

Multinational Corporations in World Development - 40 years on

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Abstract:

In light of the 2014 Ecuador-sponsored resolution at the UN Human Rights Council to examine the link between Transnational Corporations and Human Rights, in this paper I review the first major discussion at the United Nations of the role of multinational corporations. The report on Multinational Corporations in World Development (1973) for the UN Department of Economic and Social Affairs launched the (then) new UN Centre on Transnational Corporations. I examine the report in some detail, compare and contrast this with the Ecuadorian resolution from 2014, and reflect on the continuities and changes in attempts to regulate the conduct of global corporations over the forty years between these two moments.

Key words: codes of conduct; global political economy; international law; Transnational Corporations; United Nations.

In the current period of upheaval in the global economic system, the (political) regulation of the corporation has become a subject to which commentators return again and again; critics claim there is insufficient global regulation of the conduct of multinational corporations (MNCs) generally and specifically around taxation, human rights and environmental impact; supporters of the contribution MNCs make to the global economy warn that formalised (legal) rules are inefficient relative to the agility of self-regulation and as such would represent a general cost to global society. These debates are hardly novel and can be tracked back for at least forty years if not longer. In this article I compare two moments in this debate; one at a time when these issues were starting to be more widely articulated on the global political stage and a second moment 40 years later. This allows me to focus on what has changed and what has stayed the same in these debates. Recognising that the policy debates around the interaction between corporate activity and human rights, environmental impact and taxation are complex and ongoing, I have deployed an approach (set out below) that I have developed at length elsewhere to identify two particular moments that seem to represent key shifts in the manner in which the potential (international) regulation of corporations is conceived.

In the first section I briefly review and (re)present this approach that informs my political economic analysis. The following section explores the first of the two moments identified: The United Nations' report published as *Multinational Corporations in World Development*; I examine both its content and its impact. Then I move forward forty years to examine the relatively recent Ecuadorian resolution at the UN Human Rights Council to prepare the ground for formalised international regulation of MNCs around human rights. In the final section I compare and contrast these two moments to suggest some conclusions on the progress and shape of the engagement between MNCs and various aspects of the political programme of global governance.

Critical Realism and ecology of regulation around MNCs

In previous work I have deployed Margaret Archer's approach to conceptualizing the relationship between ideas and their articulation by 'social forces', and material conditions. Most valuably, Archer refuses the temptation to identify either structure (institution) or agency as the final determining factor in social relations.¹ She argues that focusing on agency alone and offering a 'bottom up' causal explanation would make 'no allowances for inherited structures, their resistance to change, the influence they exert on attitudes to change, and crucially..., the delineation of agents capable of seeking change'.² At the beginning of any particular chosen/posited sequence of history there are structures/institutions carried forward, reflecting previous political economic settlements regarding the manner in which (in this case) the regulation of global corporations might be understood in a particular (historical) situation. There are always agents who are disadvantaged as well as those who manage to capture the benefits of the system at that (or any) particular juncture.

Historically extant social institutions are themselves the products of previous clashes of social forces, previous interactions of ideas, material capabilities and institutional practices. Agents' actions may be the immediate cause of specific moments of settlement, but they also remain embedded in these larger structures, including material conditions, state institutions and the structure(s) of global capitalism, that

both constrain and empower. Indeed, such change itself can alter agents' interests if it renders existing institutions less useful and agents begin to be harmed by a continuation of the status quo. Archer stressed that 'all structural influences... are mediated to people by shaping the situation in which they find themselves',³ using the tools (language and rules) available to them. The key issue is the difference between the inherited structures (playing out in institutionalized settlements) and the continuing (or changing) interests of specific agents.

Structure/institutions and accumulated social facts condition but do not determine agency. The power of agency lies in its 'capacities for articulating shared interests, organizing for collective action, generating social movements and exercising corporate influence in decision-making'.⁴ This leads Archer to identify two types of agency: primary and corporate (which to avoid confusion here I shall call 'collective') agency. Primary agents have neither organized nor articulated their interests and seldom participate strategically in shaping or reshaping structure. By contrast, collective agents are 'those who are aware of what they want, can articulate it to themselves and others, and have organized in order to get it; [only they] can engage in concerted action to re-shape or retain the structural or cultural features in question'.⁵ In this sense, Archer argues, affected primary agents must develop collective forms, to engage effectively in the political process of structural change or defence. Collective agents 'pack more punch in defining and re-defining structural forms, and are key links in delimiting whether systemic fault lines (incompatibilities) will be split open... or will be contained'.⁶ In order to be successful, agents need some form of organization and the ability to articulate their interests. They need 'technical' expertise, political power and access to resources, including the very institutions they may wish to change. Agents may become dissatisfied with the status quo, recognizing that the structural incongruities threaten to reduce benefits and power, but unless they are able to organize a collective response they will be unlikely to be able to effectively challenge more formalized groupings.

Thus, following Archer: where there is a mismatch between the structurally or institutionally available benefits and the politicized interests of marginalized agents, this may be translated into tensions and strains within the system, which are then experienced as practical exigencies by agents whose interests are vested in the impeded institutions.... Their situations are moulded in critical respects by operational obstructions which translate into practical problems, frustrating those upon whose day-to-day situations they impinge, and confronting them with a series of exigencies which hinder the achievement or satisfaction of their vested institutional interests.⁷

In these confrontations the shift in ideas about the institutional settlement starts to become more apparent. While the beneficiaries will attempt to maintain the universality of the systems of justification of the status quo, the challengers will seek to identify the emerging practical (real) gaps in the institutional reflection of the dominant ideas of the current settlement. Thus, and following this analytical approach, in both the moments I discuss below the shift in the perception of what was needed politically was driven by shifts in knowledge about, and judgments of, corporate practice and actions. In both cases the prior, and general normative settlement around the regulation of corporate behaviour was undermined (or contradicted) by the actuality, revealed by the Church Committee (and others) in the

first moment, and as directly experienced by the government of Ecuador in the second.

