

INTERNATIONAL REGIME AND COUNTERFACTUAL ANALYSIS: REGULATING TRANSNATIONAL CORPORATIONS

Cheng-Tian Kuo

郭承天 *

摘 要

由於國際建制的個別特性，使得建制理論有過多解釋項的潛在缺失。反事實分析法能夠剔除建制理論中假的或多餘的解釋。本文以改良後的反事實分析法，研究「跨國公司行為規範」的談判過程。雖然馬克斯主義、建制\制度理論、以及霸權理論都提供有力的理論和證據，來解釋該談判的失敗。但是經過反事實分析法的檢驗後，只有霸權理論所提出美國政府的決策，才是最重要的因素。其餘兩種解釋皆不成立。

Abstract

Because of the idiosyncracies of international regimes, the overloading of explanatory variables becomes a potential threat to regime analyses. Counterfactual analysis (CFA) can reject redundant or false theoretical explanations in each regime analysis. After refinement, CFA is then applied to a study of the negotiation of the Code of Conduct for Transnational Corporations. Although Marxist, regime/institutionalism, and hegemony theories all provide convincing arguments and evidence to explain the failure of the Code negotiation, CFA points out the paramount importance of the American government's decision on the issue and rejects the Marxist and regime/institutionalist explanations.

Introduction

The development of international regime theory is at a critical juncture. Since its initial formulation in the early 1980s, the theory has informed hundreds of studies on international regimes, regimes such as security, arms races, trade, debt,

* 作者為本校政治系副教授

environment, and human rights.¹ At the same time, however, the theory has fallen prey to regime idiosyncrasy. Different technological issues, political interests, power structures, available resources, and institutional arrangements have made theoretical generalizations across regimes increasingly difficult. It is necessary to move regime theory from an informative analytical framework to an empirical theory subject to verification. Using the United Nations Code of Conduct on Transnational Corporations as an example, this paper suggests that counterfactual analysis (CFA) provides an appropriate research strategy for examining causal arguments in otherwise idiosyncratic regime analyses.²

In the early 1970s under the aegis of the New International Economic Order, Third World countries requested that the United Nations (U.N.) sponsor the negotiation of a Code of Conduct on Transnational Corporations (TNCs), with the aim of regulating the TNCs' negative economic, political, and social impacts on host countries. In 1974 the U.N. established the Commission on Transnational Corporations and the Centre on Transnational Corporations (UNCTC), which set negotiation of the Code as their first priority. After sixteen years of bargaining and consultation sessions, however, the Code negotiation was permanently suspended in 1992. The major sponsor of the negotiation, the UNCTC, first had its size and budget cut by one-third and was then downgraded to the Division on Transnational Corporations and Management of the Department of Economic and Social Development of the U.N. Secretariat. In 1993 the UNCTC was moved away from U.N. headquarters in New York to Geneva, where it is now a subsidiary of the moribund U.N. Conference on Trade and Development, renamed as the UNCTAD Commission on International Investment and Transnational Corporation. Without an influential institutional guardian, few observers and participants of the Code

¹ Among the numerous books on the subject, two collections of papers epitomize the development of the regime theory in the last decade. Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983). Volker Rittberger, ed., *Regime Theory and International Relations* (New York: Oxford University Press, 1993).

² James D. Fearon, "Counterfactuals and Hypothesis Testing in Political Science," *World Politics* 43 (January 1991), pp.169-95. Thomas J. Biersteker, "Constructing Historical Counterfactuals to Assess the Consequences of International Regimes: The Global Debt Regime and the Course of the Debt Crisis of the 1980s," in Volker Rittberger and Peter Mayer, eds., *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993). For earlier CFA theorists, see Max Weber, *Max Weber on the Methodology of the Social Science*, trans. and ed. Edward A. Shils and Henry A. Finch, (Glencoe, IL: Free Press, 1949); and Jon Elster, *Logic and Society: Contradictions and Possible Worlds* (New York: Wiley, 1978).

negotiation expect the code to return to the U.N. agenda in the near future. Hence, a global regime does not yet exist to deal with the TNCs, which handle about half of the world's trade.

Given its apparent initial advantages, the failure of the Code negotiation seems puzzling. The negotiation process went relatively smoothly in the first few years. In the early 1980s, with agreements on about two-thirds of the draft Code's articles concluded, the majority of the participating countries optimistically predicted an immediate completion of the Code negotiation. The year before the negotiation was suspended, all but a handful of the participating countries had agreed on the draft Code. In addition, various international organizations had developed alternative international instruments on TNCs, which cleared the way for resolving many controversial items in the Code. The industrialized countries and developing countries, as well as the TNCs, could have benefitted from the Code, which was designed to both regulate and facilitate the operation of the TNCs. With the increasing dominance of the TNCs in international trade and national development, an international regime on TNCs should have served the interests of parent countries, host countries, and the TNCs. Even if worst came to worst, many analysts and business leaders agreed that the Code, being voluntary and loosely phrased, would not have a negative impact on the flow of foreign direct investments, thus dispelling the fear of the TNCs about the Code.

Then why did such a benign but important Code fail after eighteen years of negotiation, while more controversial human rights and environmental regimes were established? Marxism, regime/institutionalism theory, and hegemony theory each provide convincing explanations for the failure. Before discussing these theoretical explanations, the next section briefly describes the major issues and the negotiation process of the Code.

Major issues and the negotiation process

Major issues

In as early as 1977, in order to establish a solid launching pad for the negotiation, the chairman of the Intergovernmental Working Group on the Code of Conduct (established in 1976) proposed a 73-article, annotated outline of a Code

of Conduct.³ Until 1992 negotiators had worked from this annotated outline without making major structural changes. The 1990 version of the draft Code, for instance, contains five major categories and seventy-one articles.⁴ The subjects of these articles are listed in Table 1.

Table 1. *Code of Conduct for transnational corporations (1990 draft)*

I. Definitions and scope of application

II. Activities of transnational corporations

A. General. Respect for national sovereignty and observance of domestic laws, regulations and administrative practices. Adherence to economic goals and development objectives, policies and priorities. Review and renegotiation of contracts and agreements. Adherence to socio-cultural objectives and values. Respect for human rights and fundamental freedoms. Non-collaboration by transnational corporations with racist minority regimes in southern Africa. Non-interference in internal affairs of host countries. Non-interference in intergovernmental relations. Abstention from corrupt practices.

B. Economic, Financial and Social. Ownership and control. Employment conditions and industrial relations. Balance of payments and financing. Transfer pricing. Taxation. Competition and restrictive business practices. Transfer of technology. Consumer protection. Environmental protection.

C. Disclosure of Information.

III. Treatment of transnational corporations

A. General Provisions Relating to the Treatment of Transnational Corporations.

B. Nationalization and Compensation.

C. Jurisdiction.

D. Dispute Settlement.

IV. Intergovernmental cooperation

V. Implementation of the code of conduct

A. Action at the National Level.

B. International Institutional Machinery.

C. Review Procedure.

³ *CTC Reporter* 10 (1981), pp.10-12.

⁴ United Nations Centre on Transnational Corporations, *The New Code Environment* (New York: United Nations, 1990).

International Regime and Counterfactual Analysis: Regulating Transnational Corporations

Among these articles, the most controversial were the following:

(1) Definition of TNCs. The socialist countries refused to include state enterprises in the definition, claiming that TNCs were products of capitalist systems only. The Western countries insisted on including all TNCs regardless of their ownership.

(2) Nationalization and compensation of foreign investment. Given the publicity about nationalization cases in Third World countries during the late 1960s and early 1970s, the Western countries requested "prompt and adequate" compensation for their investments should nationalization occur. The developing countries preferred the word "appropriate" to "prompt and adequate" for the compensation.

(3) National treatment of TNCs. The Western countries argued that TNCs should receive equal, if not better, treatment as national companies, while developing countries were reluctant to give TNCs such treatment for fear of driving out local companies.

(4) Reference to international law. The Third World countries guarded their sovereignty very closely and refused to be bounded by international law, which they said was developed by industrialized countries in the first place. The Western countries, however, did not trust the neutrality of national governments and courts in developing countries should business disputes between TNCs and host governments arise.

(5) The nature of the Code. The developing countries and socialist countries preferred a mandatory code, while the Western countries favored a voluntary code. Although the developing countries and socialist countries soon gave up on the mandatory code position, the Western countries still felt uncomfortable about the tone of the entire code and its implementation machinery, which sowed the seeds for a potentially mandatory code.

Other disagreements persisted over issues such as the transfer of payments, sanction against South Africa, disclosure of business information, renegotiation of investment contracts, regulation of environmental protection, and definition of non-interference in internal affairs. But these disagreements were not as important or fundamental as the first five issues described above. Many of the lesser issues could be resolved once agreements on the five issues were reached.

