'Poisonous Flowers on the Dust-heap of a Dying Capitalism': The United Nations Code of Conduct on Transnational Corporations, Contingency and Failure in International Law

By Michelle Staggs Kelsall

1. Introduction: Transnational Corporations, Economic Self-Determination and the United Nations Code of Conduct

In this Chapter, I wish to revisit a recent moment in the institutional life of international law.[1] Namely: the attempt by the United Nations Commission on Transnational Corporations ('UNCTNC') to draft a Code of Conduct for (later: on) Transnational Corporations ('the Code').[2] The UNCTNC was established by the Economic and Social Council ('ECOSOC') in 1974.[3] It was inaugurated in response to calls for institutional reform outlined in two resolutions adopted by the United Nations General Assembly ('UNGA') during its sixth Special Session in support of a New International Economic Order ('NIEO').[4] The Code negotiations, which were the UNCTNC's raison d'être, marked a final attempt to secure economic self-determination for newly emerging states in the post-colonial period.[5] The attempt failed: after over a decade of negotiations, the Code was relegated to the archives of the ECOSOC.

Like no initiative before it, the NIEO marked a sustained attempt by the Group of 77 nations ('G-77') 'to craft a new international law that would facilitate resource redistribution in a world economy whose regulatory architecture had revealed itself to be fragile, if not obsolete.'[6] However, calls to regulate TNCs are often underplayed when scholars consider the G-77's demands for permanent sovereignty over natural resources ('PSNR'), greater aid, debt

[1]Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, Cambridge 2011), 2. On institutional internationalism, see Glenda Sluga, *Internationalism in the Age of Nationalism* (University of Pennsylvania Press, Pennsylvania 2013), 57.
[2]Annex VI: Draft United Nations Code of Conduct on Transnational Corporations (as of mid-1989) in Sidney Dell, *The United Nations and International Business* (United Nations Institute for Training and Research (UNITAR), New York 1990). See also, Code of Conduct on Transnational Corporations (1983) 22 International Law Materials 192 [together, 'Code of Conduct'].
[3]Jennifer Bair, 'Corporations and the United Nations: Echoes of a New International Economic Order?' (2015) 6 Humanity: An International Journal of Human Rights, Humanitarianism and Development 159, 160.
[4]Declaration on the Establishment of a New International Economic Order, UNGA Res. 3201 (S-VI), (1 May 1974) (adopted without a vote), para 4(g); Program of Action on the Establishment of a New International Economic Order, UNGA Res 3202 (S-VI), (1 May 1974) (adopted without a vote), para V.
[5]*Bair* (n.3).
[6]Umut Özsu 'Chapter 17: Neoliberalism and the New International Economic Order: A History of 'Contemporary Legal Thought'' in Justin Desautels-Stein and Christopher Tomlins, *Searching for Contemporary Legal Thought* (CUP, Cambridge 2017) 330, 332. See also: Umut Özsu, U. 'Rendering Sovereignty Permanent? The Multiple Legacies of the New International Economic Order' (2016) 1 European Yearbook of International Economic Law 1.

relief and more favourable terms of trade in the international system. In the most common telling of the NIEO story, even before Code negotiations began, the '*real* new international economic order' – that of neoliberalism – had already come to dominate a variety of different legal responses to economic inequality.[7]

Yet the question of how to regulate the TNC formed a key part of the NIEO's programmatic platform. Arguably, its failure has had wider and deeper ramifications in the international system than this state-centric narrative admits. As Quinn Slobodian asserts, for the chief representative of corporations at the United Nations – namely, the International Chamber of Commerce ('ICC') – the point in jettisoning Third World attempts at gaining power on the international stage was not to advocate for U.S. hegemonic stability. Rather, it was to reduce the need for states altogether.[8]

The question the chapter therefore poses is: what were the necessary determinants precipitating the failure of the Code negotiations? By 'necessary determinants' I am referring to factors which 'orient change, without actually predetermining it'.[9] The three 'necessary determinants' discussed in this chapter are structure, form and actor participation: namely, (1) the structure of the negotiating entity (what this structure meant for what it could achieve); (2) the form international law took in these negotiations (both how the TNC was formally construed and what form regulating that object took); and (3) those actors who were present at (and who remained absent from) the proceedings. Conversely, I then ask: what contingencies arose from these necessary determinants that could have brought about the Code's success? And what does 'success' mean, in this context?

At first glance, the project of this chapter appears very modest. For the contemporary international lawyer, in the best case scenario, the chapter crafts a revisionist history in which a soft law instrument is agreed which provides no more than a modicum of regulation for the TNC. Yet in a second register, what this chapter argues is that the Code negotiations reveal a deeper, normative contingency present within international law itself:[10] namely, that 'consent' in international law is more accurately construed as co-existing dissent. Hence, in this register, I argue that rather than focussing on the decay of consent, international lawyers may do well to consider the possibilities created through mutual dissensus.[11] This focuses our attention on

[7]Ibid.
[8]Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, Harvard, 2018) 133.
[9]Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1, 8.
[10]With sincere thanks to Mats Ingulstad for pointing this out.
[11]Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) American Journal of International Law 1.

international law as a site of ongoing struggle, rather than letting us assume that law remains beyond this critical instability.

When viewed from within the struggle to create international law, mutually-agreed dissensus is international law's greatest strength and signals its 'success'. This is because dissensus provides the freedom for state representatives to agree tacitly to a diverse set of teleological interpretations of what aims international law will serve. The uncertain certainty provided by international law is *both* necessary and contingent: it allows the greatest space for state representatives to determine how international law will operate (contingency) yet it is precisely what enables international law to come into being *as law* (necessity). Pondering this uncertainty gives international lawyers pause for greater reflection on the possibilities contained within international law (and by extension, international lawyering) at any given moment in time.

