Ending corporate impunity

The struggle to bring about a binding UN treaty on transnational corporations and human rights

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Background

In the 26th session of the United Nations Human Rights Council (UNCHR) on 26 June 2014, Ecuador and South Africa’s jointly sponsored Resolution 26/9 was adopted. An Open-ended Intergovernmental Working Group on transnational corporations (TNCs) and other business enterprises with respect to human rights (OEIWG) was given a mandate to elaborate an internationally binding instrument to regulate the activities of TNCs and other business enterprises (OBEs).

After a three-year process that has involved intense discussions about the elements of the treaty by states, which was closely followed by movements and NGO advocacy groups, the Third Session of the OEIWG in October 2017 decided that the negotiations for a binding treaty on TNCs and OBEs would begin. Four informal consultations were held by the OEIWG in Geneva in 2018 to get substantive proposals from states about the content of the draft treaty.

This is an important initial victory for organisations like Global Justice Now and others that have campaigned for this process to happen. It could face huge challenges given the current global climate where everything seems to be moving away from multilateral processes, and multilateralism itself may be under great threat. The UK will have...
a unique and important role as one of the seven regional members of the UN Human Rights Council from Western Europe and Other States in this phase of the process as it is the most crucial period in the development of the treaty.

In this campaign, we emphasise that the history of transnational corporations is not only about pioneering production, innovations and wealth-creation. A broad range of systematic human rights abuses, especially in the global South, often accompany their operations. Some of the earliest forerunners of Dutch and British TNCs were instrumental in the period of European colonisation.

In the current period of globalisation, TNCs have taken advantage of loose regulatory frameworks in developing countries, global corrupt practices, and powerful legal rules and norms that were put in place to protect corporate interests, often through well organised and highly resourced corporate lobby groups. Current global trade, investment and financial regimes enable TNCs to operate with impunity and lack of accountability.

Reform-oriented governments; trade unions; and various civil society organisations have attempted many times to reduce their powers and stop their abuses. Several initiatives have already been launched at the United Nations, as well as various multilateral and regional bodies to regulate them since the 1970s, only to end up with current mechanisms based on voluntary standards.

**Transnational corporations as new empires**

In today’s globalised world, TNCs have become richer and more powerful than states. In fact, less than ten percent of the world’s companies earn more than eighty percent of all profits globally. Global Justice Now’s earlier research shows that the world’s top 10 corporations, which include corporate giants like Walmart, Shell and Apple, have combined revenue equivalent to more than the 180 ‘poorest’ countries.

The TNCs vast wealth and power are not the main problem. Rather, it is how they use their enormous economic powers and political clout to advance their interests even if the results lead to violations of human rights, as well as social and environmental concerns. Many of the abuses and injustices against the weak sectors and communities continue because there are no national or international legal systems that are able to regulate their activities and make them accountable.

Since the 1980s, the global market rules and treaties negotiated in various multilateral and bilateral agreements by states that promote and protect investments have allowed TNCs to shape a broad range of economic regulations. These regulations cover production of food and goods, labour conditions and relations, provision of services, natural resources and commercialisation of knowledge. Now even people’s personal information will be mined for profits through e-commerce.

TNCs now are like new empires. Unlike empires of old, however, they expand their reach and power without military and territorial conquests, and they often benefit from quasi-official relationships or complicity with state military to protect their economic interests and physical installations, such as the paramilitary-military-corporate nexus in Colombia that subjects affected populations to violence.

Trade and investment rules have given TNCs access and licences to exploit land, water and forests globally and do whatever they want for profit. More importantly, their power is generally accepted, but often poorly understood. The present ideological hegemony of neoliberalism makes it very difficult to challenge this reality.

Literature from progressive NGOs, trade unions, women, peasant and indigenous communities, public sector and academic institutions has already demonstrated the direct links between the current global trade and investment regime and increasing poverty, inequality and conflicts from which TNCs benefit and profit.