The negotiation process

The negotiation over the Code of Conduct on Transnational Corporations was born in a hostile atmosphere. On the one hand, the developing countries were

dissatisfied with the large share of profits earned by TNCs, the dominance of TNCs in local markets, and the social and political impact of TNCs on the host countries. In particular, the allegedly-CIA-plotted assassination of Chile's socialist President Salvador Allende, after the personal bickering between Allende and the president of a transnational corporation ITT, alarmed Third World leaders about the political influence of the TNCs. On the other hand, both the industrialized countries and the TNCs were dismayed by the rising wave of the nationalization of foreign investments without proper compensation in developing countries. Both were also concerned with the increasing protectionism in these countries. In sum, the developing countries wanted a code to regulate TNCs, while the industrialized countries preferred an investment protection/promotion code.

With these and other issues in mind, in 1972 the United Nations Economic and Social Council (ECOSOC) appointed the Group of Eminent Persons, consisting of experts from different countries and disciplines, to study the behavior and impact of TNCs on host countries. The Group concluded its mission in May 1974 by filing a report to the ECOSOC that recommended an institutional framework for starting the negotiation of a Code of Conduct on TNCs. The U.N. Commission on Transnational Corporations and the U.N. Centre on Transnational Corporations (UNCTC) were established in November 1974 to prepare for the Code negotiation. In 1976 the U.N. Commission on TNCs appointed the Intergovernmental Working Group (IWG) to conduct detailed negotiation on the Code. From then on the IWG met in 17 sessions over the next 12 years (until 1982), trying but failing to hammer out all of the differences among participants.

Despite the complexity of the Code and time constraints for the negotiation, the first six years of negotiation proceeded relatively smoothly. In his 1982 report, the chairman of the IWG happily proclaimed that of the Code's 71 provisions, "about two thirds had been fully agreed on without any brackets; more than half of the bracketed paragraphs contained brackets which could be removed without great effort."⁵ One of the major compromises during this period was the developing countries' agreement to "balance" the Code, i.e., to expand the section on the protection and promotion of foreign investments instead of focusing the Code only on regulating TNCs. Although some developing countries were concerned that this was tantamount to opening a Pandora's box by making the Code negotiation more

⁵ ECOSOC, "Report of the Commission on Transnational Corporations on Its Eighth Session," E/1982/18/Add.1 (1982), p.16. The bracketed paragraphs include alternative proposals made by the chairman of the IWG and different country-groups.

complicated, most of the developing countries regarded it as a necessary trade-off for the rapid completion of the Code negotiation.⁶

Other agreements were made on parts of the provisions relating to: the adherence to socio-cultural objectives and values, non-interference in internal political affairs, non-interference in intergovernmental relations, ownership and control, balance of payments and financing, taxation, consumer protection, environmental protection, disclosure of information, and implementation of the Code. Concluding these agreements was quite an achievement when, in other agencies within the U.N., the propaganda war between the industrialized countries and developing countries was at its zenith.

However, in 1982 the Intergovernmental Working Group was dissolved after it submitted a draft of the Code to the Commission on Transnational Corporations. The negotiation continued through a series of Commission Special Sessions in which all member states of the United Nations could participate. The fragile collegiality of negotiations broke down in 1983 when the Group of 77 (G-77) decided to present to the Western Group the package prepared by the Chairman of the special session of the Commission on Transnational Corporations as a "take it or leave it" request.⁷ While Sweden, Norway, and Canada were ready to accept the Chairman's package, other industrialized countries (especially the U.S., United Kingdom (U.K.), Germany, and Switzerland) were not amused by such a surprising threat.⁸ In May 1983 the ECOSOC then decided to submit the Code to the General Assembly for consideration. In December of the same year the General Assembly threw back this hot potato to the Commission for further negotiation.

Lack of trust and personal animosities among the negotiators subsequently developed. Negotiators regressed to the extremist positions they had held at the beginning of the negotiation, thus raising doubts in everyone's mind that one group or the other was not serious about completing the Code.⁹ Without an air of trust, no further agreements were possible in the following years, even though a consensus was reached on several items during informal negotiations.¹⁰ Some delegations began to wonder whether the negotiation should be suspended in such

⁶ *CTC Reporter* 12 (1982), p.8.

⁷ *CTC Reporter* 16 (1983), p.10.

⁸ ICC, "Reconvened Special Session of the United Nations Commission on Transnational Corporations 9-13 January 1984, New York," (1984), p.5.

⁹ *CTC Reporter* 18 (1984), p.3; 20 (1985), p.17.

¹⁰ *CTC Reporter* 21 (1986), p.18.

a hostile atmosphere.¹¹

From 1983 to 1992 moderate countries on both sides of the bargaining table devised a number of strategies to isolate the extremists in both groups of countries. The moderates developed a "constructive ambiguity" strategy aimed at muddling through the more controversial items; they also proposed a "mini-Code" to reach an immediate conclusion of the agreed parts of the Code.¹² In 1990 Mexican Ambassador Marin-Bosch, the Chairman of the Special Session, made another attempt by proposing a new draft that was very close to the position of the Western Group.¹³ All but a handful of nations expressed their willingness to accept this new draft. But the extremist minority in both groups of nations prevailed.¹⁴

Soon afterwards the General Assembly took over the Code negotiation. In June 1992, with increasing pressure for terminating the negotiation coming from the member states, the Centre on Transnational Corporations made a last-minute pitch for a new draft that was completely tailored to the long-standing positions of the Western Group. This new draft reduced the total number of provisions from 71 to 37. Some provisions, such as those that dealt with South Africa and the review and renegotiation of contracts, were eliminated. Most of the other provisions were drastically abbreviated or merged with other provisions, meeting the Western Group's persistent demand that the Code should be simple.¹⁵

During informal consultation, the G-77, including the extremist countries, said they would accept the new draft only if the Western Group agreed to it. The Western Group, however, cited new differences of opinion and rejected the draft.¹⁶ In October 1992 the president of the General Assembly announced the termination of the Code negotiation because "it was the view of delegations that no consensus was possible on the draft Code at present Delegations felt that the changed international

¹¹ *CTC Reporter* 22 (1986), p.3.

¹² ICC, "Reconvened Special Session of the United Nations Commission on Transnational Corporations 17-21 June 1985, New York," (1985), pp.3-7.

¹³ Seymour J. Rubin, Former Executive Director, American Society of International Law, Hearing Before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, November 15, 1989, pp. 38-39; ICC memorandum (1990), p.1.

¹⁴ United Nations General Assembly, *Proposed Programme Budget for the Biennium 1992-1993, Vol. I*, (New York: United Nations, 1991), p.1.

¹⁵ UNCTC, "United Nations Instrument on Foreign Investment. A document circulated for delegation comments," (1992).

¹⁶ Interview with a UNCTC official, 7/22/93.

economic environment and the importance attached to encouraging foreign investment required a fresh approach.”¹⁷

The above description reveals that although the negotiators came close to reaching an agreement several times, the negotiation always broke down at the last minute. Finally, the majority of the U.N. member states gave up this exercise, which had lasted for 18 years. What were the major causes that obstructed, distorted, and, finally, terminated the negotiation? Current theories of international political economy each provide a partial answer to this question. Marxist analysis would attribute the failure to the dominance of international capitalists in the capital-scarce global market of the 1980s and 1990s. Regime theory would locate the contradictions and weaknesses in the proposed regime’s principles, norms, rules, and decision-making procedures. The institutional approach would point out the differential access of the business community, labor unions, and consumer alliances to national decision makers. And, finally, hegemony theory would explain Code failure by the opposition of the U.S. to the issue. The following sections discuss in more detail these theories as they apply to the failure of the Code negotiation.

Marxism

The applicability of Marxism to the Code negotiation failure can be examined from three levels: Marxism as an ideology, global capitalism, and instrumental Marxism.

Marxism as an ideology

The Code negotiation was initiated by Third World countries and based on a Marxist interpretation of the TNCS. The TNCs were regarded as a tool owned by capitalists and industrialized countries to exploit workers and developing countries. The TNCs were an extension of the home country, acting as protege, agent, or conduit for alien influence. Their presence constituted a rivalry to the host government, local business, and labor.¹⁸ Therefore, the Code should

¹⁷ *Transnationals* 4 (October 1992), p.1.

¹⁸ Robert T. Kudrle, “The Several Faces of the Multinational Corporation,” in Jeffrey A. Frieden and David A. Lake, eds., *International Political Economy: Perspectives on Global Power and Wealth* (New York: St. Martin’s Press, 1987).

condemn and prevent the TNCs' encroachment on the local economy, society, and politics.