The 'normative surplus' of the NIEO embodied in these proceedings, therefore, remains ripe for re-examination.[12] By re-considering the necessary determinants and embedded contingencies associated with institutional structure, legal form and actor-participation, twenty-first century international lawyers are provided with a prudent opportunity. The path from NIEO to now is one in which the TNC is often relegated to the role of handmaiden to the United States and its allies, a mere bit-player in the background of a pervasive and trenchant realpolitik embodied in Cold War international law.[13] Focussing instead, on how international civil servants attempted to navigate the relationship between TNCs and states illuminates a more complex story, in which our telling of the ascendance of the global North needs to further accommodate the rise of the First World in the Third and the Third World in the First – a rise which the TNC undoubtedly helped facilitate.[14]

2. A Question of Structure - Development and the Struggle to Regulate the Transnational Corporation at the UNCTNC

By the 1970s, international jurists were deeply concerned with the perceived threat of the TNC

[12]Ingo Venzke, 'Possibilities of the Past: Histories of the NIEO and the Travails of Critique'(2018) 20 Journal of the History of International Law 263.
[13]Margot E. Salomon, 'From N.I.E.O. to Now and the Unfinishable Story of Economic Justice' (2013) 62 International and Comparative Law Quarterly 31. Note however, forthcoming: Matthew Craven, Sundhya Pahuja and Gerry Simpson, *Cold War International Law* (CUP).
[14]On this point, see in particular: B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (CUP, Cambridge 2018) 16. Muthucumaraswamy Sornarajah 'The Myth of International Contract Law' (1981) 15 Journal of World Trade 187; 'The Climate of International Arbitration' (1991) 8J. Int'l Arb. 47; *The International Law on Foreign Investment* (CUP, Cambridge 2004).

in the post-World War II period. In the seminal corporations case inaugurating that decade, *Barcelona Traction*, *Light and Power Company*, Justice Padilla Nervo polemically noted:

> It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure…Perhaps modern international business practice has a tendency to be soft and partial towards the powerful and rich, but no rule of law could be built on such flimsy bases.[15]

For many Third World statesmen and jurists, Justice Nervo articulated a belief they shared: the TNC should be seen as nothing other than an entity from whom they – and, to some extent, *all* states – were in need of protection.[16] The idea of investigating the TNC gained momentum, fuelled by state representatives supporting the NIEO. In keeping with the NIEO's central ethos, the Charter of Economic Rights and Duties of States ('CERDS') included provisions calling for TNCs' regulation.[17]

The gap between incomes of Third World developed world countries had become enormous. According to Franck and Munansungu, developed market-economies enjoyed about two-thirds of the world's income.[18] In contrast, Third World economies housing almost 50% of the world's population (excluding the People's Republic of China) received only one-eighth of its income.[19] Between 1953 and 1972, this had corresponded with an increase in the share of world trade for developed countries from 64.9% to 71.5%, while developing countries had a share of only 13% (excluding petroleum-exporting countries). Although these figures were

[15]*Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, (1970) ICJ Rep 3, Judge Padilla Nervo, Separate Opinion at 250. See also Markos Karavias, 'Shared Responsibility and Multinational Enterprises' (2015) 62 Netherlands International Law Review 91 (citing Judge Nervo).
[16]Sundhya Pahuja and Anna Saunders, 'Chapter 6: Rival Worlds and the Place of the Corporation in International Law' in Jochen von Bernstoff and Philip Dann, *The Battle for International Law: North-South Perspectives on the Decolonisation Era* (OUP, Oxford 2019). See also Anthony Anghie, 'Legal Aspects of the New International Economic Order' (2015) 16 Humanity: An International Journal of Human Rights, Humanitarianism and Development 145, 150-154.
[17]Charter of Economic Rights and Duties of States, UNGA, Res. 3281 (xxix) (12 December 1974) (adopted by 110 votes to 10; 6 abstentions).
Article 2(1) states: 'Every State has and shall freely exercise full and permanent sovereignty, including possession, use and disposal over its wealth, natural resources and economic activities'.
Article 2(2)(b) states: 'Each State has the right: (b) To regulate and supervise activities of transnational corporations within its jurisdiction and take measures to ensure that such activities comply with its law, rules and regulations and conform to its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard to its sovereign rights, cooperate with other states in the exercise of the right set forth in this paragraph'.
[18]Thomas Franck and Mark M. Munansangu, 'The New International Economic Order: International Law in the Making?' *Policy and Efficacy Studies No.6* (United Nations Institute for Training and Research, New York, 1982) 3, 20.
[19]Ibid.

disputed, the fact that economic growth was disproportionately benefiting the developed world was not.[20]

In one register, establishing the UNCTNC can be read as states agreeing an institutional antidote to this growing inequality. Although since largely ignored or considered weak by those who pay it attention, the UNCTNC provided Third World states with the political machinery and technical expertise to continue to assert their claims to regulate foreign investment in an international fora.

The resolution calling for the UNCTNC's establishment placed a primacy on institutionalizing a system enabling the Third World to monitor and document the inner workings of the TNC.[21] Hence, like the League of Nations before it, the UNCTNC sought to discover the interiority of the transnational firm – conceived by several prominent theorists at the time as an entity that was able to construct its own universe, through the marshalling of extensive resources and capital across state lines.[22]

As Anthony Anghie has noted, international jurists in the era of the League sensed that access to the interior of the state would 'revolutionise their discipline in much the same way that Joyce had revolutionised the novel and Freud had revolutionised our understanding of human nature'.[23] It was precisely through the Mandate system that international law and institutions had complete access to the interior of society – and with which the violence of that law could be further sustained.[24]

Many member states' representatives conceived of the TNC with similar aversion, but subverted violence with passive resistance. The Centre supporting the UNCTNC was able to provide Third World economies with the chance to test propositions regarding the benefits they were presumably accruing from TNC presence on their soil, and decide for themselves whether or not these entities were working to the benefit of their societies. Issues such as the veracity of claims regarding technology transfer to the Third World (and whether technology remained an enclave within the TNC or was diffused through the country through linkages) were given