While TNCs can be credited for many innovations that have led to the growth of the global economy to almost five times the size it was half a century ago, their operations are also to blame for the destruction of the world’s resources and ecosystems that people rely on for their livelihoods. TNCs are also one of the big causes of climate change and some are even hindering real solutions to it.
Skewed trade rules, corporate abuses and global migration

Yash Tandon, in his latest book, argues that trade is war against the poor. Free trade is neither ‘free’ nor ‘fair’ when trade in real life is an instrument of war and predation. Indeed, far from producing a power shift in favour of poor and low-wage countries, the growth of foreign trade and the rules that govern it reflect skewed relations between countries at the core (rich) and the periphery (poor/developing).

Until the last decade, the richest and most powerful TNCs were mostly from the rich countries in Europe, the US, Japan, Canada, etc. The rise of new powers like China and India, has seen TNCs from these new powers also investing aggressively in other developing countries. In China’s case, Chinese state-owned enterprises and big private firms are now also investing heavily in Europe, the US and Japan.

Persistent and rampant violations of workers’, peasants’, women’s and indigenous peoples’ rights are common by TNCs, as are violations of social standards and environmental regulations in large-scale manufacturing, in extractive industries, shipping and transportation services, tourism and hospitality and other sectors of operations by TNCs. Governments whether in core or periphery countries, but more blatantly in poor countries, often fail to fulfil their duties to protect people’s rights, the environment and communities through effective regulation of the business activities of abusive foreign and domestic corporations.

To cut costs, businesses are increasingly relying on complex chains of suppliers, distributors and markets that include multiple countries to provide their goods and services, which further weaken workers’ capacity to protect their rights to secure jobs and decent wages. The weakness and non-enforcement of global labour standards, as well as the continuing wage differentials between rich and poor countries, are the biggest causes of global migration.

Frontline communities in poor countries constantly suffer from abusive operations by transnational corporations that are aggressively extracting the wealth of their resources, to the point of destruction and in effect their dispossession. The poor from rural areas turn into economic refugees and exploited workers in the cities. This flow of displaced people is not just incidental, it is actually vital for capital accumulation on the global scale. Those who are more daring and have more skills and/or money (or, who have little left to lose) cross oceans and borders as migrants.
Despite their huge contributions to the economy, culture and knowledge creation of their host countries, migrants have become targets for abuse and discrimination by racists and xenophobes. The relatively more open policies on migration in the 1960s, which encouraged migrant workers to come to rich countries, used ‘divide and rule’ tactics to pit local workers against migrant workers, which raised anti-migrant sentiments. This process has been used by businesses to lower wage levels and working conditions for all workers, regardless of their nationalities, and reduced workers’ collective power in society.

The expansion of TNCs into poor countries for lower production costs, which has enabled consumers in rich countries to enjoy imported cheap manufactured goods, not only encourages planet-frying consumerism in core countries like the UK, it also directly supports the profitability and competitive position of industrial giants. Far from ending their dominance, the outsourcing of operations by TNCs to workers in developing countries, at the same time as exploiting local and migrant workers in rich countries, enables them to keep big chunks of profits from their operations.

Aggressive, comprehensive and strict trade and ‘intellectual property’ rules continue to sustain corporate control and dominance. This is most glaring if we look at one of the most profitable industries – the pharmaceutical business. Big corporations have control of prices and availability of medicines making their profits go through the roof. Here in the UK, public funds are used in the invention of new medicines and their production, but many patients cannot get them at affordable prices. Global Justice Now’s report *Pills and Profits* illustrates this grave injustice of pharmaceutical companies generating huge private profits from public funds by charging high prices for products with relatively low production costs.

**Past efforts to curb the power of TNCs and the resulting backlash**

Making TNCs accountable for their operations has proven to be a very difficult battle, as can be seen in the history of global advocacy for a universal regulatory mechanism. In the 1960s and 1970s the central issue for many newly-independent states was to ensure a new international economic order built on sovereignty, international cooperation and the elimination of inequalities. This led to the 1974 UN Declaration to promote their interests by improving their terms of trade, increasing unconditional development assistance, developed-country tariffs to correct inequalities and redress the remnants of unjust relations from the colonial era.

