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Thoughts on John G. Ruggie, "Multinationals as Global Institution: Power, Authority, and Relative Autonomy," *Regulation and Governance* (2017)

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John G. Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at the Kennedy School of Government and an Affiliated Professor in International Legal Studies at Harvard Law School. He is a Fellow of the American Academy of Arts & Sciences. From 1997-2001, he served as United Nations Assistant Secretary-General for Strategic Planning, a post created specifically for him by then Secretary-General Kofi Annan. In 2005, Professor Ruggie was appointed as the UN Secretary-Generals Special Representative for Business and Human Rights, tasked with proposing measures to strengthen the human rights performance of the business sector around the world. In June 2011 the UN Human Rights Council, in an unprecedented step, unanimously endorsed a set of Principles on Business and Human Rights developed by Professor Ruggie over the course of six years of research, consultations and pilot projects. Professor Ruggie has been examining the issue of the multinational corporation in international governance. His latest article, "[Multinationals as Global Institution: Power, Authority, and Relative Autonomy](#)," has just been published in *Regulation and Governance* (2017; online version: [10.1111/rego.12154](#)). In his abstract, Professor Ruggie explains:

This article aims to inform the long-standing and unresolved debate between voluntary corporate social responsibility and initiatives to impose binding legal obligations on multinational enterprises. The two approaches share a common feature: neither can fully specify its own scope conditions, that is, how much of the people and planet agenda either can expect to deliver. The reason they share this feature is also the same: neither is based on a foundational political analysis of the multinational enterprise in the context of global governance. Such an analysis is essential for providing background to and perspective on what either approach can hope to achieve, and how. This article begins to bridge the gap by illustrating aspects of the political power, authority, and relative autonomy of the contemporary multinational enterprise. The conclusion spells out some implications for the debate itself, and for further research.

The issue tackled is important and quite current. It is unlikely to go away, whatever happens to the current efforts at elaborating a comprehensive business and human rights treaty. The focus of the analysis is long overdue. This post includes my brief thoughts on this important work.

In his recently republished article for Regulation and Governance, "[Multinationals as Global Institution: Power, Authority, and Relative Autonomy](#)," Professor Ruggie raises the fundamental issue of the role of the multinational corporation in the debates about the scope and framework for managing economic activity, especially that which is effectuated across the political borders of states. He means this refocus as a necessary step away from the now tired (and tiresome) debates about the role and character of "law" (whatever that is coming to mean in this century) and governance (in the form mostly of CSR initiatives, however sourced outside or next to states). The current contours of this debate—and its quite important political ramifications in international law, are nicely framed in the introduction. Yet they are meant to serve as foundation for movement (mercifully) in a quite different direction:

what is missing from that discussion is a current and systematic political analysis of the multinational enterprise in the context of global governance. Such a portrayal seems essential for providing perspective and guidance to what both voluntarism and binding treaty advocates can hope to achieve, and how. (Ruggie, "[Multinationals as Global Institution](#)," supra., p 1)

What follows, then, is gap filling; the rubble for which is made up of "aspects of the political power, authority, and relative autonomy of today's multinational enterprise" (Ibid). Professor Ruggie notes that the implications of this shift do not produce a "silver bullet that would fully achieve the objectives of either the voluntary and mandatory side in the global CSR debate." (Ibid, p 2). But certainly for me the implication ought to be that by the end of the discussion one ought to care less about this (ultimately silly) debate in light of the realities of economic behaviors that have sprung up around academics, diplomats and non state actors who still enjoy the rituals of old debates (perhaps in part precisely because they do not really matter anymore). It is with this in mind that I considered the four sections of the examination that follows: (1) the core features of MNE's in relation to the CSR debates; and the MNE's (2) power; (3) authority; and (4) relative autonomy.

A. The MNE in the Context of the CSR Debates.

Professor Ruggie starts his examination with a consideration of the MNE itself. There is much irony here. For such an overused term, definition of an MNE remains elusive—or flexible enough to be whatever those who invoke it wish it to be. Indeed, the MNE *appears best understood as a fetish object that is essential in the magical incantations that support current CSR debates*. Professor Ruggie moves from magic to reason. He starts where most people start—the OECD's minimalist definition, one which I tend to find unhelpful (see, e.g., "[Regulating Multinational Corporations: Trends, Challenges, and Opportunities](#)"). But where my preference is to describe the multinational enterprise as a system—the institutional expression of the production chain—Professor Ruggie approaches a better understanding of the MNE as a global institution by considering it as an economic and as a legal entity. (Ruggie, "[Multinationals as Global Institution](#)," supra. pp 2-5).