[20]Ibid.
[21]*Öszu* (2017), 341 (n.6) and *Salomon* (n.13). See also ECOSOC 'The Impact of Transnational Corporations on the Development Process and International Relations', Res. 1913 (LVII) (5 December 1974), 3.
[22]Tagi Segafi-Nejad (with John Dunning), *The UN and Transnational Corporations*: *From Code of Conduct to Global Compact* (Indiana University Press, Indiana 2008) 96. See also Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (Basic Books, 1971). Both Dunning and Vernon were advisors to the Centre for Transnational Corporations.
[23]Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2005), 135.
[24]Ibid.

fine-grained analysis enabling states to determine the veracity these claims and the desirability of TNCs more generally.[25]

Hence, the UNCTNC's 'civilizing therapy' was not aimed at the interior of the sovereign state but instead, the interior of the TNC. The TNC's role as an agent of foreign direct investment became the subject of studies;[26] reports and panel discussions with relevant groups;[27] technical cooperation and the of rendering advisory services (for states, regarding industry);[28] and ongoing exchanges of views amongst governmental; business; trade union; non-governmental; and consumer organizations.[29] It provided an opportunity for Third World representatives to challenge claims of 'barbarism' from the West, by utilizing the United Nations' machinery to investigate one of the West's most loved associational forms.[30]

By its second meeting, the UNCTNC had assembled the machinery to service its highest priority: the creation of a Code of Conduct.[31] Work to this end would proceed along two interrelated paths. On the one hand, it assembled an information-gathering system through the UN Centre on Transnational Corporations ('the Centre'). On the other, the Commission appointed an Intergovernmental Working Group ('IGWG') to undertake the task of producing drafts of the Code of Conduct.[32]

The Centre was tasked with gathering, analysing and disseminating information on TNCs through the creation and maintenance of a comprehensive database.[33] In addition, conducted research on the political, legal, economic and social aspects of TNCs (including in support of the Code of Conduct negotiations).[34] Finally, it provided 'technical co-operation' programmes, upon request by Member States, in order to 'increase their negotiating capacity vis-à-vis transnational corporations'.[35] Technical co-operation was primarily financed by the UN Development Programme ('UNDP') from 1979 onwards.[36]

---

[25]Segafi-Nejad (n.22), 96-97.
[26]Resolution 1913 (LVII) (n.21), at ¶3(d).
[27]Ibid.
[28]Ibid.
[29]Ibid., at para 3(b).
[30] *Pahuja and Saunders* (n.16).
[31]For a comprehensive overview of the Code of Conduct, see Karl Sauvant, 'The Negotiations of the United Nations Code of Conduct for Transnational Corporations: Experiences and Lessons Learned' (2015) 16 Journal of World Investment and Trade 11.
[32]Ibid.
[33]*Segafi-Nejad* (n.22).
[34]ECOSOC, 1-12 March 1976 E/C.10/16, para 39.
[35]UNCTNC, Third Session (Summary Record of 25TH Meeting), Comments of Mr Aissa (Algeria), E/C.10/SR.25 (2 May 1977), 2 para 7 as noted in Office of the Secretary-General, File No. S-1051/10/1/92/155 Organization Manual: Section T – A Description of the functions and organization of the United Nations Centre on Transnational Organizations, ST/SGB/Organization Section T/Rev.1 (28 June 1979), 2 (United Nations Archives and Records Management Services, New York) (on file with the author).
[36]Ibid., 2.

The IGWG would meet during seventeen sessions, between 1976 and 1983, to compile the draft. The IGWG worked in tandem with the Centre to produce what the UNCTNC still hoped would culminate in a multilateral framework supported by all United Nations' Member States. Yet from the moment negotiations began, States' perspectives on the TNC were divergent. After the first meeting of the IGWG (charged with drafting the Code), Klaus Sahlgren would send an internal memo to Secretary-General Kurt Waldheim, stating that:

> Even though, as was expected, the 48-member Intergovernmental Working Group was not able to endorse in a committing manner the annotations of the Chairman, it is remarkable that it did agree to incorporate the Chairman's annotated outline in its report on the understanding that it would serve as the basis for future work. The fact that…the Working Group's report does not contain any brackets is, in my view, a significant achievement…[37]

Proceedings were stymied by an inability to determine what the TNC actually *was*, and how it should be treated. The IGWG fielded distinct views about the form of the corporation. The German Democratic Republic reiterated the principles contained in the CERDS and argued for 'controlling the activities of TNCs and subordinating their activities to the national jurisdiction of states,'[38] and '[a]n effective curtailment of the neo-colonialist practices of transnational corporations', was conceived by the GDR as 'a pre-requisite for establishing truly equitable international economic relations based on the principle of mutual advantage.'[39]

Jamaica went even further in asserting states' sovereignty against the TNC. States should ensure TNCs and their direct affiliates 'operate as good corporate citizens and not act against the state objectives of host countries'.[40] Somewhat paradoxically, Jamaica further asserted that this would include conforming 'in the case of apartheid' to the laws of *that* state, rather than the home state.[41]

Ecuador asserted the Code should be addressed to TNCs to ensure they 'effectively participate in the process of development.'[42] Japan argued Code negotiations should proceed without a definition of the TNC. Delegates could learn through the process and experience of the Code's formulation how to define its object.[43]

---

[37]Inter-Office Memorandum, Klaus Sahlgren to U.N. Secretary-General (13 May 1977), 2. Viewed at United Nations Archives and Records Management Services (UN-ARMS), File No. 0897/7/4 – Secretary-General Kurt Waldheim's Administrative Files (New York, New York), from (13-26 May, 2017) (copy on file with the author).
[38]ECOSOC, E/C.10/19 'Transnational Corporations: Views and Proposals of States on a Code of Conduct: Report of the Secretariat' (30 December 1976), 7 at ¶23. (considered at the Intergovernmental Working Group of the Whole of the Code of Conduct, First Session, 10-14 January 1977).
[39]Ibid., 7, ¶23.
[40]Ibid., 9, ¶40.
[41]Ibid.
[42]Ibid., 5, ¶15.
[43]Ibid., 11, ¶51.

