AGAINST THE “LEX MERCATORIA”

Proposals and alternatives for controlling transnational corporations

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Title: Against the “lex mercatoria”. Proposals and alternatives for controlling transnational corporations.

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The Observatory of multinationals in Latin America (OMAL) is a project created by the Association Peace with Dignity in 2003. It has the aim of investigating, documenting and systematizing the activities of transnational corporations in Latin America and their social, environmental, cultural, economic and human rights impacts.
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The association Peace with Dignity is a non-profit organization created in 1995. It works for the transformation of the neoliberal model and tries to help solve the causes of inequalities and injustices, through the defense of human rights, solidarity and international cooperation (www.pazcondignidad.org).

Date of publication: October 2016.

With the collaboration of:

*This publication is the English version of a book published by Icaria editorial in 2015.*
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Though lawmaking is a task of the State as representative of the dominant classes, the law applicable at any one time is not a mere product of the will of those classes; rather, in schematic terms, it reflects the balance of power across the social classes at a given point in history. Where the balance of power favours subordinated groups, progressive laws are passed (...) Where the balance of power is unfavourable, criminal, civil, labour and other legislation is regressive. But even in these circumstances, invoking legal measures and in particular penalties for sanctioning the members of economic elites that breach fundamental human rights has an educational and ideological value – by “arousing social concern”, as Alessandro Baratta says – in exposing the mechanisms of an unjust social system.

ALEJANDRO TEITELBAUM

La armadura del capitalismo
(The armour of capitalism, 2010)
Operating and marketing contracts signed by large corporations, trade treaties and investment protection agreements negotiated between States, fiscal adjustment policies imposed by the International Monetary Fund, conditional loans granted by the World Bank along with the measures sponsored by the World Trade Organisation, investor-State dispute settlement systems included in “free trade” treaties and suits brought by multinationals against States in international arbitration tribunals, thousands of rules and regulations on trade and investment serving to protect the interests of transnational corporations worldwide – such is the machinery of the *lex mercatoria*, the new global corporate law by which legal certainty is given to the transactions of large corporations while their social, labour and environmental obligations are left up to corporate goodwill and “business ethics”.

And as they armour-plate their rights with a global legal framework based on the prolific regulatory output of international economic and financial institutions and multilateral bodies, large corporations refer their obligations to national legislation previously subordinated to neoliberal logic, to international human rights law characterised by weakness in addressing abuses committed by multinationals, and to “social responsibility” and codes of conduct based on voluntariness, with no legal enforceability to oblige transnational firms to effectively respect human rights.

Cases such as that of Chevron-Texaco, which has sued Ecuador in various international arbitration tribunals since the Ecuadorian National Court confirmed a judgment requiring the US oil firm to pay compensation to those impacted by its pollution in the Amazon, or the current negotiation of the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States, with which large corporations are seeking to ensure their earnings in a future market in continuing crisis (not just economic but multifaceted, and now a crisis of civilisation) and against possible changes of government – these are just two examples illustrating the profound asymmetry between the power of the *lex mercatoria* and the fragility of the international human rights system.
Accordingly, in response to a *legal architecture of impunity* that puts the private profit of a small minority before the wider interests of society, new regulatory frameworks and alternative proposals are needed to put the rights of people and of nature on at least the same level as those of transnational corporations. Various initiatives along these lines have already been formulated and deployed by grassroots organisations and even some tiers of government (in Spain, so far, at municipal level; in other countries, especially in Latin America, also at national level), involving ways of progressively dismantling the power of large corporations and building other economic and social models. In the current context of global capitalism, where any reform liable to challenge the dynamics of growth and accumulation driven by multinationals is regarded as little short of revolutionary, taking steps in providing mechanisms for controlling transnational companies ultimately means helping to radically transform a system that has proven to be socially and ecologically unjust. Such is precisely the intention of this book.

**Structure and purposes**

Transnational corporations elude practically all control, whether by public authorities or citizens, thanks to their unprecedented economic and financial power, their transboundary nature, their legal versatility and the complex structures which they use to evade all kinds of national and international laws and regulations. They generally prefer to set up their headquarters in countries with weak legislation on tax, accountability and transparency as well as on employment and the environment, and far from where they do most of their business and where their operations may have adverse impacts on human rights. But as well as great economic, political and cultural power, large corporations have legal muscle: today’s *lex mercatoria* is the rugged armour legally protecting their commercial interests and shielding their contracts. Thus the balance of power in neoliberal globalisation results in a regulatory asymmetry which means that legal certainty is assured for the business of multinationals whereas the fundamental rights of the majority are confined to the declaratory sphere.

As we shall see in our first chapter, in the *lex mercatoria* the power of multinationals is reinterpreted and enshrined through international practice, national standards and the various multilateral, regional and bilateral agreements, conventions, treaties and rules on trade and investment, as well as through decisions rendered by arbitration tribunals and investor-State dispute settlement systems. And the
erosion of State powers, the expansion and consolidation of large corporations and the creation of a formal and informal network of legal and economic rules and practices by multilateral bodies and international institutions have managed to establish a *lex mercatoria* with huge legal force, making multinationals the top players in the world economy and global capitalism. Indeed these corporations have been the main beneficiaries of the policies provided by core States and international organisations, which have opted to set up a global legal network favouring the interests of large shareholders and business leaders over the rights of peoples and individuals. For multinationals there is the potency of the new global corporate law; for the individuals and peoples impacted by them, the weakness of “business ethics” and “social responsibility”.

As opposed to the strength of the *lex mercatoria*, corporate social responsibility and *ad hoc* systems for controlling transnational firms – such as the United Nations *Global Compact* and *Guiding Principles*, among others – are paradigmatic expressions of *soft law*, based on a set of codes of conduct and voluntary, unilateral and legally unenforceable agreements which are resulting in the atrophy, colonisation and corporate capture of the main international institutions. This is plain to see in the regulatory trends over the past four decades in bodies such as the United Nations: whereas in the early 70s the General Assembly gave a standing ovation to Salvador Allende’s speech asserting that “the world community, organised under the principles of the United Nations, does not accept an interpretation of international law subordinated to the interests of capitalism”, by the end of the first decade of this century it was content to hear its secretary-general Ban Ki-moon say, “now, a new set of crises requires a renewed sense of mission...” and go on to call on his audience to sign up to *inclusive capitalism*: “a new constellation of international cooperation – governments, civil society and the private sector, working together for a collective global good”\(^1\). We will look at this more closely in our second chapter.

In sympathy with the *International Peoples’ Treaty for the Control of Transnational Corporations*, “indignant at the regulatory asymmetry between international human rights law and the international corporate law that safeguards the rights of transnational corporations imperatively and coercively,” we shall focus finally on how normative proposals and legal alternatives could be deployed to ensure that human rights are universally respected by large corporations. For in the words of this initiative promoted by hundreds of grassroots organisations worldwide with the aim of providing effective mechanisms for controlling multinationals: “in order
to confront the *architecture of impunity* in favour of transnational corporations, we must build an architecture of human rights in favour of the social majorities” This is precisely the aim of the various proposals for States, companies, governments and international institutions put forward in our third section.

Today, as the power of *the markets* and the pressure of the *lex mercatoria* weighs ever more heavily on individuals and peoples – overriding any democratic considerations, as recently seen in Greece, to protect the interests of transnational capital as well as on this planet’s environment and life-support systems, it is crucial to understand the foundations of the legal architecture of impunity, so that we may work from there to dismantle it and seek to articulate other development models based on social and environmental justice. We hope that these pages, developing this idea, may in some way contribute to the task.
the legal architecture of impunity: the *lex mercatoria* against international human rights law?
1. The legal architecture of impunity: the *lex mercatoria* against international human rights law?

*Capitalism has reached a paroxysmal state, and States stand wholly disarmed before it; the mobility of capital and the downright cynicism of banks mean that large trading corporations can contest any political decision they dislike. The real subjects of history, and the most powerful ones today, are private transcontinental companies.*

JEAN ZIEGLER (2014)

The evolution of global capitalism from the late 19th century to the present has consolidated and reinforced the crucial role of transnational corporations in the world economy, as well as their growing dominance over multiple spheres of life on earth. This has been especially so in the past four decades, as financial globalisation processes and the extension of neoliberal policies have fuelled the construction at international level of a complex economic, political, cultural and legal architecture of which large corporations have been the main beneficiaries. They live under a world tyranny of globalised capitalism,” says Jean Ziegler, United Nations special rapporteur for the right to food between 2000 and 2008 and currently vice-chair of the Advisory Committee to the UN Human Rights Council, “of an oligarchy made up of transcontinental companies whose sole principle is maximising profit, imposing a ‘cannibalistic order’ on the world, an absurd and deadly order”.

1.1 The power of large corporations

Transnational companies currently have more economic power than many States: Wal-Mart, Shell and Exxon Mobil, for example, have annual earnings greater than the gross domestic product (GDP) of countries such as Austria, South Africa and
Venezuela; Telefónica and Repsol, for their part, turn over twice as much as the GDP of Bolivia and Honduras respectively⁴. And these companies’ earnings, yielding huge yearly dividends for their main shareholders and top managers, have not stopped rising since the global crash: in 2013, the fortunes of the world’s top 25 millionaires grew by 9% over the previous year. Amancio Ortega, owner of 59% of the Inditex group, will receive this year 961 million euros just in dividends, and Pablo Isla, president and chief executive of that clothing multinational, received 9.93 million in 2014, over 100 times the salary of the Spanish prime minister⁵.

At the same time, large corporations have undeniable political power, both in Nation-States, where they promote structural counter-reforms and the dismantling of social rights, and globally, with their lobbying in international economic and financial institutions. This is recognised even by the Spanish foreign minister, José Manuel García-Margallo: “Multinational groups have a power and a magnitude which in many cases exceeds that of Nation-States, and this allows multinationals to impose certain para-political decisions as preconditions for establishing themselves or moving on”⁶. Thus, while the revolving doors phenomenon has spread, with countless cases of former political leaders moving from government to the private sector and vice versa - subordinating political decisions to economic power while increasing the wealth of those concerned- it is estimated that at the European Parliament alone there are some 15,000 full-time lobbyists, 70% linked to big multinationals and engaged in influencing decisions in European institutions.

Their role is also crucial in the construction of collective subjectivities and imageries, with advertising and marketing techniques that consolidate their communicative and persuasive power in consumer societies⁷. Through the mass media, which have become wholly dependent on advertisers and the financial institutions that control their boards of directors, transnational corporations continue to build a hegemonic narrative presenting the international expansion of business and foreign investment as the building blocks of “economic recovery” and the “way out of the crisis”.

The impacts of transnational corporations’ global expansion in the context of the current socioeconomic model have been documented and systematised by various think-tanks, non-governmental organisations and social movements around the world⁸. The findings of these studies show that the international growth of these corporations’ business operations has a wide range of social, economic,
political, environmental and cultural impacts\textsuperscript{9}. And despite the promises of official narratives such as \textit{marca España} ("brand Spain"), the main beneficiaries of the model have been not the working classes or social majorities but the owners and top managers of these companies\textsuperscript{10}.

In the legal sphere transnational firms have become actors that directly or indirectly condition the enactment of national and international legislation via formal and informal agreements at global level and specific dispute settlement systems acting outside any judicial criteria or framework\textsuperscript{11}. Multinationals thereby armour-plate their contracts and investments with the plethora of regulations, conventions, treaties and agreements forming the \textit{lex mercatoria}, a new global corporate law that enables big companies to protect their rights, in contrast with the lack of adequate checks and balances or effective mechanisms for controlling their social, economic, employment, environmental and cultural impacts\textsuperscript{12}.

On one hand, the rights of multinationals are shielded by a worldwide legal system based on trade and investment rules whose character is mandatory, coercive and enforceable. On the other, their obligations are referred to national legislations subordinated to neoliberal logic, to international human rights law that has proven manifestly fragile, and to a corporate social responsibility (CSR) characterised by voluntarism, unilateralism and a lack of legal enforceability.

\section*{1.2. Rights \textit{vs} obligations}

The frontal opposition of the major powers and transnational lobbies to the enactment of standards liable to put at risk their business prospects has a simple explanation: global corporate standards are drawn up in their own image. They are “laws” for defending the interests of large corporations, i.e. rules for the rich.

Multinationals safeguard their rights with supranational rules of a multilateral, regional and bilateral nature that weaken the sovereignty of their host States, while their obligations must only comply with national legislations, previously subjected to business logic. And on top of States’ weakness in controlling transnational companies, there are no appropriate bodies or systems for holding such companies to account at global level, as regional and international systems are not intended for dealing with claims against large corporations, and the decisions taken by the competent bodies are not complied with nor enforced.

One example: when in 2012 the Argentinean government nationalised a subsidiary
of Repsol, the *architecture of impunity* was quickly deployed. Citing the contract signed, the oil firm brought proceedings before the national courts; it appealed to the ICSID (the International Centre for Settlement of Investment Disputes, an arbitration tribunal attached to the World Bank); together with a US financial firm, it brought a class action in New York against Argentina for expropriation; it filed a commercial claim in Madrid for unfair competition, and also benefited from all the political, economic, media and diplomatic pressure exerted by the Spanish State and the EU. Meanwhile the indigenous Mapuche communities suffering the impact of Repsol’s operations in their territory over decades cannot directly sue the multinational before any international court; they may defend their life and integrity as a people only in the Argentinean courts.

For the obligations of transnational corporations are referred to national laws, previously subjected to neoliberal policies of deregulation, privatisation and restriction of the State’s ability to intervene – as regards public policy, but not the military or apparatus for social control. Thus legislation is produced *ad hoc* to defend the interests of multinationals and a soft landing is prepared so that large corporations may comply with the laws of the countries where they establish themselves at a low cost. Yet where necessary to boost their business, multinationals will appeal to the State for subsidies and tax breaks, as well as for help in exploiting, forcibly removing or even physically eliminating (e.g. as evidenced by the conditions endured by human rights defenders in countries such as Mexico, Guatemala or Colombia) the individuals or peoples who oppose their expansive projects.

International human rights law has proven in practice to be manifestly fragile for protecting majority rights and controlling large corporations. Its enforceability and justiciability regrettably lag far behind those of trade and investment law. Thus, US court rulings favouring speculative *vulture funds* over the Argentine government have no comparison in terms of effectiveness and enforceability with the “moral sanctions” that the ILO Committee on Freedom of Association imposed on Colombia for the thousands of murders of trade unionists in recent years; while the Colombian government is unpunished for disregarding that “judgment”, the Argentine government underwent an economic blockade.

CSR and codes of conduct, for their part, are merely *soft law* formulas devised as alternatives to any real possibility of legal control. They are voluntary and unilateral rules that cannot be enforced in order to curb the power
of multinationals, which staunchly uphold their rights while referring their obligations to their annual reports and to “business ethics”. The notion of being a regulatory “extra” that is associated with CSR does not in any case work through into corporate rules: statements by business about protecting the environment or not funding investments in the arms industry are not reflected in corporations’ bylaws as an expression of real concern about their social responsibility.

**FIGURE 1. The *lex mercatoria vs soft law.***

- Operating and marketing contracts
- Bilateral and regional trade treaties
- Investment protection agreements
- Adjustment policies and conditional loans
- Multilateral standards and provisions
- Arbitrators’ awards

Source: Authors

### 1.3 Actors complicit in the *lex mercatoria*

The global expansion of transnational firms cannot be understood without taking account of the contributions of other key actors in consolidating and extending the force of the *lex mercatoria*, such as States (whether as sources or destinations of investment), international economic and financial institutions and arbitration courts. In other words, this *armour of capitalism* giving corporate business priority over general interests could not have been built up without the active participation of public institutions and multilateral bodies throughout the process.

In the context of economic and financial globalisation, States have undeniably handed over a large portion of their powers in all areas linked to social rights. Privatisation and deregulation policies have helped to progressively dismantle what was once known at the “welfare state”, with the steering of economic strategy being handed over to large corporations and their representatives:
lobbies, employers’ organisations, think-tanks and business associations. Along these lines, all that might be unfavourable to the interests of transnational business has been deregulated and “made flexible”: reforms of the labour market and collective bargaining, reworking of pensions systems, pruning of environmental legislation, running down of public services such as water supply, health and education in order to facilitate their subsequent privatisation, and so on. But this does not mean that the State has gone away; on the contrary, its role is vital to multinationals both in repressing any social mobilisation against them and in enacting legislation in their interests.

It may be said that while all areas linked to social welfare and the rights of the majority have been deregulated, all those linked to contracts and the business of large corporations have been re-regulated. In fact the reinterpretation of law in favour of business and multinationals, along with the regulatory asymmetry vis-à-vis the rights of the majority, is displacing the rule of law, the separation of powers and the very essence of democracy. Now more than ever in history the law is being used to benefit a political/economic elite which is able to operate at international level without regulatory controls and with a high degree of impunity.

The work of international institutions such as the IMF, the WTO, the World Bank and more recently the European Commission and the European Central Bank has also been crucial in this. But all these bodies lack democratic legitimacy and transparency when adopting their rules; their decision processes, the normative content of their decisions, the crisis of multilateralism and their unilateral reinterpretation of the principle of equality all strengthen their legal power and weaken legal certainty for the rights of the majority.

Moreover one of the most notable strengths of global corporate law is the existence of international arbitration tribunals and the effectiveness of their rulings. The deep asymmetry between the lack of safeguards and legal effectiveness in international human rights law and international labour law as opposed to the WTO dispute settlement system or the arbitration mechanisms provided in trade and investment treaties ultimately puts the rights of transnational companies on a hierarchically higher than those of social majorities. WTO sanctions, for example, are normally accompanied by legal amendments, trade sanctions and hefty compensation, and any failure to comply with the arbitrators’ awards, as decided by the International Centre for Settlement of Investment Disputes (ICSID) is unthinkable in view of the international economic blockade to which it could lead.
Finally, transnational corporations seek to transfer decision-making on the adverse impacts of their practices into a legal labyrinth under the auspices of multinational law firms in the service of business. Thus their legal representatives collect huge fees, buy witnesses, transform facts, make the guilty innocent, re-construe rules and -most serious in legal terms- put the rights of large companies at the tip of the regulatory pyramid in place of the rights of the majority. The big law firms that advise multinationals have evolved so that their role is no longer so much to defend their clients’ interests as to act as guardians of the new transnational feudal order. There is a now a new generation of highly qualified, excellently informed lawyer-businessmen who have access to many channels of power, and who identify fully with the mercantilisation of law, imposing political lobbying over professional ethics, specialising in economic disputes and employing multifarious strategies.