This Marxist ideology had an impact on all three major groups of negotiation parties. The developing countries began the negotiation with a hostile attitude toward the TNCs and insisted on a regulatory, legally binding Code.¹⁹ Although most of them later softened their position after they understood the perspectives of industrialized countries, a few developing countries, such as Argentina, India, Mexico, and, particularly, Brazil, remained very dogmatic about the regulatory nature of the Code, thus blocking several attempts to reach a moderate, compromised view of the Code.²⁰

Since the Marxist ideology was the official ideology of the socialist countries, these countries naturally sided with the developing countries in condemning and regulating the "negative features," "malpractice," and "neo-colonialist" interference of the TNCs in internal political and economic affairs.²¹ Furthermore, in the first 10 years of the negotiation, the socialist countries had created an impasse by refusing the Western proposal to include state-owned TNCs in the Code. According to Marxism, they argued, TNCs were the products of capitalist countries, not of socialist countries, and, therefore, state-owned TNCs were a different kind of animal. Although the socialist countries abandoned this insistence in the mid-1980s when they needed to encourage foreign investments, many opportunities had been lost for constructing a cooperative atmosphere for the negotiation.²²

¹⁹ *CTC Reporter 2* (1977), pp.17-18; ECOSOC, "Transnational Corporations: Views and Proposals of States on a Code of Conduct," E/C.10/19/Corr.1 (1977), pp.4-10.

²⁰ ICC, "Reconvened Special Session of the United Nations Commission on Transnational Corporations," 1985; ICC Memorandum 9/20/90, p.2; 6/25/91, p.2; 9/26/91; 6/92, p.1; Abraham Katz and Jonathan Huneke, "The U.N. Code of Conduct for Transnational Corporations: A Relic of the 1970s May Yet See Completion," *Focus on Issues* (U.S. Council for International Business, May 1991), p.6; United States Council for International Business, "Testimony of the United States Council for International Business Before the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs," November 15, 1989, p.5.

²¹ ECOSOC, *Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct*. E/C.10/20/Corr.1 (1977), p.7; ECOSOC, *Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct*. E/C.10/20/Add.1, (1977), p.14.

²² Testimony by Jane Becker, Deputy Assistant Secretary for the Bureau of International Organizations at the State Department, Hearing Before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, November 15, 1989, p.19.

The Marxist ideology had also an impact on industrialized countries, in a negative sense. Some of the Western countries never trusted that the developing countries would fundamentally change their Marxist beliefs. Due to the unpleasant negotiation experiences since 1982, the Western negotiators regarded all concessions by the Third World countries as a disguise, which would be reneged on later by their Marxist-minded leaders. Many Third World negotiators, indeed, continued to use Marxist rhetoric to accuse their Western counterparts and the TNCs, thus reinforcing Western suspicions. Moreover, some Western negotiators never fully recovered from the wave of expropriations of foreign investments by Third World countries during 1970-76, even though the extent of expropriation had been exaggerated.²³ Without a common ideological language, the negotiation sessions amounted to nothing more than shouting matches.

Global capitalism

Another factor cited by negotiators for the breakdown of the Code negotiation is the dramatic shift of bargaining power between the industrialized countries and the developing/socialist countries. From the very beginning, the Third World countries overestimated their bargaining power with the TNCs and the Western countries.²⁴ This overestimation came as a result of the 1973 OPEC-orchestrated oil crisis which crippled the Western economies for a number of years. Other developing countries were encouraged by the OPEC example and endeavored to establish similar cartels on raw materials and minerals in order to redress inequalities in international trade and finance.

A second source of the overestimation of Third World bargaining power came from the surge of national sovereignty claims over the foreign investments during the 1960s and early 1970s. Many developing countries renegotiated their contracts with the TNCs, which had previously had monopoly over the production of minerals and oil in the host countries. The renegotiation strategy was used along with expropriation of foreign investments without prompt or adequate

²³ *CTC Reporter* 13 (1982), p.13; UNCTC, *The New Code Environment*, (New York: United Nations, 1990), pp.2-3. During 1960-79, although less than 5 percent of all foreign subsidiaries in the developing countries were nationalized, they received publicity that affected TNCs' perceptions of investment environments in the LDCs (*CTC Reporter* 13 (1982), p.13).

²⁴ Werner J. Feld, *Multinational Corporations and U.N. Politics: The Quest for Codes of Conduct* (New York: Pergamon Press, 1980), pp.127-31.

compensation. The pace of expropriation accelerated during 1970-76 and reached its peak in 1975, when a total of 83 cases were reported.²⁵ Parent governments of the TNCs could not offer much protection except for ineffective diplomatic protests.

Finally, the over-estimation of the Third World countries was derived from their voting power in the U.N. Because of the admission of a large number of developing countries during the 1950s and 1960s, the developing countries already constituted a two-thirds majority in the General Assembly. Collectively they were able not only to block any resolution they disliked but also to pass any resolution they favored. After the 1973 oil crisis, despite the strong objection by some influential Western countries, the G-77 easily passed the Charter of Economic Rights and Duties of States, which proclaimed the coming of the New International Economic Order. With this voting power in hand, the Third World countries could have passed the Code of Conduct in the General Assembly without the approval of the industrialized countries.

The tenacity of global capitalism, however, shattered the bases of the Third World confidence one by one. After the oil crisis the industrialized countries soon adopted energy-saving plans to cope with the short-term shortage and, then, began developing alternative sources of fuel or synthetic substitutes for raw materials and minerals in order to reduce long-term dependence on Third World supplies. As a result, none of the Third World producers' cartels has worked, and even the OPEC countries have had trouble keeping the real price of oil above the pre-1973 level.

To cope with the uncertainty in contract negotiations and the risk of expropriation, the TNCs have adopted a number of effective strategies. The simplest way has been to shift their investments from investment-risky countries to investment-friendly countries, such as to other industrialized countries and the Asian Newly Industrializing Countries. Other methods for reducing investment risks have included non-equity investments (turnkey, plant leasing, management contracts, co-production and co-marketing, subcontracting, and licensing) and intercorporate alliances, which are joint ventures between local companies and TNCs from more than one parent country.²⁶ These new investment strategies, along with the reduction of foreign investment caused by the oil crisis, created political pressure on host governments

²⁵ UNCTC, *The New Code Environment*, p.18.

²⁶ UNCTC, *The New Code Environment*, pp.6-11.

to modify their anti-TNC regulations.²⁷ Thus, the bargaining advantage gradually shifted in the TNCs' favor.

Furthermore, after the international debt crisis broke out in the early 1980s, Third World countries began to scramble for foreign investments in order to replenish their dwindling foreign exchange reserves and to modernize their economies. At the same time socialist economies such as Poland, Hungary, and China embarked on bold market liberalization programs, including aggressive investment incentives for foreign investments. Therefore, industrialized countries began to talk tough on the Code negotiation, citing the draft Code as being out of date.

Finally, the voting power of the G-77 in the General Assembly turned out to be a paper tiger as differences of opinion toward the TNCs emerged within the G-77. Non-oil-producing countries suffered from the price hikes caused by the oil crises of 1973 and 1979. Other countries began to promulgate generous investment incentives to lure TNCs from other developing countries. And since General Assembly resolutions have no binding power over the TNCs or the industrialized countries, the success of an international code of conduct depends ultimately on the voluntary acceptance of the TNCs and the cooperation of their parent countries.²⁸

In sum, given the loss of Third World bargaining power due to ineffective producers' cartels, the relative shortage of foreign investments, and their hollow voting power in the General Assembly, the gap between the intention of the Code and its underlining political forces became unbridgeable. The negotiators had no choice but to abandon the entire Code framework.

Instrumental Marxism

Marxists have long argued that the state is only an executive committee of the capitalists, serving the wishes of politically influential capitalists.²⁹ During the Code negotiation the participation of experts and non-government organizations (NGOs), including the capitalists, was severely restricted. The negotiation was conducted, for the most part, behind closed doors and among delegates of nations.

²⁷ UNCTC. *The New Code Environment*, pp.17-18.

²⁸ Sidney Dell, "The United Nations Code of Conduct on Transnational Corporations," 1982(?; book chapter, source unknown), p.71.

²⁹ Karl Marx and Friedrich Engels, *The Communist Manifesto* (New York: Washington Square Press, 1964). Ralph Miliband, *The State in Capitalist Society: An Analysis of the Western System of Power* (New York: Basic Books, 1969).

But the shadow of international capitalist associations, in particular the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE), hung over the Code negotiation from beginning to end. During the final days of informal negotiation the ICC/IOE literally took the center stage in terminating the negotiation.

The ICC, established in 1919, is the most influential association for capitalists around the world. It claims a membership of 7,500 companies and professional organizations in 123 countries. Its National Committees in some 60 countries “represent ICC views to their national governments and alert headquarters in Paris to national business concerns.”³⁰ The ICC consists of the President, Council, Executive Board, Secretary General, and the following headquarters: Policy and Programme, ICC International Court of Arbitration, Institute for International Business Law and Practice, International Bureau of Chambers of Commerce, ICC Corporate Risk Management Services, and ICC Publishing.³¹

Both the ICC and IOE are credited by the ECOSOC as Category I Consultative Status NGOs and, therefore, may be invited to provide consultation in U.N. meetings, receive U.N. meeting documents, and circulate position papers among delegates. IOE was a silent partner in the Code negotiation, with most of the lobbying activities done by the ICC representatives to the U.N., which happened to be the staff members of the U.S. Council for International Business (USCIB).³²

Although NGO participation in the Code negotiation was severely restricted, the ICC exerted significant impact on the negotiation through its influence on a number of Western countries, especially the U.S., the U.K., and Germany, which were the major parent countries of the TNCs.³³ The ICC monitored the Code negotiation constantly from its first meeting until its last. Even when it was not invited in the meeting, the ICC was able to acquire meeting information from Western delegates during social hours.

