local level, the level where the 'real world' of FDI takes place. The linkage of the structures and contents of IIAs with the operational priorities of host developing countries must be further examined in this context. This may require more detailed consideration than has occurred to date of the relationship between investor protection rights and investor responsibilities in host countries. In this regard the old UN policy centred on the draft Code of Conduct was perhaps closer to these vital concerns, though it suffered from being identified with what can be termed as 'Cold War' agendas of competition between pro- and anti-capitalist ideologies. In the contemporary environment, however, the link between rights and responsibilities of investors should not be perceived as so threatening as to be omitted from the agenda. In a sense this is, to use current British political jargon, a 'Third Way' issue that has a clear acceptability to both business, government and civil society.[39] UNCTAD is in a very good position to further develop these concerns as part of the 'flexibility' agenda to which a 'social responsibility' agenda may be added.

This has particular significance in the light of the fact that, following the 1996 Ministerial Conference of the WTO in Singapore, UNCTAD has been given special observer status in the WTO working group on the relationship between trade and investment and in the WTO working group on the interaction between trade and competition policy. Though neither working group is charged with the preparation of a WTO based multilateral framework for investment these bodies have a significant role to play in the evolution of WTO competence in the investment field. In turn UNCTAD has a significant role to play in ensuring that the development dimension is introduced into the work of these groups. It may also have a similar role to play if, at some future time, negotiations on a multilateral framework for investment begin at the WTO.[40] Such an involvement would render any WTO based initiative quite distinct from the failed MAI, which tended too far towards a narrow investor promotion and protection agenda.

UNCTAD has contributed to the discussions of the working group on the relationship between trade and investment. The official reports of the Commission relating to IIAs and their development dimension are made available to the group on a regular basis. At the group's March 1998 meet-

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39 On the 'Third Way', see A. Giddens, *The Third Way: The Renewal of Social Democracy* (1998).

40 See M. Shahin, 'Multilateral investment and competition rules in the World Trade Organization: An Assessment', 6 *Transnat'l Corp.* (1997) p. 171 at pp. 175-176.

ing, UNCTAD summarized the main results of its recent work on existing investment agreements. At the June 1998 meeting UNCTAD explained its ongoing work, briefly described above, on the development dimension of IIAs. At the third meeting in September 1998, at the group's request, UNCTAD submitted a paper comparing the OECD Guidelines on Multinational Enterprises and the draft UN Code of Conduct on TNCs.[41] This suggests that the relationship between the rights and responsibilities of investors is being taken seriously at the WTO. It is notable also that although the Draft Code of Conduct was never adopted, it remains a source of examples and ideas as to how the responsibilities of investors should be approached in an IIA. The continuing influence of the Code negotiations should not be lightly dismissed, as they provide a starting point of experience which can inform many contemporary problems involved in the drafting of provisions in IIAs. Indeed, UNCTAD was asked by the working group to add to its comparison between the Draft UN Code and the OECD Guidelines the text of the Draft UN Code as well as the UNCTAD draft Code on the Transfer of Technology and the only adopted UNCTAD Code, the set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices of 1980.[42]

3.2 Secretariat Work

The work of the Secretariat on the PMFI programme consists of the following elements: the preparation and dissemination of a series of 'International Investment Agreements Issues Papers', the organization of capacity building seminars, regional symposia and training courses, responding to *ad hoc* technical assistance requests, the organization and facilitation of public private sector dialogue and research and policy analysis.[43]

3.2.1 The 'Issues Papers' Series

This aims to discuss the key concepts in IIAs and to present them as a series of issue specific 'handbooks' which may be used by non-specialist end users to understand the technical aspects of the issue in question. Each paper seeks to identify the principal questions raised by the issue under examination, to

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41 *UNCTAD Issues Note,* loc. cit. n. 28, at p. 2. The deliberations of the group involving UNCTAD's presentations are summarized in the *1998 Report of the Working Group on the Relationship Between Trade and Investment to the General Council,* WTO Doc.WT/WGTI/2 (8 Dec. 1998) especially at pp. 51-62, paras. 191-225.