Although the Soviet Union did not initially express a view, ongoing work on the Code would reveal it considered any definition to preclude publicly-owned and mixed enterprises. According to this view 'enterprises of the socialist countries had nothing in common with transnational corporations'.[44]

The UK maintained the Code's purpose was to secure effective international arrangements to promote TNC's contribution to 'national developmental goals and world economic growth'. [45] Additionally, however, states should conform to extant international law, even as states required TNCs to conform to their national laws. The U.S. went even further, noting domestic enterprises as well as TNCs should be included, wherever possible.

The response of Sten Niklasson, the appointed Chairman of the IGWG and his successors, to the question of corporate form was largely, to defer determining what the TNC *was* and focus instead on its 'activities' and 'effects'. As states' representatives continued to debate the extent to which the TNC could be embedded within the social institutions of the nation, international civil servants continued maintain that they should proceeding with 'imagination and pragmatism', focusing all the while on the art of the possible.[46]

Throughout the 1980s, the UNCTNC and the Centre produced a body of work documenting the 'effects' of TNCs in intimate detail. The Centre's output was vast: between 1975 to 1992 it produced a total of 265 publications – one for every month of its lifetime.[47] The UNCTNC and the Centre proved to be a genuine source of information-gathering and Third World resistance, in that it engaged in critical research about TNCs and refused to bow to pressure from states that saw its work as detrimental to *their* corporations.[48] This was pragmatism, late twentieth century style: unlike the League of Nations, the UNCTNC was not concerned with challenging positivist ideas about international law or furthering particular social ends. Instead, reports evidence an ongoing attempt to mobilize instrumental management and bureaucratic process in order to achieve specific, measurable outcomes. The technology of technocracy was prioritized by the Centre – as civil servants worked toward the goal of harnessing the TNC to do the sovereigns' bidding.

The structural constraints of the UNCTNC's process, however, meant that the leviathan representatives sought to tame was never fully within their grasp. Pahuja and Saunders argue

[44]UNCTNC, E/C.10/1982/18 'Report of the Eighth Session' (30/8-10/9 1982), 40, at para 142.
[45]*Transnational Corporations: Views and Proposals of States on a Code of Conduct* (n.38) 14, ¶72.
[46]UNCTNC, E/79/38/Rev.1 Intergovernmental Working Group (Code of Conduct) 'Report on the Fifth Session', 9 ¶14.
[47]Khalil Hamdani and Lorraine Ruffing, *The United Nations Centre on Transnational Corporations: Corporate conduct and the public interest* (Routledge, London 2015), 49.
[48]Ibid, 50.

that these constraints were intentional: the task set for the UNCTNC, from the very outset, had been one in which the possibility of determining a legally binding agreement had become remote. With only the possibility of a non-binding Code of Conduct on the table, the work of the Centre and the IGWG could only ever become a footnote in the history of international law.

I argue the situation was more nuanced. As will be discussed in the Section which follows, between the need for more law and the inability to agree to it lay an opportunity to reconfigure the material sources of custom as more aligned with the practice of Third World states. Justice Padillo's warning at the start of the 1970s could have resulted in the 'flimsy bases' of international law being strengthened by the Code. Yet the deferral of the question of definition meant that the TNC *was* reduced to being a 'business enterprise', largely eschewing any question of states grappling with the politics to which its form gave rise.[49]

Although the Soviet Union's representatives largely saw TNCs as 'poisonous flowers on the dust-heap of a dying capitalism', international law proved to be a paltry antidote for this particular toxicodendron.[50] The 48-member panel comprising the UNCTNC's proceedings was *too* democratic: the inability to reach decisions was tempered only by generating reports, the assumption being that this would lead to Third World empowerment against TNCs, over time. What this shows, however, is that in addition to providing us with a normative surplus, the NIEO reveals a descriptive deficit in our understanding of international law. The descriptive deficit arises from the need for greater inquiry and historical analysis of the making of international law, in all its forms. This is so, even (or perhaps, especially) when those forms lie in the messy formative space between law and non-law and the line between a private history of international and a history of private international law is at its most blurred.[51]

3. : A Question of Form – Custom, conduct, contract and the battle for [re]new[ed] international law

A second necessary determinant analysed in my assessment of the Code negotiations, is the form which international law would take through this process. I use the term 'necessary

[49]See: UNCTNC, E/1979/38/Rev.1 (14-25/05/1979), 'Work related to a Definition of Transnational Corporations', para 130; Interoffice Memorandum From Sidney Dell, Executive Director of the Centre for TNCs, to the Secretary-General (Javier de Pérez Cuéllar) EO/433, 5 July 1984, 1 (Folder S-1048-21-2-95-3), United Nations Archives and Records Management Service ('UNARMS') (copy on file with the author).
[50]Cited in Klaus A. Sahlgren, 'Scenes from my UN journey' in Martti Ahtisaari (ed) *Finns in the United Nations* (Finnish UN Association, Helsinki 1996), 205.
[51]For a wonderful discussion of the former as it relates to PSNR, see Lucas Lixinski and Mats Ingulstad, 'Chapter [.] in this volume.

determinant' drawing from the work of Susan Marks with regard to false contingency. Marks argues that, in international jurists' efforts to evade determinism in their readings of history, they fail to consider certain determin*ing* factors which may contribute toward necessary constraints on the possibilities of the past. As I have noted, determining factors set limits or exert certain pressures (necessity) that can be contrasted with 'accidental' or 'voluntary' factors (contingency).