As an economic entity, the MNE assumes two distinct but related forms. The first is solid and old fashioned—an actor based form that most Western theorists are eminently comfortable with (Ibid. p 2). The second is more abstract and fluid—a network based form that follows power and control (but not necessarily production chains) (Ibid. p 2-3). This networked model, though, Professor Ruggie correctly suggests, "becomes more complex when we look at multinationals through the lens of the contractual ecosystems they continue to generate." (Ibid. p 3). Others might reference these as self constituted regulatory spaces (e.g., "[Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect](#)"; "[Constitutional Fragments: Societal Constitutionalism and Globalization](#)"). But the view is the same: "a fundamental transformation that has taken place in the production process of many if not most sectors." (Ruggie, "[Multinationals as Global Institution](#)," supra. p 3).

As a legal entity, the MNE takes on a quite distinctive (and to lawyers at least) a more comforting if fantastical form (Ibid p 4-5). What economics treats as singular enterprises, the law fractures. And the law fractures these economic enterprises precisely to afford them a measure of risk avoidance, and of protection, otherwise unavailable. The construction of the MNE as a legal construct produces systems of subsidy and protection that are inconsistent with the economic operation of the MNE (though quite valuable to the MNE itself understood as an economic entity in fact though a legal entity (ies) in form). Professor Ruggie briefly describes this legal universe within its principal territories—the nation state and under international law. And these disjunctions provide the basis for the analysis that follows. "The fact that public law (national and international) does not generally encompass the economic unity of the multinational firm is the single most important contextual factor shaping its power, authority, and relative autonomy." (Ibid p. 5).

B. The MNE as Power Relations.

Professor Ruggie focuses not on the objectification of power (that is, of power as a "thing"), that is more at home in anthropology and related fields (e.g., [*Two-dimensional Man: An Essay on the Anthropology of Power and Symbolism in Complex Society*](#)), but rather focuses on the perhaps more useful approach of the political sciences that frames power as "inherently relational" (Ibid p. 5). These relational power arrangements he divides into instrumental, structural and discursive power relations (Ibid pp. 5-10).

Instrumental power is probably the easiest to understand: direct and indirect institutional interventions in political life (elections of officials and engagement in policy and lawmaking), and privileged access to officials. Professor Ruggie focuses on lobbying "because its evolution closely tracks corporate globalization itself." (Ibid p 5). He draws attention to lobbying in three specific forms: (1) the size of the lobbying effort; (2) asymmetries in access; and (3) the locus of lobbying. With respect to the first, Professor Ruggie notes the extent to which enterprises devote resources to the cultivation of government and its officials. That makes sense, of course for a number of reasons in the context of globalization. Lobbying reflects the extent to which enterprises view government as an important locus of power; it signals the utility of government to reduce transaction costs of operation, or to be used instrumentally in competitive environments; government is also useful for reducing the costs of operations—from the provision of protective services, to infrastructure, to a sound legal system that reduces the costs of contracting and enforcement ad hoc. *Lobbying, then, and its costs, suggests the value of government as an instrument.* Asymmetries in access states the obvious—power likes to engage with its own. Lobbying, in this respect *suggests the value of enterprises as an instrument* of governmental ambitions. The two together—the expense of corporate lobbying, and the price of access—can be understood as the reciprocal valuation of enterprises and states to each other as instruments to further the respective ends of each of these "partners" whose complicity in each other's work serves to reinforce and sustain their respective power.

Professor Ruggie notes, to great effect, the value of litigation as an instrument of lobbying.

Lose in Congress when legislation is written, then pressure the agency drafting the regulations, and finally, sue the regulator for issuing regulations that are depicted as being too "intrusive," too "costly," or violate some constitutional right that the same Supreme Court has attributed to corporations as legal persons. This, too, can have significant international consequences. (Ruggie, "[Multinationals as Global Institution](#)"; supra. p 6).

What globalization has done, of course, is to change the locus of lobbying—enterprises tend to seek power. And power has appeared to move from states to multilateral actors—the European Union, the World Trade

Organization, the World Health Organization and so on. (Ibid). Professor Ruggie notes as an example the efforts of global tobacco to undo international efforts to manage tobacco (Ibid pp 6-7).