Earlier in 1972, Chilean president Salvador Allende called for the creation of a Code of Conduct for TNCs in a speech he made at the United Nations. Southern countries pushed for and succeeded in establishing the Centre on Transnational Corporations (CTC) in 1974 as part of the global struggle by Southern countries to fundamentally confront existing unequal global power relations. This was the first global attempt to legally reduce the power of TNCs. The Centre started negotiations on the Draft Code of Conduct on Transnational Corporations in 1977.

In the face of third world debt, of aggressive and comprehensive global trade rules, and the increasing marginalisation of the UN, the consolidation of corporate power incrementally increased in the 1980s. The regulatory efforts that followed reflected a turn in global power relations in favour of corporations, both a symptom and cause of neoliberalism. The CTC negotiation was stalled in the 1990s due to divisions between government representatives over making the Code legally binding or voluntary. In 1993, the pro-regulation bloc lost and the CTC was abolished and reincarnated as the Transnational and Investment Division within the UN Conference on Trade and Development (UNCTAD).

Labour unions also contributed their efforts by influencing states. In 1977, the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The Declaration, however, does not provide an international mechanism for workers to punish TNCs for their abuses.

UN secretary-general Kofi Annan announced the UN Global Compact while addressing the World Economic Forum in 1999. It was formally introduced in 2000. The Compact is a partnership between the UN and transnational corporations to promote 10 principles in the areas of human rights, labour, the environment, and anti-corruption. The 10 principles are based on the 1948 Universal Declaration of Human Rights, the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the 1992 Rio Declaration on the Environment and Development, and the 2005 UN Conventions Against Corruption.
In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights. Although it demanded that businesses must comply with international human rights standards, there is no enforcement mechanism to do so as it was opposed by the International Chamber of Commerce and the International Organisation of Employers. The launch of the UN Global Compact was attended by major TNCs like British Petroleum, Nike, Shell, Rio Tinto and Novartis. These corporations have been heavily criticised by NGOs and trade unions for their long record of violations of workers’ rights and/or displacement and marginalisation of people, as well as environmental destruction, in their areas of operations. Because of the painful history of failures of enforcing rules for TNCs, it is understandable that there is considerable scepticism about the ability of the United Nations to produce a treaty that will enshrine the primacy of human rights over the power of corporations to operate with impunity.

### Currently existing voluntary agreements on human rights and transnational corporations

**1976 – The OECD Guidelines for Multinational Enterprises**, originally adopted as part of the Declaration on International Investment and Multinational Enterprises. This is a framework of non-binding principles and standards addressed to governments and enterprise. The latest **2011 Version** covers multinational enterprises operating in or from the 30 OECD countries, plus 8 non-members. It covers employment and industrial relations, the environment, bribery, consumer interests, science and technology, competition, and taxation.

**2000 – UN Global Compact**, the world’s largest voluntary corporate sustainability initiative encouraging businesses to align their strategies and operations with universal human rights, labour, environmental and anti-corruption principles, and take actions that advance societal goals. The International Chamber of Commerce, which was headed by the then CEO of Nestle, was a very influential lobby group in this process.

**2011 – UN Guiding Principles on Business and Human Rights (UNGPs)** guidelines to prevent, address and remedy human rights violations committed in business operations.

The **International Labour Organization (ILO)** – Since its founding in 1919, the ILO has adopted 185 standards in the form of conventions that are subject to ratification by member states. In 1977 the ILO adopted the **Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy**. It was amended in March 2017 to provide guidance to TNCs, governments and employers and workers.

Sources: OECD, UN Global Compact, UN-Sub Committee on Business and Human Rights

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### The process of developing a binding UN treaty on TNCs: A good beginning and not an end

A binding treaty on TNCs is the beginning of the new stage of fighting for the rights of people that are negatively affected by the operations of TNCs and abusive big businesses. The 2014 resolution was drafted by Ecuador and South Africa and signed also by Bolivia, Cuba and Venezuela. Regardless of the fact that these countries may have their own internal social, political and economic problems, it is nonetheless still notable, and far from coincidental, that, at the time the resolution was drafted, these were all countries with either a left government, or those with their origins in anti-imperialist and Third World nationalist struggles. The vote was twenty in favour, fourteen against and thirteen abstentions. The UK government under David Cameron voted against it.
Legally binding rules are essential. The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign), which has worked towards a binding treaty since 2013, argues that such a treaty could address the ever-increasing asymmetry of power between transnational corporations, states and peoples and communities. The Global Campaign is a network representing more than 200 movements, organisations, trade unions, peasant organisations, Indigenous peoples, communities affected by the activities of TNCs and many other sectors from all over the world. Another network, the Treaty Alliance, which is co-established by the Global Campaign, is also mobilising groups at the national level and the European level to pressure governments to support the process. Both networks are actively engaging and cooperating in this process.