Furthermore, due to the complexity of TNC issues and the change in negotiation personnel, few of the delegates from Western countries had a good grasp of the intricate nature of negotiation. Therefore, they often depended on ICC position

³⁰ Quotations in this paragraph are from an undated, unnumbered ICC brochure “Serving World Business.”

³¹ ICC, organization brochure, 1992, p.35 and back cover.

³² The USCIB was formerly named the United States Council of the International Chamber of Commerce. It changed its name around 1983.

³³ Katz and Huneke, “The U.N. Code of Conduct for Transnational Corporations,” p.2.

papers as their negotiation blueprints.³⁴ In contrast, the ICC representatives to the U.N. were experts on TNCs and had held their positions for long periods of time. They had full support from ICC headquarters, which coordinated lobbying activities in various national governments, and from the USCIB, which was located only a few blocks away from the U.N.

The ICC/USCIB made no secret about its suspicion of the Code and its sponsor, the U.N. Commission on TNCs.³⁵ But due to publicity reasons and the hope that investment protection might be strengthened, the ICC supported the negotiation until the mid-1980s. During this time, the ICC strategy was to reduce the regulatory nature of the Code while strengthening its protection and encouragement of foreign investments. The bottom line of the ICC position was to avert “the creation of an overlay of real and detailed international legislation and bureaucracy upon the many burdensome levels of regulation they encountered within national systems.”³⁶ This was also the attitude of the Western countries toward the Code.

Around 1989, however, the ICC adopted a totally different strategy, aiming at the termination of the Code negotiation, even if its requests for investment protection and encouragement were satisfied.³⁷ By that time the ICC had concluded that the developing countries were in no position to bargain at all, due to the strong demand for foreign investments in both developing countries and socialist countries.³⁸ Hence, in 1990 the major parent countries of the TNCs also suddenly adopted a hostile attitude toward the Code negotiation. Germany was the first Western country publicly suggesting that it “would like to get rid of the Code with a minimum possible amount of fuss.”³⁹ In 1991 and 1992 when the UNCTC made two last-minute efforts to save the Code by revising it entirely according to the ICC version

³⁴ ICC, “Report of the International Chamber of Commerce on the Ninth Session of the United Nations Intergovernmental Working Group on a Code of Conduct for Transnational Corporations. Document No. 191/140 (1980), p.3.

³⁵ *CTC Reporter* 7 (1979), pp.12-13.

³⁶ Detlev F. Vagts, “Multinational Corporations and International Guidelines,” *Common Market Law Review* 18 (1981), p.472.

³⁷ Thomas Bata, “Joint Statement of the International Chamber of Commerce and the International Organization of Employers to the Fifteenth Session of the United Nations Commission on Transnational Corporations,” April 5, 1989, p.4; USCIB, “Testimony of the United States Council for International Business Before the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs,” November 15, 1989, p.8.

³⁸ *CTC Reporter* 27 (1989), p.52.

³⁹ ICC Memorandum 9/20/90, p.2.

(not the less-demanding version of the Western countries) and got the endorsement of Third World countries, the ICC had no interest in accepting it any more.⁴⁰ Once the uncompromising ICC position became clear, all of the major industrialized countries abandoned their reservations about condemning the Code negotiation to death. Japan commented, "The Code is a futile exercise." Germany remarked that "to spend further time on it wouldn't be fruitful." The U.K. regarded the Code as "not acceptable." Sweden declared that "the Code has become irrelevant to the real world." And the U.S. did not even bother to prepare an original statement, saying simply that "our position is essentially that of Japan and Germany."⁴¹

Therefore, even though international capitalists, represented by the ICC/IOE, were rarely allowed to participate in the Code negotiation, they solidly manipulated the Western states in order to protect their interests. They also orchestrated the final breakdown of the negotiation by conveying to the states their outright objection to the Code. The Western states simply formalized this objection at the General Assembly.

International regime/institutionalism

As Stephen D. Krasner defines it, a regime consists of a set of principles, norms, rules, and decision-making procedures.⁴² Criticisms of the regime approach have been raised by a number of scholars.⁴³ Recent regime theories have incorporated institutional analysis to strengthen their explanatory power.⁴⁴ This section uses regime

⁴⁰ ICC Memorandum, 9/26/91, 2; Katz and Huneke, "The U.N. Code of Conduct," p.1; Interview with an UN official on 7/16/93.

⁴¹ ICC Memorandum 6/92, p.1.

⁴² Krasner, *International Regimes*.

⁴³ For example, Susan Strange, "Cavei Hic Dragones: A Critique of Regime Analysis," in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1982). Stephan Haggard and Beth A. Simmons, "Theories of International Regimes," *International Organization* 41 (Summer 1987), pp. 491-517.

⁴⁴ For example, Charles Lipson, "Bankers' Dilemmas: Private Cooperation in Rescheduling Sovereign Debts," *International Organization* 38 (October 1985), pp.200-25. Helen V. Milner, *Resisting Protectionism: Global Industries and the Politics of International Trade* (Princeton, NJ: Princeton University Press, 1988). Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47 (Summer 1993), pp.411-41. Beth Yarbrough and Robert M. Yarbrough, "Cooperation in the Liberalization of International Trade: After Hegemony, What?" *International Organization* 41 (Winter 1987), pp.13-26. A recent revision of the regime theory is provided by Volker Rittberger and Peter Mayer, eds., *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993).

as a causal variable to explain the failure of the Code negotiation. Although a regime on TNCs has never formally existed, the negotiation can be analyzed by the principle components of the regime theory. Furthermore, during the negotiation many of the decisions and activities of the U.N. Commission on TNCs and the U.N. Centre on TNCs had the attributes of a full-fledged regime. Three regime/institutional factors are considered below: regime weaknesses, asymmetrical institutional access by interest groups, and organizational threat to the TNCs.

Regime weaknesses

The international regime on TNCs failed to materialize because the actors involved disagreed on the regime's principles, norms, rules, and decision-making procedures. The two major *principles* of the TNC regime as proposed in the Code were the regulation and encouragement of foreign investments. The negotiators had trouble seeking a balance between these two principles, which were often entangled with the debate over central planning and free market. The Third World countries started the negotiation with the intention of restricting the negative impact of TNCs on local politics, economy, and society, as well as to navigate the TNCs toward national development goals. In contrast, the major parent countries of the TNCs were interested in breaking down barriers and reducing regulations on foreign investments in developing countries.

Although most of the negotiators finally agreed on a fragile balance between the two principles in the last draft of the Code, a few countries on both sides of the debate did not think that the principles could or should be compromised. Furthermore, the industrialized countries challenged the political legitimacy of the regulation principle in the later years of the negotiation on two grounds. First, the regulation principle had lost its appeal in both academic and policy circles and had been replaced by the free market principle. Second, the regulation principle was usually espoused by foreign affairs officials but opposed by economic officials in the developing countries. Unfortunately, it was the foreign affairs officials who conducted the negotiation.⁴⁵ Thus, without a common understanding or mutual recognition of the legitimacy of the basic principles, the TNC regime as proposed in the Code could not exist.

⁴⁵ Thomas G. Weiss, "The UN Code of Conduct for Transnational Corporations," in David P. Forsythe, ed., *The United Nations in the World Political Economy: Essays in Honour of Leon Gordenker* (London: Macmillan Press, 1989), p.86.

The debate over the regime principles spilled over to the regime *norms*. On the issue of the regulation of the TNCs, the Third World countries preferred a mandatory, detailed, and effective Code, while the Western countries insisted on a voluntary, broadly phrased, and normative code. On the issue of the encouragement and protection of foreign investment, the Third World countries judiciously guarded their national sovereignty, while the industrialized countries could not be relieved of their worries about national abuse unless the treatment of foreign investment was guaranteed by international law and standards. Finally, the Third World countries requested that the TNCs contribute to national economic development and social goals, while the industrialized countries rejected the imposition of macroeconomic or non-economic responsibilities on the TNCs. Again, these differences in norms largely reflected the differences in regime principles.