In this next section, I argue that the question of form – whether the Code should be mandatory or voluntary; whether it should be declaratory of custom, crystallise as custom over time, or support a 'new' international contract law – was *both* a determinant and a normative contingency within the Code negotiations. The determinant (or determining constraint) lay in the power differential between states representatives, and the capacity of some Western states to exert pressure, as champions of both extant European international law and novel international contract law, as to how that law should come into being. The contingency lay in the timing at which this form was taking shape, which gave both states' representatives and international civil servants the chance to work toward shaping a Code that was responsive to the desires of the Third World, even if not symbolic of a new international economic order.

Although it has often been stated that the Third World sought to obtain a 'legally binding' instrument and developed states did not, the position of several States' representatives was more nuanced than this would suggest. The fault lines lay between those states who wanted the Code to form part of custom and those who saw TNC regulation as distinct from it. The former – largely comprising G-77 nations – wanted to maintain, within the instrument drafted, the contingent possibility that its status as customary international law would be determined over time. In keeping with the Charter on the Economic Rights and Duties of States, states would maintain their individual right to 'regulate and supervise the activities of transnational corporations' while securing a collective duty of cooperation in the exercise of that right as states would individually determine.[52] This would allow for the terms of foreign direct investment to remain largely at the behest of individual states (rather than a pre-conceived agreement in international law).

The latter -- for whom the U.K. and U.S. were the chief proponents -- wanted instead to champion further what Muthucumaraswamy Sornarajah has termed the 'myth' of international contract law.[53] As A.A. Fatouros would reiterate, the idea of international contract

[52]CERDS (1974) (n.17), Article 2(2).
[53]Ibid. See also Robert Brown, 'Choice of Law Provisions in Concession and Related Contracts' (1976) 39 Modern Law Review 625 at 632.

law reflected a significant doctrinal trend of the 1950s and 1960s perpetuated primarily (though not exclusively) by Western lawyers. The trend encompassed formulating international legal norms that would ensure the freedom of contract of investors in host states. Yet ironically, attempts to uphold this position had been in the minority prior to the negotiations. The myth of international contract law would further sustain the fallacy that TNCs and other business enterprises were at once not obliged to be regulated by international law in terms of their conduct, but must be guaranteed a right through international contract to full return on their investments.[54]

Third World states championed the primacy of the NIEO informing the proceedings and being the Code's *modus operandi*.[55] Yet states' representatives of the G-77 recognized that as an international code, its legality would need to be evidenced through customary international law and any 'bindingness' as such would be centred in state practice once the instrument itself had been drafted. The problem became how customary international law was determined, which, as Samuel Asante recalls, remained 'highly controversial' throughout the proceedings.[56]

It is perhaps more accurate to state that Third World countries wanted TNCs to be bound by the terms of an international instrument which states themselves could implement in keeping with their own development policies. As such, they wanted corporate conduct to be highly regulated, but foreign investment terms to remain highly flexible. This caused tensions after 1980, when it became clear that developed states wanted the Code to be both on and *for* TNCs, including provisions pertaining to the treatment of TNCs in the Code that would safeguard the demands of foreign investors.[57]

Latin American countries argued that attempts to utilize international law to regulate TNCs had to be balanced against states' interest to utilize them as '*real* mechanisms for progress'.[58] Specifically, the government of Ecuador recommended that the Code should 'be addressed to transnational corporations *only* and not the States themselves' to enable states to maintain 'the sovereign right to enact national laws to determine how the Code would be implemented'.[59]

---

[54]A.A. Fatouros, 'International Law and the Internationalized Contract', (1980) 74(1), 134, 135. See also Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment' (2008) 106 Mich. L. Rev. 853.
[55]See in particular, UNCTNC E/C.10/46 (Fifth, Sixth and Seventh Sessions, 11/04/1979) 6 ¶ 24-26.
[56]Samuel K.B. Asante, 'Doctrinal differences on the Code' in *Hamdani and Ruffing* (n.48), 91-2.
[57]See submissions of Chile, Ecuador and Jamaica in UNCTNC E/C.10/19 (30/12/1976). Sauvant (2015); and ibid., *Asante*, 91.
[58]*Transnational Corporations: Views and Proposals of States on a Code of Conduct* (n.38) 5, 13 ¶13-16.
[59]Ibid., 5, 15 ¶13-16.

Switzerland and Japan stressed the importance of the scope of application over form, although both countries ultimately favoured guidelines which were *not* legally binding.[60] Japan took the view that the Code should basically cover TNC's activities but should also contain provisions covering government policies (e.g. nationalization, taxation, anticorruption) to enable uniformity in the treatment of TNCs.[61] This may in part have reflected the states' own desire to protect the interests of the *keiretsu* (Japanese TNCs), which are characterized by small, intra-group, cross-shareholdings coupled with strong coordinated management.[62] Switzerland favoured a Code that would enable governments to refrain, as much as possible, from intervening in the economic decisions of the private sector, preferring instead to use 'other methods to influence such decisions'.[63]

For their part, submissions from the U.S. and the UK made it clear from the outset of negotiations that the Code should be a 'voluntary' instrument, which would influence, rather than regulate, corporate behaviour. Any national laws and policies that states sought to use to regulate the TNC 'should in turn be clearly stated and conform to [extant] international law'.[64] The UK insisted that expropriation should be 'in accordance with the rules of international law' and compensation should amount to 'the market value of the investment appropriated'.[65]