Florian Wettstein has argued that increasingly multinational corporations are playing a political role in global system and as such should be subject to the same checks and balances as other equally powerful organisations as part of a move to a more democratic and deliberative form of global governance; what is required is some form of countervailing power. This would likely involve a 'cosmopolitan system of laws and regulations [that] would establish global incorporation combined with global taxation...[and] effectively eliminate multinational corporations' capabilities to evade taxes and regulations'.⁸ For John Ruggie this asks 'too much from the system of international public governance' leaving him to prefer on pragmatic grounds a combination of national remedies around human rights with stronger normative leadership by the institutions of global governance.⁹ As this suggests, and following Larry Catá Backer's characterisation, we can usefully see the regulatory environment that encompasses MNCs as an ecology that adds three separate interweaving elements to states' regulatory scope: corporations own internal governance functions;¹⁰ the emergence of private regulatory capacity; and the development of multi-stakeholder regulatory (autonomous) systems.¹¹ We can then see the (revived) interest in formalised and positive international law in the second moment that I discuss below as a reflection of specific agents' judgement about the regulatory efficacy of such ecology.

This ecology is perhaps most developed in the realm of human rights and the posited responsibilities of global corporations in this regard. As Nadia Bernaz sums it up, in her survey of the issue; the regulatory intent 'rests on two simple ideas. First, business entities should refrain from violating human rights. Second, if they do end up violating human rights, victims must be provided with a remedy'.¹² As Bernaz sets out, this ecology or network of regulatory instruments has a long history, and it now seems clear that the practices of large corporations will not be altered significantly other than through a combination of formal legal, soft law and civil society regulatory developments.¹³ However, as Archer's perspective would suggest, it is also likely that the balance between ecological elements will shift in relation to the experience(s) of particular actors, organisations or political communities, perhaps most clearly to the shape and extent of what Bernaz refers to as the 'accountability gap'. This lack of accountability results from three factors: firstly, where corporations are (forced to or voluntarily) collude with host states, legal recourse in the state where abuse takes place is compromised by the involvement of the host state itself; secondly, if there are significant barriers in the way of victims can seek recourse via the legal systems of corporations' home states; and lastly when there is a lack of an international mechanism of (legal) accountability.¹⁴

Therefore in this article I examine two moments in the history of this ecology: the first represents the moment when its complex character started to cohere for policy makers and others focussing on the conduct of MNCs; the second is much more recent and may represent a key shift (back) towards an aspiration to strengthen the formal legal element of the regulatory system.¹⁵ The question I seek to explore is not whether regulation would be legitimate, but rather to assess what has changed (and what has not) in the political perception of the 'problem' of regulating MNCs' activities and behaviours between these two moments divided as they are by forty years of

global political economic history. By exploring two moments in the development of what Wettstein has called the 'institutional cosmopolitanism' (and I have referred to as an ecology or regulation) whose components can 'make valuable contributions to the realisation of people's rights',¹⁶ I aim to illuminate the manner in which some aspects of the first moment's analysis and prognosis of the issues have become normalised, and others have continued to be unsettled and contentious. In Archer's sense it seems to me that we can usefully regard these moments as relations between continuity and contradiction in the manner in which social actors interested in the operation and practices of global corporations have returned to formal regulation after the promise(s) of self-regulation has been (relatively) unfulfilled, and by doing so account for actions that seek to rebalance what initially might seem a relatively settled ecology of regulation.

Multinational Corporations in World Development (1974)

At the end of the 1960s and into the early 1970s it was becoming increasingly obvious that large, internationally focussed corporations could wield significant influence across the world, and that sometimes this was achieved via dubious means.¹⁷ As John Braithwaite and Peter Drahos have commented, 'the mid-1970s saw a frenzy of code and guideline development on various abuses of power by [MNCs] in the climate created by the revelations of the Church Committee', and specifically the reports of ITT's actions in Chile.¹⁸ Reflecting this mood of disquiet, and the growing aspirations for a new international economic order (NIEO), on 28th July 1972 the United Nations Economic and Social Council (ECOSOC) adopted resolution 1721 requesting that the Secretary General appoint a Group of Eminent Persons to examine the role of MNCs in the international economy, their impact on development, and the implications for international regulation. Fortuitously, at this time *détente* also meant that the idea of international cooperation, between the developed countries of the 'west', and communist countries of the 'east', as well as developing states, was relatively well-received and enhanced the potential to build a cooperative approach.¹⁹

The Group of Eminent Persons' remit stretched from considering recommendations for states' governments, to more general 'recommendations for appropriate international action'.²⁰ Their work was framed by a report that sought both to map the contours of the international corporate economy, and also make a range of initial recommendations for suitable actions.²¹ Recognising the likely interest in this research and policy analysis the UN arranged for the report to be published by Praeger Publishers in New York in 1974. This report prompted the establishment of the UN Commission on Transnational Corporations, and the UN Centre on Transnational Corporations.²² Moreover, the report set the agenda for discussion of both the Group of Eminent Persons and the wider community of scholars, commentators and activists who had started to focus on the activities of MNCs.