The debate over the *rules* of the TNC regime was laid out in the first section of this paper. An equally important factor that leading to the breakdown of the Code negotiation was the proliferation of alternative instruments sponsored by various international organizations outside the Code framework. For example, even before the Code negotiation began, the ICC itself passed an internal code of conduct, the Guidelines for International Investment (1972). Five years later the ICC generated the Rules of Conduct to Combat Extortion and Bribery. In particular, the ICC has its own independent, impartial Court of Arbitration to adjudicate international business disputes.⁴⁶ In 1976 when the U.N. established the Intergovernmental Working Group to prepare for the Code negotiation, the OECD issued the Declaration on International Investment and Multinational Enterprises, which included the Guidelines for Multinational Enterprises, National Treatment, and International Investment Incentives and Disincentives.⁴⁷ In 1977 the International Labor Organization produced the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. In 1980 the United Nations Conference on Trade and Development adopted the Rules and Principles for Control of Restrictive Business Practices, which was later approved by the General Assembly. The World Health Assembly approved the WHO/UNICEF International Code of Marketing of Breast-milk Substitutes.⁴⁸ The World Bank formulated its Guidelines for Investment with the support from the Multilateral Investment Guarantee Agency. The final blow to the draft Code was

⁴⁶ Feld, *Multinational Corporations and U.N. Politics*, p.108.

⁴⁷ In 1984 the OECD Declaration was revised to clarify its terms and strengthen its implementation.

⁴⁸ Kathryn Sikkink, "Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code," *International Organization* 40 (Autumn 1986), pp. 815-40.

the Uruguay Round of the General Agreement on Tariffs and Trade (1986-94), which included a large section on Trade-Related Investment Measures.

Along with more than 400 bilateral investment treaties signed mostly between industrialized countries and developing countries, the existence of these alternative instruments had a number of detrimental effects on the Code negotiation.⁴⁹ First, many of these alternative instruments were based on the principle of investment protection and were sponsored by influential, international economic institutions or even by the very Third World countries that espoused a mandatory Code.⁵⁰ The ICC/IOE preferred to abide by these alternative instruments. Second, together these instruments covered a substantial party of the topics listed in the Code. A sense of repetition was widespread among the Code negotiators. Third, the implementation of the OECD Guidelines and the ILO Tripartite Declaration alarmed the ICC/IOE. They feared that what appeared to be a harmless-looking, voluntary instrument at the beginning might gradually turn into a Frankenstein that haunted the TNCs. Although the OECD and ILO instruments had had positive impacts on international business, many TNCs were bothered by occasional lawsuits, demonstrations, and bad publicity associated with the alleged violations of the OECD and ILO instruments.⁵¹ After experimenting with these instruments, the last thing the international business community wanted was a even bigger, more global Frankenstein.

Finally, the *decision-making procedure* as described in the Code was the last contentious issue hastily brought up by the Western countries before the Code negotiation was terminated. In response to the Third World's demand for an effective code, the draft Code had a special section on the implementation of the Code, which included routine monitoring of TNC activities, regular review of the Code's effectiveness, interpretation of the Code, and the establishment of a well-functioning machine (i.e., the Commission and the Centre on TNCs) for the implementation.

The industrialized countries agreed on an effective implementation mechanism at the beginning.⁵² However, 10 years later, after the Third World countries had

⁴⁹ Transnational Corporations and Management Division, United Nations Department of Economic and Social Development. *World Investment Report 1992: Transnational Corporations as Engines of Growth* (New York: United Nations, 1992).

⁵⁰ UNCTC, *Bilateral Investment Treaties* (New York: United Nations, 1988), p.3.

⁵¹ *CTC Reporter* 14 (1983), p.55; 17 (1984), p.10; Katz and Huneke, "The U.N. Code of Conduct for Transnational Corporations," p.4.

⁵² *CTC Reporter* 9 (1980), p.15.

agreed on the ICC/IOE version of the Code in 1991, the Western countries reneged on the early agreement. They argued that the entire section on implementation violated the norm of a voluntary Code and could evolve into a mandatory, regulatory instrument. They cited the experience of the OECD and ILO instruments. Furthermore, they had no confidence in the ability of the Commission on TNCs, which is a political organization, to make decisions based on simple majority rule. The Commission, they felt, was subject to the influence of bloc politics, and, unlike the ILO tripartite (state-business-labor) governing structure, had no formal representation from business interests.⁵³

Asymmetrical institutional access by interest groups

Scholars of international political economy have argued that interest groups can influence international agreements via different institutional access points in national governments and international organizations.⁵⁴ These access points, however, are not equally open or responsive to all interest groups, due to the ideology, organizational interests, and internal politics of the concerned organizations, as well as to the strength of the interest groups. During the Code negotiation, the international business community exerted much more influence than other interest groups such as labor unions and consumer groups.

Initially, NGOs with consultative status of Categories I and II were invited

⁵³ David G. Gill, Chairman, Competition Policy, U.S. Council for International Business, Hearing Before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, November 15, 1989, p.67; Katz and Huneke, "The U.N. Code of Conduct for Transnational Corporations," pp.4-6. In 1964 General Assembly Resolution 1995 (XIX) created 4 regional groups or caucuses: group A (Africa and Asia plus Yugoslavia), Group B (OECD countries), Group C (Latin America), and Group D (Eastern Europe). Later, Africa and Asia established separate groups. The avoidance of group politics at the beginning of the negotiation facilitated compromises. After the early 1980s negotiators strictly followed group politics at the expense of conciliation. A few extremist countries on both sides of the bargaining table prevailed over the overwhelming majority of the countries (*CTC Reporter* 3 (1977), p.8; Dell, "The United Nations Code of Conduct,"; ICC Memorandum 9/20/90, p.2).

⁵⁴ Richard Friman, *Patchwork Protectionism: Textile Trade Policy in the United States, Japan, and West Germany* (Ithaca, NY: Cornell University Press, 1990); Karen Mingst, "Implementing International Environmental Treaties: The Role of NGOs," paper presented at the Annual Meeting of the International Studies Association, Acapulco, Mexico, 1993; Ethan A. Nadelman, "Global Prohibition Regimes," *International Organization* 44 (Autumn 1990), pp. 479-526.

to offer proposals and comments on the Code. About a dozen business associations, including the ICC and IOE, responded, while only a few labor organizations provided input.⁵⁵ After the negotiation began, very few formal opportunities were offered to the interest groups to voice their opinions. They were authorized to attend only public meetings, which were few, not the more frequent, significant, informal or restricted meetings.⁵⁶ Even the expert advisers, whom the U.N. paid for, made very limited contributions to the negotiation.⁵⁷ The labor unions, consumer groups, and experts found many sympathizers in the Centre on TNCs, which provided negotiators with information and administrative supports. But the negotiators from the major industrialized countries kept the role of the Centre to a minimum.

As discussed before, the ICC/IOE had well-established lobbying networks in national governments and provided position papers to negotiators on a personal basis. In particular, during the 1980s in the U.S. and the U.K., the ICC/IOE found an attentive and sympathetic audience in these national governments led by free-market leaders. American and British negotiators often looked to the ICC/IOE for their bargaining positions. In contrast, the voice of labor unions and consumer groups frequently fell on the deaf ears of conservative governments. For instance, in her testimony to the U.S. House of Representatives hearing in 1990, the representative to the U.N. for the International Organization of Consumers Unions (IOCU) complained that the Republican administrations of the 1980s never bothered to solicit the views of the IOCU, which had the same consultative status as the ICC and IOE.⁵⁸

⁵⁵ ECOSOC, "Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct. E/C.10/20/Corr.1.; ECOSOC," *Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct. E/C.10/20/Add.1.*

⁵⁶ Dell, "The United Nations Code of Conduct on Transnational Corporations," pp.69-70; ICC, "Report of the International Chamber of Commerce on the Eighth Session of the United Nations Intergovernmental Working Group on a Code of Conduct for Transnational Corporations," (1980), p.1.

⁵⁷ ICC, "Report of the International Chamber of Commerce on the Eleventh Session of the United Nations Intergovernmental Working Group on a Code of Conduct for Transnational Corporations," (1981), p.2.

⁵⁸ Esther Peterson, Representative to the United Nations for the International Organization of Consumers Unions, Hearing Before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, November 15, 1989, p.92.

Organizational threat

A successful international regime often builds on an effective international organization, for instance, the GATT in the international trading regime, the World Bank and International Monetary Fund (IMF) in the international financial regime, and the International Atomic Energy Agency in the nuclear non-proliferation regime. For the international regime on TNCs, however, an effective international organization might have cursed its creation.

The core of the potential international regime on TNCs was the United Nations Centre on Transnational Corporations, established in 1974. The Centre consisted of the Policy Analysis Division, Information Analysis Division, and Office of Advisory Services. In 1983 the Centre was reorganized into the Policy Analysis and Research Division and the Advisory and Information Services Division. Its operations continued to expand both in scope and in size. In addition to its regular budget, the Centre received donations from national governments for its Trust Fund for Technical Cooperation. The Centre also formed joint units with regional commissions of the ECOSOC, financed from the regular U.N. budget.