Neither state seemed to acknowledge the precariousness upon which their claims regarding 'international law' were made. As Theodore Kill has documented, the principle of fair and equitable treatment of investors (which the U.S. agitated for) did not arise from multilateral agreements negotiated under the auspices of the UN but rather, from the Organization on Economic Cooperation and Development (on the one hand) and the ICC on the other. The OECD Draft Conventions on the Protection of Foreign Property ((1962) and (1967)) purported to ground the fair and equitable treatment provision in customary international law. Yet at the time, 'the idea that customary international law imposed an obligation to treat foreign commerce fairly and equitably emerged only in the 1950s and only among rich countries'.[66]

Similarly, the UK's claim that the terms of expropriation should be 'in accordance with [extant] international law' and investors should be compensated 'at market value' assumed that

[60]Ibid., 3 ¶¶ 51-53 (Japan), 18 ¶¶97-106 (Switzerland).
[61]Ibid., 3 ¶¶51-52.
[62]Article 9, Law on Prohibition of Private Monopoly and Ensuring of Fair Trade (Anti-Monopoly Law), Law No.54 (1947) (Japan). See also Peter Muchlinski, *Multinational Enterprises and the Law* (OUP 2007), 63-4.
[63]*Transnational Corporations: Views and Proposals of States on a Code of Conduct* (n.38) 18-19, at ¶97-106 at 101.
[64] Ibid., 18-19.
[65]*Transnational Corporations: Views and Proposals of States* (n.38), 14, ¶72.
[66]Kill (n.55), 880.

the original investments had been undertaken in accordance with, and adherence to, fair and equitable principles for which there would be no need to renegotiate or from which Third World states may wish to claim equitable estoppel.[67] Yet as Samuel Asante notes, the legacy of colonialism meant that many corporations continued to utilize the concession agreement as a form through which they could exercise 'a virtual assumption of sovereignty over a nation's natural resources'.[68] According to Asante:

> The consideration for these exclusive economic benefits was patently ludicrous. In many cases the companies paid a nominal rent of say, GBP150 for a whole concession, plus one or two bottles of rum…The title to the natural resource passed to the transnational corporation at the point of extraction.[69]

That the United Kingdom was now insisting upon 'market value' for the investments appropriated seemed to forget this legacy of abuse or at the very least, to assume it had no effect on how the terms of the contracts in existence between TNCs and states should be governed. Conveniently, the determinant imposed by the U.K. was that extant international law should be maintained only insofar as it ensured customary practice regarding a state's right to secure a diplomatic remedy for its citizens extraterritorially, as in earlier cases pertaining to state responsibility. This much became clear in the UK's claim that while host countries were free to regulate the operations of transnational corporations within their jurisdiction, international law *and international agreements to which governments have subscribed* should be respected.[70] Hence the contingency for the U.K. was the possibility that any *novel* reading of international law through the Code would be restricted by terms which favoured investors obtaining market value for their investments, regardless of whether that compensation was 'fair and equitable' from the perspective of the host state.

Similarly, the U.S.' position throughout the Code negotiations continued to evoke the 'myth' of international contract law.[71] This view had been upheld in a series of arbitral

[67]Here, I am adopting the broad view of estoppel in international law, although it is arguable that even on the stricter view, estoppel in international law is so broad as to accommodate these claims. See Ian MacGibbon, 'Estoppel in International Law' (1958) 7 ICLQ 468. Note *contra* Derek Bowett, 'Estoppel Before International Tribunals and its Relation to Acquiescence' (1957) British Y.B. Int'l L. 176. For a good analysis see Andreas Kulick, 'About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of Investment Tribunals' (2016) 27 EJIL 107.
[68]Samuel B. Asante, 'Restructuring Transnational Mineral Agreements' (1979) The American Journal of International Law 335.
[69]Ibid., 339.
[70]*Transnational Corporations: Views and Proposals of States on a Code of Conduct* (n.38) 16 at ¶88.
[71]*Sornarajah*, note 24. See also R Brown, 'Choice of Law Provisions in Concession and Related Contracts' (1976) 39 Modern Law Review 625 at 632.

decisions during the late 1970s and early 1980s.[72] As Fatouros noted, international contract law eviscerated the sovereignty of newly emerging states by wresting from their authority the capacity to determine investment disputes nationally. The paradoxical result of the creation of international contract law was to prevent a diversity of state practice and *opinio juris* in the international system to crystallize into customary international law norms. According to Fatouros:

> Once international law is thus opened up, its vaunted diversity somehow disappears…But if the international law of contracts is identical in content with the international law of treaties, why is it necessary to stress the distinction? If the multiplicity of subjects and kinds of international law is to have any meaning, there has to be *at least a possibility* of variation in outcomes.[73]

At the same time, other jurists had argued for an emerging 'international law of development' which attempted to delegitimate certain legal principles and practice regarded by several Third World countries as being inimical to their needs for development.[74] This view found support in the International Law Commission, where it had been noted that the body of international law was growing to incorporate a 'duty to cooperate in the promotion of national and human *welfare*'.[75]

These two contrasting positions – one that was viewed the form of international law as based upon safeguarding contractual primacy and the other, viewing law's form as ensuring endogenous development supported by existing customary international law and an emerging duty to cooperate in the promotion of welfare – framed many of the debates about the form that the Code should take.