The report published as *Multinational Corporations in World Development* (MCWD), was the first major report from the UN on the issue of multinational corporations; in the words of Tagi Sagafi-Nejad and John Dunning, it was perhaps the most comprehensive review of the state of knowledge on [MNCs] at that time and was ground-breaking in its scope, content and format... The range of policy issues it covered set the agenda for subsequent years,

and the concepts it considered became springboards for later UN work ... [and it] was explicit, detailed and prescriptive.²³

That said, it is also admirably balanced in its treatment of MNCs, leaving criticisms of (then) recent scandals to one side, and working hard to recognise the positives as well as the negatives of MNC involvement in many states' economies. The report had three main elements: the first third was intended to introduce and explore the character of MNCs; the middle section deals with their impact in international relations, as well as identifying some tensions; and the final segment makes some recommendations 'toward a program of action'. The report starts from the recognition that MNCs can be valuable to economic development (nationally and internationally) while also acknowledging that their conduct and activities may privilege or advance certain interests at the cost of others. While resisting an unalloyed anti-MNC position, it is premised on the need to develop international policies to guide and shape how MNCs interact with host states and other non-state economic actors, and perhaps most significantly to address what Bernaz has called the 'accountability gap'.²⁴

The report begins by setting out a range of descriptive issues; noting the size of the largest MNCs, with which the report is interested; recognising that many of these largest of MNCs operate in oligopolistic markets,²⁵ while also identifying the central role of affiliates for their operations. It then moves on to examine the extent of MNCs involvement in the world economy, suggesting that in 1971, MNCs accounted for around a fifth of world value added,²⁶ although foreign direct investment (FDI) was uneven both geographically and by industrial sector. Thus MCWD suggests that the 'typical multinational corporation is a large-sized, predominantly oligopolistic, firm with sales running into hundreds of millions of dollars and affiliates spread over several countries'.²⁷ These MNCs were mainly based in the developed countries of the world economy with over half (by share value) from the USA. In the report's analysis the spread of investment and activity was influenced strongly by historical ties (often but not always relating to colonial holdings), and overall MNCs played a key role in intertwining the international economy across developed, un(der)-developed states and the then socialist bloc.²⁸ Reflecting the manner in which at that point MNCs had organised their international activities, the report concludes that most invest abroad either to gain access to raw materials, or to manufacture (both to reduce costs *and* to gain better access to new markets).²⁹ The report posits increasing formality of structure and control of MNCs' own networks, following models and practices developed by US MNCs, and notes that transfer pricing practices distorted and obscured the profitability of various parts of these organisations.³⁰ This leads to a conclusion that the 'need to exercise control is reflected in the preference of multinational corporations for wholly owned subsidiaries, although control can at times be achieved through joint ventures and even minority positions'.³¹ As the report suggests, at this point MNCs were often relatively simple organisations and as such relatively easily identified and described.

Recognising that MNCs had an 'almost boundless capacity for adaptation' to changing circumstances,³² the report then moves on to examine how they helped shape international relations and how they adapted to this changing context. Certainly, MNCs remained embedded in a system of national economies, but even in the 1970s it was clear that there were significant avenues of global influence. Firstly, managers and other senior executives of MNCs moved within an international network that also included policy makers, legislators and other members of national

elites. While this allowed MNCs to mobilise influence, MCWD also notes that nationally significant economic activity carried out by MNCs was managed and controlled from outside the jurisdiction of most host states, producing a set of dependent and interdependent economic relations.³³ This leads the report to set out some areas where tensions between host states and MNCs could be identified.

Focusing largely (although not exclusively) on natural resources the authors of MCWD suggest that states found their sovereignty was often compromised by the need to engage MNCs to fully exploit natural resources.³⁴ Equally, the ability of states' governments to develop and follow planned economic policy might be compromised by the actions and/or requirements of investing MNCs, leading to a requirement to negotiate and compromise over developmental strategies.³⁵ These tensions were particularly pronounced in the areas of technology and innovation, and in the development of high(er) skills in the workforce. Few MNCs conducted research and development in host states, and the utilisation of technology fees and licenses was often a cost on local production.³⁶ Interestingly as regards labour, the report suggests that for many states MNCs labour practices (higher than local wages, better training) served to unhelpfully distort local labour markets.³⁷ The report concluded that in

many host countries there is a growing dissatisfaction over playing a peripheral role. Host developing countries are moreover suspicious of the multinational corporations' style of doing things. Their financial power and easy access to the top hierarchy of government and business may be used, openly or covertly, to influence the domestic political process to their liking.³⁸

For some social elites, the alliance of MNCs with other elements of the local political community was regarded as an impediment to locally planned development trajectories; the report therefore concluded that the political reception of MNCs' activity in any state was unlikely to be uniform.

The report then moves to discuss the relations between MNCs and their home countries, although unsurprisingly here the issues were somewhat different. For the home countries the difficulty was that MNCs moved large amounts of revenue around their networks producing, the data suggested, increases in exchange rate volatility due the practical demands for foreign currency and the repatriation of profits/earnings.³⁹ Likewise the then developing operation of international supply chains and the flow of intermediate and end products around these networks, distorted the overall international market position of hosts states, with less than predictable impact(s) on the balance of trade.⁴⁰ These issues prompted a concern with the question of taxation, the use of transfer pricing to minimise tax exposure and the varying treatment of corporate revenue/profits between different jurisdictions, leading to the conclusion that while there was yet to be a crisis around this issue in the early 1970s, 'there is a tendency to long-term deterioration that could eventually result in drastic unilateral actions by governments, or even by the corporations themselves in respect of their investment decisions'.⁴¹ However, forty years ago the distorting influence of tax competition was regarded as unhelpful to both states *and* MNCs.

Having set out the range of knowledge and information that the report team had been able to access on behalf of the report's primary intended audience – the Group

of Eminent Persons empanelled by ECOSOC resolution 1721 – the final section of MCWD provided a suggested programme of action. The report's researchers regarded the continued thinness of reliable information about the activities of MNCs as a major hindrance, but the report *does* identify a range of actions at national and regional level. These ranged from addressing issues of expropriation and nationalisation, to regional guidelines around technology transfer (taken furthest at the time by the Andean group of six South American countries), foreign investment and required levels of local participation in new ventures, while the European Community (as was) had been more concerned with reigning in inter-corporate collusion and restrictive practices.⁴² Although accepting that some MNCs had modified their behaviour in light of pressure from host states, regional actors, and in some cases labour unions, it was also clear that there was a significant gap in attention to MNCs activities that *matched* the scope and reach of those activities, leading the report's authors to conclude:

No matter how wisely the host and home countries deal with multinational corporations, and how socially responsive the behaviour of these corporations may be, tensions and conflicts will inevitably arise and international machinery and procedures must be devised for dealing with them.⁴³

This prompted seven recommendations for action at the international level.