The objective scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure. It is of fundamental importance that it should cover all transnational activities along the supply chain of the corporation.

Current measures to prevent human rights violations and abuses in the operations of TNCs are not sufficient. Rights defenders are already losing their lives, livelihoods and communities/territories because of TNCs’ activities. Corporations benefit from the weaknesses and loopholes in international law and the ever-increasing armour of defensive and offensive instruments in the guise of investor protection clauses and policies that governments tie their hands to.

Voluntary mechanisms and self-regulation will not be able to address these widespread violations. They merely serve as “policy deodorants” designed to hide and not prevent the source of the stink coming from the violations. In poor and developing countries, those who oppose TNC projects are deemed “anti-development” and in many cases the full power of an authoritarian state working in cahoots with corporations is used against them. Movement leaders can be labelled “terrorists” and “enemies of the state” instead of seen as defenders of rights and their environment. A binding treaty, however, is not an end, but rather a beginning that could be enriched by other protocols, instruments and supporting processes.
The binding treaty as an alternative to unjust trade and investment agreements and the ISDS

The big challenge being faced by campaigners is that almost all governments believe in the primary importance of attracting foreign investments to achieve economic growth. To lure and encourage investors, governments agree to free trade and investment protection agreements that give too much power to transnational corporations.

The intricate web of rules constructed over decades has given rise to institutions like the International Centre for Settlement of Investment Disputes (ICSID) and Investor-State Dispute Settlement (ISDS) mechanisms that have legal powers to reward TNCs and punish states when there are conflicts of interests between the two. TNCs can use existing special courts to file cases against states when they deem that a state’s measure could affect their profits or if any initiative or new law by a state could hamper their operations. This has already resulted in ‘regulatory chill’ (governments being reluctant to regulate) and weaker policies, especially in poorer and less powerful countries.

While TNCs can rely on the ICSID and ISDS, there is no binding rule for corporations that could compel them to observe human rights, nor any institutions that can impose this. There are growing cases of rights defenders and indigenous leaders who are being murdered, disappearing or getting jailed for protecting their resources and ancestral territories from resource-grabbing by corporations, for example in the Philippines and Honduras in recent years. Although new free trade agreements being negotiated by the EU now carry the principles of sustainability and human rights impact assessment, these do not change the overriding agenda of advancing corporate interests.

A binding treaty to challenge corporate crimes after Brexit

On 6 March 2018, the European Court of Justice ruled that the controversial ISDS in bilateral investment treaties is not compatible with EU law. However, future trade deals will still carry it as the practice we have seen is to make new trade agreements more comprehensive and aggressive than those already in place. There is also the possible establishment by the EU of a Multilateral Investment Court (MIC), a permanent body to settle investment disputes. This court would adjudicate disputes under future and existing investment treaties and support the very same unfair ISDS mechanism that enables foreign corporations to sue governments for protecting people and the environment, but on a global scale.

The UK government, like the EU, prefers the current process of voluntary mechanisms wherein transnational corporations manage how they address allegations of human rights and environmental regulations. Post-Brexit trade deals that the UK will negotiate are very likely to include ISDS investment clauses too.

The binding treaty is putting forward what states have been failing to in the last 40 years. Its supporters are also pushing that an International Court on Transnational Corporations will implement international monitoring and carry enforcement mechanisms.

The incredible and enduring resistance of people and their communities to reclaim their common economic, political and cultural rights must be supported and celebrated through our own resistance against corporate power here in the UK. We need to expose the impunity of TNCs and the architecture of impunity built by trade agreements. We need to demand that the UK government shows people and the environment matter more than big business by supporting the ongoing process of building a binding UN treaty on transnational corporations.
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