Based on the reports produced of the meetings for the UNCTNC, the question as to the legality of the Code appeared at its most heightened during the first,[76] sixth,[77] seventh[78] and fifteenth[79] sessions of the IGWG – the last of which included reviewing a draft Code which was tabled by Venezuela on behalf of the Group of 77 nations.[80] Despite 'exhaustive'

[72]*Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v Libyan Arab Republic* 17 ILM 1, 29 (1978) (Dupuy arb); *Kuwait and American Independent Oil Co*., 66 ILR 519, 21 ILM 976 (1982) (Reuter, Sultan & Fitzmaurice arbs).
[73]Fatouros (1980), 135 [My emphasis].
[74]Oscar Schachter, The Evolving International Law of Development (1976) 15 Colum. J. Transnat'l L. 7
[75][1971] II Y.B. International Law Commission (Part 2), 34-5. See also F.V. Garcia Armador 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Lawyer of the Americas 1, 16.
[76]UNCTNC, E/C.10/31 (Third Session, 4/05/1977).
[77]UNCTNC, E/C.10/46 (Fifth Session, 11/04/1979), 4 ¶16 (noting 'At its sixth session, the Working Group concentrated its deliberations on the legal nature of a Code of Conduct').
[78]UNCTNC, E/C.10/46 (Fifth, Sixth and Seventh Sessions, 11/04/1979), 4-5.
[79]UNCTNC, E/C.10/1982/6 (5/06/1982).
[80]UNCTNC 'Draft Code of Conduct for Transnational Corporations – Proposed by Venezuela on behalf of the Group of 77', E/C.10/1983/S/4 (22 May 1981).

discussions on the topic, any final determination as to the legality of the Code was 'by consensus, deferred to the concluding phase of the negotiations' and was still outstanding at the time the IGWG delivered its draft to the UNCTNC in 1983.[81]

In reality, international law came out of these proceedings as only able to chart a midway path between consent and consensus.[82] Writing to the Secretary-General in 1984, following a special session in which the UNCTC had attempted to obtain broad Member State support for the Code, the then Executive Director of the Centre, Sidney Dell, noted:

> On international law, it was recognized that there existed a fundamental difference of opinion between the OECD countries and the developing countries on the relationship between international law, including customary international law, and the Code. It was also agreed by *all sides* that the only way of dealing with this matter was to employ language that was *sufficiently ambiguous to be interpreted differently by the various groups*. Although the need for ambiguity was *generally recognized*, the search for a formula was unsuccessful. Numerous drafts were considered, but all were viewed by one group or another as compromising its *fundamental position of principle*…[83]

The question to which this gives rise, then, is not (or not solely) how or why international law safeguarded the interests of the powerful, but rather, what the inability to reach agreement evidenced about the creation of international law. As I have argued throughout this Chapter, that the intent and purpose of international law should be to provide enough flexibility for all parties to interpret the Code's provisions *differently*, rather than to settle on an *agreed* interpretation of provisions, reveals international law's normative contingency. By 'normative contingency', I am referring to the ongoing possibility contained within international law to wage a struggle to create meaning from vocabulary: it is the possibility of that struggle that is international law's greatest strength.

In this respect, the role assigned to international law was not to secure agreement or consensus, but to enable dissent to co-exist. The failure of the Code negotiations was as much due to states' incapacity to facilitate multiple interpretations of the Code as it was due to a lack of agreement between the parties about what provisions should be included in it. Viewed from this perspective, international law is not governing by consensus, but rather, mutually agreed dissensus.

---

[81]'United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete a Code of Conduct on Transnational Corporations.' (1983) 22 ILM 177, 185.

[82]On the distinction between consent and the formation of custom as international jurists during this period considered it, see in particular, Anthony D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 Columbia Law Review 1110, 1117-8. Compare: Franck and Munansangu (1982).

[83]Interoffice Memorandum From Sidney Dell, Executive Director of the Centre for TNCs, to the Secretary-General (Javier de Pérez Cuéllar) EO/433, 5 July 1984, 1 (Folder S-1048-21-2-95-3), United Nations Archives and Records Management Service ('UNARMS') (copy on file with the author), 2 [My emphasis].

International law's contingency, in this moment, therefore, was limited to maintaining stasis. That states' representatives refrained from compromising on 'fundamental positions of principle' can be read not as the failure of these negotiations, but instead, their resounding success. That international law failed to be agreed in form reveals the intransigence of states' determinations in substance. Yet it also evidences the significance placed on agreeing any law at all. In my critical re-reading of these negotiations, that states refused to compromise on principle shows the genuine power of international law, and the contingent opportunity within that law for states, once agreed. The question then becomes why states could not agree, and whether the presence of the TNC could have changed the parameters of this mutual dissensus.

4. Merchants of Peace – Business' Participation in the Code Proceedings as a Precursor to their 'Success'

A final determinant worthy of consideration in the Code negotiations is the question of actor participation in the UNCTNC's proceedings. The failure to include TNCs more readily in the Code negotiations has been attributed to its failure by several commentators, the most famous of which is perhaps Jonathan Charney. Writing in the aftermath of the first near-final draft of the Code in 1983, Charney argued:

> Failing to bring the major international actors into this process does little to advance relevant interests and imposes unnecessary risks on the inherently frail international legal system…Expanding the role that TNCs and other major interest groups play in the process of developing and implementing these rules might be one way to avoid these negative results.[84]

In coming to this conclusion, Charney understated the role of business interest groups in the process, who remained present throughout the UNCTNC's proceedings and provided their views to the IGWG drafting the Code. For Charney, the presence of these groups did little to guarantee business' interests, because they could not directly participate in the norm development process.

Yet Charney proceeds from the assumption that the strength TNC participation would provide would have proved favourable to states, if not individually, at least collectively. This fails to understand the intimate connection between sovereignty and property already operative within the proceedings and the desire to keep these spheres distinct from one another precisely

[84]Jonathan Charney, 'Transnational Corporations and Developing Public International Law' (1983) Duke LJ 748, 754. [Emphasis in the original].

to diminish the role of the former in permitting the facilitation of the latter. In other words, far from *strengthening* the international legal system, increased presence of TNCs could very well have resulted in ensuring that the frailty of that system was not appreciated for what it was and in fact diminished further. The struggle amongst states to maintain mutual dissensus, to ensure the greatest amount of freedom between them to determine the parameters of the law accorded with that of the political communities they represented, may have become jettisoned for the demands of the facilitation of capital that key players at the UN – notably, the International Chamber of Commerce – were already seeking to safeguard.