**FIGURE 2. Key actors in the *lex mercatoria***

- Transnational companies
- States of origin and of destination
- International economic and financial institutions
- Arbitration tribunals

Source: Authors

### 1.4 Boosted takeoffs and soft landings

International human rights law applies to transnational firms only through action by States. Their legal responsibility pivots around national law, for today a company is subject only to the legislation of the country where it is located. Thus the BBVA bank’s subsidiary in Colombia complies only (if at all) with Colombian law; and whatever offences it may commit, with the sole exception in certain national jurisdictions of genocide and crimes against humanity, international human rights law and the home country’s national law do not apply. In defending their rights, transnational companies can move their domicile with ease; in complying with their obligations, their domicile is a substantive, inalterable reality.
The political and economic ties between core States and multinational companies and the pressure which those companies apply on the international economic and financial institutions allow them to shape policies and regulations according to their interests. Thus their home States boost them on take-off, as the crisis in democratic institutions, the ascendance of minority business rights over majority rights, the reformulation of legal principles and guarantees and the consolidation of the *lex mercatoria* have created a regulatory framework in which the rights of large corporations are now referred to the sphere of international trade rules. The States where multinationals are domiciled also support their internationalisation with grants and soft credits, foreign policy measures and mixed political and business missions, together with lobbying in international institutions and economic diplomacy. It suffices to see, in an example close to home, how successive Spanish governments, past and present, have treated support for the international expansion of Spanish firms as “state policy”.

Host States, for their part, have been subjected to dual pressure. On one hand the policies applied by the world economic and financial institutions have generated the high debt that has led to fiscal adjustment policies, with the backing of “developed” countries, facilitating the advent of transnational firms; on the other, they have made their legislation more flexible, privatised their public sectors, opened their frontiers to trade and reformulated social rights. Thus all these policies have *de facto* imposed the adoption of legislation subordinated to neoliberal principles: privatisation, deregulation and reduction of state intervention in the economy have in essence formed the rules that have prepared a soft landing for multinationals.

As against the weakness of the national legislation in host States responsible for controlling large corporations’ compliance with their obligations, very few States have provided instruments for holding companies accountable indirectly in their home countries. While they have lobbied for the signing of countless trade treaties and investment protection agreements to safeguard their business around the world, transnational companies have given strictly no support to extraterritorial obligations on human rights – whether directly, by including mechanisms in their codes of conduct, or indirectly, by proposing them to the their home States. So, returning to the example of Argentina, why are the Mapuche people not allowed to sue Repsol in the Spanish courts?
1.5 Contracts and legal certainty

Another key aspect of the *lex mercatoria* is the contracts signed by multinationals. For the conventional model of private law corresponds in legal terms to the precepts of the liberal state: formal equality before the law for parties to a contract, freedom of choice by those parties, contracts as a legal institution for the exchange of goods, the State as the guarantor of business. These principles constitute the formal legal logic on which global corporate law is based, with the transnational contract as one of its key elements.

But here a substantive conflict certainly does arise: the tension between the States receiving investments, which have the duty to protect their sovereignty and the public interest, and multinationals, whose sole interests are the stability of their business and the increase of their earnings. In this context, States should seek to make investment contracts comply with their national legislation, letting their courts settle any disputes that arise. But what is sought by large corporations, with the argument of minimising risks and the aim of shielding themselves from any future changes in national law, is the referral of any such disputes to international arbitration tribunals. Or else they directly collect generous compensation without even having to appeal to tribunals, as in the case of the Castor project: when in 2014 the natural gas reservoir created by a subsidiary of ACS offshore of the provinces of Castellón and Tarragona was abandoned when a link was found between the injections of gas and hundreds of earth tremors in the area, the Spanish government simply compensated the company with 1.35 billion euros.

Indeed, the concept of “legal certainty” as it has been progressively established relates only to bilateral, multilateral and regional provisions and agreements backed by the WTO, the IMF and the World Bank, whose sole basis is the protection of contracts and the defence of multinationals’ private interests. *Pacta sunt servanda*, argue the corporations’ lawyers: “agreements must be kept”. But how about when, as in the case of Fujimori’s Peru or Menem’s Argentina, contracts were signed by corrupt governments seeking only the personal gain of their leaders? What about the contracts and laws inherited from dictatorships such as that of Pinochet in Chile? According to the dominant conception of “legal certainty”, what was agreed by the parties – even in contexts where human rights are systematically violated, as in Equatorial Guinea, Colombia or Saudi Arabia – must be carried out.
In our view the answer can only be *rebus sic stantibus*: “a fundamental change in circumstances alters the obligations undertaken by the parties”. Because in the event of changes of government or where so required by the popular will, the State is entitled to amend laws and contracts with transnational firms where these involve infringements of national sovereignty and of the fundamental rights of the majority. For in reality legal certainty is an international legal principle not linked solely to economic considerations: true legal certainty puts international human rights law above the *lex mercatoria*, giving priority to the interests of social majorities rather than to those of the minorities that control political and economic power.

Transnational firms’ refusal to accept a binding external code in the framework of the United Nations or an international court for overseeing their operations, along with their opposition to the creation of a centre for auditing their practices, examining infringements and drawing up complaints, clashes with their recurrent calls for respect of human rights and the environment. They patently prefer to define the sphere of their responsibilities themselves, opposing any form of external control and preferring “social responsibility” to international law.

**1.6 The co-responsibility of international institutions**

The rules, provisions, adjustment policies and conditional loans of institutions such as the World Trade Organisation (WTO), the International Monetary Fund (IMF) and the World Bank also lie at the heart of the new global corporate law. For substantively the WTO’s rules and bilateral and regional trade and investment treaties (the misnamed “free trade treaties”) act as connected vessels in respect of the overall international legal and economic architecture. Thus the *lex mercatoria* formally and substantively guarantees the free movement of goods, services and investments against barriers or regulations of any kind.

The policies of the international economic and financial institutions have had huge impacts on the rights of social majorities. We should not forget that the adjustment policies of the World Bank and the IMF have systematically infringed human rights around the world. And after several decades of neoliberal reforms, the social and environmental conditions in the countries affected are ruinous: the rights to education, health, food, housing, employment and a healthy environment have all been downgraded since these policies were introduced. Moreover international human rights law and constitutional rules have also undergone changes.
The now defunct *Troika*, consisting of the European Commission, the European Central Bank (ECB) and the IMF, adopted adjustment plans linked to austerity measures that have blighted the lives of thousands and generated real humanitarian crises. The Greek case is paradigmatic: more poverty and homelessness; dismantling of public health systems and marketisation of healthcare with a two-year fall in life expectancy; three million people without social security coverage; thousands of women no longer entitled to breast cancer screening, and the withdrawal of reproductive health; higher mortality in newborn babies and a lack of vaccinations for those unable to afford them; a rise in suicides; a general impoverishment of the population, and so on.

Given these realities, corroborated in the reports of NGOs, UN rapporteurs and the various committees that monitor international human rights covenants, what responsibility do these institutions have? For the debate should not in any event focus only on the duties of States, and these economic and financial bodies also have international responsibility, despite attempts to grant them utter impunity. Such responsibility derives from international human rights law based on the Universal Declaration of Human Rights, together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ESCR) and their optional protocols, jointly forming the International Bill of Human Rights, along with the relevant declarations, guidelines, comments and principles adopted at international level.

Hence the World Bank, the IMF, the European Commission and the ECB have the obligation to respect international human rights law. Like transnational companies, as legal persons, these international economic and financial institutions should be legally accountable, together with the members of their decision-making bodies, for any breaches of civil, political, social, economic, cultural and environmental rights that they commit or contribute to, by action or omission.

### 1.7 “Free trade” treaties

From a human rights perspective, trade treaties and investment protection agreements disregard international human rights law both in their philosophy and in the rules that they lay down. In the case of the Transatlantic Trade and Investment Partnership between the European Union and the United States (TTIP), as with other “free trade” treaties (as they are normally called, though
they have little to do with trade between free and equal parties) signed over the last few decades, its advocates claim that this agreement between the world’s two chief economic blocs will be an opportunity to establish norms, standards and rules that will then be adopted globally, thereby benefiting third countries. We believe, however, that the negotiators of such treaties should be providing for the observance of international human rights law rather than drawing up standards tailored to the interests of transnational business.

Regarding “free trade” treaties, we should keep in mind that, over and above all the legal and economic architecture provided in them, there are rights protected by international standards which must be respected. Thus any regulation that does not respect these principles (see box 1) in its “normative essence” is at odds with international legality. Moreover trade and investment agreements, treaties and rules (naturally including the TTIP), together with the policies and reforms imposed by the international financial institutions, increase the power of large corporations and infringe the rights of the majority. So why are the effects on the public of the 3000 treaties of this kind adopted worldwide not evaluated?

As a concrete example, in what conditions are the people – the men and women – of Mexico living 20 years after the signing of the North American Free Trade Agreement (NAFTA) between Mexico, the US and Canada? The judgment at a recent session of the Permanent Peoples’ Tribunal, held in November 2014, is incontrovertible:

The witnesses who spoke at the final hearing confirmed that Mexico’s accession to neoliberal globalisation has been associated with a remarkable increase in suffering for the Mexican people. [...] The economy has been globalised and the democratic institutions which protect the rights of majorities operate in a subordinate marginal space. Globalised institutions have replaced democratic control with the opaque framework of global trade.

International human rights law -including international labour law and international environmental law- is hierarchically superior to trade and investment rules, whether national or international, given its imperative nature and its obligations erga omnes, i.e. of the whole international community and for whole international community. Yet in this type of agreements, priority is given to free trade, investment and the privileges and earnings of investors and transnational companies, as opposed to the rights of peoples and international human rights law.
**BOX 1. Essential mandatory principles**

- All human beings, wherever they are from, are born free and equal in dignity and are entitled without discrimination to all human rights and freedoms, both individually and collectively, inherent in their condition as human beings.
- All citizens, and in particular more vulnerable groups, should participate effectively in the decisions affecting their lives and environment.
- All States have the obligation to promote, respect, protect and guarantee human rights, i.e. civil, political, social, economic, cultural and environmental rights, both in their territories and elsewhere.
- Human rights, and all the standards implementing them, are universal, indivisible and interdependent.

The Universal Declaration of Human Rights, the United Nations Charter, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (though the latter has not been ratified by the US), and other international human rights and environmental treaties and conventions have the status of peremptory norms and general international law. For this reason free trade treaties and investment agreements are void where the pre-eminence of a higher-ranking norm may be invoked: article 53 of the Vienna Convention on Treaties provides that treaties conflicting with a peremptory norm of general international law are void.

The legal principles linked to free trade and investment rules – national treatment, most-favoured nation, most-favoured treatment, fair and equitable treatment, retroactive treaty protection, free availability of currency, post-termination survival clauses, etc. – must be subordinated to international human rights standards. For an equity-based interpretation involves treating equals equally, not non-equals equally. Hence not to allow positive action clauses to benefit disadvantaged social and economic sectors – such as in TTIP, for example – is to shore up discriminatory practices.
Signing contracts, adopting trade and investment agreements and accepting structural adjustments on the false premise of equality of the parties involves putting asymmetrical power relationships at the heart of legislative practice. “Free trade” agreements are based on this interpretation of the principle of equality: treating transnational corporations, small domestic firms and the public equally, which is essentially discriminatory. So why should contracts signed by transnational companies based on improper enrichment or abuse of rights be respected? Why are investor-State disputes submitted for resolution by arbitral panels (private tribunals), resulting in the undermining of the protection granted by international human rights law to state sovereignty and the rights of individuals and peoples?

1.8. The privatisation of justice

The existence of such arbitration tribunals is another characteristic element of the *lex mercatoria*. For international arbitration courts have a vital function in the *legal architecture of impunity* – that of giving full legal certainty to the investments of multinationals vis-à-vis host States. Thus, while there are no effective instruments at international level for controlling transnational firms, and the notion of legal certainty that puts international human rights law at the tip of the normative pyramid is set aside, the awards of arbitration tribunals trigger coercive mechanisms and are “judgments” with mandatory effect, as the economic implications of non-compliance are hard to endure for periphery countries.

The Permanent Court of Arbitration based in The Hague, the Court of Arbitration of the International Chamber of Commerce, the WTO Dispute Settlement System, the World Bank International Centre for the Settlement of Investment Disputes (ICSID) – all these private tribunals form a sort of parallel judicial system, ruling in favour of large companies outside of national and international judiciaries. In this *privatised justice*, it is multinationals that sue States – never the other way round – and that choose the forum, with no need to exhaust domestic remedies at national level; moreover these tribunals may even act as appeal courts for the judgments of ordinary courts, but the arbitration award is not subject to appeal.

The fact that “free trade” agreements such as the Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated by the European Union and the United States include recourse to such arbitration tribunals as the main means of settling disputes between big investors and States is plainly a threat to
the full realisation of democracy, sovereignty and social rights. Two cases by way of example: the US multinational Philip Morris has sued Uruguay and Australia over the “plain packaging” of cigarettes with messages about the health impacts of smoking; and the Swedish energy corporation Vattenfall has sued Germany over the latter’s decision to phase out nuclear power. For the creation of these private courts, situated above States and allowing transnational firms to sue States when their businesses may be affected by public measures, represents a head-on attack on the sovereignty of individuals and peoples, and prevents these, even in the context of formally democratic societies, from enjoying their right to shape their own destinies.

This was already the case in Latin America back in the 80s and 90s with the imposition of the Washington Consensus, which led most States in the region to sign multiple trade treaties and investment protection agreements with core countries, allowing dozens of claims, whenever any Latin American government sought to modify the terms of contracts in keeping with the popular will, to be brought before the ICSID by European and US multinationals. Now, in the European Union, we are subjected to the same structural adjustment, austerity and fiscal discipline policies as were imposed in Latin America towards the end of last century; similarly, with TTIP, the aim is to restrict our economic sovereignty as Latin American sovereignty was restricted with the advent of “our companies” two decades ago.

The deep asymmetry between the limited safeguards and legal effectiveness of international human rights law and the arbitration mechanisms provided in trade and investment agreements ultimately puts transnational companies’ interests on a hierarchically higher plane than majority rights. Thus the number of suits has risen exponentially: according to the Profiting from injustice report published by the Transnational Institute, whereas in 1996 there were just 38 investor-State disputes, in 2011 there were 450 known cases. And multinationals are the great beneficiaries of these dispute settlement systems in arbitration tribunals, as the resulting awards are fully effective, and any failure to abide by them may involve much harsher economic consequences than compliance.

“The referral of disputes between States and foreign investors to arbitration forms part of the obligations signed up to in treaties for promoting and protecting investments, free trade agreements and the like,” recalls Alejandro Teitelbaum. According to this lawyer and international law expert, “States thereby waive a
key prerogative of sovereignty, namely the territorial jurisdiction of their national courts. Accordingly, against this armour of capitalism we need to restore that jurisdiction and to recover the role of parliaments, and, at international level, to establish binding rules to redress the great asymmetry between the lex mercatoria and international human rights law, i.e. to put the rights of individuals and peoples before the private interests of large corporations.

**BOX 2. Chevron-Texaco vs Ecuador**

The oil firm Texaco extracted crude oil from the Amazon in Ecuador over three decades (1964-1992). Over this period it spilled 80,000 tonnes of oil waste, 85 times the quantity spilled by BP in the Gulf of Mexico. On leaving the country, the company left behind environmental damage which, according to international experts, has caused the death of more than a thousand people, all from cancer.

In 1993 the Ecuadorian victims of Texaco’s practices sued the American firm in a court in New York. The ruling was in Texaco’s favour and the case returned to Ecuador, so the firm considered the matter closed. But in 2011 an Ecuadorian court of first instance ruled that Chevron-Texaco (as Chevron had taken over Texaco in 2001) should pay 19 billion dollars to the impacted communities. Although an appeal was brought, the provincial court ratified the judgment. Two years later the Ecuadorian National Court again ratified the ruling, albeit reducing the fine to 8.646 dollars.

Since then the company has accepted neither the judgment nor the judicial procedure and nor has it acknowledged its liability, and it has set in motion all the mechanisms of global corporate law to promote its interests. In reality it does not acknowledge the country’s sovereignty and is taking advantage of a wholly asymmetrical international legal system. At the same time it has launched a campaign against Ecuador and the persons affected by its operations in the Ecuadorian Amazon. It is spending more than 400 million dollars on lawyers and the media, on bringing legal claims of all kinds in countless places, on defamation and lies...
Chevron-Texaco opted to invoke the bilateral investment protection treaty between the US and Ecuador – which came into force in 1997 – to claim against the country in the Permanent Court of Arbitration of The Hague, a tribunal which the Ecuadorian government had to accept by “order” of that treaty. Here there are two surprising points: first, a breach of the principle of non-retroactivity, as the treaty came into effect five years after Texaco had left the country; second, it was not the State of Ecuador that sued the multinational but the impacted communities, led by the Amazon Defense Coalition (FDA), and so the bilateral treaty should not in any event have applied. But the Court of The Hague asserted its jurisdiction and suspended the enforcement of the Ecuadorian courts’ judgment in favour of the impacted communities.

And Chevron-Texaco continues its legal campaign: in 2010 it filed a petition to the Federal Court of New York against the plaintiff communities’ legal representatives for criminal association in order to blackmail the oil firm. The multinational is also seeking to make Ecuador liable to pay the compensation which the Ecuadorian court had ordered the firm to pay. If the State of Ecuador finally had to pay the compensation which Chevron-Texaco should be paying to the communities hit by the spills, the impact on the people of Ecuador would be catastrophic.

1.9. TTIP and the architecture of impunity

The trade and investment agreement now being negotiated by the European Union and the United States is the penultimate example of how the lex mercatoria works. This is a trade agreement intended to remove tariff barriers between the two partners along with regulatory obstacles – basic social and environmental legislation – that limit the accumulation of wealth by large corporations. And the precepts on which it is based are part of the legal architecture restricting the exercise of democracy and the sovereignty of peoples: TTIP is not just a trade agreement but a new founding treaty at the service of transnational companies.

The legal technique used in TTIP is not neutral: this is a classic case of the architecture of impunity built up to favour multinationals and capital. Inequality
and asymmetry are constituent elements of the agreement, and its lack of transparency and reinterpretation of formal elements of the rule of law need to be publicised, dismantled and re-appropriated by the majority.

Secrecy and opacity are core elements of TTIP, for these trade and investment rules are drawn up with no parliamentary or public control. We do not know who the negotiators are, what criteria are being applied or what decisions are being taken. And the whole procedure is wrapped up in technical considerations that “require confidence” and “discretion between negotiators”; decisions are taken behind the public’s back and outside of parliamentary procedures, and the texts being discussed are concealed even from our elected representatives.

This whole process infringes basic democratic principles, i.e. the procedural safeguards for citizens: transparency, separation of powers, parliamentary debate, etc. Yet the final normative outcome will have legal certainty and binding force. Quite the reverse applies to human rights legislation, for which the legislative process is very much open to proposal and discussion, but whose final outcome has a legal certainty that is eminently fragile.

