


# Feb 5, 7 **Regulatory Responses and Options: From Confrontation to Pragmatism**


Examines early questions about how, or if, to control MNC activities. Explores regulatory responses both historically and in terms of recent trends, ranging from national to international strategies, spanning a number of issue-areas, and encompassing more to less ambitious conceptions of an international investment “regime(s).”

## **Readings**

 David Levy and Aseem Prakash (2002) “Bargains Old and New: Multinational Corporations in Global Governance,” *Business and Politics* Vol. 5, No. 2 ([Levy PDF](#))

 Shean Murphy (2005) “Taking Multinational Corporate Codes of Conduct to the Next Level,” *GWLaw Commons*, 43 ([Murphy PDF](#))

Stephen Kobrin (1998) “The MAI and the Clash of Globalizations,” *Foreign Policy*   
([Kobrin PDF](#))

 Kathryn Sikkink (1986) “Codes of Conduct for TNCs: The Case of the WHO?UNICEF Code,” *International Organization* 40, 4: 815-840 ([Sikkink PDF](#))

# Regime goals versus Location of authority

- We develop a typology of regime types with two dimensions, the goal of the regime, which can be **market enabling** or **regulatory**, and the location of **authority**, which can be **national**, **regional**, or **international**, with **public** and **private** elements. MNCs tend to support the creation of market enabling regimes at the international level, and prefer to keep social or environmental regulation under national or private authority”

David Levy and Aseem Prakash (2002) “Bargains Old and *New: Multinational Corporations in Global Governance*,” *Business and Politics* Vol. 5, No. 2

# Regulation

- Refers traditionally & broadly to idea of control or management
- Closely connected to *international institutions*

# Post 1945 Political Economy

- The most deeply institutionalized era in history
- Bretton Woods system
- By 1970s, “regimes” a pervasive feature of the IPE

# International regimes defined

- Principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area of the IPE
- Regimes said to exist in a wide range of “issue-areas”
- Yet not in area of FDI?
- Why?

# 1. Lack of consensus

- very different views from North & South
- North seeks empowerment of MNCs
  - e.g. status quo
- South seeks control
  - e.g. NIEO of 1974; 1980 code on Restrictive Business Practices (Brandt Commission report)

## 2. Lack of will and urgency among politically powerful states

- Most OECD countries perceive MNCs as wholly positive
- France and Japan exceptions
- Labour movements within AIS also express concerns
- But overall little pressure for an FDI regime

# 3. Sense of resignation

- MNCs (by definition) seem largely impervious to effective control
- Especially strong view post-1980s
- But all this *appears* to change by 1990s



# The MAI Initiative

- Negotiated largely “in secret” between 1995-8
- Sought to develop rules to govern investment in a more systematic & uniform manner
- Explosion of MNCs leads to desire for more stable & secure investment conditions
- But mostly an attempt to minimize state regulations?
- An attempt to empower MNCs (give them legal rights) in national courts of law
- MAI generates storm of protest from NGOs
- By 1998 OECD abandons ratification process

# The MAI as regulation?

- MAI episode reinforces distinction between regulation-as-control vs. regulatory-efficiency(market enabling)
- MAI more of an effort to empower than curb MNCs
- Strong emphasis on rights, not responsibilities
- Indeed, MAI would have severely curtailed state power

# Managing MNCs to date: Four strategies

## One: National or Unilateral Management

- Most extreme form of national control is expropriation
- Fueled by development of strong nationalist sentiments in 1950s-1960s
- especially prevalent in Latin America
  - why? Calvo Doctrine
  - Carlos Calvo, *International Law of Europe and America in Theory and Practice* (1868)
  - “Calvo clause” written into contracts; stipulates that alien agrees unconditionally to the adjudication within the state concerned of any dispute between the contracting parties
  - e.g. nations were not entitled to use armed force to collect debts owed them by other nations
  - US supported this doctrine... unless it applied to it!

- MNCs often a “soft option” for politically troubled regimes
- Especially attractive in extractive sectors
- Between 1960 & 1976: 71 countries nationalized 1,369 enterprises
- But seldom delivers on its most cherished goals (e.g. increased revenues and reduced dependence on MNCs)
- By 1980s politically difficult weapon to wield (even where prompt, adequate, and effective compensation was offered)
- “new pragmatism”

## ■ National management—less extreme than expropriation

- Often consists of screening mechanisms (e. g. Canada —FIRA, 1974; Mexico—Foreign Investment Law 1973)
- Mexico: protectionist law strongly favouring Mexican nationals or the state; investment prohibited in many sectors and allowed to a maximum 49% equity anywhere else
- Both Canada (1984/5) and Mexico (1993) have liberalized these laws
- Most countries utilize investment related laws (including the US)

# More Creative Initiatives

- *ad hoc* controls can be directed at particular countries or industries (e.g. Canadian sanctions against S. Africa in 1980s; US Alien Tort Claims Act 1789, or US Foreign Corrupt Practices Act, 1977)
- January 26 2017: BCCA overturns BC Supreme Court's earlier ruling that Guatemala is appropriate jurisdiction for the claims of 7 plaintiff's (mine workers) injured during a shooting outside Tahoe's Resources Escobal silver mine in 2013
  - BCCA determined plaintiff's could seek damages in Canada
  - NB: first time a Canadian appellate court has allowed a lawsuit to proceed against a Canadian company for alleged human rights violations committed abroad

- Unilateral codes can also be declared by groups within states
  - e.g. labour groups like AFL-CIO in US called for control of MNC activities—a shift away from a traditional interest in free trade
- Or even by MNCs themselves
  - e.g. pre-emptive codes

# Two: Regional Government Codes

- **Andean Pact** (or Andean Common Market) 1969-1996 and thereafter Andean Community
- Founders BCCEP:V joined 1973; Chile withdrew 1976;V withdrew 2006
- 1970, Decsion 24 established a common set of regulations governing direct foreign investment and the transfer of technology
- sought to create a “favorable climate for stable investment” but opposed by many critics
- **OECD** also known as a “regional” example
- Devises a “voluntary code of conduct” for MNCs in 1976
- Also devises a “model tax convention” in 1979
- **NAFTA** (“ch. 11”) another example of a regional “code” (but, like OECD initiatives, designed to promote not control investment)



# Three: International Codes of Narrow Scope

- Single industry codes applied internationally
- Best example perhaps the WHO/UNICEF Code on Breast Milk Substitutes (1981)

# Four: International Codes of Broad Scope

- by 1970s, MNCs under attack, mostly because of ITT (International Telegraph and Telephone Corporation) affair in Chile
- bribery scandals uncovered by U.S. congressional committees yet Washington hostile toward UN efforts to establish a code of conduct for MNCs
- but LDCs urged UN action (NIEO)
- 1973: UN(ECOSOC) appointed a Group of Eminent Persons to study the impact of MNCs on economic development and IR
- 1974: led to “permanent” Commission and a UNCTC
- mandate: study the feasibility of producing a multilateral agreement on MNCs and a code of conduct.
- dismantled in 1993
- overall “success” debatable though some praise UN’s capacity-building activities, monitoring and formulation of policy at both the national and international levels
- paved way for Global Compact

“The role of governments would not be one of state control of corporate activity but, rather, one of helping empower the individual autonomy of corporations within certain bounds of justice, fairness, and equity.”

Shean Murphy (2005) “Taking Multinational Corporate Codes of Conduct to the Next Level,” *GWLaw Commons*, 43