42 Ibid., para. 225, at p. 62. On the draft Technology Transfer Code see Muchlinski, op. cit. n. 1, at ch. 12; on the set of Multilaterally Agreed Principles on Restrictive Business Practices see Muchlinski, ibid., ch. 11.

43 *UNCTAD Issues Note,* loc. cit. n. 28, at pp. 2-5.

provide a stocktaking of the way in which existing agreements have dealt with the issue, identifying, where possible, different models of provisions which relate to that issue, how the issue interacts with other key issues in IIAs and, by way of conclusion, what are the principal economic and development implications of the issue and, in the light of identified models of provisions, what options are open to countries as regards dealing with the issue in an IIA.

The aim of the series is not to prescribe how negotiators of IIAs should act, only to offer a better understanding of the available alternatives by pointing out those alternatives and by providing references to where they exist through precedents. It would be beyond the mandate given to UNCTAD at Midrand for this body to instruct countries as to the proper policy to pursue. In any case this would be futile as the member countries of UNCTAD are sovereign. Thus it is up to each country to decide for itself whether it wishes to follow a more or less restrictive policy on the treatment of foreign investors. The Issues Papers are no more than an aid to this process.

The issues to be covered in the series follow the most common clauses found in IIAs.[44] These include (in alphabetical order): admission and establishment,[45] dispute settlement (investor-State), dispute settlement (State-State), fair and equitable treatment, funds transfer, most-favoured-nation treatment,[46] national treatment, scope and definition,[47] taking of property, and transparency. However, the UNCTAD agenda is wider than this. The Issues Papers therefore also deal with matters not often found in traditional investor protection oriented BITs or other IIAs. These involve, first, certain commercial/industrial issues including competition, home country measures, host country operational measures, illicit payments, incentives, investment related trade measures ('IRTMs'),[48] taxation, transfer of technology, and transfer pricing;[49] secondly, social issues such as employment, environment and corporate social responsibility. In addition certain titles consider wider background issues which will impact on the negotiation and conclusion of IIAs. These include the economic question of foreign direct investment and development,[50] modalities and implementation issues, and

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44 See UNCTAD, *Report on the Launching of UNCTAD Issues Papers on International Investment Agreements* (Geneva 16 and 18 Feb. 1999) UNCTAD/ITD/Misc.12, 16 Mar. 1999, at pp. 11-12.

45 Already published UN Sales No.E.99.II.D.10.

46 Already published UN Sales No.E.99.II.D.11.

47 Already published UN Sales No.E.99.II.D.9.

48 Already published UN Sales No.E.99.II.D.12.

49 Already published UN Sales No.E.99.II.D.8.

50 Already published UN Sales No.E.98.II.D.15.

an overview of present international arrangements for foreign direct investment. A further title will consider lessons from the Uruguay Round negotiations.

The Issues Papers have been made available not only to the general public, but in particular to the member States of UNCTAD and WTO, both through their Permanent Missions and through the training events that form part of the project.

3.2.2 Capacity Building Seminars, Regional Symposia and Training Courses

A number of regional symposia for decision-makers in the field of FDI regulation have taken place in developing countries. The first was in Fez, Morocco, for African countries in June 1997. Since then three further symposia have been organized in New Delhi, India, in July 1998, for Asian countries, in Kingston, Jamaica, in September 1998, for Caribbean countries, in Lima, Peru, in November 1998, for Andean Group countries and in Cairo, Egypt, in May 1999, for Arab countries. Future symposia are in preparation, as well as an inter-regional symposium in China scheduled for September 1999. The delegates to these symposia include not only government officials and UNCTAD specialist faculty but also representatives of civil society and specialist academics from the region. In this connection, a significant development arose in the context of the Regional Symposium in New Delhi. The Indian based Consumer Unity and Trust Society (CUTS) co-organized with UNCTAD a round table for NGOs for the day after the symposium. This event can be seen as a response by UNCTAD to criticisms against its policy on IIAs already mentioned above. Since the Delhi meeting it is now become a part of UNCTAD practice to organize similar meetings with local representatives of civil society, in addition to their participation in the symposium itself. Such a meeting took place after the Peruvian and Egyptian symposia.