With TTIP the aim is to remove all barriers – tariffs or otherwise – in the way of free trade and investment. To this end, standards are harmonised downwards, i.e. if financial control is stricter in the US, it is harmonised in line with European standards. If labour legislation is more protective in the EU, US rules are applied to deregulate employees’ rights. Thus harmonisation means deregulating the rights of social majorities in the sphere of everything liable to be bought and sold.

The deregulation of multinationals’ obligations, a classic measure in the neoliberal model, is combined with the re-regulation of their rights. If in the 90s neoliberalism set out to roll back the State and to clear the way for the markets, now TTIP is designed to provide a strong State to safeguard the profits of European and US multinationals. The State is indispensable to capital’s accumulation of wealth and in leading and reforming society in the service of large corporations.

At the same time, investor-State dispute systems (ISDS) are to be established, including the option of recourse to international arbitration tribunals. Indeed, among the various questionable legal aspects of TTIP, many of them complex and hard to grasp for the general public, the most prominent issue has been precisely this. And when earlier this year the results were published of a public consultation by the European Commission on the inclusion of ISDS in TTIP and other “free trade” agreements, it turned out that 97% of European citizens consulted said they were against this arbitration system.\(^{19}\)
1.10. Regulatory convergence and downward harmonisation

In the context of the campaign mounted against TTIP, public opinion has been informed about the creation of these arbitration courts that would allow transnational companies to claim against States when any of their “rights” were infringed. But the regulatory convergence mechanism is less well known. And though it is presented as being aimed at “facilitating trade and investment in a way that supports the Parties’ efforts to stimulate growth and jobs”\(^{20}\), the reality is that it may have highly serious effects on the (de)regulation of social rights.

Regulatory convergence involves a process of adapting existing regulations on either side of the Atlantic so as to ensure that the goods produced on one side can be exported to the other with no particular extra requirements. The technique of downward harmonisation is the *de facto* rule in TTIP and covers labour, environmental, social, tax, cultural, health and other standards. The aim is to repeal any regulations that may represent obstacles to the market.

Although TTIP mentions human rights, sustainable development and public services as essential values vis-à-vis trade, they are treated in rhetorical terms, with no regulatory effectiveness; provisions in this sphere are hedged with phrases such as “provided that they do not compromise the benefits of the Partnership”.

Regulatory convergence also affects all tiers of public administration (local, regional and central) as well as basic legislation, its enforcement and delegated acts. And regulatory consistency also entails that any environmental or social impact study must not be “more rigorous than strictly necessary”, i.e. it must be consistent with the rights of “stakeholders”, or in other words, the interests of transnational companies.

TTIP cannot effect a total and absolute harmonisation of all sectors by a single deadline. Accordingly the job is to be done in stages according to the procedures provided in the agreement, such as mutual recognition of regulators and of the Regulatory Cooperation Council. This will involve a “race to the bottom” in social, food, financial, chemical and other regulations according to the (often contradictory) interests of States, economic sectors and transnational companies. It will also depend crucially on the level of social mobilisation: the more protests there are, the less absolute and immediate the harmonisation will be. But the agreement itself provides for the subsequent inclusion of harmonisation into
its text according to the procedures established for the Regulatory Cooperation Council.

Regulatory convergence is also a long-term project. Differences which cannot be resolved at the negotiating table or which spark widespread protests may be fed into ongoing procedures. For TTIP is really a long-distance agreement intended for continuing creative interpretation by civil servants and law firms in the service of transnational corporations. Thus the points that are hardest to harmonise are assigned to a system with scarcely any democratic control provided for in TTIP, and which once the treaty is ratified will be set in motion automatically with binding force for all signatory countries. The body that is to oversee this whole process of privatising decisions will be the Regulatory Cooperation Council, a transnational institution out of democratic reach and acting outside of parliamentary logic: a supranational “legislative”.

With TTIP, the procedures for passing laws are shifted from parliaments to secret meetings between technocrats and representatives of transnational companies; legislative bills are replaced by private documents, and parliamentary debate by closed texts submitted only for ratification. Yet the mere publication of information is not enough; it should also be subjected to democratic procedures – release of the consolidated text, description of what each party proposes, detailing of points of disagreement and of the proposals of transnational corporations, etc. The TTIP documents known to date, moreover, continue the legal logic of the regulatory texts provided by the World Trade Organisation21, with constant confusion in the form of grammatical errors, vague provisions, obscure clauses and “get-outs” allowing obligations to be dodged.

1.11. Business ethics or mandatory standards?

In this context, in response to the new global corporate law that has been built up over the last 40 years by large corporations along with the States and international institutions that support them, through countless contracts, trade treaties and investment protection agreements, thousands of WTO, IMF and World Bank rules, international arbitration tribunals and investor-State dispute settlement systems, what is needed are sufficient checks and balances and effective mechanisms for controlling corporations’ impacts on people and the planet.
So to counter the great political, economic and legal power of transnational companies and the force of the *lex mercatoria*, the regulatory pyramid needs to be inverted, with the rights of social majorities being put at the top in place of the private interests of the politico-business class that governs us. Thus we need a new model in which people and the environment take priority over corporate profit and interests. It is along these lines, as we shall see in detail in our last chapter, that social movements, the Permanent Peoples’ Tribunal and numerous experts and social activists have been proposing concrete alternatives for controlling the practices of transnational companies.

In this regard, the adoption of a binding code, the creation of an international court to judge transnational companies and the establishment of a centre for monitoring them are some of the ideas underlying the alternatives put forward by civil society. As stated in the *Alternative Trade Mandate*22, the aim is that human rights, women’s rights, indigenous rights, labour rights and environmental protection should take precedence over business and private interests. And these initiatives are in turn complemented by others such as the *International Peoples’ Treaty for the Control of Transnational Corporations*, an alternative instrument drawn up by social movements and international solidarity networks with a view to the exercise of real control over the operations of large corporations, setting out from this premise:

The current international context demands that we decide between one of two possible paths or roadmaps: either we develop a radically different model in which peoples and communities campaign for a binding framework to control transnational corporations, or we carry on with the condescending voluntarism of transnational corporations and rely on instruments such as corporate social responsibility, the *Global Compact* and the *Guiding Principles*.

International institutions and multilateral bodies, as we shall see below, have opted to continue backing the logic of voluntarism and self-regulation (although, as shown by the crash of 2008, this may have destructive effects even for capitalism itself), rather than introducing effective mechanisms for making large corporations respect human rights. For the institutions that govern us, “social responsibility” and “business ethics” are more than enough to moderate the model’s “excesses”. But as has been clearly apparent in the Volkswagen case – the biggest German multinational has admitted that it manipulated the software in the engines of 11 million cars so that their emissions of polluting gases would seem much less
than in reality – CSR is little more than a corporate facelift that results in no real changes in large corporations’ *modus operandi*. To sum up in the words of Enrique Dans, lecturer at IE Business School:

The Volkswagen case represents above all an absolute failure in terms of Corporate Social Responsibility (CSR). The company deliberately set out to design a means to circumvent emissions control—a stratagem known at the highest levels—with the aim of giving the company an unfair advantage over its competitors that made it the world’s number one car-maker, in large part on the basis of its supposedly environmentally friendly cars; meanwhile it was poisoning the planet.
“social responsibility” or binding standards?
the “private sector” and regulatory developments at the United Nations
2. “Social responsibility” or binding standards?
the “private sector” and regulatory developments at the united nation

I believe it is illusory to seek to create a single international legal framework covering all issues related to human rights, though at the same time I think specific legal instruments should be created to address some dimensions of them [...] I took the approach of not including new international norms in the Guiding Principles in order not to jeopardise the Principles’ adoption.”

JOHN RUGGIE (2014)

In late spring 2015 the European Parliament adopted a text setting out some recommendations to the European Commission on the TTIP negotiations between the European Union and the United States. At the behest of the Socialist group, two amendments were included mentioning the need to “ensure that the sustainable development chapter is binding and enforceable” and to “include rules on corporate social responsibility.” New currency was thereby given to a debate which has really never been absent in any discussion of how to regulate the business and investments of transnational companies: voluntary agreements or binding standards?

Today, with the negotiation of TTIP and the signing of a new wave of “free trade” agreements (including the Trade in Services Agreement (TISA) currently being negotiated in secret by 50 countries), and with the prospect of the lex mercatoria and the legal certainty of multinational firms’ contracts being even further reinforced to the detriment of majority rights, the notion of invoking “social responsibility”
as a means of correcting this regulatory asymmetry has re-emerged. But as we shall see in this chapter, CSR has already proven ineffective as an instrument for controlling big companies: it is a soft-law formula for “containing” the power of multinationals, which refer their obligations to their annual reports and shelter behind “business ethics”.

In practice, CSR programmes and codes of conduct commit multinational firms to nothing, for such firms freely decide what to sign, what is involved and how (not) to comply. After two decades of theoretical models, business forums and academic debate on the nature of corporate social responsibility, we return to the starting point; as stated in the recently adopted Spanish corporate social responsibility strategy, “the adoption of social responsibility policies is voluntary”.

2.1. From marketing to CSR 3.0

All this debate has to do with the concept of the “social responsibility” of large corporations – known as corporate or business social responsibility (CSR or BSR) – which had gone into standby. Now that the failure of corporate self-regulation has been exposed by the global financial crash and after the death of more than 1100 people in the collapse of a sweatshop making clothes for major international brands in Bangladesh, each new scandal or fraud involving a transnational corporation revives a debate which has in reality been going on for more than four decades.

Let us recall that, in the 60s, the United Nations included among its priorities the drawing up of an international code of conduct for big companies, while setting up a UN Commission and Centre on Transnational Corporations. Back then, concern was already growing around the world at the huge power being amassed by transnational companies, those “global organisations that depend on no State and are neither accountable to nor monitored by any institution representing the collective interest” to which Salvador Allende referred in his historic speech to the UN General Assembly in late 1972. “We are faced with forces that operate in the shadows, without a flag and with powerful weapons, stationed in a range of influential positions,” said the Chilean president one year before the coup d’état that put an end to the “Chilean road to socialism” and marked the launch of neoliberalism in Latin America.

But over that decade and the next two, the frontal opposition of the major powers and business lobbies to the enactment of rules that might put at risk their
business prospects meant that, 20 years later, both projects were dismantled and the promised international standards never materialised. They were replaced in the late 90s by CSR and the Global Compact, reflecting how the United Nations had moved on from a logic of mandatory rules to a philosophy of voluntarism. Thus, as the body of rules linked to neoliberal marketisation was quantitatively and qualitatively fine-tuned, reinforcing transnational corporations’ extraordinary economic, political and legal sway over society, the possibility of exercising real control over their activities was abandoned, leaving their socio-environmental obligations in the hands of business “goodwill” and corporate social responsibility.

In its beginnings, CSR was essentially a matter of PR and marketing: a counter-offensive by business to restore corporate image and reputation after the financial scandals, environmental disasters and labour disputes in which many multinationals were immersed. Later on, CSR 2.0 reworked the concept as part of core business: without losing its marketing dimension, the strategy proved to be profitable for large corporations, helping them to maximise income, reduce costs, manage risks, build customer loyalty and access new market niches. Four years ago the European Commission summed it up like this: “A strategic approach to CSR is increasingly important to the competitiveness of enterprises,” as it “can drive the development of new markets and create opportunities for growth.”

And after the outbreak of the financial crisis came what we might call CSR 3.0. This is an updated version in which social responsibility still contains a large component of marketing (though it is abandoned by companies that regarded CSR solely as a PR strategy) and the strategic approach seeking to link “image cleanup” with the bottom line of enterprises remains present, as is especially apparent in the companies (such as Telefónica, BBVA or Iberdrola) that have incorporated CSR into their business strategy. The novelty of RSC 3.0 is that, in response to the critics who in recent years have called for an end to the self-regulation of markets and for alternative approaches for controlling multinationals, it has a new pitch on how large corporations may “protect, respect and remedy” human rights... without jeopardising their own logic of growth and accumulation.

If the Global Compact, launched in 1999 with the aim of constituting “a framework of action intended to build social legitimacy for business and markets”, launched the first version of CSR, and the book The Fortune at the Bottom of the Pyramid, published in 2005 to disseminate the idea that “the poor must become active, informed and involved consumers”, may mark the launch of the second, we may
cite the *Guiding Principles on Business and Human Rights*, endorsed by the United Nations in 2011 following the work of special representative John Ruggie\(^\text{30}\), as the turning point into CSR 3.0.

All these CSR models are in any event inseparable from the *soft law* that has had such adverse effects on any attempt at controlling transnational corporations. For the impression could be given that corporations submit to international human rights law and sign up to ethical business and “best practice”, whereas in reality the legal duality is patent: the utmost strength in the protection of their rights, and the utmost weakness in the meeting of their obligations.

### TABLE 1. Background and history of CRS

<table>
<thead>
<tr>
<th>YEAR</th>
<th>EVENT</th>
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<tbody>
<tr>
<td>1974</td>
<td>Establishment of the Commission and Centre on Transnational Corporations at the United Nations</td>
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<tr>
<td>1976</td>
<td>Publication of the OECD <em>Guidelines for Multinational Enterprises</em></td>
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<tr>
<td>1977</td>
<td>Publication of the ILO <em>Tripartite Declaration of Principles concerning Multinational Enterprises</em> and Social Policy</td>
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<tr>
<td>1984</td>
<td>E. Freeman propounds his stakeholder theory as the basis of CSR</td>
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<td>1987</td>
<td>Birth of the “sustainable development” concept (Brundtland Report)</td>
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<td>1992</td>
<td>Rio Earth Summit and alert on climate change</td>
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<td>1994</td>
<td>Dismantling of the United Nations Commission and Centre on Transnational Corporations</td>
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<tr>
<td>1999</td>
<td>Launch of the <em>Global Compact</em> at the World Economic Forum</td>
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<td>2000</td>
<td>Signing of the <em>Global Compact</em> at the UN headquarters in New York</td>
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<td>2000</td>
<td>Signing of the Millennium Development Goals at the United Nations</td>
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<td>2001</td>
<td>Publication of the European Commission’s <em>Green Paper on corporate social responsibility</em></td>
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<td>2003</td>
<td>Publication of the United Nations <em>Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises</em></td>
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<tr>
<td>2005</td>
<td>Appointment of John Ruggie as the UN Secretary-General’s Special Representative on the issue of transnational corporations and human rights</td>
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<tr>
<td>2005</td>
<td>C.K. Prahalad publishes his book <em>The Fortune at the Bottom of the Pyramid</em></td>
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<tr>
<td>2008</td>
<td>Third Ruggie report, with the “protect, respect and remedy” framework(^\text{31})</td>
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<tr>
<td>2011</td>
<td>The European Commission publishes <em>A renewed EU strategy 2011-14 for Corporate Social Responsibility</em></td>
</tr>
<tr>
<td>2011</td>
<td>Publication of the latest Ruggie report, the United Nations <em>Guiding Principles on Business and Human Rights</em></td>
</tr>
<tr>
<td>2013</td>
<td>The Spanish government starts drawing up a <em>National Plan on Business and Human Rights</em></td>
</tr>
<tr>
<td>2014</td>
<td>Publication of the <em>Spanish Corporate Social Responsibility Strategy 2014-2020</em></td>
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Source: Authors
2.2. From a binding code to “social responsibility”

Forty years ago, as we said, the United Nations Commission and Centre on Transnational Corporations were set up, with the main aim of preparing the ground for an ad hoc code to provide a binding regulation of the activities of multinational companies. And for a while the work made regular progress: in 1976 the Centre adopted a document drawing on the principle of “promotion of development”, according to which transnational firms were to align their activity, especially in host countries, to development goals and public policy. Two years earlier the General Assembly had adopted the Declaration on the Establishment of a New International Economic Order, of which one of the basic principles was the “regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries”.

But the pressure by multinationals to prevent the UN from adopting an external regulatory code by the deadline set (1978) led to the discussions being moved to the Organisation for Economic Cooperation and Development (OECD), which in 1976 published its Guidelines for Multinational Enterprises, and to the International Labour Organisation (ILO), which in 1997 released its Tripartite Declaration of Principles concerning Multinational Enterprises – both with a voluntarist philosophy. In other words, as at the UN General Assembly there was majority support for mandatory measures, the discussions on the possibility of enacting binding standards for multinationals were passed on to other international institutions, only to be fully neutralised soon afterwards.

The rise of neoliberal governments and policies in the 80s and 90s had an even greater impact on efforts to regulate the operations of large corporations. Thus, as social pressure increased over the human rights violations committed by well-known commercial brands, especially regarding child labour and environmental impacts, the UN took a non-interventionist line in economic and political...
relations. And codes of conduct, the fullest expression of corporate self-regulation, emerged as the (pseudo-)normative future at the UN. This was largely thanks to transnational companies, which at that time (as recalled by Susan George, President of the Board of the Transnational Institute), “began to pay great attention to the United Nations and to the growing number of international conferences that many of its agencies were organising on key issues such as food and hunger, science and technology, water, housing, work and others.”

And thus the discourse and practice of the multilateral bodies were gradually colonised. Consequently, in the mid-90s the bodies set up two decades earlier for controlling multinationals were shut down. In fact both the Centre and the Commission on Transnational Corporations were turned into different bodies, stripped of their initial significance: the Centre became the Division on Transnational Corporations and Investment within the UN Conference on Trade and Development (UNCTAD), and the Commission turned into the Commission for International Investments and Transnational Companies, also within UNCTAD. So, by decision of the UN itself – where in addition to the pressure of business lobbies there had been a shift in the balance of power at international level, with the weakening of the Non-Aligned Movement and the decline of the Soviet Union – those bodies went from being instruments for monitoring and supervising the activities of large corporations to dealing with the “contribution of transnational companies to growth and development.” And the project of adopting a binding international code was abandoned.

All these developments in the United Nations were refined by its secretary-general over the decade from 1997 to 2006: “such mass industry participation in UN events from the 1970s to the early 1990s was relatively rare and not systematic. It was only under the leadership of Kofi Annan that it really got under way,” writes George in *Shadow Sovereigns*. And Annan took the side of the multinationals from the start of his mandate: “Entrepreneurship and privatization for economic growth and sustainable development” was the title of the report he submitted to the UN General Assembly in 1998. According to the secretary-general, deregulation was key to the reform agenda and the sale of public companies would lead to investors enhancing their performance; he also opposed any broad distribution of privatised companies’ capital and restated his intention, announced a year earlier, to establish inter-agency liaison with big companies in order to develop dialogue between multinationals and the United Nations.
All these factors, in addition to the weakness of human rights standards and the context of deep crisis in the various UN agencies and bodies, led to a consolidation of the power of transnational corporations across the various multilateral agencies and bodies. And at the same time, as neoliberal logic spread through UN structures, the Global Compact was starting to take institutional shape: “restrictions on trade and investment are not the right means to use” Annan concluded on presenting the initiative early the following year⁴².