Structural power, the ability of an actor to affect outcomes without exercising instrumental power, is exercised by the MNE within the governance gaps created by globalization and the deterioration of political borders as a containment device. (Ruggie, "[Multinationals as Global Institution](#)," supra. pp 7-9). This structural power may be evidenced by the rise of autonomous governance systems that reduce the value of states as sites for the resolution of disputes (either by providing a legal system or the mechanics for dispute resolution). Professor Ruggie illustrates his sense of the manifestation of MNE structural power in several ways (Ibid pp. 7-9). First he notes the right of MNEs under bilateral investment treaties—especially their power to sue states—which is structured in a way that suggests advantage to MNEs. The second touches on transfer pricing through related party trade. The third is grounded on the advantages of relying on states that are willing to serve as tax havens. The last focuses on the way that trade has been internalized within MNEs rather than manifested in its traditional form as arm's length transactions among actors. Of these, the last is the most interesting. It provides a strong reminder that the focus on MNEs may itself be misfocused. Indeed, structural power analysis might as strongly suggest the inversion of the traditional relationship between MNEs and the production process over which they preside. To my mind Professor Ruggie's excellent analysis may be a *better way of understanding how one structures and institutionalizes the production process*. That is, Professor Ruggie's structural analysis suggests to me the way that MNEs are better understood as an instrument of production—rather than the way that the production process is the instrument of MNE (e.g., "[Regulating Multinational Corporations: Trends, Challenges, and Opportunities](#)"; "[Are Supply Chains Transnational Legal Orders?](#)").

Discursive power is likely the most subtle but important element of MNE power. Professor Ruggie describes this as "the ability to influence outcomes through promoting ideas, setting social norms and expectations, and even shaping identities. Its exercise involves persuasion and emulation, not coercion." (Ruggie, "[Multinationals as Global Institution](#)," supra. p 9). Here one experiences the ordering power of the MNE at the level of culture, and of the basic principles that guide the tastes and actions of political actors—from individuals to institutions. Professor Ruggie observes that "corporate globalization has benefited from a massive shift in discursive power that favored business even if it was not always directly driven by business itself." (Ibid). Yet the opposite might also be true—that a massive shift in discursive power that flowed from a confluence of factors that produced a "conservative" revolution evidenced by the near simultaneous appearance of Margaret Thatcher, Helmut Kohl, Pope John Paul II, Deng Xiaoping, and Ronald Reagan produced a discourse that at first favored and then was driven to some extent by and for MNEs. The contingency for the direction and sources of discursive power remains difficult to place with any degree of certainty—though the necessity of asserting it does not (see, e.g., [here](#)). And indeed, Professor Ruggie's reference to the efforts of President Clinton and Prime Minister Blair with respect to the political culture of CSR intimates this dynamic.

Professor Ruggie also observes that "certain ideational elements of this broader shift can be closely related to the power of business." (Ruggie, "[Multinationals as Global Institution](#)," supra. p 9). Most powerful, for me at least, was the identification of the power to alter the reality of perception through the creation and acceptance of new fields of study. The reference to the rise of the law and economics field, itself a cultural-political construct with an instrumental objective every bit as rigid as that of the Marxist Leninist conceptual universe which it opposed (implicitly) and mirrored (explicitly in its orthodoxy through organs such as the Federalist Society) is a telling point.

Professor Ruggie's third observation (Ibid pp.10)—of the normalization of the MNE within the framing structures of globalization is perhaps key to the understanding of the reciprocal web of power relations that define and

defined by the power of production. Inherent in this observation is the key point that globalization has produced the governmentalization of the enterprise and the privatization of the state (discussed in [Transnational Legal Orders and Global Regulatory Networks](#)). In that context Professor Ruggie powerfully notes

The normative dimension comes into play when such consequentialist considerations are supplemented or even yield to the logic of appropriateness – that this, not that, is the appropriate and expected form of conduct. Whatever combination of factors best explains the outcome, it endows the multinational with a reservoir of discursive power that it can draw upon in pursuing its interests. (Ruggie, "[Multinationals as Global Institution](#)"; supra. p 10).

C. Authority and the MNE.

Professor Ruggie starts with the important observation that the boundary between power and authority "is blurry" the key difference "lies in the voluntary suspension of individual judgment based on a widely accepted and institutionalized belief that the authoritative entity is entitled or has the right to prescribe." (Ibid p 10). Professor Ruggie notes that MNEs draw on and embody a combination of traditional and legal authority. Traditional sources include the authority resident in property and contract—the basis of much in Western law—that has now been embedded in the fundamental structures of globalization. These traditional sources of authority, of course, are "enshrined in, elaborated by, and enforced through public and private law, including obligations under the WTO and international investment agreements." (Ibid p. 11). Of course, the authority of states and of enterprises are distinct. Professor Ruggie goes to some pains to ensure proper understanding of this distinction—but also of the way that the authority of both are intertwined within the structures of globalization. To that end he provides the example of Disney China (Ibid).