Firstly the research team behind MCWD suggested the establishment of an international forum (under the auspices of ECOSOC) to generally gather, share and publicise research into the activities of MNCs. Secondly, this forum should also support an 'information centre' that would seek to conduct new research to develop authoritative data on transfer pricing, the international division of labour within MNCs (both technical and managerial), reliable statistics on intra-corporate financial flows, and a clearer understanding of the policy influence wielded by MNCs in both home and host countries.⁴⁴ Thirdly, the report saw a need for a wider range of technical cooperation between states, to help them counter MNCs' ability to mobilise influence (and more practically technical expertise) across their operations. Fourthly, MCWD envisaged the development of a code of conduct that would be progressively widened and strengthened, cumulating in a code with organisational backing similar to the (then operative) General Agreement on Tariffs and Trade, allowing for some form of enforcement and sanction.⁴⁵ Fifthly, the report argued for a register of MNCs and (sixthly) the development (building on such a register) of an (international) law of international corporations, to establish MNC's formal international legal subjectivity, which would also lastly, support a UN-mandated dispute resolution (arbitration) mechanism.⁴⁶ While the report's authors recognised some of these proposals were far reaching, they also noted that the informational and technical assistance proposals had little to obstruct them.

Indeed, the relatively prompt establishment of the United Nations Centre on Transnational Corporations (UNCTC) reflected the first two proposals directly. The UNCTC, and other developments contributed to a widening in subsequent years of the exchange of information and advice on MNC activities, but the posited code of conduct while subject to a series of discussions and the drafting of proposals came to little.⁴⁷ These efforts paralleled the development of the Organisation for Economic Cooperation and Development (OECD) code of conduct but this was perhaps not quite what had been intended by MCWD's authors as not only did it have little in the

way of enforcement mechanisms, and implicitly rejecting the sixth proposal, it explicitly did not establish MNCs as subjects of international law. Moreover, as the OECD guidelines were an addition to its inter-governmental Declaration on International Investment and Multinational Enterprises many treated them with some scepticism seeing them as a way of heading off the development of a UN code.⁴⁸ Lastly while arbitration and conflict resolution mechanisms were increasingly deployed in the relations between states and MNCs, this was almost entirely privatised rather than being lodged in a multinational institution, and remains so four decades later.

To a large extent MCWD was part of a brief flowering of developing country-led pressure for reform of the organisation of the increasingly global political economy. It sits in a context of debates around the NIEO alongside attempts (through the UN's various agencies) to construct a system of regulation that would be less unbalanced towards the larger, most developed states and their businesses.⁴⁹ As noted the report fed directly into the establishment of the UNCTC which for the first decade of its existence managed to retain a semblance of independence, reporting to ECOSOC not UNCTAD, and establishing a constructive engagement with many MNCs' management teams around the development of a code of conduct for transnational business.⁵⁰ However, while this may have also normalised the interest in corporate affairs within the UN, increasingly its work was perceived by some powerful countries as detrimental to the interests of *their* MNCs, and as such in the 1990s it was closed (and collapsed into UNCTAD), in what Braithwaite and Drahos have called in their survey of globalised business regulation the 'most extreme example of forum-shifting we have seen'.⁵¹ Moreover, often the UNCTC seems to be written out of history; by 2003 a *South Centre* report (jointly published with a UN agency) on UN-Business Partnerships,⁵² despite adopting a critical perspective on such developments, made no mention of the UNCTC or its work, mistakenly assuming that the UN's engagement with corporations really only got under way with the UN Global Compact. Nevertheless, international organisations, latterly the institutions of global governance have kept the activities of MNCs in focus even if this has not produced any 'hard' regulatory structure. Likewise, one could argue that the UN-based critical research initiated by the UNCTC has continued to some extent both at the UN Industrial Development Organisation (UNIDO) and at the United Nations University, although both organisations are to one side of mainstream discussion of the contemporary practices and governance of global corporations.⁵³

The Ecuadorian Resolution (2014)

Some forty years after MCWD, in a different forum – the UN Human Rights Council (UNHRC) – a clear statement of intent around their relations with MNCs was put forward by developing countries and adopted. This time the initiative was led by Ecuador, reflecting the country's experience in a long running legal dispute with Chevron, which has involved the corporation seeking retrospective protection from a judicial decision on damages reached before any bilateral investment arbitration treaty was in force (the environmental damage at the centre of the case took place between 1964-1992, while the treaty was signed in 1993 and came into force in 1997).⁵⁴ The case then became focussed on how investor protection(s) in the *Bilateral Investment Treaty* might be interpreted and applied.⁵⁵ However, due to Chevron's lack of assets in Ecuador the original plaintiff's only hope of restitution

was recognition of the judgment abroad; thus the case was initially litigated in Ecuador, but then 'recognition proceedings' were commenced in Canada as this was regarded as the most friendly jurisdiction in which to establish the international efficacy of the award of damages.⁵⁶ The case also included claims of fraud against the plaintiff's US lawyer, as well as a US legal finding that the Ecuadorian justice system was unreliable and subject to political direction.

Space precludes a detailed account of the many twists and turns of this case, but the legal quagmire seems to have convinced the Ecuadorian government that current norms and codes have too little ability to hold corporations to account when a domestic court finds evidence of illegal environmental damage.⁵⁷ Indeed, the case needs to be set in the context of President Rafeal Correa's position that despite complaints and criticisms from various leftist groups it was possible to construct a beneficial political economy of extractive industries for Ecuador.⁵⁸ Thus, to protect this position Correa's government needed to demonstrate that it was attempting to neutralise the perceived power imbalance enjoyed by the corporations on which the extractive strategy at least partly depended. Moreover, Ecuador's new (2008) constitution, reflecting more general trends in Latin American constitutionalism, shifted the state from being *estado de derecho* (essentially a limited liberal rule of law state) to the more expansive *estado de derechos* (in Spanish the one letter addition, adds 'justice' to the core reason of state)⁵⁹ and as such Correa's government (and the state more generally) now have a widened remit as regards relations with major corporate investors.