### 2.3. The Global Compact as an “alternative”

“Over cocktails and asparagus mousse, corporate executives can hobnob with prime ministers, renowned academics and the occasional rock star celebrity, and stitch the deals that will keep profits flowing”⁴³. This is how Nick Buxton, editor of the State of Power report, sums up the yearly events in the Swiss town of Davos, where the World Economic Forum holds its annual meetings. Here, in late January, the planet’s top multimillionaires and potentates meet to do business – those that the Transnational Institute president calls the Davos class: “Some have economic power and usually a considerable personal fortune. Others have administrative and political power, mostly exercised on behalf of those with economic power, who reward them in their own way”⁴⁴. And it was precisely in Davos that Kofi Annan chose to launch the Global Compact, an initiative intended to weave a “creative partnership between the United Nations and the private sector” and to “give a human face to the global market”.

The Global Compact was launched officially a year and half later at the UN HQ in New York with the involvement of 44 transnational companies including BP, Nike, Shell and Novartis, and a few NGOs⁴⁵. Thus the signing of a voluntary code of conduct including ten generic principles on human rights, the environment, labour rights and corruption assembled multinationals under question for labour abuses and socio-environmental impacts – the selfsame Nike had been accused of sponsoring exploitative working conditions and child labour in Southeast Asia, and complaints had been brought against Shell for environmental damage in the North Sea and for its link with the execution of the writer Ken Saro-Wiwa and

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III These included WWF, Amnesty International and Human Rights Watch. CIOSL, the current International Trade Union Confederation, also took part.
eight other social activists in Nigeria – with major non-governmental organisations and trade unions, which at the time justified their presence on the “lesser evil” principle and because they saw it as a first step towards the regulation of corporate practices.

But as Annan himself has acknowledged, “The Global Compact is not a regulatory instrument – it does not ‘police’, enforce or measure the behaviour or actions of companies.” It is quite the reverse: it “relies on public accountability, transparency and the enlightened self-interest of companies”45. Hence it is of no use, not even in part, in countering the fortress of global corporate law. Nor is this the aim; its main purpose is to help prevent any binding external code being enacted and to become the sole valid “alternative” in a world subordinated to neoliberal theses and the force of the lex mercatoria. Thus the Global Compact belongs to no clear legal framework and specifies no means of monitoring the commitments made46; it is not a practical regulatory tool but an instrument in the service of the planet’s dominant class.

The Global Compact represents the spirit with which CSR emerged: it is an excellent means of enhancing corporate brand image and reputation. Thus, many multinationals charged with violating human rights, not respecting workers’ rights and engaging in corruption may enjoy the endorsement of the United Nations (in what has been called bluewashing) thanks to being full members of the Global Compact. And this also allows them to influence economic policy in poor countries, as their link with the UN gives them direct access to governments and multilateral bodies, and at the same time it is a powerful mechanism for penetrating the markets of periphery countries.

As against all these “benefits”, the multiple drawbacks we could mention may be summed up in one: the Global Compact fails to curb the impunity in which transnational companies operate. And it does not even serve to make their actions visible, for it helps multinationals project an image disconnected from reality. It is just a “a happy-go-lucky club”, as ActionAid CEO Ramesh Singh said; “voluntary action, though welcome, can never be a substitute for much-needed government regulation,” said Daniel Mittler, a Greenpeace specialist on business accountability, explaining the organisation’s rejection of the initiative. Even the former UN special rapporteur on the right to food, Jean Ziegler, said “I think that we have to fight the Global Compact, not only criticise it, because it is a public relations operation of the big multinational companies”47.
2.4. The “private sector” and inclusive capitalism

“To develop strong partnerships with the private sector and with civil-society organizations in pursuit of development and poverty eradication.” The Millennium Declaration, adopted by the UN General Assembly in September 2000, just two months after the signing of the Global Compact, thereby anticipated what was to become the model for “public-private partnerships”, setting the strategy to be followed by the United Nations over the first decade of this century. Such is the philosophy of inclusive capitalism: “an approach where governments, businesses, and nonprofits work together to stretch the reach of market forces,” as Bill Gates said in a speech at the Davos Forum.

“This is a time for multinational corporations to look at globalisation strategies through a new lens of inclusive capitalism”, said the ideologues of the renewed CSR 2.0 at the turn of this century. Thus they called on big companies to focus on “the bottom of the pyramid” – that great market consisting of the two-thirds of the world’s population excluded from the global consumer society. The aim is to increase big companies’ business niches: “Business with the poor can be profitable” said the UNDP in its report Creating Value for all: Strategies for Doing Business with the Poor, as it may “lay the foundations for long-term growth by developing new markets, driving innovation, expanding the labour pool and strengthening value chains”. The justification is that this will supposedly help to prevent people from being poor: “Companies are a powerful force in combating poverty” said the head of the UNDP office for the private sector and partnerships ten years after the signing of the Millennium Development Goals.

Thus the United Nations, like the other major international agencies and multilateral bodies, signed up to that business logic, calling on “all stakeholders ... to make concerted efforts in finance, skills and public-private partnerships for the delivery of basic services”. The about-turn by the UNDP is especially illustrative, as in one decade it went from saying that “Human development is development of the people for the people by the people,” to asserting that “private-sector players driven by market-based incentives have the demonstrated capacity to contribute to important development goals.”

Since the global financial crash, this logic has been reinforced and extended, with a reprioritising of economic growth as the hegemonic strategy for combating...
poverty and the involvement of the “private sector” – the name normally given to large corporations in the official international cooperate agenda – as the key “development player”\textsuperscript{55}. As pointed out by Lou Pingeot, researcher at the Global Policy Forum, “The trend towards an increased role of corporate actors in global governance through various models of multi-stakeholder initiatives is also reflected at UN level”\textsuperscript{56}. And the role of the “private sector” is moreover emphasized by the lack of funding of the various specialist UN bodies, subsidised by States and multinationals in support of certain programmes of interest to the donors. Long gone are the days when the UN Human Rights Centre declined to accept a donation of computers from a government because this might have compromised its independence.

The reality is that, under lots of statements of good intentions – “ensure that the benefits of new technologies ... are available to all”, “encourage the pharmaceutical industry to make essential drugs more widely available”, as the \textit{Millennium Declaration} proclaims – lies a strategic alliance with the same multinationals which, in the words of the lawyer Alejandro Teitelbaum, who for many years represented various grassroots organisations before the UN Sub-Commission on Human Rights and is well acquainted with how UN mechanisms work (or not)\textsuperscript{57}, “determine the orientation of UN policies and use the UN to give themselves the appearance of respecting human rights.” And the official concern about poverty conceals a real concern about corporate earnings and the market niche represented by \textit{poverty 2.0}: “The starting point for this argument is not the base of the pyramid’s poverty. Instead, it is the fact that base-of-the-pyramid population segments for the most part are not integrated into the global market economy,” we read in a study published by the International Finance corporation\textsuperscript{58}.

Ultimately all this merely expresses a general trend within the United Nations. The involvement of those with senior responsibilities in the UN structure; the alliances consolidated with multinational companies; the lack of agreements with local communities, trade unions, consumers and grassroots organisations affected by the practices of those companies; the lack of any control or assessment of large corporations’ activities; the asymmetry between their integration into the United Nations and the atrophy in the provision of mechanisms for protecting economic, social and cultural rights; the inclusion of “social responsibility” as a soft-law formula for multinationals as against violations of majority rights – all this means that the developments described above are the United Nations’ true operating strategies. And what is really serious is that these trends take concrete
shape in the rule-making process and the specific content of the rules adopted within the UN.

2.5. From the UN’s draft Norms to CSR

In the early years of this century, while under the umbrella of CSR, first the Global Compact and then inclusive business at the “base of the pyramid” were being propounded, the normative evolution at the UN went through various phases. Here we should note the gap that appeared between the position advocated by successive secretary-generals, culminating with the presentation and implementation of the Global Compact, and the dynamic of the Sub-Commission on the Promotion and Protection of Human Rights, which, despite manifold difficulties, managed to have the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (hereinafter the “Norms”) adopted in 2003.

These two positions correspond to highly different normative rationales: either the outright voluntarism at the heart of CSR and internal codes of conduct based on self-regulation as espoused by the Global Compact, or the logic of universal systems for regulating and protecting human rights with the binding force underlying the Norms. In any event the official dynamic that has been consolidated at the United Nations, as was made evident years later when the Norms were finally shelved, is that of promoting “social responsibility”.

In the 90s the Sub-Commission on Human Rights played a key role in articulating proposals for the regulation of transnational companies. Although by 1992 the possibility of drawing up a binding external code had already been derailed59, its reports on impunity for violations of economic, social and cultural rights, together with its request in 1995 that the secretary-general should analyse the links between human rights and the operations of large corporations, led to the creation of a working group to study the methods of transnational firms as regards the enjoyment of socioeconomic rights and the right to development60. The Sub-Commission said at the time, justifying the working group’s creation, that one of the obstacles normally encountered in the exercise of those rights was precisely the concentration of political and economic power in a few hands – those of large corporations.

On the basis of a mandate that included examining the activities of multinationals, gathering data on them, drawing up a yearly list of countries and multinationals
and comparing their GDP and turnover, analysing compatibility between human rights instruments and investment agreements, making recommendations regarding multinationals’ working methods and their suitability vis-à-vis the socioeconomic goals of the countries where they operate, and finally promoting human rights, the working group set up by the Sub-Commission resolved at its first meeting in 1999 to require large corporations to produce periodic assessments of their activities with respect to human rights, and to draw up a binding code. After four years of discussions, as the first draft was presented in 2001 and then submitted for consultation, debate and successive amendments, the final text of the Norms was adopted by the Sub-Commission in August 2003.

Inevitably, the International Organisation of Employers and the International Chamber of Commerce reacted hostilely, launching a campaign based on a long document with a critique focussed chiefly on two aspects: the infringement of private companies’ legitimate rights and the fact that responsibilities regarding human rights were assigned to multinationals, whereas human rights should be the sole responsibility of States. Representatives of NGOs and grassroots organisations, for their part, took differing views in the discussions leading up to the publication of the Norms, though they finally agreed to defend them in the Sub-Commission: Amnesty International collected endorsements while other organisations highly critical of the Norms proposed a working group to improve them.

In 2004 the Norms were submitted for ratification by the UN Human Rights Commission, which according to the old UN procedure was empowered to decide on their treatment before they were adopted by the General Assembly. But the Norms were rejected. Moreover the Human Rights Commission prevented the Sub-Commission’s experts from having them followed up and implemented. Although the high commissioner for human rights showed increasing interest in a UN declaration being issued on universal rules applicable to transnational firms and asked the Commission to specify large companies’ responsibilities on human rights and to maintain the draft Norms, the Commission rejected his recommendation and instead chose to appoint a special representative of the secretary-general for the issue of multinationals and human rights. And with that the matter was closed.

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IV Along with Amnesty International, other signatories included the International Federation for Human Rights, Human Rights Advocates, Human Rights Watch, the Lawyers’ Committee for Human Rights, the World Organisation Against Torture, the Prince of Wales’s International Business Leaders Forum and Pax Romana.

The key aspects of the Norms are the co-responsibility of transnational corporations with States in human rights violations, the right to equal opportunities and non-discriminatory treatment, the right to personal security, workers’ rights, respect for national sovereignty and obligations concerning consumer and environmental protection. All of these provisions are drawn from existing international rules and texts; the novelty lies in applying them to private corporations, and establishing various forms of monitoring and enforcement. Moreover the following aspects are worth noting:

- “Other business enterprises”: this term was included in the initial mandate of the Norms, though it contributes little and may cause confusion; it would have been better to keep the initial option, referring only to transnational corporations, as preferred by both the OECD and the ILO when drawing up their Guidelines and Tripartite Declaration respectively.

- Co-responsibility of States and transnational corporations in the protection and promotion of human rights: this is one of the Norms’ most significant contributions, though not uncontroversial. The traditional notion that States are the sole subjects of international law has been accompanied by the idea that only they are bound by human rights standards; the Norms break with this conventional view and bind multinationals with the obligation to respect human rights.

- Binding character: one aim of the Sub-Commission on Human Rights was that the rules drawn up should be mandatory, with the recognition that codes of conduct alone do not suffice. Thus, between voluntary systems and an international treaty with directly binding effects on corporations and individuals, the Norms seek a middle way. But unlike the distinctly voluntary OECD and ILO declarations, the normative tone and the consultative process, formally conducted and authorised by the UN, gave the Norms a mandatory edge.
2.6. The appointment of Ruggie

In July 2005 the United Nations secretary-general appointed John Ruggie, who had been his chief advisor for the Global Compact, as special representative to study the question of transnational corporations. Ruggie drew up his interim report in February 2006 and submitted it to the Human Rights Commission’s 62nd session; a year later he submitted his final report to the new Human Rights Council. Both documents propose shifting the Norms into voluntary codes, imposing soft law, developing technically weaker aspects and interpretations more favourable to large companies; in fact many of the arguments used are the same as those deployed by the International Chamber of Commerce. The special representative also deemed that it was impossible for human rights violations by multinationals to be institutionally certified: “There being no global repository of comprehensive, consistent and impartial information, we cannot say with certainty whether abuses in relation to the corporate sector are increasing or decreasing over time, only that they are reported more extensively”.

With regard to the Norms, Ruggie’s reasons for shelving them were that their legal claims were exaggerated, that they contained many conceptual ambiguities, that they were made redundant by the OECD and ILO declarations and finally that they were merely a draft that had not been requested by the Commission and therefore lacked legal standing. He thus ignored the fact that the Norms might prove to be a valuable instrument in establishing the direct accountability of transnational firms and affording some protection to social majorities in States whose legislations have been deregulated, which have not ratified international standards or which do not apply international jus cogens.

With their reliance on voluntary initiatives as the means of protecting human rights, the Ruggie reports prompted reactions from numerous civil-society groups, from legal standpoints and in a letter signed by more than 100 organisations, as well as in a joint address to the Human Rights Council. Along similar lines, the Sub-Commission submitted a report to the Council pointing out that codes of conduct had proved

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V The ILO, in its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, States expressly in its point 6 that “to serve its purpose this Declaration does not require a precise legal definition of multinational enterprises”. The OECD, for its part, in its Guidelines for Multinational Enterprises, deems that “a precise definition of multinational enterprises is not required for the purposes of the Guidelines.”

VI “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law”
insufficient for safeguarding the protection of the human rights of those impacted by the activities of multinationals, along with the need for the Norms to be adopted, for a future expert mechanism to be established to advise on the issue and for work within the United Nations system to be coordinated through such experts.72

The manifest contradiction between the dynamics and proposals of the Sub-Commission, on one hand, and the consolidation of the Global Compact and the devaluation of the Norms, as ratified by Ruggie, on the other, led as of 1999 to the Human Rights Commission presenting recommendations for progressively stripping the Sub-Commission of its powers, taking away its ability to adopt resolutions on countries or on issues concerning them concretely. Finally in 2007, with the remodelling of the Commission and its transformation into the Human Rights Council, the Sub-Commission was replaced by an advisory committee with the role of providing the Council with “specialist advice”, as defined by the Council and solely as requested by it. So with the demise of the Sub-Commission, the working groups disappeared, and in particular those on transnational firms.

Now, once the Sub-Commission on the Promotion and Protection of Human Rights had been wound up, the Global Compact became the UN’s sole benchmark in all matters to do with the accountability of transnational companies. And since then, while the Norms have not been enacted and their shelving in the archive of multiple UN reports is an irreversible reality, the main international framework for “social responsibility” in its softest form continues to endorse the activities of multinationals. But this is not a decision taken by “experts” on technical criteria: it is the expression of neoliberal ideas and of the political and economic power of large corporations carried over to the structures of the United Nations. For there is no other reason, even in legal terms, to account for the continuing reinforcement of global corporate law as the fragile universal systems of international human rights legislation slide into soft law, i.e. into the voluntary logic of the Global Compact, with no regulatory control.

2.7. Responsibility or obligation?

In his reports, special representative Ruggie takes advantage of a technical flaw to downgrade the direct obligation of corporations to respect human rights provided in international standards, for in the Norms’ first section, transnational corporations are assigned the obligation to promote and secure the fulfilment of human rights, whereas their only responsibility is to respect them and to help ensure that they are respected.
We agree with Alejandro Teitelbaum that the universal obligation is that of respecting them, whereas States and international bodies are responsible for safeguarding and promoting them, sanctioning violations and guaranteeing reparation; but in all events, international human rights law must be complied with by transnational companies. “The main line of the rapporteur’s legal approach may be summed up as that companies have no duties or obligations, just responsibilities,” Teitelbaum says; “the result is that his reports propose no mandatory standards for companies.”

Though it might seem that this discussion concerns a merely doctrinal issue, the matter at issue is highly significant, for the report advocates confining multinationals’ obligations to the sphere of national legislations, which on many occasions are insufficient for holding them to account, let alone for sanctioning them. Could Nestlé be sanctioned by Eritrea? Are the Spanish firms present in China not obliged to respect trade-union freedom and collective bargaining if the country’s legislation does not protect them?

And such a closed interpretation of social, economic and cultural rights as is proposed in the Ruggie reports can only be understood as treating these rights as merely declaratory, and accordingly as generating obligations for multinationals only in so far as these are recognised in national legislation. Thus, to give an example, Inditex and H&M need not pay their workers more than the legal wage applicable in the countries where they operate and will raise them only if collective bargaining or codes of conduct so require (an entirely hypothetical prospect in the political, economic and social context of many periphery countries), and in no event will they countenance being regulated by an international standard. This is how the *lex mercatoria* normally works: the involvement of multinationals in host countries’ development is mediated by operating and marketing agreements, which are in turn subject to national legislation (based on a supposedly two-sided expression of mutual intent) and international trade and investment rules, but not to international human rights law.

At heart this whole question has nothing to do with any technical flaws there may have been in the distribution of responsibilities between States and multinationals. The point is that the neoliberal model puts pressure on States – and the farther these are from the centres of power, the greater the pressure – to sign up to bilateral, multilateral and regional trade and investment rules, to deregulate social, environmental and labour rights, to privatise public companies
and community services, to reform the State and to obey arbitration tribunals. Then, as competences linked to the businesses of large corporations are de-territorialised, those linked to the rights of social majorities are territorialized. While multinationals can make direct use of global corporate law and sue States in international arbitration tribunals, natural and legal persons may sue those companies only in the sphere of their national courts.