Professor Ruggie then asks: over what or whom do MNEs have authority? The answer is both simple and powerful. *MNEs have authority over themselves.* (Ibid p 11-12) This simple statement veils a powerful insight about the self-constitution of the enterprise and the regulatory authority that flows from this self-constitution—both within and beyond the state. And here he emphasizes the point with a reference back to the opening issue—of definition and conceptualization of the MNE itself: "The difference between the multinational as a single economic organization and the group of separate entities recognized under the law is critical to understanding the scope of multinationals' authority over "themselves." (Ibid p 11). And here the ordering power of the production chain again appears embedded in the analysis. MNEs serve as de facto governance units across state boundaries—but the extent of their jurisdiction is limited to their production. And the production chain itself orders economic and legal relations as instruments of production—from the organization of economic structures to the instrumental use of law across states to maximize the value of production to stakeholders. For all that possibility, the institutional structures of production reflected in the organization remains the centering element for Professor Ruggie's cogent analysis. "Their authority is clearest and most direct when it is administered internally within the corporate group. From there it radiates outward across networks and down supply chains via the private law of contracts." (Ibid p 12).

The Relative Autonomy of the MNE.

For Professor Ruggie, MNE authority is connected to MNE autonomy. Having considered the question, over what and to whom do MNEs have authority, discussed above leads inevitably to a second question: "in whose name or on whose behalf MNEs exercise the authority they have." (Ibid pp. 12-13). Professor Ruggie notes the common sense and traditional answer, one grounded in powerful principles of law and politics—their owners. Yet he notes two problems with this traditional answer. The first is the disconnect between owners and enterprise operations. Investors who hold stock are not owners whose interest in the operation of an enterprise are reflected in shares. The second problem touches on the exact meaning of ownership and the problem of the orthodox view

of shareholder primacy (in law at least). It is not clear that anyone owns the corporation. Here Professor Ruggie moves from a property to a process notion of share ownership, the way that it might be useful to move from institutional to production process notions of MNEs. "The owners of shares thereby constitute a market force that constrains directors' and management decisions. Moreover, holders of large blocks of shares, such as institutional investors, can exercise influence through board elections and more informal means. But neither of these situations makes them owners of the firm." (Ibid p. 13).

Where does that leave the question of relative autonomy? Professor Ruggie advances two notions—the first that one owns them and the second that they own themselves. (Ibid). And he suggests that the two may amount to the same thing. It is interesting to note that beyond the path breaking work of Jean-Philippe Robé, cited by Professor Ruggie, Katsushito Iwai had long suggested that beyond the narrow confines of Western capitalist notions, Asian capitalism had long considered the idea that the largest national enterprises might well effectively own themselves with substantial effects on governance frameworks (e.g., [here](#) and [here](#)). Either way Professor Ruggie makes an excellent point—the MNE exercises its authority on its own behalf. In sum, the institution of the multinational has come to constitute not only a significant center of global power but with the exception of state-owned enterprises, also a relatively autonomous transnational authority structure." (Ruggie, "[Multinationals as Global Institution](#):", supra. p 13).

The Conclusions that Follow.

The preceding analysis leads Professor Ruggie to some eminently powerful conclusions.

The first is that scholarship and practice should strive to better understand the limits of both CSR and the pursuit of international treaties governing multinational enterprises. As measured against multinationals' power, authority, and relative autonomy, the former currently underreaches while the latter overreaches. CSR by itself is highly unlikely to take us far enough, and the repeated pursuit of an overarching constitutionalizing treaty is doomed to repeated failure. The second implication is that much greater attention should be paid to the dynamic interplay between the two spheres, and its potential cumulative effects. (Ibid).

I would suggest a third: that scholarship should consider the MNE as a process, as the manifestation of production, rather than as an institution around which law and governance revolves. It is becoming clearer that the dynamic process of production is itself the territory within which governance is situated and around which institutions are produced and maintained. That dynamism is lost when one considers the productivity process itself principally from the static orientation of the institution created to manage production. This suggested inversion of the relationship between process and institution might go far to help better embed CSR notions, including human rights, within the process of production, and through it, within the institutions through which production is organized.

But whatever the future, Professor Ruggie underlines the critical insight of the analysis (Ibid p 14—reality has moved far beyond the niceties of the mandatory/voluntary dichotomy that continues to burden and inhibit a more realistic and robust discussion of the MNE and of CSR in globalized space.