Prior to Ecuador's recent initiative John Ruggie reported that at the 2008 meeting of the UN Human Rights Council, at which the intent was to endorse the *Guiding Principles on Business and Human Rights*, it was the Ecuadorian representative(s) who was the last to hold out against endorsing them because they were not legally binding. After some 'back-channel work' they agreed to endorse the *principles* to allow them to be consensually adopted.⁶⁰ However, such acquiescence in this non-legal approach was not to last, and while not necessarily wishing to completely dismiss the *Guiding Principles*, the Ecuadorian government representatives and their allies on the UNHRC subsequently sought to go beyond voluntary or civil regulation.

Before moving to discuss the Ecuadorian Resolution, it is as well to note that Ruggie's position while working for the UN was that legal instruments should be targeted on specific issues (for him, issues of corporate liability),⁶¹ while the Ecuadorian position was that there should be a much more comprehensive international legal instrument; the distance between these positions is really of degree rather than being completely incompatible. Nevertheless, in practical terms these two positions remain in tension and hence in 2014 the Ecuadorian government proposed developing such a comprehensive legal instrument. In the terms of the analysis set out in the first section, above, a gap (a contradiction) opened up between the continuing normative settlement on the regulatory value of guidelines (which the beneficiaries argued remained justified) and the Ecuadorian government's experience of their efficacy, prompting a shift in their socio-political priorities for international policy-making, and their political actions.

The Ecuadorian proposal, the 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect

to human rights' runs to only two pages, and is important more for what it asserts is required than for any content one might infer from the document.⁶² While stressing the continuing responsibility of states to promote and protect human rights the resolution also '*Emphasiz[es]* that transnational corporations and other business enterprises have a responsibility to respect human rights', before also '*Acknowledging* that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights'. As this indicates the resolution still seeks to establish clearly the MNCs can contribute to the ends desired by governments and populations in less-developed countries, as Correa's government wished to maintain, thereby still retaining the overall position set out in MCWD some forty years before.

This is then followed by nine articles which seek to establish an 'open-ended intergovernmental working group on a legally binding instrument on transnational and other enterprises' with the express purpose of drafting such a legally binding instrument after having taken evidence and representations from a range of experts. The articles include various aspects of a timetable of work, and ask the group to 'submit a report on progress made to the Human Rights Council for consideration at its thirty-first session' (Spring 2016). Perhaps most controversially, the resolution included a footnote stating that ' "Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law'. This was intended to limit the group's work to a legal instrument covering *only* global, transnational or multinational corporations while excluding state-owned enterprises or locally owned and incorporated enterprises. The resolution was adopted by the Human Rights Council with a vote of 20 states in favour, 14 against and 13 abstentions, demonstrating a lack of overall consensus on the proposal(s).

At the same session, and reflecting a range of countries' disquiet at the Ecuadorian proposal, Norway offered a resolution which was focussed on already existing 'guiding principles' for MNCs. Moreover, while the Ecuadorian resolution was exclusively concerned with the progress towards legally binding requirements for corporations, the Norwegian resolution sought to identify the range of existing mechanisms by which corporations could be *encouraged* to recognise and protect human rights.⁶³ Moreover where legal instruments were mentioned these were exclusively national rather than inter- or trans-national. Across its 19 articles the Norwegian resolution identifies a number of ongoing projects related to guidelines, access to local/national legal institutions and the role of a range of stakeholders. This resolution was adopted by consensus which given its largely uncontroversial content is unsurprising, but enabled supporters of the guidelines and non-legal instruments to note that this approach garnered much more support than the resolution towards a legally binding regulatory regime.

Having survived this attempt to marginalise its work, the open-ended working group presented its first report to the Human Rights Council in February 2016.⁶⁴ Reporting on the first sessions that would lead to this report Katharine Valencia of the *Due Process of Law Foundation* observed that the controversial footnote in the Ecuadorian resolution caused some difficulty. While most (although not all) states' representatives at the 2015 Geneva meeting regarded any attempt to widen the

scope of the discussion to be outside the working group's explicit mandate, they also argued that it was transnational corporations for whom a new legal instrument was required, as domestic corporations mostly were unable to avoid the reach of national courts or enforcement institutions. Conversely, many of the civil society representatives and the European Union team regarded the focus as potentially allowing corporations to avoid any legal instrument by incorporating affiliates and subsidiaries locally.⁶⁵ There was agreement that the working group should encompass all human rights, political and economic, and that while there was a perceived need to move beyond any guiding principles, these remained valuable and important.

This initial meeting was also at least partly framed by a 'concept note' introduced by the chair of the meeting María Fernanda Espinosa, the Permanent Representative of Ecuador to the UN in Geneva. While setting out a number of procedural issues, the Ecuadorian statement elaborated on some aspects of the original resolution. Stating (again) the obligations of states regarding corporations' actions relating to human rights abuse(s), the note stresses 'the limitations of national measures and the need for greater clarity in regard to access to effective remedies'.⁶⁶ It then goes on to argue:

the international legal system reflects an asymmetry between rights and obligations of [MNCs]. While [MNCs] are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, *there are no hard law instruments that address the obligations of corporations to respect human rights.*⁶⁷

This is then linked to the expansion of global corporations' supply and value chains, and argues that the expansion of regulatory scope over such networks would not have a detrimental impact on corporations' economic efficiency or efficacy. The note set an agenda of discussion items ranging from a sharing of views on the likely substantive content of a legally binding instrument on corporations with respect to human rights, to a number of linked items including the current state of jurisprudence on this issue, the question of extraterritoriality and standards of liability and responsibility.