**BOX 4. The ruggie reports (2006-11)**

- First (interim) report, submitted to the Human Rights Commission in 2006\(^74\): the core ideas are the dismissal of the draft Norms, a shift towards voluntary frameworks, adherence to the virtues of the market and to the market’s functional prerequisites: respect for property rights, fulfilment of contracts, competition and flow of information.

- Second report submitted in 2007 to the Human Rights Council\(^75\): aimed at releasing multinationals from the obligations arising from international law and reasserting that agreements should be made between large corporations, civil society and the UN (with the Global Compact). Recognising the asymmetry between the power of multinationals and the lack of protection for individuals, its proposals and solutions are based on voluntariness and a lack of legal enforceability.

- Third report, submitted in 2008\(^76\), recognising multinationals’ impacts on human and labour rights and setting out a conceptual structure (“protect, respect, remedy”) which seemed as if it might pave the way to new regulatory frameworks, centred on the State’s duty to protect, business’s obligation to respect and the strengthening of mechanisms for remedy.

- Fourth report, drawn up in 2009\(^77\), persisting with the idea of stopping any mandatory international standards for controlling large corporations. “Transnational corporations are left out of the international legal framework safeguarding the protection of human rights” says Alejandro Teitelbaum; “they are subject only to domestic common law, which is manifestly insufficient for holding them to account.”
2.8. “Protect, respect and remedy”

The mandate of the secretary-general’s special representative on the issue of transnational corporations and human rights ended in 2011 with the publication of a report advocating the implementation of the “protect, respect and remedy” framework. These *Guiding Principles on Business and Human Rights* propounded by Ruggie – who after leaving his UN role was appointed special consultant of the Canadian firm Barrick Gold, a mining multinational criticised for its socio-environmental impacts in Chile, Peru and the Dominican Republic – were adopted that same year by the Human Rights Council; the UN secretary-general’s final report, published in 2012, acknowledged that the *Guiding Principles* “do not give rise to any new legal obligations”.

“Business enterprises should respect human rights,” asserts the framework proposed by Ruggie: “This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.” And this is the core principle around which the various UN proposals in recent years have revolved: the responsibility to respect is in addition to that of complying with national laws and standards for human rights protection; i.e. while the responsibility to protect stems from international law, that to respect does not. Yet one of the great obstacles to eradicating the human rights abuses committed by multinationals is precisely this lack of a commitment to creating new obligations in international law.

The *Guiding Principles* are articulated around three main points: States’ obligation to afford protection from human rights abuses committed by third parties, including companies; the obligation of the latter to respect human rights; and
improved access by victims to means of effective remedy, both judicial and non-judicial. And this marks the start of the latest phase of “social responsibility”, CSR 3.0: a legal finesse that devalues the real dimension of respect for human rights by big companies, as “they do not entail the creation of new international law obligations but rather specify the implications of current standards and methods for States and companies.”

The text of the “protect, respect and remedy” framework recognises the normative disorder across the various public and private initiatives regarding business and human rights: “None had reached sufficient scale to truly move markets”, it acknowledges in its point five. The Guiding Principles seem to fulfil this prerequisite, albeit without mentioning the international human rights system or the value of international practice and custom, or the draft mandatory standards for transnational corporations, and without evaluating codes of conduct or CSR. Accordingly, it may be said that in these Principles the market has found a new normative order.

The whole development of the Ruggie framework is notable for its restrictive interpretation of the legal principles accompanying international human rights law. And in its key features it represents no normative progress over the declaratory status of transnational companies’ ad hoc control systems; in the words of the lawyer Olga Martín-Ortega, “it is designed to ‘deprive’ corporations’ international obligations of any legal nature”81. In other words, the language is complexified so as to continue protecting the rights of big companies and to carry on weakening their obligations.

The Guiding Principles are a sophisticated version of the Global Compact; or rather they are CSR anchored in the legal architecture of the United Nations. The severity of the impacts caused by transnational corporations, their power and the impunity with which they act would seem to require an evolution of the formal framework of ad hoc ILO, OECD and UN control systems towards a more solid and better-founded framework. Instead we have the Ruggie framework, a set of principles with a highly fragile form (as the legal framework for the protection of human rights is much more precise and of an imperative nature), often unclear, and with its requirements benchmarked to the voluntary and unilateral practices of transnational companies.

By way of example, as Bangladesh is subordinated to the power of the large multinationals in the textile sector (or, put in all its complexity, the workers of that
country are subordinated to the power of their employers, of their government and of foreign multinationals, the architecture of impunity does not allow Bangladesh to act with full sovereignty; protecting its local industry against multinationals could lead to claims from the States of the parent companies for breach of WTO rules and of bilateral or regional “free trade” treaties. So in this context, what does States’ duty to promote the respect of human rights mean? And reparation for victims? As transnational companies have no legal obligation, their “willingness to compensate” has been diluted over time: two years after the collapse of Rana Plaza, 6 million dollars of the 30 that were agreed as compensation for the victims remained to be paid.

BOX 5. The case of Bangladesh

Bangladesh joined the global supply chain of manufactured textile goods in the 80s; today the country is the second garment exporter in the world, after China. To achieve this, the government set up Export Processing Zones, little “fiefdoms” where the country’s fragile national legislation retreats before orders from multinational firms such as H&M, Benetton, C&A, Wal-Mart, Inditex, El Corte Inglés and Mango. In these garment sweatshops, in addition to production chains – suppliers and subcontractors – the exploitative labour conditions belong more to the industrial revolution than to the 21st century: the right to trade-union membership is denied, the wages paid are minimal, working hours are interminable, maternity leave and overtime are not respected, absences are punished with wage cuts, health and safety measures are non-existent, companies receive tax exemptions, imported materials are free of tariffs and in some cases the government even covers the costs of electricity, gas and water.

As recalled by the international union IndustriALL, the labour costs for a tee-shirt made in Bangladesh are 1.5 euro cents, whereas the final price is 20 euros; the retail price may be more than ten times the total actual cost. The women workers’ minimum wage is less than one dollar a day –

VII El Corte Inglés and Inditex have not publicly disclosed the amount they are to pay, while Wal-Mart and GAP did not voluntarily undertake to donate anything.
below internationally accepted thresholds for absolute poverty. This is the regulatory framework complied with by the textile multinationals operating in the country; these are their true “business ethics”.

Bangladesh’s government and dominant classes also benefit from these investments and exploitative conditions. All labour law reforms have been adopted as a result of worker struggle, but the multinationals’ threats – “if you change the working conditions and increase our costs, we’ll leave for another country” – and governmental complicity have resulted in social rights being restricted and widespread repression: the members of the Bangladesh Center for Worker Solidarity have been repeatedly arrested and tortured in recent years.

The homicides in Bangladesh – on 24 April 2013 more than 1100 people were killed and 2500 injured in the collapse of Rana Plaza, an eight-storey building housing several garment factories crowded with the (mostly female) workers of the subcontractors of Benetton, Mango, Primark and El Corte Inglés – occurred in this context. So why do the Spanish government and the EU not adopt a regulatory framework obliging transnational firms to respect human rights wherever they operate? For the managers of these companies should accept civil and criminal liabilities and – in the case of Mango and El Corte Inglés – it should be possible to try them in Spanish courts for gross human rights violations.

Source: Authors

2.9. The Spanish government’s plan, an example of CSR 3.0

The Ruggie framework was transposed to Spain as from early 2013, when the Foreign Affairs and Cooperation Ministry’s Human Rights Office launched a

VIII Workers had warned that there were cracks in the building the day before the collapse but their supervisors told them it was safe and instructed them to return to work the following morning. At 9 o’clock, during the rush hour, Rana Plaza – which happens to be owned by one of the leaders of the governing party – collapsed. Kalpona Akter, a prominent defender of human rights in the textile industry, recalled the tragedy just one year later in eldiario.es: “I reached the area three days later and what I saw there is hard to explain... There was so much pain, so many families wailing... These are people who go to work just to survive, and who end up dying.”
“process of dialogue with civil society” and convened representatives of social, trade-union, academic and business organisations to “develop a national plan to implement the United Nations Guiding Principles on business and human rights”\[^84\]. After a process lasting nearly two years, the outcome (albeit not yet been adopted by the cabinet despite being submitted in June 2014) was a National Plan on Business and Human Rights, a classic case for understanding how CSR 3.0 works: it is a discursive refinement in which, at first glance, certain issues regarding human rights seem to be reflected, whereas in reality all the substance is in arguments about competitiveness, profitability and business opportunities for large corporations. For ultimately this plan is merely the implementation at State level of the UN Guiding Principles.

After a “civil society consultation” that was more a formality than a reality and took no account of contributions from grassroots organisations, little can be expected of a plan which continues the drift away from fundamental questions such as the extension of extraterritorial obligations from the parent company to its subsidiaries in third countries; the concept of the interdependence, indivisibility and permeability of applicable human rights standards; civil and criminal liability of managers; direct compliance by multinationals with international law; criminal liability of legal persons; and dual indictment of companies and managers. For along with many development NGOs and grassroots organisations, we told government representatives at the various meetings held within the “dialogue process” that this plan “generates no new obligations in international law; there are merely guidelines; it continues to recognise violations of human rights by companies only where State responsibility arises.”

Regarding the State’s role, incidentally, the Plan reflects a distinct asymmetry between its measures for advising companies on human rights, which are highly specific, and its measures establishing the system for State control of state-owned companies, or companies which receive public funds, which make contracts with the State or with which the State makes commercial transactions, which are highly imprecise – and again, they involve advice and incentives rather than control and sanctions. For we believe the State should not be advising companies on how to respect human rights in their activities; its role should be to demand compliance with human rights standards, and if appropriate to apply sanctions.

Far from any of this, the successive drafts of the National Plan on Business and Human Rights have steadily downgraded any requirements for effective control
of multinationals’ practices regarding human rights. Thus the usefulness of such a plan is highly dubious where, to safeguard respect for human rights and be able to impose sanctions in the field (even though these merely involve disqualification for public subsidies and grants), it is necessary to await a final judgment from the relevant judicial authority. At the same time the references to the direct responsibility of a multinational company and its subsidiaries are insufficient, as they leave out the rest of the production chain – and thus in the case just mentioned, any co-liability of companies such as Mango and El Corte Inglés in the Rana Plaza collapse would be ruled out. The government should therefore set up a special prosecutor’s office and prosecute human rights violations wherever they are committed, applying the principle of responsibility to parent companies, subsidiaries, suppliers and subcontractors.

In line with the calls for “dialogue with civil society”, the preparation and follow-up of the Plan should have been effectively coordinated with civil-society and labour organisations with experience in defending human rights against transnational corporations. Yet under a semblance of formal dialogue on an equal footing with all social actors and stakeholders, the reality was that economic arguments had much more weight than aspects to do with respect for human rights. In the end, as is shown by the last version, all matters are subject to the macroeconomic imperatives of the markets: “All the commitments resulting from the implementation of these measures shall however be subject to resource availability in each budgetary year and the fiscal consolidation roadmap established by the government.”

2.10. The “renewed” Spanish CSR strategy

“Social responsibility may serve as a tool to help boost the Spanish economy’s capacity for recovery.” Such are the opening words of the Spanish Corporate Social Responsibility Strategy 2014-2020, adopted in 2014, representing a new reworking of the role of corporate social responsibility. But not, as one might wish, in terms of assessment and monitoring, of regulation and control of the practices of large corporations. Quite the opposite: in line with the brand Spain strategy, this “renewed” view of CSR opts for “responsible competitiveness” as a key strategy for driving economic growth and “getting out of the crisis”.

The Spanish CSR strategy sprang from the same branch as the National Plan on Business and Human Rights, though it subsequently went its own way, in a process
finally endorsed by the National Corporate Social Responsibility Council (CERSE). In its main lines it pursues the path mapped out by the Spanish government, and it makes its main aim clear from the start: “Strengthening the Spanish economy and advancing towards the achievement of inclusive and sustainable growth.” Over the document’s 60 pages, the term *competitiveness* appears 27 times, *growth* 11 times; *confidence* 13, *innovation* 7. By contrast, concepts such as *accountability* and *sanctions* do not appear at all; *assessment* appears just once.

This conception of what CSR involves is fully aligned with the *brand Spain* strategy, bolstering the prevailing economic orthodoxy and setting out the pillars on which the promised “recovery” is to be based. As well as recurrent mentions of competitiveness and growth, other “pillars” referred to are *excellence* (“resulting in improved market positioning, productivity, professionalism and sustainability”), the “creation of shared value” (“maximising the creation of shared value for owners and/or shareholders and other stakeholders”) and the need to “generate competitive advantages” and “restore lost confidence”. In this context CSR and “responsible practices” constitute “a significant driver of the country’s competitiveness and of a transformation into a more productive, sustainable and inclusive society and economy.”

But in rhetorical terms this strategy diverges from the international trend in CSR by reinstating voluntariness at the heart of its discourse, i.e. explicitly. It is not that in *CSR 3.0* this concept is lacking: as we have seen, in the UN secretary-general’s final report published in 2012 it was already acknowledged that the *Guiding Principles* “do not give rise to any new legal obligations”. But that was an indirect way of referring to the fact that there are – and are to be – no effective mechanisms for controlling, monitoring, assessing and sanctioning practices of multinationals that infringe international human rights law. Thus *CSR 3.0* is formulated with a refinement of language and rhetoric so as to avoid mentioning that, in all events, the agreements concerned are voluntary and lack legal enforceability. Here, though, the reference is explicit and direct: “The adoption of social responsibility policies is voluntary,” proclaims the Spanish CSR strategy; they are “practices that companies may adopt on a voluntary basis, in addition to applicable legislation”.

### 2.11. Proposals for control and alternatives

What the Spanish government’s two strategies do agree upon are the measures to be implemented: nearly all of them focus on raising awareness in the business
world, communication and dialogue, good governance practices, ethics and transparency, preparation of reports and guides, codes of best practice, social projects and exchanges of experience. In the case of the Spanish CSR strategy there is not a single measure – among the 60 in the text – to do with any assessment, monitoring or control of the activities of corporations; in the National Plan on Business and Human Rights, just one measure – among the 37 included in the document – provides for any form of possible sanction.

But rather than propounding advisory measures and incentives to encourage companies to respect human rights in their operations, the State ought to be providing measures for control and sanctions. For companies’ responsibility to respect human rights means – pursuant to article 29 of the Universal Declaration of Human Rights – that transnational corporations have the duty to respect the law at national and international level and, where applicable, are subject to the corresponding civil, criminal, labour and/or administrative sanctions. Accordingly, the Spanish State should be adopting and reforming legal standards along these lines, and not, as indicated by these plans, merely introducing a system of incentives, awareness-raising and recognition of best practice to address breaches of mandatory standards.

In view of the negotiation of TTIP and other trade and investment treaties, we need to restore the territorial competence of national courts, revitalise the role played by parliaments and launch popular legislative initiatives. And at international level we should be promoting mechanisms for controlling large corporations that help at least to redress the regulatory asymmetry between the lex mercatoria and international human rights law. We believe there is little point in including clauses on “sustainable development” and “social responsibility” in “free trade” treaties – the Socialist Group amendment to TTIP that we mentioned at the beginning of this section refers to the requirement to comply with the OECD Guidelines... which happen to be voluntary. Rather, they should include effective references to respect for human rights. This is the path explored by the proposals and alternatives for dismantling the power of transnational companies outlined over the following pages.
resistance, regulation and alternative proposals for controlling transnational companies
3. Resistance, regulation and alternative proposals for controlling transnational companies

We need strict, enforceable rules and binding laws – preferably international – governing corporate behaviour, not fake solutions.\(^\text{86}\)

SUSAN GEORGE (2015)

The provision of control mechanisms and binding standards to make transnational corporations respect human rights has been the subject of numerous debates at State and international level over the past five decades.\(^\text{87}\) And today, in the context of a global crisis marked by the intensification of mechanisms for *accumulation by dispossession* and the ongoing expansion of business into new sectors and markets to sustain its logic of growth and accumulation, vital issues such as the asymmetry between the rights of large companies and their obligations, the need to establish effective mechanisms to monitor and assess the impacts generated by multinational corporations, and the urgent question of drawing up concrete alternatives for controlling the practices of such companies are again the focus of political and legal debate.

In addition, the fact that the United Nations, reviving the debates of the 70s, has recently revisited the proposal to establish binding international rules to make transnational companies respect human rights worldwide has caused other key aspects of the debate to re-emerge: the extraterritorial obligations arising from the actions or omissions of States that generate impacts outside their territorial limits, or the extension of multinationals’ responsibility to include their subsidiaries, suppliers and subcontractors.
3.1. Resistance, regulation and alternatives

With the expansion of global capitalism and the rising power of large corporations, social struggles questioning the centrality of transnational companies in our “development” model have proliferated around the world. In recent decades, against the hegemonic view that endorses economic growth and the “private sector” as the pillars of progress for all society, multiple resistance movements have emerged to oppose the progressive mercantilization and privatization of ever more aspects of our lives. And together with all these experiences, largely driven by civil-society organizations and emancipatory social movements, various paradigms and frames of reference have been crystallizing as alternatives to modern-day capitalism.

A number of counter-hegemonic narratives and initiatives aimed at developing proposals for a transition towards post-capitalist economies and societies, are making headway with a triple perspective. First, with a dynamic of resistance, investigating and exposing the expansion of transnational capital so as to seek to curb its economic, political, social, environmental and cultural impacts. Second, with a logic of regulation, devising control mechanisms and redistributive proposals which could, within the existing socioeconomic model, serve to put the rights of peoples and individuals on at least the same level as the lex mercatoria that safeguards firmly the interests of large corporations. And third, seeking to develop alternatives, putting forward and carrying out concrete proposals which, given the need to build social and development models other than the dominant one, may start here and now to claw back some economic autonomy and sovereignty from transnational corporations.

FIGURE 3. Proposals for transition

<table>
<thead>
<tr>
<th>RESISTANCE</th>
<th>BIG COMPANIES</th>
<th>Stopping the expansion of transnational capital and containing its impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>REGULATION</td>
<td>GOVERNMENTS</td>
<td>Introducing mechanisms for redistribution and for controlling large corporations</td>
</tr>
<tr>
<td>ALTERNATIVE</td>
<td>CIVIL SOCIETY</td>
<td>Building concrete alternatives for a post-capitalist economy</td>
</tr>
</tbody>
</table>

Source: Authors
Indeed, it is in this constant tension between regulation and alternatives, between the possibility of establishing control mechanisms to limit the power of the markets and the urgent need to deploy proposals in order to make headway in a post-capitalist transition, that we find most of the initiatives vying with large corporations for centrality in today’s socioeconomic model. And as there is hardly any space not colonised by the logic of private property and economic growth (or, in other words, in globalised capitalism there are no “fringes”), many of these experiences operate by combining this dual perspective of regulation and alternative.