As such, Charney's views have since been discredited by scholars that document the instrumental role that business interests groups, and in particular, the ICC, have played in actively sponsoring and heavily contributing toward the development of international trade law. Originally a network of nationally and locally-based chambers of commerce in the 19th century, the ICC had assumed the form of a federation of national-based chambers with a Paris-based secretariat in the aftermath of World War I.[85] During the 1920s, it employed eminent economists Friedrich Hayek, Ludwig von Mises, Gottfried Haberler and Fritz Machlup - all of whom historian Quinn Slobodian has recently credited with being neoliberal luminaries of the Geneva school.[86]

During WWII, the ICC established a close working relationship with the UN. It attempted to safeguard the neoliberal ethos of its formative protagonists by institutionalizing the globalist ethos that would maintain the 'human right of capital flight'.[87] In this respect, Hayek and his contemporaries believed that the global economy was not, nor should it be, self-regulating.

As Slobodian argues, for Hayek, and the neoliberals thereafter, law should *encase* the global economy in institutional relationships for the benefit of capitalist elites.[88] Democracy became a problem that needed to be managed. The idea that 'successive waves of clamouring masses' would be able to determine the course of their own history was palpably anxiety-inducing.[89] That they would be able to claim the *right* to do so, was further emblematic of the 'rabies democratica' that was spreading in the aftermath of WWII.[90]

[85]Slobodian (2018), 5.
[86]Ibid., 5.
[87]Ibid., 124.
[88]Ibid.

[90]Ibid., quoting Röpke.

The UNCTNC's Centre solicited the views of non-state actors for the IGWG's consideration. In this respect, business organizations favoured a voluntary instrument and trade unions supporting a legally binding Code. Similar to many Third World countries and the G-77's combined proposal, however, any legally binding instrument should provide a maximum amount of flexibility to government to regulate TNCs.[91]

Perhaps not surprisingly, business organizations, including the ICC, the International Organization of Employers, the Business Interest Advisory Council (of the OECD) and the Chamber of Commerce of the United States of America, largely favoured standardized international guidelines that would be voluntary and serve the purpose of increased foreign investment by corporations 'in the overall development context'.[92] In particular, the ICC noted in 1977, that because only 25% of total investment was in developing countries, a United Nations code would be primarily applicable within developed market economies.[93]

On definition and scope, the ICC stressed that all TNCs – private, mixed and state-owned, should be included under the term used. The main reason given for adopting such a definition was to 'avoid discrimination and distortion between national corporations and transnational enterprises as well as between private and public sectors.'[94] The Code should be 'voluntary in nature, non-binding in character and flexible enough to allow for different situations not only arising out of varying national legislation and practices but also out of different kinds of TNCs.'[95] This plea for flexibility was in keeping with the neoliberal ethos the organization sought to defend: the movement of capital remained the primary *modus operandi* which representatives of the ICC believed the Code should embody.

In 1984, with a full draft of the Code to hand, all states expressed the view that the utmost effort should be made to conclude negotiations and to adopt the Code 'without delay'.[96] Yet the UNCTNC's proceedings continued for another eight years without agreement being reached. For an additional two years, the UNCTNC maintained that delegates should prioritise 'not its legal form but the political commitment of all parties to it' and see it as 'an important

[91] UNCTNC E/C.10/20 'Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct' (30 December 1976), 15.

[94] Ibid., 7 ¶23.
[95] Ibid.

step towards international economic cooperation'.[97] Yet by 1987, the tone had changed remarkably:

> [T]he Executive Director of the United Nations Centre on Transnational Corporations recalled that the international debate on *foreign direct investment* and transnational corporations began with the creation of the Commission on Transnational Corporations *which was given the mandate, as its main priority, to establish an international framework in that area*…he stressed the importance of concluding the code so that, among other things, countries desiring larger flows of foreign direct investment could obtain them.[98]

Conclusion: A Moment of Failure, in fact a success?

Exploring both the necessary determinants and contingencies associated with form, structure and actor-participation in the Code negotiations helps to reveal the precariousness with which international law was advanced in support of state interests (either for or against the interests of TNCs) in the final quarter of the twentieth century at the UNCTNC. The implications of this chapter are not, however, that a better institution, more (or better) law, and greater participation from TNCs would have led to the more robust regulation of TNCs by international law in our contemporary moment. Such an insipid conclusion is too facile. Nor is it to assert, [as others in this volume have], that the sovereignty of the corporation should be reconsidered in response to the contingency of the nation state and its sovereign form.

Rather, I would argue that it is our conception of international law itself that needs to be reconfigured. When considering the contours of institutionalization, form and actor-participation, international law emerges from these proceedings as the product of experts through the rise of managerialism; a means through which permitting dissent to co-exist is sought; and a tool through which business ensured the human right of capital flight.

Viewed from another perspective, however, what emerges is that international law has a normative contingency founded in its critical instability. The question that the contingency of failed proceedings provokes is therefore, not (or not solely) how international law could have been but instead, how international lawyers can maintain the latent potential of international law and enable that potential to exist at all times. The frailty of the international system in fact enables international law to always have a 'could have been' moment: in this respect, further reflections on the failure of international law to emerge or exist, reminds us that the 'could have been' is always, in fact, within our midst. It also further assists us in filling the descriptive deficit to which the normative surplus associated with contingency gives rise.

[97]ECOSOC E/C.10/1985/19 'Report on the Eleventh Session' 20 para 38; E/C.10/1986/19 'Report on the Twelfth Session' 20 ¶41-2.
[98]ECOSOC E/C.10/1987/16 'Report on the Thirteenth Session' (7-16 April 1987) 23 ¶62.

As international lawyers, therefore, contingency provides a moment of possibility through which law can always be interpreted differently. In the pendulum swing between apology and utopia, there may yet be a moment through which we can effect transformative change.