The report of the working group, presented on 5th February 2016, six months after its initial meeting summarised the eight panel discussions as well as presenting the Chief Rapporteur's digest of conclusions, which essentially agreed to develop a (revised) programme of work for the next session of the working group.⁶⁸ The discussion in the eight panels involved representatives from: Algeria, Argentina, Austria, Bangladesh, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran, Iraq, Italy, Kenya, Kuwait, Latvia, Libya, Liechtenstein, Luxembourg, Malaysia, Mexico, South Korea, Moldova, Monaco, Morocco, Myanmar, Nicaragua, Namibia, the Netherlands, Pakistan, Peru, the Philippines, Qatar, the Russian Federation, Singapore, South Africa, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukraine, Uruguay, Venezuela and Viet Nam. Notable exceptions were the United States, Canada and the United Kingdom. These state representatives were joined by a number of international organisations: the Organization for Economic Cooperation and Development, the Council of Europe, the UN Entity for Gender

Equality and the Empowerment of Women, the UN Children's Fund, the International Labour Organization, the UN Conference on Trade and Development and the South Centre. Representatives of the European Union attended some of the panels alongside a wide range of non-governmental organisations.⁶⁹

Discussions entertained a variety of views about the focus of any future legal instrument, and wide acceptance that although the extant and various 'guiding principles' represented a reasonable starting point these codes needed to be strengthened and complemented by a legally binding instrument. There was general agreement that

the scope of the instrument should start with and include the core human rights instruments of the United Nations, especially those concerning the rights of vulnerable groups, such as children, indigenous peoples and people with disabilities. In this sense, States, NGOs and panellists signalled that a limitation on the scope of rights would be counter-productive to the objectives of the instrument.⁷⁰

There was also a general recognition among participants that soft law and private regulatory instruments while offering some advances in human rights protection were insufficient in light of continuing difficulties in establishing corporate responsibility for violations. Some disagreement was evident across a number of panels about the responsibilities of states and how extraterritorial jurisdiction might be used (and/or abused), but overall 'most delegations underlined that a future instrument should clearly set out the direct obligations of corporations to respect human rights'.⁷¹ Thus, overall the session explored a range of issues of direct relevance to the building of a legally binding instrument, identified both areas of some commonality but also those over which some states and NGOs differed as regarded the best way forward (for instance as regards the range of human rights that might be best prioritised).

The open-ended working group, then, at present has been more a project of mapping a range of issues and difficulties that would need to be addressed by any attempt to draft a treaty that would establish a legally binding instrument on the conduct of global corporations relating to human rights. That the working group is slow moving should be no surprise given the likely contentious character of the issues under discussion. Therefore, as it is around forty years since a similar set of discussions were set in train by the work to establish UNCTC in the concluding section I seek to contrast and compare these two sets of discussions as a way of assessing how much (or how little) has been achieved by the attempt to establish a formal legal regime for the conduct of corporations in the global political economy.

The two moments compared

The two moments I have highlighted above are divided by forty years and while much has changed, there is also some (albeit unsurprising) continuity. In these forty years the global networks through which corporations organise their activities have become more complex, building on the type of relations MCWD identified but increasing in their density, reach and complexity while also utilising a range of 'off-shore' jurisdictions to obscure both the shape and flow around these networks as well as their beneficial owners. Moreover, global corporations are much more involved in internationalised production (with extensive supply chains) relative to

extraction than they were forty years ago, although extractive MNCs remain major players in the global corporate economy. However, at the same time, the networks of influence in which corporate interests are articulated and mediated have become more open; although not directly comparable, the Trilateral Commission while hardly secret was not well known; annual meetings of the World Economic Forum are a global media event, while remaining a site of corporate influence brokering. Perhaps most interestingly, while the MCWD's researchers suggested that international tax competition was equally unwelcome to states *and* MNCs, it would now seem to be clear (and perhaps should have been forty years ago) that corporations have utilised tax competition to greatly reduce their global tax exposure, but states have often colluded in this activity. Of course, this issue has now become the subject of the very data collection and transparency advocated by MCWD's authors, vindicating their assumption that political responses to (global) corporate practice(s) need(ed) better information.

If *Multinational Corporations in World Development* was meant to prompt an expansion of research into multinational (and global) corporations, it can be seen as a success. The report established the contours of such research and was a key element in the setting up of the UNCTC. While the centre itself did not survive, the agenda of research activity has continued, and there is now a wealth of authoritative data and information of the activities of corporations across the global political economy. Thus, one of the key achievements of the MCWD report was to establish this need for a regular and public record of the activities of MNCs; in the pre-internet period this was achieved through a series of regular updates on the original report.⁷² These subsequent reports appeared in 1978, 1985 and 1988, before at the start of the 1990s being reconfigured into the annual *World Investment Report* (WIR) that continues until today. However, the move to the annual WIR also subtly shifted the grounds for discussion of globally active corporations, to a focus on foreign direct investment as the key indicator of corporate activity and behaviour.⁷³ More generally, the normalisation of the UN's regular data gathering on MNCs' activity represents the context in which the discussion of the Ecuadorian proposal could take place.

This enhanced transparency as regards corporate activity, although clearly not the only driver towards expanded civil society interest and engagement in this area has certainly supported such political development(s). The hope that states' governments would be able to utilise this information to coordinate their activities better to counter (or perhaps moderate) the influence of corporations has been less evident. The continuation of tax competition suggests that while states may know more about what corporations are doing they find it difficult to forego offering advantageous tax treatment. Nevertheless, there has been some action against a range of tax practises in the guise of an increasingly intolerant view of tax havens (albeit driven more by issues of terrorist financing) but as recent moves by the European Union against both Ireland and Luxembourg indicate, the use of tax incentives to secure preferential inward investment remains a key element of international relations. That said, civil society pressure groups (such as Tax Justice Network) have also been able to use greater data availability to develop political campaigns (and exert pressure on some states) on the issue of corporate tax avoidance and evasion.

