I. Introduction

Thomas Wälde joined the United Nations one year before the negotiations on a Code of Conduct on Transnational Corporations began, in 1977. Indeed, these negotiations accompanied his journey in the United Nations system, since they were still ongoing when he left in 1990. While not directly involved in them, he was an avid observer of the process and of the discussions that took place at that time—discussions about a *problematique* that is still on the international agenda today, some 30 years after this first comprehensive effort to establish a multilateral framework for foreign direct investment.

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1 The author is Executive Director, Vale Columbia Center on Sustainable International Investment, a joint undertaking of Columbia Law School and The Earth Institute at Columbia University, New York. This chapter partially draws on work done for a UNDP Global Governance Project. I would like to acknowledge the work of Ilze Dubava for this text and the very helpful assistance of Delphine Papaud in finalizing this chapter.

2 When the United Nations started work in this area, the firms involved were called “multinational corporations” (see, for example, the first major report on this subject by that organization, *Multinational Corporations in World Development*, ST/ECA/190, United Nations (1973). When delegates debated the issue in the United Nations, two points were made: 1. the description “multinational” was seen to imply that the firms involved were owned or controlled by citizens of various nations, while in reality the overwhelming majority of them were in fact owned and controlled by citizens of one country, the home country, operating across boundaries; 2. at that time, the Andean Pact had adopted an agreement that foresaw the creation of “Andean multinational enterprises” owned and controlled by various members of the Andean Pact countries. See *Andean Code on Multinational Enterprises and the Regulations with regard to Subregional Capital*, 11 I.L.M. 357 (1972). To take these considerations into account and to avoid a confusion with the Andean Pact enterprises, delegates decided to change the terminology from “multinational corporation” to “transnational corporation,” and this term has been used in the United Nations since then. Of course, this change in terminology did not take into account that a number of firms operating transnationally are actually not incorporated and that, therefore, a more accurate label would have been “transnational enterprise.”

3 I had the pleasure of discussing this matter with Thomas when I had the privilege to deliver the Chalfen Memorial Lecture at the British Institute of International and Comparative Law in April 2006.

4 Arguably, the first effort was made in the context of the ITO, albeit not in as broad a manner as the United Nations Code had envisaged.
investment [FDI] had begun. At the heart of these discussions (and associated negotiations) is the question of the treatment of foreign investors and, more precisely, of what rights and responsibilities foreign investors and host countries should enjoy or bear in their interaction with each other. The balance of these rights and responsibilities determines, at least to a certain extent, the impact of FDI on development, the advancement of which is of particular concern to developing countries. And this balance finds its expression in national laws governing FDI, as well as in international investment agreements [IIAs] dealing with this subject, with the latter setting the parameters within which the former can be adopted and implemented.

Apart from being an observer of the negotiations of a United Nations Code, Thomas worked “on the ground,” first as a legal adviser in the United Nations Centre on Transnational Corporations and to the United Nations Industrial Development Organization and, from 1980, as an Interregional Advisor on matters related to petroleum and mineral resources in the United Nations Department of Technical Cooperation for Development. As such, he provided advisory services to developing countries in matters related to natural resources, helping them find the national regulatory framework that would maximize the developmental benefits reaped from these resources, most of which were owned or controlled by multinational enterprises [MNEs]. As Thomas defined this type of work at that time: “Advisory assistance [...] has a double function, that of assisting governments in bridging their experience gap and that of bridging the consensus gap between negotiating partners.” In fact, Thomas’ later focus on natural resources can be traced back to his formative years at the United Nations and the discussions that took place then, and to his hands-on experience in providing practical advice to developing countries.

This chapter looks at the considerations that shaped the negotiations of a United Nations Code of Conduct on Transnational Corporations and at the search for balance in international investment rules that has since then continued to inform efforts to establish an international framework for FDI and MNEs.

5 Although the focus of the negotiations was on FDI, it was not clear whether, in the end, other investment should be covered as well.
6 Wälde, T., “Third World minerals development in crisis: the impact of the worldwide recession on legal instruments governing Third World mineral development,” Journal of World Trade Law 19 (1985), at p. 28. As the author noted in the first footnote: “This article is based on the over 40 advisory missions carried out between 1979 and 1984 for over 30 governments.”