As to the capacity building seminars, these have taken place in co-operation with the WTO and involve delegates from the Permanent Missions to the two organizations, specialist UNCTAD faculty and representatives from NGOs trade unions and business. Three such seminars have taken place: two for anglophone countries in February and June 1998 and one for francophone countries in April 1999.

Finally, training courses for negotiators from developing countries are currently in preparation. These will involve both a familiarisation of the main issues, using the Issues Papers as part of the training package, and simulation exercises. These will be useful not only for a PMFI, but also for the considerable treaty-making activity already taking place at the bilateral and regional levels.

3.2.3 Ad Hoc Technical Assistance

This is offered in response to requests by member countries. A recent example involved a request by the Group of 15 for a forum to negotiate BITs among the G-15 countries. The forum was held from 7-14 January 1999 and resulted in the negotiation of eight BITs. UNCTAD organized the event and provided the resource persons and background documentation.[51]

3.2.4 Facilitation of Public/Private Sector Dialogue

UNCTAD has hosted a number of round table events to promote dialogue on IIAs between Geneva based ambassadors with interested groups from civil society and the private sector. The first such dialogue was organized with the co-operation of the European Round Table of Industrialists in December 1997. This was followed by a dialogue with ambassadors and NGOs in June 1998 which was held just prior to the annual UNCTAD-NGO consultations. A similar event took place with the International Confederation of Free Trade Unions in December 1998.

3.2.5 Research and policy analysis

This aspect of the PMFI programme is part of the wider research activities of UNCTAD already mentioned above.

The PMFI programme is evaluated by independent evaluators who attend all events and critically assess their utility to members. To date evaluations have been positive. The programme is also monitored by the principal funding countries and bodies which include: Australia, Brazil, Canada, the Netherlands, Norway, Switzerland, the United Kingdom and the European Union. Periodic meetings are held with UNCTAD to discuss progress.

CONCLUSIONS

This paper has sought to trace the development of UN policy in the field of TNC regulation from its inception in the early 1970s to the present. The abiding theme has been the shift from a negotiating process aimed primarily at the conclusion of a Code of Conduct addressed to TNCs and governments, to a more detached and analytical approach aimed at ensuring further and better knowledge concerning the activities of TNCs and their effects on the development process, and on ensuring that developing countries are themselves better aware of, and able to deal to their benefit with,

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51 *UNCTAD Issues Note*, loc. cit. n. 28, at p. 4; UNCTAD, *Bilateral Investment Treaties Among the G-15: Bilateral Negotiations Final Report*, UNCTAD/ITE/Misc.7/Rev.1 (15 Mar. 1999).

the principal issues arising out of a possible emerging global framework of investment rules.

It is possible to describe this shift as one towards a new 'consensus' in international investment policy, one which may view TNCs in a less hostile manner than before and which places investor protection alongside development concerns. However, that is to assume that the original UN position was different. The Group of Experts vision in the 1970s was precisely that of consensus around the basic assumption that FDI by TNCs is good for development but that it may need a degree of regulation to ensure that this is the case. The contemporary version of this vision stresses 'balance' and 'flexibility' for development in the way that possible future IIAs are drawn up.