The major activities of the Centre were advisory services in the following three areas: (1) Formulation or revision of laws, regulations, and guidelines relating to foreign direct investment and technology, either generally or in specific sectors (e.g., petroleum, mining) or with respect to specific issues (e.g., transfer pricing). (2) Related to the above, the establishment or strengthening of institutional mechanisms and administrative procedures for screening foreign direct investment and technology proposals and monitoring enterprises with foreign participation. (3) Evaluation of specific contractual arrangements, existing or proposed, with foreign enterprises, and assistance in the preparation for specific negotiations.⁵⁹

From 1974 to 1987 the Centre implemented about 600 advisory projects valued at more than \$20 billion and 152 training workshops attended by 5,050 officials from more than 70 countries.⁶⁰ Requests for advisory projects and training workshops grew every year. About 80 percent of the countries that had received advisory services requested more or sent participants to the Centre's workshops. These projects and workshops covered subjects such as mining,

⁵⁹ *CTC Reporter* 15 (1983), p.18.

⁶⁰ *CTC Reporter* 24 (1987), p.9.

petroleum, fisheries, petrochemicals, international banks, technological acquisition, negotiation with TNCs, and labor-management bargaining in TNCs.⁶¹

Although some of these advisory services and workshops had a positive impact on foreign investment by establishing proper attitude and incentive laws, most of them aimed at dividing the investment pie in the favor of local governments or companies. The bargaining advantages of TNCs in technology and market information were often offset by the detailed information about particular TNCs and market analyses provided by the Centre. The TNCs could certainly live without such a third party during negotiations with host governments and local companies.

Moreover, when it was established, the Centre was assigned as its primary task assisting the completion of the Code negotiation. A significant portion of the Centre's budget and personnel, therefore, was devoted to this task. Over the years the Centre developed a vested interest in facilitating the Code negotiation.⁶² It provided expert opinions, conducted research, and convened meetings in support of the Code. As the draft Code stated, the Centre would be the executive arm of the Code's implementation machinery once the Code took effect. When the Code negotiation reached the final showdown in 1991, this organizational interest prompted the Centre's Director to "twice make an 'impassioned' plea for the Code . . . as though he were a delegate." An American negotiator had to warn the Director of his proper role.⁶³

In the eyes of the ICC/IOE and the industrialized countries, the Centre, building upon its past success and popularity, would evolve into a hostile, effective, international government on TNCs. By terminating the Code, the Centre would no longer be a major threat to international business interests. The decision to terminate the Code negotiation was reached only a few months after the Centre was merged into the newly established Department of Social and Economic Development of the Secretariat.

Hegemony theory

In simple terms, hegemony theory suggests that the existence of an inter-

⁶¹ *CTC Reporter* 3 (1977), p.18; 6 (1979), p.24; 7 (1979), p.22; 8 (1980), p.21; 10 (1981), p.24.

⁶² Katz and Huneke, "The U.N. Code of Conduct for Transnational Corporations," p.2.

⁶³ ICC Memorandum 6/26/91, p.1.

national hegemony tends to promote free trade and international financial stability.⁶⁴ Promulgated during the 1960s and early 1970s, the theory has been seriously challenged on theoretical and empirical grounds.⁶⁵ However, in the late 1980s when the Soviet bloc collapsed and Japan and the newly united Germany were suffering from economic stagnation, the United States was reaping the fruits of relatively successful restructuring programs and seemed to resume its hegemonic status. Furthermore, the “structural capabilities”⁶⁶ of the U.S. remained predominant in several international issues, such as nuclear weapons, banking, services, seabed mining, and TNCs. Susan Strange argues that even in the 1970s and 1980s, when the U.S. seemed to lose her “structural power,” it retained “relational power” over major global issues.⁶⁷

This relational power enabled the U.S. to exercise both positive and negative influence (veto power) on the establishment of international regimes. During the Code negotiation, the U.S. opposition (veto) alone was sufficient to prevent the establishment of the TNC regime, despite a near consensus among all other countries, industrialized or developing. If the U.S. had supported the Code (positive influence), the TNC regime would have become a reality despite the opposition from other extremist countries.

Official records of the Code negotiation usually referred to groups of countries, not individual countries. So most of the opposition to the Code came from the Western group. But from the very beginning, the Western group did not have a

⁶⁴ Charles Kindleberger, *The World in Depression 1929-39* (Berkeley, CA: University of California Press, 1974). Benjamin J. Cohen, “A Brief History of International Monetary Relations,” in Jeffrey A. Frieden and David A. Lake, *International Political Economy: Perspectives on Global Power and Wealth*, 2nd ed., (New York: St. Martin’s, 1991). Stephen D. Krasner, “State Power and the Structure of International Trade,” *World Politics* (April 1976), pp.317-43.

⁶⁵ Duncan Snidal, “The Limits of Hegemonic Stability Theory,” *International Organization* 39 (Autumn 1985), pp. 579-614; Arthur A. Stein, “The Hegemon’s Dilemma,” *International Organization* 38 (Spring 1984), pp.355-86. Edward D. Mansfield, “The Concentration of Capabilities and International Trade,” *International Organization* 46 (Summer 1992), pp.731-64. Robert O. Keohane, *After Hegemony* (Princeton, NJ: Princeton University Press, 1984). For a recent clarification of the hegemony theory, see David A. Lake, “Leadership, Hegemony, and the International Economy: Naked Emperor or Tattered Monarch with Potential?” *International Studies Quarterly* 37 (December 1993), pp.459-89.

⁶⁶ Mansfield, “The Concentration of Capabilities and International Trade.”

⁶⁷ Susan Strange, “Protectionism and World Politics,” *International Organization* 39 (Spring 1985), pp.233-57.

coherent policy platform toward the Code; neither did the developing countries. Most of the Western countries were susceptible to the concerns of the developing countries about regulating the TNCs. For instance, France, Italy, Finland, and Sweden shared the developing countries' concerns over national sovereignty, especially with regard to the control over TNCs and the protection of domestic companies and labor unions. The Netherlands did not object to a mandatory Code.⁶⁸ Many small European countries, such as Finland, Italy, the Netherlands, Norway, and Sweden, were regular and active contributors to the budget of the Centre on TNCs.⁶⁹ Even the U.K. and Canada, close ideological allies of the U.S., made such contributions.⁷⁰ At one time or the other, even the most conservative countries, such as Japan, Switzerland, Germany, and the U.K. were ready to accept the compromises offered.⁷¹ When the negotiation stagnated in the early 1980s, France offered a compromise that was accepted by the G-77, expert advisers, and most of the other industrialized countries.⁷² The final revision of the draft Code in accordance with the ICC/IOE proposal had persuaded all but a few Western countries to accept the Code. However, all of this Western support for the Code amounted to nothing because the U.S. opposed it. Using Oran Young's words, the clash between the "entrepreneurial leaders" provided by other industrialized countries (as well as by Mexico) and the "structural leader" ended in the latter's favor.⁷³

The U.S. opposed the TNC regime for three reasons: First, the Republican administrations in the 1980s were critical of the U.N. system as a whole for its corruption and inefficiency. Second, these administrations particularly objected to the regulatory approach of the Code, which was inconsistent with the free trade ideology of the Republicans. Third, the U.S. was the parent country of more than 40 percent of the world's TNCs. The U.S. would have to compete with the global regime over the control of these TNCs. Therefore, the American government was first reluctant to break up the negotiation stalemate during the 1980s. Then, in 1992

⁶⁸ ECOSOC, "Transnational Corporations: Views and Proposals of States on a Code of Conduct," E/C.10/19/Corr.1 (1977); ECOSOC, "Transnational Corporations: Views and Proposals of States on a Code of Conduct," E/C.10/19/Add.1 (1977).

⁶⁹ *CTC Reporter* 11 (1982), p.9.

⁷⁰ *CTC Reporter* 5 (1978), p.3.

⁷¹ *CTC Reporter* 24 (1987), p.36; Dell, "The United Nations Code of Conduct on Transnational Corporations," p.73.

⁷² *CTC Reporter* 17 (1984), p.24; 20 (1985), p.11.

⁷³ Oran R. Young, "Political Leadership and Regime Formation: On the Development of Institutions in International Society," *International Organization* 45 (Summer 1991), pp.281-308.

it decided to bury the regime proposal once and for all. The Bush Administration pressured the General Assembly to terminate the Code negotiation.⁷⁴ During the negotiation process, in fact, the U.S. was often alone objecting to some of the important clauses that eventually obstructed the negotiation, for instance, the dispute about international law.⁷⁵

Counterfactual analysis (CFA)

The above explanations by Marxism, regime/institutionalism, and hegemony theory seem equally convincing. It is tempting to conclude that the failure of the Code negotiation is caused together by Marxist ideology, global capitalism, the political domination of capitalist class, regime weaknesses, asymmetrical institutional access to interest groups, the organizational threat of the UNCTC, and the U.S. hegemonic power. But this synthesis risks the overloading of causal factors. To reduce the overloading, this paper suggests an improved version of the counterfactual analysis (CFA) developed by social scientists.⁷⁶ The improved counterfactual analysis demonstrates that although Marxism, regime/institutionalism theory, and hegemony theory all provide convincing explanations and evidence for the failure of establishing an international regime for TNCs, the application of CFA singles out hegemony theory as the most convincing one and rejects the other two.