The fourth & fifth recommendations set out in MCDW unfortunately reveal how little has changed in relation to the legal aspect of the issue, as these are essentially

repeated in the Ecuadorian proposal. The authors of MCDW, as the meeting of the Human Rights Council did forty years later, accepted that codes and principles were a welcome starting point but needed to be the precursor to more formal international regulation not an alternative to legal instruments. In the 1970s there was a hope (I hesitate to say expectation) that the existing and developing codes and principles would be the basis on which an international law of corporate practice could be built. However, what has actually transpired is a little different. There has been a clear move to establish a range of rights for corporations, with few if any associated legal responsibilities.

Indeed, the reaction to the MCWD and the establishment of the UNCTC in US government circles in the early 1970s was focussed on seeking to protect the 'rights' of MNCs.⁷⁴ Whatever the formal considerations, global corporations enjoy a range of rights, including intellectual property protection, and the protection of investments from appropriation (through the now contentious investor arbitration elements of free trade agreements), which they are able to defend via legal means. These rights are not infrequently contrasted with the lack of legal enforcement around the responsibilities for corporations that have been expressed in various sets of guidelines (from the OECD guidelines to the expressly advisory UN Global Compact). Indeed, at the centre of the Ecuadorian proposal is exactly this disparity between hard rights and soft responsibilities (as noted above).

Again, a collective actor (here Ecuador) has identified a contradiction – here around the enjoyment of rights – and has developed their political actions accordingly. So, despite MCWD's professed aim of establishing MNC as legal subjects under international law, MNCs remain without international legal personality when their putative responsibilities are discussed. As the Ecuadorian proposal points out, corporations are happy to have their legal personality recognised where their rights are concerned. Conversely, critics have argued that the confusion that such allocation of transnational rights would produce should prompt international lawyers to return to a more focussed recognition of subjectivity being limited to states.⁷⁵

The Ecuadorian proposal on legal personality does not merely represents the product of the country's own history, and the forty year development of the regulation of MNCs, it also reflects some critical analyses in international legal scholarship. As Karsten Nowrot put it:

The current predominant view concerning the prerequisites of international legal personality is neither compatible with the central aim of the current international legal order, nor is it reflective of the resulting necessity for international law to be in sufficient conformity with the changing realities of the international system...In an economic as well as political sense [corporations] are among the most influential participants in the current international system, thereby being endowed with a considerable potential to positively contribute to, but also to frustrate the promotion and protection of global public goods.⁷⁶

Thus, as the Ecuadorian proposal makes clear, the legal asymmetry currently patterning global corporations' international legal character cannot continue if the international legal system is to be fully mapped onto the forms and practices one finds in the global political economy. In the terms utilised in the first section, political

actors are seeking to resolve a political contradiction, not by amending their account of legal legitimacy but by trying to shift the ecology or regulation for MNCs.

Likewise, as reflected in Ecuador's own recent legal struggles with Chevron, the move to try and reinvigorate debates about formal legal regulations of global corporations also reflects a shift in the arbitration environment around Investor-State disputes. As Kyla Tienhaara has suggested in the last decade

several investment provisions have been interpreted in such a broad manner that it would appear that (at least some) arbitrators believe that it is within their purview to review any state regulatory action, or indeed inaction, that has a negative (not necessarily devastating) impact on a foreign investor or investment.⁷⁷

This expansion of remit has been allowed by the relatively vague language of earlier Bilateral Investment Treaties, and the increasing competition between arbitration bodies for the 'business' of aggrieved multinational corporations.

Conclusion

Although the agenda set out in MCDW has in many ways has been achieved, if not in quite the institutional form that was imagined forty years ago, the key remaining issue is the manner in which the legal developments identified for development have played out subsequently. While pragmatically global corporations are often treated as having legal personality, this has not led to the establishment of international regulatory instrument also focussing on their purported responsibilities rather than *just* their rights; one might summarise the situation as corporations are able to enjoy an elective and partial legal subjectivity.

At the UN Human Rights Council, there was a move among those states unwilling to support the Ecuadorian initiative to (again) stress that focussed legal instruments were more effective than a more general law of corporations. Certainly there has been a move in various jurisdictions to make laws (especially around environmental issues) that seek to regulate corporate activity, but for 'weaker' states these have become tokens in bargaining to secure investment rather than hard or robust regulation. Moreover, and against the hopes of forty years ago, many corporations still manage to play states governments off against each other to secure preferential treatment, as recent tax-related revelations have clearly exposed.

It is unlikely that the UN Human Rights Council will achieve its aspiration to establish a formal and enforceable international legal instrument to regulate corporate behaviour. What the forty years between the two moments I have considered here demonstrates is that where the agenda laid in MCWD was broadly neutral or advantageous to the corporate sector there has been a willingness to move forward in various ways, harnessing various states and international organisations. However where the agenda was seen to be against corporate interests, there has been considerably less movement, with activity being diverted into voluntary codes and principles, including but by no means limited to the UN Global Compact. This is not to say that these codes or principles are worthless, but rather that this history offers a clear and long running example of the impact corporate interest(s) has/have on global political deliberation and institutionalisation. The strength of corporate social forces to resist the collective political action prompted by the perceptions of

contradictions between promise and delivery of benefits, may drive actions like those of the Ecuadorian government but they remain constrained (at present at least) by the structures of political power evident in the global system. Certainly, much has been achieved in the last forty years and this should not in any way be gainsaid but equally it is instructive to recognise exactly what has not been achieved against the agenda set four decades ago.