And it is in this context that various grassroots organisations and social movements, the Permanent Peoples’ Tribunal and countless experts and activists have been proposing concrete alternatives for controlling the activities of transnational corporations. Aimed at the various key players in the lex mercatoria (States, large corporations, international institutions, arbitration courts), these control mechanisms and alternative proposals focus on improving national legislation, and above all on creating new procedures and bodies at international level.

**FIGURE 4. Proposals, alternatives and actors in the lex mercatoria**

- Extraterritorial obligations
- Policy coherence
- Social and environmental clauses
- Redistribution mechanisms
- Remunicipalisation and nationalisation

- Binding international treaty
- Assessment and monitoring body
- Observatory/centre on transnational companies
- World court on corporations and human rights

Source: Authors
3.2. Extraterritorial obligations of States

The States in which transnational companies have their parent offices may have various degrees of responsibility and even criminal liability where, for example, they force the signing of trade and investment treaties or fail to protect citizens’ rights against pressure from large corporations. For this reason States should, in turn, demand respect for human rights by multinationals wherever these operate and adopt specific proposals on their extraterritorial responsibility.

Transnational firms now commonly “de-territorialise” their activities to States with weaker legislation, and the variety of procedures and formulas that they use for the purpose – with the aim of evading legal liabilities – contrasts with the homogenised normative apparatus that they apply. In this regard their domicile is a key feature: the holdings and subsidiaries of any one multinational are subject to the legislations of the countries where they operate, and so account must be taken of national rules when delimiting the ties between multinationals and their headquarters, and in turn in making large corporations comply with regulations applicable in the national sphere.

But domicile is not enough to go on, as alone it does not identify the hub of decision-making. Accordingly better defined legal criteria need be developed to make it possible to unveil the source of capital, the nationalities of the members of boards of directors, the location of the managing body within the corporate network, accounting information, business decisions, outsourcing of production and the allocation of earnings. International labour law standards should moreover be extended to events in which mobility concerns the employer as contractor but not its employees, and to define the responsibility of subsidiaries as if they were branches, as in many cases they act as such.

Although business decisions may be split across various national territories, they do not correspond solely to criteria set in the head offices of subsidiaries. Moreover, even though strategic decisions are centralised, they may on occasion be taken outside the parent’s physical location. Many States in which the central or leading companies of corporate groups are located even lack effective ad hoc legislation, and so general company law – which generally lacks relevant responses – is applicable. Hence the need to devise new criteria for normative relationships with a view to delimiting the chain of responsibilities, the legislation applicable and the competent jurisdiction. Also for this reason we need to develop international regulations able to embrace the full complexity of large business conglomerates.
The substantive issue is that, notwithstanding the emergence of a multiplicity of independent companies with different nationalities, it should be possible to hold to account whoever coordinates and manages a group operating as a business unit. And so, what is needed in order to implement this are criteria going beyond domicile and national legislation – such as the Alien Torts Claim Act in the US – with legal coverage for the concept of lifting the corporate veil. In the case of Europe, such options are slowly being incorporated into legislation, though only in certain areas such as tax fraud, money laundering and employer’s liability. Company law is far from moving in this direction, by contrast with the many advantages that neoliberal globalisation offers for the internationalisation of multinationals.

From a legal perspective, the free movement of goods and capital on a global scale complicates the identification of those actually responsible for business operations. For this reason Professor Alain Supiot proposes that such responsibility should rest with all the business operators that benefit from the corporate activity, whatever the legal strategy employed by the company: “A product is thus imbued with the spirit of whoever put it into circulation, who should continue to be responsible for it notwithstanding its changes of owner.”

In this context, the international institutions and the European Union should adopt a regulatory framework in which transnational companies are obliged to respect human rights wherever they do business. This is precisely the demand underlying the Europe-wide “Law without borders for multinationals” campaign, whose aim is to force States to define a legal framework imposing clear obligations on multinationals and to take measures to ensure that their business respects human rights and the environment – including their business abroad. Given the imbalance between the de-territorialisation of the protection of their rights and the “nationalisation” of their obligations, the legal separation between headquarters and subsidiaries should therefore be abolished. In addition, there is a need to start establishing a legal basis so that those who suffer damages as a result of the activities of multinationals, their subsidiaries or their suppliers, may bring legal proceedings to seek redress.

As Alejandro Teitelbaum reminds us in his book La armadura del capitalismo, “the US Alien Tort Claims Act (ATCA) was passed in 1789 with the initial aim of prosecuting piracy on the high seas. It allows foreigners to sue US and non-US individuals or corporations on US territory for torts ‘committed in violation of the law of nations or a treaty’ signed by Washington, even if such torts occur outside the country. [...] The first suits based on ATCA in the 1980s and 90s against individuals caused no great controversy, but subsequent actions against corporations led to a fierce counterattack, backed by the US government.”

Extraterritoriality is beginning to be reality in some European (and especially German) courts: in 2013 twelve Tanzanians sued two subsidiaries of Barrick Gold in a UK court; in Germany two NGOs sued Olof von Gagern, a senior manager of the timber firm Danzer Group; Nestlé has been taken to court in Switzerland; and the environmental group Friends of the Earth has sued Shell in courts in Holland and the UK.
BOX 6. Extraterritorial obligations of states

- States must guarantee and protect communities and individuals affected by the practices and operations of TNCs that violate civil, political, social, economic, cultural and environmental rights, and guarantee the affected communities’ access to justice and right to compensation.

- According to international human rights law - including international labour law and international environmental law, the direct and indirect relations of States where transnational corporations’ headquarters are located oblige them to ensure that their political and economic practices conducted within and beyond their jurisdiction do not violate civil, political, social, economic, cultural and environmental rights and to guarantee that corporations do not contribute to human rights violations in other countries.

- According to the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, States have the obligation to respect, protect and fulfil civil, political, social, economic, cultural and environmental rights, both within their territories and extraterritorially. Failure to meet this obligation may compromise a State’s international liability. In the absence of the recognition of these extraterritorial obligations, human rights cannot assume their rightful role as the legal base for regulating globalisation and guaranteeing the universal protection of human rights.

Source: *International Peoples’ Treaty for the Control of Transnational Corporations* (section 3: States and international entities: general regulatory framework)
3.3. Internationalisation and policy coherence

In the direct and indirect relations of transnational companies with the governments of the countries in which they are headquartered, those governments are obliged, in accordance with international human rights law, to ensure that their political and economic practices do not violate human rights. Accordingly, the public bodies that support direct foreign investment should ensure that control mechanisms are in place – through socio-environmental impact assessments, public consultation processes (especially with affected communities), transparency systems, etc. In short, formulas need be established for incorporating a human rights philosophy into private investments.

With regard to business internationalisation policies, investments that are directly in conflict with human and environmental rights, such as in the arms industry or in nuclear power, should be classified as irresponsible, and participatory channels should be put in place to establish new parameters for the concept of “development”. In any case it is human rights offices and international cooperation departments which, in line with goals for “development policy coherence”, should define the roadmap for companies’ international expansion.

As corporate business and international trade cannot be alien to human rights or public policy in host countries, the delegations that accompany political leaders on their foreign visits should not consist only of political and corporate representatives; trade unionists, grassroots organisations and development NGOs, representatives of the social and solidarity-based economy, etc. should also be invited. And along the same lines, there is no reason for meetings in investee countries to be confined to government institutions, chambers of commerce and business associations; they should also include trade unions and consumer organisations, environmentalist and feminist movements, etc.

In any event, if public institutions wish to subsidise the internationalisation of companies, they should guarantee respect for the national legislation of host countries and for international human rights law. Thus, it is not enough to respect national legislations that in many cases are subordinated to a predatory neoliberal logic, as in Russia, Peru or Colombia; and if China fails to respect trade-union freedom and collective bargaining, companies should still comply with the standards provided by the International Labour Organisation.

In addition, job creation in host countries and the activities of the companies receiving subsidies should be evaluated with reference to other indicators
Regarding business internationalisation

- State mechanisms to support the internationalisation of corporations - including export credit agencies and banks, trade promotion, trade diplomacy, financial instruments, instruments of international aid policy, direct logistical support and foreign expansion - must be subordinate to the international human rights protection system. Through their departments responsible for international cooperation and human rights, States must establish guidelines for programs on the internationalisation of corporations that guarantee respect for human rights.

- States and international institutions’ humanitarian aid policies must be aimed at saving lives, relieving suffering and maintaining human dignity. The economic interests of States, these international institutions, corporations or all of the above must not be allowed to influence the design or condition humanitarian aid policies.

- “Revolving doors” (the free circulation of top-level executives and political representatives between the public and private sector), the capture of public policy decision-making processes (cooperation on regulations, joint elaboration of legislation, standard rules or draft bills), bribery and other forms of corruption must be prohibited.

- Governments and parliaments will consult - online or in public hearings - companies, interest groups, social movements, trade unions, NGOs, indigenous peoples, among others, on decisions that will affect their interests. The complex network of banks, corporations, investors groups, agencies, consultants, commission agents and other actors that operate...
in the financial markets must be regulated. Norms on the transparency of financial practices; capital controls and financial services; control over hedge funds; fraud and fiscal evasion; rating agencies; executive compensation; and banking secrecy; and sanctions on illicit capital flows must be approved. Rules on taxing capital flows and progressive taxation on income, assets and corporate profits must be elaborated.

Source: International Peoples’ Treaty for the Control of Transnational Corporations (section 3: States and international entities: general regulatory framework)

3.4. Labour rights and social clauses

Requests for the inclusion of social, environmental and democratic clauses in international trade relations have been made, especially in core countries, both by employers’ associations linked to the sectors most exposed to international competition from low-wage countries and by trade unions and non-governmental organisations. The object of such clauses would essentially be to avoid a “race to the bottom” in labour rights and social protection.

Their content should therefore focus on the fundamental labour rights that protect workers from any assault on their dignity. Because economic globalisation and international competition at the expense of labour rights mean that we need, at the least, more precise standards with mandatory and enforceable effect. For to regard the other fundamental labour rights recognised in ad hoc international texts – the right to work, to a wage, to social security, etc. – as subject to countries’ general level of development, i.e. to their economic sovereignty, is to recognise only the legal effectiveness of civil and political rights, and consequently only the labour rights embedded in them – trade-union freedom, collective bargaining, etc. But the rights linked to social, economic and cultural covenants should have full legal effectiveness, albeit on a progressive basis and in keeping with State obligations, at least within the limits of States’ economic development.

Moreover, the fact that States claim to respect human rights and to be coherent in their policies while at the same time failing to regulate company relocations represents an irresolvable contradiction. For this is a phenomenon that requires firm measures: prohibiting the closure and relocation of profitable work centres, empowering works councils to suspend restructuring plans while information required to ascertain the company’s financial situation is gathered, giving them a veto over possible relocations and other job-shedding measures, sponsoring a
European regulation to prohibit redundancies solely for purposes of increasing profits, extending multinationals’ joint and several liability to include their subsidiaries, suppliers, subcontractors and licensees, imposing levies on the re-imported products of relocated companies, demanding refunds of public grants received by companies that relocate, giving tax relief for exports to outside the EU, providing European rules for taxing transport given the environmental harm that it causes, combating outsourcing by demanding that the activities to be subcontracted (and the relevant employees) be reintegrated, and promoting re-industrialisation and diversification as preventive measures.

States are on many occasions responsible for not safeguarding the rights of peoples and individuals and for acting in such a way as to favour transnational companies. But action can be brought against host States – as accessories – regarding the human rights abuses committed by large corporations, for enacting legislation or ratifying trade treaties facilitating such activities by multinationals, or for complicity by not preventing them. Yet host States lack the political and regulatory instruments required for controlling transnational companies, for international trade and investment rules and the support that they receive from rich countries forms a legal armour that is hard to penetrate solely from a Nation-State perspective.

3.5. Controlling multinationals

“Madrid, off-limits for Coca-Cola” ran a front-page headline in the newspaper El Pais in early September 2015. On the same day most major media outlets ran similar items about the “rebuff”, “revenge” and “veto” on the world’s best-known multinational by Madrid City Council with its refusal to allow a municipal sports facility to be used for filming a commercial. Even the comic El Gran Wyoming spoke of it in his programme El Intermedio: “What has the councillor achieved apart from starting an absurd controversy?” So what should never have been more than a symbolic gesture by the councillor for the district of Salamanca, Pablo Carmona, in solidarity with the workers laid off from the Coca-Cola factory

XII In the labour sphere, workers’ rights are impacted by changes in business organisation as outsourcing and decentralisation accompany changes in rules on employee safeguards. In this context the emergence of global framework agreements has brought improved developments in codes of conduct, with a shift away from unilateralism and towards participation and collective bargaining. Unilateral and voluntary codes of conduct are replaced by mechanisms for dialogue and trade union participation which have contractual force between the signatory parties, albeit no normative effect; the company itself is responsible for applying them. We propose that the legal enforceability of global framework agreements be developed, and that if they are not respected, compliance may be enforceable – before the judicial authority of the host State of the multinational’s activity – and, failing that, before the judicial authority of the home State in which the parties signed the agreement.
in Fuenlabrada – who are to be reinstated by the company following the National Court’s invalidation of the redundancy plan and the Supreme Court’s upholding of the judgment on the infringement of the workers’ right to strike – became a target for criticism by the mass media and opposition.

Far from being a mere anecdote, the affair of the Coca-Cola advert in Madrid allows us to imagine how the major economic powers would react if steps were taken towards the remunicipalisation of public services, higher taxation of large corporations, non-payment of illegitimate debt incurred by previous governments or nationalisation of companies in strategic sectors. For this very reason we need to continue along these lines, as it is the way to gradually lay the ground for more complex tasks. For it seems clear that the way in which conflicts with transnational corporations are resolved – conflicts that will doubtless arise if municipal and regional governments, not to mention national ones, take decisions unfavourable to the interests of big companies in the construction, energy, telecommunications and finance sectors – is going to be one of the key factors in defining the limits and possibilities of political action by public institutions in times to come.

“Someone said that in the United States you can malign a Democrat president or a Republican president but you can never publish the news that a fly has been found in a Coca-Cola bottle.” This quote from the journalist Pascual Serrano at the start of Una mosca en una botella de Coca-Cola (A fly in a Coca-Cola bottle)92, a documentary analysing the close ties between the mass media and transnational companies, helps illustrate how firms such as Coca-Cola (the corporation that has spent most on advertising in the history of capitalism) directly or indirectly exert decisive influence in determining the agenda of what may and, above all, what may not be said – both in the mass media, dependent on advertising to keep up profits, and by public institutions, which in addition to coming under fierce media pressure often need to secure sponsorship from these same companies to sustain their budgets.

Thanks to the campaign by trade unions and workers over the past two years it has to a large extent been possible to get past the media blackout and “show the fly in the Coca-Cola bottle”. Despite the multinational’s efforts to save its brand image, the labour dispute over the closure of four bottling plants in Spain has filtered through to public opinion, which opposes the idea of a profitable company laying off workers and blocking the democratic exercise of the right to strike. And this has by no means been the only case of human rights impacts involving this
multinational: as various grassroots organisations and the Permanent Peoples’ Tribunal have documented over the past two decades, complaints against Coca-Cola have mounted up in Colombia, for threats, persecution and even murder of trade-union leaders; in El Salvador, for the exploitation of aquifers threatening the right to water of 30,000 people; in Brazil, where its massive acquisition of land for sugar production has caused the displacement of indigenous communities; and in Pakistan, Turkey, Guatemala, Russia, India and elsewhere.

In this context, with systematic impacts of which Coca-Cola is just one example, there is a clear need to take steps to provide control mechanisms and binding standards to make large corporations respect human rights, and especially where final judgments have been rendered against a company for breaching them. Along these lines, why not combine symbolic gestures with effective policies to challenge the power of large corporations? The moratorium on the granting of new hotel licences in Barcelona or the audit of municipal debt in the city of Madrid, or other measures with the same thrust such as introducing responsible public procurement criteria or terminating contracts with rating agencies, are more than mere gestures of “social responsibility”, and indeed are progressively starting to show the way for tackling the owners of transnational capital.

As new examples surface every day of how Spanish capitalism works, with “donations” from the big Spanish multinationals to treasurers and intermediaries of the Partido Popular and to the Convergència i Unió party foundations, why should we not take measures to regulate the activities of multinationals such as Agbar, the construction firms OHL, Sacyr and ACS, the banks BBVA and Santander and other corporations such as Telefónica-Movistar, Iberdrola, El Corte Inglés or Coca-Cola?

**BOX 8. Obligations of transnational companies**

Transnational companies, their subsidiaries (de jure or de facto) and their suppliers, subcontractors and licensees must:

- Recognise the principle of the primacy of human rights and of the public interest over private economic interests.
- Respect civil, political, social, economic, cultural and environmental rights and fulfil their tax obligations so that States may guarantee, in
particular, the rights to development, adequate food, food sovereignty, health, a healthy environment, housing, education and land.

- Not commit acts that constitute war crimes, crimes against humanity, genocide, torture, forced disappearances, forced or compulsory labour, hostage taking, displacements, summary or arbitrary executions and violations of international humanitarian law, nor will they act as accomplices, collaborators, instigators, backers or accessories to such acts.

- Respect all international and national standards prohibiting discrimination on the basis of race, colour, sex, religion, political opinion, nationality, origin, social status, etc.

- Respect women’s living conditions, avoid exploiting them and prevent violence against them.

- Respect the rights of women as regulated by international human rights law.

- Not use state armed or security forces in their service, or hire private militias.

- Refrain from all forms of partnership (economic, financial or in service delivery) with other entities, institutions or persons that commit human rights violations.

- Abide by fair practices in trading and marketing operations and adopt all reasonable measures to guarantee the safety and quality of the products and services that they offer.

- In the countries where they operate, carry out their activities in accordance with national laws, regulations, administrative practices and environmental protection policies.

- Be accountable for their environmental liabilities and compensate the peoples and communities impacted by any damage caused and, where appropriate, remedy such damage by restoring the environment to its previous condition.
- Refrain from making use of forced or child labour, while providing a safe and healthy work environment; and pay wages allowing a decent livelihood for workers of both sexes as well as safeguarding trade-union freedom, the effective recognition of collective bargaining and the right to strike.

- Respect the rights of migrant workers as regulated by international human rights law.

- Respect the territorial rights of indigenous and Afro-descendant peoples and their ownership of the natural resources and genetic wealth to be found both underground and above ground, whether renewable or non-renewable.

- Respect ILO Convention No 169 and the UN Declaration on the Rights of Indigenous Peoples; consultation and participation rights are inalienable, non-delegable and binding in the establishment of relationships with States, corporations and other actors.