CFA has been widely used in philosophy, history, social sciences, and even theology. But the current CFA is ambiguous in its logical and epistemological

⁷⁴ Interview with an U.N. official on 7/16/93.

⁷⁵ As one legal expert commented, "most of the civilized nations of the world do not adhere to the strict definition that the United States puts forward in a good many of its international and bilateral notes. And as a point of fact the United States does not adhere to it in a good many cases" (Rubin, "Hearing Before the Subcommittee," P.67).

⁷⁶ James D. Fearon, "counterfactuals and Hypothesis Testing in Political Science," *World Politics* (Vol.43, January 1991), pp.169-95. Thomas J. Biersteker, "Constructing Historical Counterfactuals to Assess the Consequences of International Regimes," in V. Rittberger and P. Mayer (eds.), *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993). G. King, R.O. Keohane, S. Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press, 1994), pp. 10-12, 77-79. For earlier CFA theorists, see M. Weber, *Max Weber on the Methodology of the Social Science*, trans. And ed. E.A. Shills and H.A. Finch, (Glencoe, IL: Free Press, 1949); and J. Elster, *Logic and Society: Contradictions and Possible Worlds* (New York: Wiley, 1978).

value. In a formal logic sense, a statement that if C (an explanation or event) exists, then E (an explanation or event) exists is true if and only if the statement that if E does not exist then C does not exist is true; that is, $C \rightarrow E$ iff $\sim E \rightarrow \sim C$.⁷⁷ For example, hegemonic stability theory argues that the existence of hegemons (C) helps create and maintain the international trade and financial regimes (E). It also implies that if chaos in international trade and finance emerges ($\sim E$), then the hegemons must be in decline or non-existent ($\sim C$). Debate about historical evidence aside, hegemonic stability theory is thus shown to have a valid logic structure.

In contrast, CFA has a different logical structure. In order to support the statement that $C \rightarrow E$, CFA constructs a hypothetical statement, $\sim C \rightarrow \sim E$, that never exists in the real world. Logically speaking, these two statements are not equivalent to each other, and therefore each one's logical and empirical validity is neither refuted nor supported by the other. However, this logic problem has not deterred scholars in various disciplines from using CFA, which has been regarded as an epistemological device approximating formal logic while satisfying human beings' "feeling or rightness" toward counterfactuals.⁷⁸

In most scientific, controlled experiments, approximation is always a concern but not a serious problem. If we light a match, we see the light. If we had not lighted a match, we would not see the light. As long as we are able to control the specifications of this experiment, both the factual and counterfactual statements tend to support each other. In human behavior analysis, however, approximation is a more serious problem and subject to infinite debate. The critical issue is whether, for the counterfactual argument, we can construct a hypothetical world, which is almost the same as the real world except for C and E. Many philosophers answer no, unless there is a miracle that invents $\sim C$. John Halpin argues that "there may be *no* worlds that are intuitively similar (but not qualitatively identical) to the actual world through long stretches of time. A small difference between two physically possible worlds at one time is (at least typically) magnified into a significant difference at earlier and later times."⁷⁹ James F. Sennett points out that CFA is self-defeating because "for any world W that is relevantly similar to the actual world to any degree r at any time t* prior to t in which J performs A at t, there is

⁷⁷ "Iff" means "if and only if."

⁷⁸ Ernest W. Adams, "On the Rightness of Certain Counterfactuals," *Pacific Philosophical Quarterly* 74 (March 1993), pp.1-10.

⁷⁹ John F. Halpin, "The Miraculous Conception of Counterfactuals," *Philosophical Studies* 63 (September 1991), p.281, emphasis in original.

world W^* that is relevantly similar to the actual world to degree r at t^* in which J refrains from performing A at t .”⁸⁰ And David Lewis concludes that “a hypothetical present or future different from ours must evolve miraculously from a past assumed to be exactly like ours.”⁸¹

Supporters of CFA correctly argue from a practical viewpoint that although the above miracle theory is logically sound, it unreasonably restricts the pursuit of knowledge. Even most scientific experiments would fail in this test. Furthermore, the problem of CFA is more about controlling for, in statistical terms, the colinearity between C and other explanatory variables than the similarity between the actual and hypothetical worlds. After all, CFA is based on the assumption that all other explanatory variables (or conditions) are the same except for C .

In order to control for, but not eliminate, the colinearity problem, philosophers have made a number of suggestions. First, CFA should be “cotenable” in the sense that it relies on valid (in a logical sense) or reliable (in a probabilistic sense) theoretical propositions, and it should build on strong facts or initial conditions. Second, the temporal and spatial distance between C and E should be kept to a minimum, although this suggestion does not totally remove the possibility of epiphenomenon. Third, C should be “logically, nomologically, and causally independent of other variables or conditions.”⁸² And last, the counterfactual should allow a certain degree of freedom in human decision-making. Otherwise, the counterfactual will demand a miraculous force to change the reality. Thus, the logic and epistemological value of CFA is probabilistic, an approximation of both formal logic and the real world.⁸³

Under the shadow of approximation, how does CFA evaluate different theories for a particular phenomenon? We can treat the construction of a similar world as a continuum. In some cases we are able to do so; in others, due to the available evidence and the nature of the case, the hypothetical world contains flaws. This flawed hypothetical world, nevertheless, can be included in the analysis in order to maximize the use of data. The following operational rules are proposed for an

⁸⁰ James Sennett, “Why Think There Are Any True Counterfactuals of Freedom?” *Philosophy of Religion* 32 (October 1992), p.112.

⁸¹ David Lewis, “Counterfactual Dependence and Time’s Arrow,” *Nous* 13 (1979), p.456.

⁸² P. Horwich, *Asymmetries in Time* (Cambridge, MA: The MIT Press, 1987).

⁸³ Adams, “On the Rightness of Certain Counterfactuals,” p. 6. For similar rules on using counterfactuals, see Fearon, “Counterfactuals and Hypothesis Testing,” pp.176-93, and Biersteker, “Counterfactuals and Regime Consequences,” pp.327-30.

argument that $C \rightarrow D$:

In a similar world,

Rule One: if $\sim C \rightarrow \sim D$ is true, then the argument is accepted.

Rule Two: if $\sim C \rightarrow D$ is found, then the argument is rejected.

In a dissimilar world,

Rule Three: if $\sim C \rightarrow \sim D$ is true, then the argument is not rejected nor accepted.

Rule Four: if $\sim C \rightarrow D$ is found, then the argument is rejected.

Rules One and Two are commonly used in CFA, which approximate, but are not equivalent to, the true logical test of "if $C \rightarrow D$, then $\sim D \rightarrow \sim C$." By Rule Three the argument is neither accepted nor rejected due to the difficulty of constructing a similar world. The burden of proof, however, still lies with the argument's proponent. Rule Four operates on the same assumption of the burden of proof.

A simple distinction between a similar world and a dissimilar world is that the former often involves a voluntary change or an isolated change in the variable in focus, while the latter often involves a structural change. In this paper, examples of voluntary changes include the participation of interest groups in a decision-making process and the decision by the United States (U.S.) to disrupt the negotiation. Examples of structural changes include changes in the ideology and investment environment.

This refined version of CFA is particularly appropriate for regime analyses. Each international regime has its unique institutional structure, power relationships, technological background, and resources, all of which affect its formation, performance, and maintenance. For instance, the nuclear non-proliferation regime is dramatically different from the international human rights regime in terms of the above attributes. Even in the environmental area, the ozone regulation regime is substantially different from the whaling regime. While these idiosyncrasies make theoretical generalizations difficult, regime theorists are not hesitant to bring in theoretical arguments to explain regime dynamics. How do we reduce the risk of overloading redundant explanations in regime analyses? Neither regression analysis nor comparative methods, such as the most different system and most similar system designs, are as potent as CFA for dealing with the fact that international regimes vary widely. CFA does not depend on the assumption of the comparability of two or more regimes in order to evaluate the validity of one particular regime

analysis.

However, the strength of CFA also generates its weakness. Because of its strong assumption about “similar worlds” and not about the “comparability of regimes,” CFA does not make claims about the applicability of the rejected or accepted theories employed in a particular regime analysis to other regime analyses. For instance, the following CFA of the TNC negotiation accepts hegemony theory while rejects Marxist and regime/institutional theories. This does not imply that hegemony theory is superior to other theories in other regime analyses.

Applied here, the counterfactual question for the TNC regime is: If the obstructing factors described by a particular theory had not existed, could the Code negotiation have been completed? The CFA results on the Code negotiation are summarized in Table 2.