Against this general conclusion, certain more specific points may be made. First, the draft UN Code of Conduct, as shown above, may still have some role to play in this process. Indeed, its contents appear far less controversial now than they did in the more politically polarized days of the 1970s and 80s. The question arizes what role can the Draft Code actually perform? Despite its age, it is sufficiently broad in its subject matter to encompass many of the issues that the contemporary agenda has placed at the heart of discussion including, for example, disclosure, taxation, competition and environmental protection, not to mention respect for human rights and for the internal cultures and political systems of host countries. On the other hand, the Draft Code cannot be used as a means of avoiding new negotiations concerning the scope and content of a new, balanced, regime of rights and responsibilities for investors. First, certain provisions of the Draft Code, notably those concerning non-collaboration by TNCs with racist minority regimes on Southern Africa are a product of their time. They should be replaced by an expanded provision on respect for human rights and fundamental freedoms. Secondly, the provisions on the treatment of TNCs, which led to the non-conclusion of the Code, will need to be re-examined in the light of contemporary investment patterns and policies. Here the problems encountered by the negotiators of the Draft Code have not disappeared, and the alternative formulations at which the negotiating process ended still display the basic starting points of debate. However, they do not encompass the debate as it might evolve now. For example, in the controversial area of national treatment, no mention is made in the Draft Code of exceptions or reservations. In any future multilateral regime on FDI, such issues will inevitably be included. Thirdly, the Draft Code was intended to be a non-binding instrument. A future regime of rights and responsibilities for investors is likely to be legally binding. Thus greater detail and precision will be required of its provisions. The Draft Code did not need to offer such a degree of drafting sophistication. So, while it may point the way to

the general content and approach to a new regime for investment regulation, the Draft Code cannot, by itself, offer that regime.

This point leads to a second concern, the widening of the agenda of IIAs, and how to deal with it. The paper has shown that UNCTAD is in the process of responding to this challenge, both as regards the range of substantive issues covered and through the diversity of the dialogues with governments, business and civil society that it has, and continues to, engage in. However, there is room for more detailed consideration of certain issues. Corporate responsibilities were highlighted above as an example. This in turn demands further understanding of the linkages between issues.[52] This may require a more fully institutionalized structure of consultation not only with business and civil society but also with other UN agencies and outside bodies responsible. The linkage with the WTO on training issues is one example of what may become a wider series of contacts that go beyond informal interactions. Indeed, following the pattern of the seminars for delegates, a series of joint UNCTAD and WTO seminars is being launched for NGOs.

In addition, as noted above, the 'top-down' approach of the UNCTAD agenda must be supplemented with further research and discussion of the local effects of FDI regulation. The 'bottom-up' aspects of this process have not been as fully developed as they should be. If they are not, UNCTAD may well be perceived as being out of touch with real issues and concerns. Thus issues such as the interaction of national, regional and multilateral regulatory regimes should be more fully investigated, as should local systems for the attraction and control of FDI.[53]

Thirdly, should a negotiating process for a multilateral framework for investment commence in the near future, UNCTAD may have a role to play as part of the secretariat for such a process. Much has been said of the WTO as a possible future forum for negotiations. Critics have argued that this would place too great an emphasis on liberalisation and investor protection, given the WTO mandate. On the other hand the WTO is the only body which already has experience of negotiating and operating an emerging multilateral framework for investment through the GATS, TRIMS and TRIPS agreements, and the financial services and telecommunications protocols. What is needed is a balancing of these priorities with the wider priorities connected with the existing UNCTAD programme. Perhaps the best

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52 On which see further S. Picciotto, 'Linkages in International Investment Regulation: The Antimonies of the Draft Multilateral Investment Agreement', 19 *U. Pa. J. Int'l Econ. L.* (1998) p. 731.

53 On which see UNCTAD, *World Investment Report 1992* (1992), which considered FDI and development; the *World Investment Report 1999* will address that issue again.

approach would be to create an arms-length relationship with the WTO and UNCTAD by establishing a negotiating machinery that would access the skills and services of both WTO and UNCTAD, but remain outside both bodies. A not dissimilar approach was, after all, taken in the process of negotiating GATS itself, resulting in a separate Council on Services in the WTO, and in the OECD during the negotiations for the MAI, where the OECD provided the negotiating services but where the negotiations occurred outside the usual OECD structures. Therefore, UNCTAD and the WTO may have a role to play in the creation of a truly forward looking multilateral framework for investment though the establishment of an independent negotiating machinery that could benefit from the skills and experience of the secretariats of both organizations while at the same time being able to provide the wider agenda required of the complex contemporary economic and social environment for transnational business.