- Comply with tax legislation in all countries where they operate, contributing to their host countries’ public finances by promptly paying their tax liabilities.

- Disclose in what countries they do commercial and/or financial business of any kind, the identities of their subsidiaries, suppliers, subcontractors and licensees and the legal form of any holdings in other companies or entities with legal personality.

- Quickly, effectively and adequately compensate any individuals, entities or communities that have been harmed by their practices, through compensation, restitution, remuneration and restoration for harm sustained or resources depleted, at least equivalent to the damage caused.

Source: International Peoples’ Treaty for the Control of Transnational Corporations (section 4: Specific Obligations of Transnational Corporations).

XIII Vienna Convention on the Law of Treaties, article 27: “Internal law and observance of treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”
3.6. Are there alternatives to “free trade” treaties?

Trade and investment treaties like TTIP are based on an undisputed and indisputable model of society and economics: capitalism as the only possible and best system. From there on, the arguments in favour of such treaties become “objective truths”: we are assured that TTIP will generate economic growth, employment and development, that smaller firms will have greater business opportunities, and that this agreement between the world’s two largest economic blocs will be a chance to establish standards and rules that will subsequently be adopted globally, thereby benefiting third countries. Its promoters argue that such a trade agreement between the European Union and the United States will help us take better advantage of economic liberalisation and moderate what has so far been a “globalization without rules”. All this rests on the key idea of regarding the object of international trade as the free exchange of goods and services, enhancing competition between economies and thereby resulting in lower prices and job creation.

The reality, however, is quite different. The EU, whose creed is the free movement of capital and “free trade”, has based its economic policy on supply-side economic growth, the primacy of the financial sector’s interests, privatisations of public services and regressive tax policies. TTIP is thus linked to the idea of stimulating the economy by increasing exports, foreign trade and competitiveness, i.e. through deregulating social rights, lower wages and restraint across all public policies. But the link between increased trade flows and economic growth and the general public wellbeing is not absolute. In fact, in an economic context marked by falling profits and reduced consumption, TTIP responds – contrary to the claims of the transatlantic treaty’s propagandists – to capitalism’s intrinsic need to expand trade boundaries, unlimitedly accumulate wealth and commodify all aspects of life.

“Free trade” treaties are not necessarily useful in themselves, and their provisions and contents cannot be alien to the internal realities of the countries concerned and the needs of the population as a whole. In fact, the content of such agreements should be the product of balancing economic variables with social results. And an assessment of their impact on people’s lives should be the real indicator to be considered. For macroeconomic figures, increased exports and GDP growth cannot hide the fact that, on one hand, a minority is pursuing its logic of growth and accumulation, while on the other, poverty and inequality for the majority are rising.
TTIP serves to underpin the economic model that is destroying the planet, giving priority to the most polluting forms of energy and opening the door to fracking. As Noam Chomsky says, “humanity is racing to its own destruction: lethal industries are subsidised and incentives given for the extraction of the last drop of oil even though scientific evidence tells us we should leave these fossil fuels where they are”. For unlimited growth and unfettered competition – the backdrop to all the trade agreements promoted under the new *lex mercatoria* – have nothing to do with people’s real needs or consideration for the environment.

From this perspective, trade and investment cannot be ends unto themselves. The distribution of wealth, economic growth and the quantification of macroeconomic indicators should at least be aligned with principles of human and sustainable development, or else with a radically different economic model setting out from an acceptance, for a start, of the physical limits of our planet. Taking tentative steps along these lines, the *New Alternative Trade Mandate* offers some principles for defining alternative regulatory proposals: European trade policy should respect the rights of regions and countries to develop – and give priority to – local and regional over global trade (for example, in the food sector); common goods and public services should be excluded from European trade and investment negotiations; European governments and parliaments should hold their corporations to account for the social and environmental consequences of their operations in Europe and elsewhere; governments should regulate imports, exports and investments in keeping with their own strategies for sustainable development; countries, regions and communities should regulate the production, distribution and consumption of their own goods and services; governments, parliaments and public authorities should have full rights to regulate financial markets, in order to protect social rights and to safeguard democratic control and guarantee socio-environmental sustainability.

Moreover, with a view to reinterpreting the neoliberal legal armour built up with “free trade” and investment treaties, following Alejandro Teitelbaum we may propose a few measures, such as: denouncing trade agreements, whether bilateral, regional or multilateral, when they expire; not ratifying any treaty that is based on contractual asymmetry and that disregards human rights; withdrawing from the International Center for the Settlement of Investment Disputes (ICSID); re-establishing the territorial jurisdiction of national courts; reviewing the constitutionality of those treaties; and, finally, checking for fatal flaws in the conclusion and adoption of such treaties which might make them void.
BOX 9. Principles for trade and investment agreements

- **Paradigm shift**: trade based on complementarity, with respect for peoples and nature, as opposed to trade based on competitiveness, war and destruction.

- **Normative hierarchy**: human rights should have primacy over trade and investment rules.

- **Consultation**: including companies, naturally, but also the various tiers of government, trade unions, consumer organisations, social movements, individuals and peoples and so on.

- **Transparency**: in the whole process, and at least in all matters linked to parliamentary process.

- **Commons**: leave water, health, education and public services out of trade rules and put them under public and collective stewardship.

- **Legal sovereignty**: close down private arbitration tribunals and seek to establish agencies and bodies for the public control and citizen oversight of transnational companies.

Source: Authors

3.7. The responsibility of international institutions

The responsibility of international organisations is specifically regulated by the Space Treaty of 1967, ratified by more than 100 countries, and then in the draft articles submitted by the International Law Commission to the UN General Assembly in 2011. “An international organization incurs international responsibility”, the draft says, “by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful”, or “authorizing member States or international organizations to commit an act that would be internationally wrongful”. Accordingly adjustment policies, conditional loans and EU memoranda constitute legal straitjackets forcing States to commit wrongful acts. And those responsible are the World Bank, the IMF, the European Commission and the European Central Bank.
In addition, the violation of an international standard and the attribution of that wrongful act to an international organisation gives rise to the corresponding civil and criminal liabilities, which in turn give entitlement to various forms of reparation: restitution, compensation and satisfaction. As Javier Echaide, lawyer and member of ATTAC Argentina, says:

One possible form of this restitution would be that the bodies which unleashed unrestricted, unregulated capital flows under the aegis of bilateral investment treaties, or the waves of privatisations as prerequisites for the granting of loans, should fund the costs of *de-privatisation*, i.e. of bringing the state of affairs back to the situation where the causal events leading to a violation of human rights began.

Economic and financial institutions are not exempt from this category, and therefore they should be held accountable for the damage caused. In other words, they should provide restitution and compensation to the peoples affected by their policies in breach of international human rights law.

At the same time these institutions have evident criminal responsibility. Consequently, we believe it is urgent for a standard classification of international economic crimes to be adopted: the practices of international economic and financial institutions – and the individuals responsible for them – in which they commit acts or act as accomplices, assistants, abettors, instigators or accessories after the fact in gross breaches of civil, political, social, economic, cultural and environmental rights may be classified as international economic crimes; this international element arises where the criminal conduct affects the collective security interest of the international community or infringes legal rights recognised by it as fundamental.

Right now, though, some of the policies adopted by the economic and financial institutions, including those comprising the Troika, may be regarded as crimes against humanity as classified in the Statute of the International Criminal Court. There is already enough evidence and a sufficient normative basis to bring action against the individuals responsible – the members of the European Council, the EU presidents and prime ministers, the European Commission president, and the chairs of the boards of the IMF, the World Bank and the European Central Bank – in the International Criminal Court.

As we see, there are various alternatives for holding the international economic and financial institutions and their leaders to account for civil and criminal
responsibilities. What is unacceptable is that plans as destructive as those which they have imposed should go unpunished. For, in the end, their economic policies are real international crimes.

3.8. The “new” TTIP arbitration system

Last September the European Commissioner for Trade, Cecilia Malmström, presented a proposal for modifying the investor-State dispute settlement mechanism (known as ISDS) provided in the Transatlantic Trade and Investment Partnership (TTIP). According to Malmström this reform and the new Investment Court System involve a “modernisation of the former dispute settlement system”. But this is untrue, as the substantive features of the arbitration system are maintained: the formal modifications proposed concern just one link in the long chain of impunity for transnational corporations surrounding arbitration.

The proposal modifies various points: the public appointment system for judges, who will not be part of the judiciary but rather “experts” chosen by a committee created pursuant to the Treaty, their fees, the duration of their mandate, the two-level structure – a first-instance chamber and an appeals division, both within the new arbitration tribunal – and procedural aspects, i.e. random selection of case judges, conflicts of interest, publicity, deadlines for decisions and the possibility of applying to the arbitration court at first instance after receiving a negative decision at state level... But, without denying the significance of some of the changes, in this “new” version of arbitration, the core elements of the proposal remain unaltered.

In the Investment Court System presented by the commissioner there is not one mention of human, labour, environmental, social or cultural rights. Thus the Court’s judges will essentially apply the trade and investment rules contained in the TTIP. In other words, the international human rights system will not be connected with trade and investment rules, and the fact that international human rights law is hierarchically superior to the content of any trade treaty is to be disregarded; this approach means that at least article 103 of the United Nations Charter and article 52 of the Vienna Convention of the Law of Treaties are infringed.

The rules protecting investors’ rights are very precise, detailed and abundant: the expansive conception of investment; the repatriation of funds that are part of transnational companies’ investment in a country; compensation commitments for losses incurred in the events of war, armed conflict or direct or indirect
expropriation; observance of contracts signed and of contractual obligations... and a whole string of rules favouring large corporations. Yet the Commission’s proposal does not include States’ right to restructure their debt or respect for States’ sovereign immunity, ignoring the resolution adopted on 14 September 2015 by the UN General Assembly, and the proposal contains no legal standards or principles for defending society’s majority interests.

The concepts of investment and indirect expropriation are also regulated in keeping with corporate interests. Thus the term “investment” is defined very loosely and identified with assets, thereby including shares and other forms of holdings in companies, rights deriving from all kinds of contributions for generating economic value, moveable and immovable property, rights in rem, industrial and intellectual property, public services, licences granted by law or contract, including those linked to the exploration and exploitation of natural resources, etc. And all “legitimate” income expectations are protected, including both consequential damages and loss of profit, i.e. an investment frozen by a public authority is subject to compensation both for the amount spent and for future lost profit, even beyond the direct and immediate consequences of the causal event.

The principle of “fair and equitable treatment” remains at the heart of the Commission’s proposal. This is an indeterminate legal concept that may be somewhat intangible, but once suitably framed and geared to protecting foreign investors vis-à-vis a host State, it is perfectly well defined. It means that the host State cannot discriminate against foreign investors and must treat them fairly and equitably, which requires a stable legal framework compatible with the investor’s expectations. An interpretation based on equity, however, would allow for positive action clauses to favour disadvantaged social and economic sectors.

Commissioner Malmström has said that the proposed reform will not affect the arbitration system provided in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA). This means that, through their subsidiaries in Canada or the EU, transnational companies in the US and third countries may invoke the conventional arbitration mechanism provided in CETA. The European Commission is also maintaining the previous arbitration system (ISDS) in the more than one thousand investment protection agreements that it has ratified worldwide.

In the Commission’s proposal, the amendments that countries such as India, Indonesia and South Africa are proposing – after appraising the impacts of the
trade and investment treaties signed in recent years – are completely ignored. But notably what these countries are advocating is a new regulation of the obligations of investors, their home States and host States, providing for the protection of human, environmental and cultural rights over trade and investment rules; a redefinition of the concepts of investment, fair and equitable treatment, expropriation and dispute settlement systems; States’ right to sovereignty and development; accountability; healthcare and social rights in general.

With this “alternative proposal”, we, for our part, propose the abolition of the existing arbitration tribunals and the creation of a World Court on Transnational Corporations and Human Rights – to complement global, regional and national mechanisms; to ensure that affected individuals and communities have access to an independent international body in which to seek justice in the event of breaches of civil, political, social, economic, cultural or environmental rights; and to be responsible for receiving, investigating and judging complaints brought against transnational companies, States and the economic and financial institutions that support them regarding any human rights abuses that they may commit.

**BOX 10. Alternative proposals for control**

- A binding external code: Its content should combine a synthesis of what is provided in the *ad hoc* rules of the OECD (the Guidelines), the ILO (the Tripartite Declaration) and the UN (the Norms of 2003), as well as the draft mandatory codes drawn up by the United Nations in the 70s. Moreover other aspects should be included such as: extension of the parent company’s responsibility to its subsidiaries, suppliers and subcontractors; technology transfer; subordination of multinationals to the sovereignty of host States, the notion of interdependence, indivisibility and permeability of applicable human rights standards; civil and criminal responsibility of company managers; criminal liability of legal persons and dual indictment – large corporations are criminally liable for any crimes and offences that they commit and so are the managers taking part in their decisions.

- An international court: responsible for receiving, investigating and judging complaints brought against transnational companies, and for
enforcing its judgments. Its procedure and other technical aspects, such as coordination with national courts and international control bodies, should not pose insuperable legal or technical difficulties, especially if account is taken of the proposals already drawn up by various UN rapporteurs. Its composition and operation will be consistent with the principles of the rule of law, banishing the formula of business tribunals tied to bodies such as the World Bank.

- A transnational corporations centre: with the aim of analysing, investigating and overseeing the practices of multinationals. Such a centre could be attached to the United Nations and above all it should be managed by a four-party structure of employers, governments, civil-society movements and trade unions. Its chief function will be to investigate complaints brought by groups and organisations impacted by the practices of transnational companies and to compare these with the CSR reports submitted by those companies.

Source: *Diccionario crítico de empresas transnacionales* (Critical dictionary of transnational companies) (Icaria, 2012)

### 3.9. The United Nations and the consensus of the powerful

In late June 2014, at the 26th session of the Human Rights Council in Geneva, the United Nations adopted a highly significant resolution: “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” The resolution also stated that the working group should hold its first session over five working days in 2015 before the 30th session of the Human Rights Council. Exactly a year later the group set forth with its first meeting in Geneva, with the goal of drawing up an international standard to oblige large corporations to respect human rights.

On 26 June 2014 the resolution was backed in the Human Rights Council by a total of 20 countries, with 14 against and 13 abstentions. On one hand, the core countries – the US, the EU, Canada and Japan – and transnational companies
naturally did not like the resolution at all; hence the pressure they have been applying ever since to derail the process. On the other, the resolution was backed by more than 600 organisations from around the world representing victims of the practices of multinationals, civil-society movements, local communities, human rights groups, etc. Thus at the meetings to be held at the United Nations over the next few years with a view to drawing up a binding international treaty, we will begin to see a direct clash between those who defend large corporations and their political, financial and even legal interests, and those of us who advocate setting out on a road of control and of subordination of the rights of a small minority to the common interest, the rights of social majorities and global commons.

As regards the various civil-society organisations like ours which have in recent years followed the same path – that of applying pressure and advocating legally binding international standards on transnational corporations and human rights, we believe it is still worth seeking a treaty conceived “from below”, in the wake of the widespread mobilisation and struggle by social movements against the _lex mercatoria_ and the _architecture of impunity_ on which the business of large corporations is founded. But this, in our view, requires a clarification of certain questions such as the value of consensus and of “realism” in negotiations.

Much emphasis has been put on the broad consensus achieved by the _Guiding Principles_ and the “Protect, Respect and Remedy” framework in the UN Human Rights Council, and their warm reception by business lobbies and associations. But in practice this consensus is due to the voluntary nature of the Ruggie framework and its kinship with the various mechanisms linked to CSR. So what should be considered is whether the course taken is useful for effectively controlling transnational corporations, and thereby diminishing their systematic violations of human, social, cultural and environmental rights in their daily practices. Are victims, impacted communities, social movements and trade unions included in this consensus?

And at a time when we confirm daily how capitalism deploys its power ruthlessly and how transnational corporations have penetrated the whole United Nations system, is consensus desirable? Is it not that only submission to business logic allows this consensus? And if consensus is a value in itself, why was it broken when a resolution on binding standards was adopted? For a consensus based on the interests of rich countries and multinational firms is in reality an imposition. And the possibility of discussing an international agreement for the control of transnational corporations has no place in the consensus of the powerful.
As the US representative said to the UN Human Rights Council last year, any majority resolutions adopted by the working group will not be binding in the countries that voted against the group’s creation. In other words, the major powers will oppose any draft resolution, whatever it may be, on binding rules for the control of multinationals. This represents a reinterpretation of international law based on power relationships with a very peculiar notion of consensus, placing big companies at the heart of international standards and in turn subordinating most people’s rights to those companies’ private interests.

Consensus is normally linked to “realism”, and the call for realism very often leads to social movements being asked to act with “pragmatism” and broad-mindedness. But we should note that our idea of realism is not the same as that of core-country governments and transnational corporations: these days realism and pragmatism tend to lead to empty, ill-defined processes, and we must be clear that asymmetrical power relationships are at odds with consensual processes. So do not want a treaty at any cost but rather a treaty with content that represents real progress over past agreements. As the struggle of the Greek people against the Troika has taught us, consensus and realism are equivalent to unconditional acceptance of plans tailored to suit the interests of European capital; in Geneva this logic was present as of the first minute of talks.

Within the United Nations, the normative evolution on transnational companies has crystallised into two positions responding to very different regulatory rationales. On one hand, total voluntariness, i.e. the essence of codes of conduct based on the self-regulation associated with the Global Compact and the Guiding Principles; on the other, the logic of global regulatory systems and binding protection of human rights, which through the meetings to be held in Geneva may begin to turn into the new normative axis. The ascendancy of one or the other option is not the product of technical differences: it is the result of what we may call “class struggle on the field of legal regulation”.

In this field, mobilisation and alliances between grassroots organisations are vital. For they are inevitably up against large corporations that cannot directly take part in the process of discussing and negotiating the treaty, as they are a part of it and being regulated by it, but they have manifest weight in the backroom of negotiations and enjoy the support of many governments that share their goals and interests.
3.10. Obstructing regulatory proposals at the UN

At the first session of the intergovernmental working group on transnational corporations and human rights, held in July 2015 at the United Nations office in Geneva, the representatives of the participating countries – as it is an open-ended group, any country in the world, whether a member of the Human Rights Council or not, may take part – expressed views on what an international instrument of this type ought to be like and what it should include.