Table 2. *Counterfactual analysis of the Code of Conduct*

<i>Explanations</i>	<i>Similar World</i>	<i>CFA Test Confirmed</i>	<i>Accept/Reject</i>	<i>Rule #</i>
Marxism				
Ideology	No	No	Reject	Four
Global Capitalism	No	No	Reject	Four
Instrumental Marxism	Yes	No	Reject	Two
Regime/institution				
Regime Weakness	Yes	No	Reject	Two
Institutional Access	Yes	No	Reject	Two
Organizational Threat	Yes	No	Reject	Two
Hegemony				
Veto Power	Yes	Yes	Accept	One
Relational Power	Yes	Yes	Accept	One

Marxism

Included in the Marxist analyses mentioned before were Marxism as an ideology, global capitalism, and instrumental Marxism. The counterfactual questions are: if the groups of countries changed their ideological stands, if the global investment

environment did not shift in the TNCs' favor, and if the international capitalist community had not influenced the governments, could the Code negotiation have been completed?

It is difficult to construct a similar world for the ideological variable. By changing the ideological variable, other important variables in the hypothetical world (such as the cultural exchange among nations and the role of the World Bank and IMF in imposing conditionalities on Third World countries) have to be changed as well. In this dissimilar world, however, the fact that the G-77 (including Brazil, Mexico, and India) were willing to accept the ICC/IOE version of the Code in the early 1990s indicates that ideological differences were not vital to the failure of the Code negotiation. At the same time, Western negotiators recognized that the Marxist rhetoric used by Third World negotiators was contradictory to the statements and practices of the economic officials in those very countries. Ideological differences did not have a substantial impact on the negotiation, especially the later stage.

What if the global investment environment had not changed? Would a different environment have compelled the TNCs and the industrialized countries to accept the Code? Again, this counterfactual world is hard to construct, because the change in the global investment environment was related to recession in the industrialized countries, the debt crisis, the change of TNC investment strategies, and the adjustment policies of developing and socialist countries. However, in this dissimilar world, even if the bargaining advantage did not shift in favor of the industrialized countries, they would continue to postpone the Code negotiation (as they did in the 1970s when they had weaker bargaining advantages) and not support its completion. For the industrialized countries the Code represented a net loss for the TNCs, since the regulation was comprehensive and potentially strong while the protection was ambiguous and weak.

Finally, if the ICC/IOE had not intervened in the negotiation process, or if other interest groups, such as labor unions and consumer groups, were more active in lobbying activities, would the Code have been completed? Since the decisions by these interest groups are voluntary decisions, a similar world can be constructed.⁸⁴

⁸⁴ One can argue that the Code negotiation revealed a structural weakness in other interest groups. The TNCs had a vital interest in such an international instrument, while other groups were concerned about the capitalists in general and usually targeted domestic capitalists more than international capitalists. However, the structural imbalance can often be corrected by countervailing mobilization efforts. Therefore, it can be regarded as a voluntary choice by interest groups.

But even without the intervention of the ICC/IOE, according to the Structural Marxist view, the capitalist states would have prevented any attempt that would undermine capitalist reproduction.⁸⁵ To them the Code was the antithesis of domestic and global capital accumulation.

International regime/institutionalism

Three regime factors were used to explain the failure of the Code negotiation: regime weaknesses, asymmetrical institutional access by interest groups, and organizational threat to the TNCs. The weaknesses of the proposed TNC regime reflected a predetermined inconsistency in principles and norms. If the G-77 had chosen different principles, norms, rules, and decision-making procedures, the Code, just like other alternative instruments, could have been completed.

This counterfactual world, in fact, was realized in June 1992 when the G-77 decided to accept the proposal of the industrialized countries. But by then the industrialized countries and ICC/IOE had lost interest in the Code. Moreover, inconsistency within a regime does not necessarily spell its demise or inefficiency. The trade regime has been characterized by such inconsistency but has worked very well.⁸⁶ And the newly established environmental and human rights regimes are based on even shakier foundations.

The asymmetrical institutional access issue has been alluded to before in the discussion on instrumental Marxism. The organizational threat to the TNCs was real but not the primary cause of the negotiation breakdown. The information and advisory services offered by the Centre on TNCs could have been provided by private consulting companies or other U.N. development agencies. As to the role of implementation machinery, this was a last-minute issue raised by the industrialized countries to ward off any attempt to revive the Code negotiation after the G-77 had agreed on the ICC/IOE version of the Code.

⁸⁵ Nicos Poulantzas, *Political Power & Social Classes*, trans. Timothy O'Hagan, (London: NLB and Sheed & Ward, 1973). Adam Przeworski, *Capitalism and Social Democracy* (Cambridge: Cambridge University Press, 1985).

⁸⁶ Jock A. Finlayson and Mark W. Zacher, "The GATT and the Regulation of Trade Barriers," in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983).

U.S. hegemony

Although the simplest explanation among the three, hegemony theory seems to be the strongest one. A counterfactual analysis can further strengthen its explanation. The conclusion is that the U.S. was the *veto state* in the proposed TNC regime. If the U.S. had taken a positive attitude, the Code could have been completed long time ago. And this decision would not have involved much political cost or been related to other structural trends in either the hypothetical or real worlds.

As the predominant parent country of the TNCs, the U.S. was the country all other industrialized countries looked to during the negotiation. Other major parent countries, such as Germany, Japan, and the United Kingdom, certainly would like to protect their TNCs from the encroachment of Third World countries. But the relative importance of their TNCs was small and their international political influence was limited. The United Kingdom almost always voted with the U.S. in the United Nations, while Germany and Japan still had doubts about their proper role in world politics. Therefore, it was natural to rally behind the U.S. on this issue.

As the evidence showed, all other industrialized had revealed their acceptance of the Code one time or the other during informal discussions. But when it came to a formal decision, these countries would not break away from the U.S. An international Code without U.S. support would not be effective and would be discriminatory against those TNCs from other industrialized countries.

It was clear that the U.S. administration would incur political costs should it decide to support the Code. The ICC and IOE were powerful lobbyists. In particular, the U.S. Council for International Business, the liaison office of the ICC/IOE, included as its members some 300 American TNCs, service companies, law firms, and business associations. However, first of all, in its history of foreign relations, the U.S. has demonstrated repeatedly that it rarely yields to international agreements or laws when its vital national interests are threatened, e.g., the invasion of Panama and Grenada, support for Israel and South Africa, and the application of section 301 of the 1985 Trade Act. If the Code turned out to be detrimental to American TNCs, the U.S. government would be the TNCs' firm guardian. As John S. Duffield correctly argues, "Rarely, if ever, will regimes shape behavior in ways that are fundamentally at odds with the dictates of structural factors, such as the distribution of power."⁸⁷

⁸⁷ John S. Duffield, "International Regimes and Alliance Behavior," *International Organization* 46 (Autumn 1992), p. 853.

Second, legal experts had testified repeatedly that the Code would not have a significant impact on business behavior because the Code was voluntary. Third, many American TNCs, such as Hilton Hotels, supported such a Code because it would increase the firm's reputation as a quality provider. And last, the Code would have received widespread support from labor unions, consumer groups, environmental groups, and domestic industries which were threatened by the foreign investments in the U.S.⁸⁸ Thus, the American government had a relatively low-cost political choice to make.⁸⁹

Would the negotiation have been completed if a Democratic administration had been in power in the 1980s? It might have. After all, it was during the late 1970s when the negotiation started and progressed speedily. But the partisan nature of the American administration does not seem to bear a direct relationship to the negotiation. The Clinton administration has not had any plan to revive the negotiation, even when the Democrats were controlling both houses of the Congress.

In sum, CFA demonstrates that a similar hypothetical world can be constructed in which the American government had enough freedom and autonomy to make a choice between supporting and rejecting the Code. Had the American government simply changed its policy, an international regime on transnational corporations would have existed today.

Conclusion

Because of the idiosyncrasies of regimes, the overloading of explanatory variables becomes a potential threat to regime analyses. Counterfactual analysis can reject redundant or false theoretical explanations in each regime analysis. This case study of the negotiation of the code of conduct for transnational corporations has demonstrated the utility of CFA. Although the Marxist, regime/institutionalism, and hegemony theories all provide convincing arguments and evidence to explain the

⁸⁸ Milner, *Resisting Protectionism*; Edward M. Graham and Paul R. Krugman, *Foreign Direct Investment in the United States*, 3rd ed. Washington D.C.: Institute for International Economics, 1994).

⁸⁹ One might point out that in order to construct a counterfactual for the American government's decision, another counterfactual for the "Republican" President needs to be constructed, which is a difficult CFA task. In this dissimilar world, however, a Democratic President would not be compelled to vote for the Code, as evidenced by the disinterest of Clinton Administration in the Code.

International Regime and Counterfactual Analysis: Regulating Transnational Corporations

failure of the Code negotiation, CFA points out that only the hegemony theory (the American veto and structural power) is critical to the success and failure of the Code. Had the U.S. supported the Code, an international regime on the TNCs would have been created.