¹ May *The Rule of Law*, 17-32 & *passim*

² Archer, *Realist Social Theory*, 250

³ *ibid*, 196, *her emphasis*

⁴ *ibid*, 259-260

⁵ *ibid*, 258

⁶ *ibid*, 191

⁷ *ibid*, 215

⁸ Wettstein, *Multinational Corporations and Global Justice*, 355

⁹ Ruggie, *Just Business*, 171 & *passim*

¹⁰ See: May 'Who's in Charge'

¹¹ Backer 'Evolving Relationship between TNCs and political actors'

¹² Bernaz, *Business and Human Rights*, 296

¹³ Bernaz, *Business and Human Rights*, 204

¹⁴ Bernaz, *Business and Human Rights*, 9

¹⁵ For a parallel discussion of how critical academic research on MNCs developed between these two points see Radice, 'Transnational corporations'.

¹⁶ Wettstein *Multinational Corporations and Global Justice*, 348

¹⁷ *Multinational Corporations in World Development*, xxii

¹⁸ Braithwaite and Drahos, *Global Business Regulation*, 193, [MNCs substituted for TNCs in quote for consistency only]; see also: Bair, 'Taking Aim', 367; Hamdani and Ruffing, *United Nations Centre on Transnational Corporations*, 8; Sauvart 'Negotiations of UN Code', 13-14; Bernaz, *Business and Human Rights*, 164-165

¹⁹ I owe this point to Hugo Radice.

²⁰ *Multinational Corporations in World Development*, v.

²¹ Hamdani and Ruffing *United Nations Centre on Transnational Corporations*, 44.

²² Muchlinski, *Multinational Enterprises and The Law*, 119; 660. For a comprehensive discussion of the UNCTC (including participant reflections) see Hamdani & Ruffing *United Nations Centre on Transnational Corporations*; for a contemporary report on its initial sessions see Rubin 'Developments in Law and Institutions'.

²³ Sagafi-Nejad and Dunning *UN and Transnational Corporations*, 60; 63.

²⁴ Bernaz, *Business and Human Rights*, 166

²⁵ *Multinational Corporations in World Development*, 4.

²⁶ *Ibid.*, 16.

²⁷ *Ibid.*, 27-28.

²⁸ *Ibid.*, 29.

²⁹ *Ibid.*, 34-36.

³⁰ *Ibid.*, 40.

³¹ *Ibid.*, 45.

³² *Ibid.*, 45.

³³ *Ibid.*, 49

³⁴ *Ibid.*, 52-53.

³⁵ *Ibid.*, 54.

³⁶ *Ibid.*, 58.

³⁷ *Ibid.*, 60.

³⁸ *Ibid.*, 64.

³⁹ *Ibid.*, 66-70.

⁴⁰ *Ibid.*, 71-72.

⁴¹ *Ibid.*, 77.

⁴² *Ibid.*, 87-88.

⁴³ *Ibid.*, 109.

⁴⁴ *Ibid.*, 98.

⁴⁵ *Ibid.*, 110.

⁴⁶ *Ibid.*, 110-111.

⁴⁷ For an extensive discussion of the lengthy negotiations towards a UN Code of Conduct on Transnational Corporations, see Sauvart 'Negotiations of UN Code'.

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- ⁴⁸ Clapham, *Human Rights Obligations*, 201.
- ⁴⁹ Bair 'Taking Aim'.
- ⁵⁰ *Ibid.*, 369-372.
- ⁵¹ Braithwaite and Drahos *Global Business Regulation*, 567.
- ⁵² Zammit, *Development at Risk*.
- ⁵³ This is Hugo Radice's assessment with which I concur.
- ⁵⁴ See: Müller-Hoff 'Human Rights Challenges Posed by Transnational Corporation', 340-341; Ricardo Patiño 'Transnational Misconduct Must End' *Huffington Post* 24 October 2014 (updated 24 December 2014) http://www.huffingtonpost.co.uk/ricardo-patino/ecuador-ricardo-patino_b_6040920.html
- ⁵⁵ A relatively neutral narrative of the case(s) can be found in Gaukrodger, 'State-to-State Dispute Settlement' pp. 20-28
- ⁵⁶ Dhooge, 'Yaiguaje v. Chevron Corporation: Testing the limits' p. 95, p 111
- ⁵⁷ For an extensive (alternative) overview of this case see James North (2015) 'Ecuador's Battle for Environmental Justice Against Chevron' *The Nation* (June 22-29, 2015 issue) <https://www.thenation.com/article/ecuadors-battle-environmental-justice-against-chevron/>
- ⁵⁸ Becker 'Rafael Correa and Social Movements in Ecuador'; Rosales 'Going Underground' pp.1451-1452
- ⁵⁹ Schilling-Vacaflor and Kuppe, 'Plurinational Constitutionalism', 360, fn.19
- ⁶⁰ Ruggie, *Just Business*, 159.
- ⁶¹ *Ibid.*, 192-200.
- ⁶² The resolution can be downloaded from: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.22/Rev.1 from which all quotes are taken unless otherwise stated.
- ⁶³ The Norwegian resolution is available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.1
- ⁶⁴ The first report is available as a download here: <https://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>
- ⁶⁵ Valencia's blog is available at: https://dplfblog.files.wordpress.com/2015/07/blog20igw20english_kv207-27.pdf
- ⁶⁶ The note is available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>
- ⁶⁷ *Ibid.*, *emphasis added*
- ⁶⁸ The report is available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/50
- ⁶⁹ A full list is available at Annex II of the report listed in previous endnote.
- ⁷⁰ *Ibid.*, 13.
- ⁷¹ *Ibid.*, 16
- ⁷² Sagafi-Nejad and Dunning *UN and Transnational Corporations*, 97-100.
- ⁷³ Hamdani and Ruffing, *United Nations Centre on Transnational Corporations*, 48.
- ⁷⁴ Bergsten, Horst and Moran *American Multinationals and American Interests*, 31
- ⁷⁵ Pentikäinen, 'Changing International "Subjectivity"', 152-154
- ⁷⁶ Nowrot 'Reconceptualising International Legal Personality', 572; 585.
- ⁷⁷ Tienhaara, 'Investor-state dispute settlement', 681

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