Accordingly, the session was also attended by various experts, jurists, members of grassroots organisations, human rights activists and persons affected by the operations of large corporations. One was Rosiane Mendes, from a fishing community in the Brazilian State of Maranhão that is suffering impacts from the activities of the mining company Vale: “We are here, as persons impacted by transnationals, to submit proposals to States on holding companies to account for violations of our human rights.” On behalf of the global campaign to Dismantle Corporate Power and Stop Impunity, Mendes summed up to the working group what the platform is calling for: “We want to be consulted and to participate in the decisions and the auditing of companies. This is why we are here today in Geneva, to say ‘yes’ to the dismantling of transnational corporations.”

Though it is certainly a step forward that all these voices may be heard within the United Nations, the process of drawing up an international instrument to guarantee respect for human rights by big companies is going to be long and arduous. This was already apparent in the discussions at the first meeting in Geneva, pointing to a steep path strewn with obstacles for carrying the initiative forward. In other words, the major powers and corporate lobbies are going to do all they can to obstruct the process. To this end they will use strategies such as blocking the discussions, discrediting the debate, dragging out the process, exploiting the group’s pluralist character and promoting the further corporate capture of the UN.

Indeed, at the intergovernmental working group’s opening session, the EU sought to prevent the process from even getting started. After allowing the Ecuadorian representative to chair the session, the EU representative proposed that rather than being confined to transnational corporations the discussion should cover all enterprises, and requested that the meeting agenda be changed to include the
implementation of the UN’s Guiding Principles. Except for support from Mexico, the countries that took the floor – Cuba, South Africa, Pakistan, Bolivia, Russia, El Salvador, China, Egypt, Venezuela and Indonesia – opposed the EU position, as the mandate in the UN resolution refers to transnational corporations and says nothing about discussing the Ruggie framework. Following informal consultations and once the session was finally able to continue as programmed, the EU withdrew from the discussions and was absent from the remaining sessions. First the EU sought to obstruct the discussions by shifting them to its own ground; then, on finding that this strategy would not work, it walked out.

None of the major powers attended the remaining discussions: aside from the European Union, which took part only at the start, sought to stall the debate and did not return (only one member country – France – kept its representative, though without taking the floor), the United States, Japan and Canada did not even turn up. The same countries that had opposed the resolution a year before were not now going to let their participation endorse a process that might harm the interests of transnational corporations. This is basically a discrediting strategy: let the “axis of evil” countries talk among themselves – Ecuador, Bolivia, Cuba and Venezuela have been most active in calling for binding international standards for large corporations – with a view, when the time comes and as required, to objecting that any output from the working group is unrepresentative because it reflects the views of only a few countries.

The very procedure followed by the United Nations when undertaking an initiative is in itself a form of delaying the enactment of any new standards, if not indefinitely then at least for long periods. Let us recall that the resolution to create this working group was adopted in 2014; this year the first session of discussions was held; in 2017 we will have an initial proposal for the structure of a treaty, and we will have to wait until 2018 for a draft text. On top of this there may be further stalling tactics later on, and moreover when documents start to circulate with concrete proposals, the process will be further drawn out as amendments and additional provisions are included. Again, the asymmetry between the power of the lex mercatoria and the fragility of international human rights law is evident: by contrast with the speed with which the European Union and the United States have negotiated trade and investment treaties in recent years – TTIP is taking longer than planned due to the strong social mobilisation against it but all other trade agreements in recent years (with Colombia, Peru, Central America, etc.) have been negotiated quickly, as has the “free trade” treaty
between the EU and Canada (CETA), which is now only pending translation into all the EU languages for ratification –, human rights standards follow a much slower process with complications at every turn.

When the task of organising commissions and working groups falls to those who control political and economic power, these rarely invite any individuals or groups that oppose their positions. An example of this would be the dozens of official forums on “social responsibility” held over the past decade and a half: while business schools, business think tanks and civil-society organisations in favour of CSR have occupied the committees and discussions, those of us who have opposed this new model of business-society interaction have not had the chance to express our views on the same footing. But when discussions are organised by “progressive” institutions and governments (in this case the Permanent Mission of Ecuador to the UN in Geneva), representatives of all tendencies are usually invited. Yet this political pluralism, undoubtedly necessary if we are to avoid the very practices we criticise, is now taken advantage of by the major powers to bring their “specialists” and “experts” into the debate and thereby drag out the whole process.

From 1927, when Rockefeller funded the League of Nations Library, which still functions in the Geneva offices, to 1999 when Kofi Annan presented the Global Compact at the Davos World Economic Forum with the backing of the world’s largest transnational corporations, and the conspicuous promotion of public-private partnerships and inclusive capitalism by the UN in the first decade of this century, this multilateral organisation has undeniably undergone a process of “corporate capture”. Accordingly the corporate lobbies, backed by the governments of core States, will do all they can to again derail the process, as they did in the last three decades of the 20th century. This is what we are up against.

3.11. Towards binding international standards

After decades of discussions and failed attempts at the United Nations, the UN Human Rights Council resolution on the creation of “an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” is certainly a significant achievement, as such an instrument may, in the long term and on a global scale, improve the protection and realisation of human rights. And above all it may help put an end to the impunity for the abuses committed by large
corporations, especially in periphery countries, ensuring access to justice for the victims of their operations.

On the basis of the preparatory work carried out over the past two years, resulting in the proposal for an International Peoples’ Treaty for the Control of Transnational Corporations, we believe that this new regulatory proposal on corporations and human rights should cover at least the following aspects:

**BOX 11. Proposals for an international treaty on corporations and human rights**

- **Put the focus on transnational corporations**: for there is a legal vacuum in international human rights law which needs to be addressed in order to put an end to the impunity for human rights violations committed by such companies.

- **Assert the obligation to respect all human rights**: in particular the right to life, the right to free association, the right to freedom of opinion and expression, the right to non-discrimination, the right to work, the right to food, the right to water, the right to housing, the right to health, the right to self-determination and the right to a healthy environment.

- **Oblige States to protect human rights and reaffirm human rights’ primacy over trade and investment treaties**.

- **Establish civil and criminal responsibility for companies and their directors**: the principle of dual indictment – by which both the legal person and the individuals taking decisions are liable – must be recognised.

- **Include obligations for international economic and financial institutions**, for the economic policies imposed by the IMF, the World Bank and regional banks contribute to the impunity of transnational corporations.

- **Establish international mechanisms to enforce the treaty**, including a body responsible for assessment, a centre for monitoring transnational...
corporations and a world court on transnational corporations and human rights.

- Protect negotiations from influence by large corporations.

Source: Global campaign to Dismantle Corporate Power and Stop Impunity (2015)

This new international legally binding instrument should detail the specific obligation of transnational companies to respect all human rights. It should, in short, include their obligation to respect international human rights law, international labour law and international standards on the environment. Transnational companies should also respect national regulations and refrain from interfering in their drafting process, recognising the primacy of human rights and the general interest over private economic interests.

The future binding United Nations treaty should affirm States’ obligation to protect human rights against violations committed by transnational companies, detailing the specific measures that States should take in this regard. Specifically these should include the establishment of effective mechanisms at national level to facilitate access to justice and reparation for victims and impacted communities. States should also ensure that large corporations headquartered in their territories respect all human rights when operating abroad; the treaty will have to specify precisely when such extraterritorial obligations arise, but States must at least embrace the principle of extraterritoriality when a multinational is registered, has its headquarters or carries out business/financial activities in the State in question.

The proliferation of “free trade” treaties and investment protection agreements has given transnational companies great economic, political and legal power. Such agreements protect the business of multinationals against any public decisions that might adversely affect their interests – including their future earnings – and take no account of the binding obligations that States have concerning human rights. In this regard, international arbitration tribunals and investor-State dispute settlement systems are of particular concern, as they allow large corporations to sue States so as to impose their preferences and to promote their interests. Accordingly, the treaty should oblige States to enact binding clauses on the hierarchical supremacy of human rights in all the trade and investment treaties that they sign, and renegotiate existing treaties with this same purpose.
Likewise, the United Nations treaty should require States to provide for the legal accountability of large corporations and their managers in their national jurisdictions, and their civil and criminal liability should extend to offences committed directly as perpetrator and also in the role of accomplice, abettor or accessory. The treaty should also include provisions on the joint and several liability, by action or omission, of transnational firms for their subsidiaries and chains of suppliers and subcontractors. This principle of joint and several liability should also apply upstream, ensuring that the investors, shareholders, banks and pension funds that finance multinationals may be held responsible for any human rights violations that such companies commit.

Structural adjustment policies and the conditions imposed by the regional and international financial institutions operate as straitjackets forcing States to open up their borders to large corporations. As a result, these bodies have significant responsibility in the human rights violations committed by multinational companies. Yet the IMF and the World Bank are specialised agencies within the United Nations, and so their decisions must conform to the UN Charter and respect human rights. It is therefore crucial that the international binding instrument includes measures on the obligations of these regional and international financial institutions, requiring them to contribute to the treaty’s implementation and not to take measures contrary to its goals and rules.

As well as the lack of binding international standards, a key aspect to address in stopping impunity for human rights abuses by transnational companies is the lack of international control and implementation mechanisms. To fill the vacuum, three bodies should be set up: a body to assess their compliance, a public centre for monitoring large corporations, and a world court on multinationals and human rights. One of the main contributions of the new international legally binding UN instrument should be to give victims the possibility of lodging complaints against multinationals for breaches of their obligation to respect human rights.

The doors of the United Nations have for years been wide open to transnational corporations, which are referred to as “stakeholders”, following the general trend of handing over decision-making power to large economic and financial conglomerates in preference to States, governments and civil society in general. This alliance between the UN system and large corporations creates a dangerous confusion between an international public institution – which, according to the Charter, represents “the peoples of the United Nations” – and a group of agencies
that represent solely the private interests of a political and business elite. By
definition, multinationals defend only their private interests – especially those
of their majority shareholders – and not the general interest, and for this reason
they should not be allowed to participate directly in a process in which they would
be both judge and party.

3.12. For an international peoples’ treaty

In this context, in the organisations forming the global campaign to Dismantle
Corporate Power, we have for years been pointing to the need to establish effective
mechanisms for controlling transnational firms. As part of this, three continental
hearings organised by the Enlazando Alternativas (Linking Alternatives) network – a
bi-regional platform assembling many Latin American and European social, trade-
union, environmental, indigenous and women’s organisations, establishing links of
solidarity and resistance against multinationals and free trade agreements – have
been held in parallel to the summits of presidents and heads of State of the European
Union, Latin America and the Caribbean, in Vienna (2006), Lima (2008) and Madrid
(2010). All of them addressed the impacts of neoliberal policies and European
multinationals and dozens of witnesses and experts told the tribunal what the
advent of large corporations in the region had been like and what it has meant for
local communities and ecosystems. With the various cases concerning transnational
corporations presented at the sessions of the Permanent Peoples’ Tribunal, the
structural nature of the socio-environmental impacts generated became evident.
In the words of the opinion rendered by the tribunal held in Madrid, all these cases
“should be considered not just for their singular features but also as the expression
of a situation characterised by the systematic nature of these practices”101.

And the proposed International Peoples’ Treaty for the Control of Transnational
Companies XV sets out along these lines. For we believe that, as well as strengthening
the processes of resistance to multinationals, it is vital to promote effective
mechanisms for social redistribution and the control of large corporations allowing
us to progress in the medium term towards a change of socio-economic paradigm.

XV The organisations forming the global campaign to Dismantle Corporate Power and Stop Impunity carried out a consultation
with the campaign members (including La Vía Campesina, World March of Women, Friends of the Earth, Public Services Inter-
national, Jubileo Sur, the Seattle to Brussels Network, the Transnational Institute, Ecologistas en Acción, Hegoa, Observatorio
de Multinacionales en América Latina (OMAL) – Paz con Dignidad) and various legal experts and academics to develop a final
text of the Peoples’ Treaty, which is to be submitted for a broad dialogue ending with a global assembly in 2016.
Thus, as we take steps in building other economic and social models not based on maximising private profit above all social and environmental considerations, the rights of individuals and peoples should at least not be subordinated to the legal certainty of large corporations.

Accordingly, with a view to creating instruments for exercising real control over such companies’ operations, various social movements, indigenous peoples, trade unionists, jurists, activists and victims of the practices of multinationals have jointly drawn up an International Peoples’ Treaty for the Control of Transnational Corporations.

A radical alternative proposal whose objectives are, on one hand, to propose control mechanisms to halt human rights violations committed by transnational corporations, and on the other, to offer a framework for exchanges and building alliances between communities and social movements to reclaim the public space now occupied by corporate power.

The idea of all this is that the collective work underpinning this treaty should reflect the experience acquired over the past decade in the various struggles against transnational companies and the national and international institutions that support them. In the words of the proposed Peoples’ Treaty, the aim is to “construe and analyse international law ‘from below’, from the perspective of social movements and resistance by men and women, not that of State-centred economic and political elites”.

Accordingly we submit to the recently created United Nations intergovernmental working group on transnational corporations and human rights the various proposals and alternatives propounded by hundreds of grassroots organisations in this International Peoples’ Treaty. The last paragraph of its preamble says:

We proclaim the International Peoples Treaty and call on the UN General Assembly to adopt it as a common standard for all States and institutions in relation to transnational corporations and urge that the rights, responsibilities and proposals recognized in this Treaty be transformed into new legislation, mechanisms and institutions at the national, regional and international level and that their implementation be promoted among all peoples and States.

We believe, however, that an international legally binding standard to regulate the activities of transnational companies should address at least three broad issues. First, new general premises need to be established as to the responsibility
of transnational companies. Thus national and international standards should be regarded as mandatory for natural and legal persons; transnational firms are legal persons, and as such are subjects and objects of law. Second, the specific obligations of transnational companies should be regulated, including a ban on patenting life forms, payment of fair and reasonable prices to suppliers and subcontractors, control of security personnel employed by multinationals and observance of all rules against discrimination. Third, we propose the creation of bodies such as a public centre for controlling large corporations and a world court on transnational companies and human rights, which would be responsible for trying multinationals and their managers for human rights and environmental offences.

In this regard the legal and political content of the *International Peoples’ Treaty* reflects the doctrine laid down in various judgments of the Permanent Peoples’ Tribunal. The responsibility of transnational firms for systematic human rights violations is addressed through the four pillars of corporate responsibility, extended to include home States, host States and economic and financial institutions. So the Treaty does not refer only to the liability of transnational corporations. It also covers the complex areas of perpetration, complicity, cooperation, incitement, inducement and acting as accessory after the fact.

As to international crimes against humanity, the *Peoples’ Treaty* seeks to develop the notion of economic, financial and environmental offences as offences against humanity. To this end it proposes the establishment of new categories of offence and of international control bodies. International crimes should be defined so as to include structural adjustment policies, payment of illegal and illegitimate debt, exploitation of natural resources, economic offences impacting communities as a whole, speculation with foodstuffs, child labour, etc. Gross and mass violations of economic, social and cultural rights and major damage to the environment caused wilfully or by culpable negligence should be classified as international economic and environmental crimes.

### 3.13. The alternative use of law

To define the potential alternative use of law as a means of controlling transnational firms, we must firstly specify what we mean by “counter-hegemonic globalisation”. As Boaventura de Sousa says:

> Counter-hegemonic globalisation is a vast set of networks, initiatives, organisations and movements combating the economic, social and...
political outcomes of hegemonic globalisation. It challenges the notions of world development underlying that hegemony and, in turn, proposes alternative notions\textsuperscript{103}.

Thus the \textit{International Peoples’ Treaty} is linked to international counter-hegemonic networks and is founded on a logic of resistance by peoples and communities\textsuperscript{104}.

The foundations on which counter-hegemony may be built are reflected in the key points of the proposed international treaty. The most notable negative effects of capitalist globalisation, i.e. of asymmetrical power relationships, are the exploitation and exclusion of peoples and social majorities; both are potent forms of social subordination. Hence redistribution and recognition must be the foundations on which to build counter-hegemony and the parameters with which to construct a new model of justice. The US feminist Nancy Fraser explains this as follows:

Redistributive struggles follow a logic aimed at abolishing, or at least minimizing, group differences as regards class. That is to say, they are transformative in the sense that it is not a matter of recognizing the difference of the proletariat, but rather of rising above or at least minimizing the significance of class. In struggles for recognition, by contrast, the aim is to accentuate these differences (gay and lesbian rights would be an example); they follow the watchword of ‘deconstruction in the culture plus redistribution in the economy’\textsuperscript{105}.

Fraser adds a third dimension to this new reinterpretation of global justice: representation, as a new principle implying that “anybody who is subject, in any part of the world, to a structure of governance (whether transnational, national or sub-national) which generates rules that are applied coercively must be allowed to take part in decision-making.” The World Trade Organisation (WTO) is a very clear example. For competing international jurisdictions are resulting in a manifest commercialisation of justice, highlighting the need for it to be democratised\textsuperscript{106}.

The above premises form a base on which counter-hegemonic practices may be built in order to act at the root of problems. They should in turn permeate alternative uses of law as an expression of a new form of global justice. But power relationships and the effects of inequality and exclusion are enshrined in law; hence the use of law as a counter-hegemonic instrument involves highlighting the links between the existing dominant conceptions of law and justice. Questioning these notions means questioning the social processes in which they are inherent\textsuperscript{107}.
This last issue is clearly reflected in international law. Various authors consider that concepts such as solidarity and cooperation serve as camouflage for the violence, injustice and exploitation embedded in international relations. And this view of law as the enshrinement of power relationships between the weak and the strong still prevails in today’s international law. Accordingly, its counter-hegemonic use seems to be conditioned by hegemonic forces, eroding any form of resistance or alternative use of law: “When the substantive goal is intra- and inter-generational equity, these forces prefer the traditionally soft nature of international law to a legislative order with institutional mechanisms for enforced compliance,” according to professor José Manuel Pureza.

All this is part of the architecture of impunity linked to the oversight of transnational corporations in the framework of the ILO, the OECD and the United Nations, in this latter case through the Global Compact and the Guiding Principles. Soft law is the model and any reinterpretation towards mandatory law equivalent to global corporate law will encounter all manner of hegemonic resistance, linked to the promotion of CSR in the regulatory sphere. Consequently, the alternative use of law entails clarifying – in the context of the various forms of institutionalisation – the following political, social and legal guidelines for the control of multinationals:

- Account must be taken of global, national and local spheres – both from regulatory perspectives and in social and trade-union mechanisms – for controlling transnational companies. Various forms of legal pluralism above and below State level should be explored as systems for legal and social cooperation for the control of multinationals.

- The alternative use of law involves legal, alegal and illegal uses; the conceptual reinterpretation of legality as opposed to legitimacy reemerges once more in the human rights sphere. But it is hard to confine oneself to legal uses in the context of the right to subsistence when faced with the occupation of land (legal in national terms) by multinationals, carried on outside the international legitimacy of human rights legislation.

- The use made of hard law (global corporate law), soft law (codes of conduct and CSR) and fragile law (international human rights law) by multinationals should be incorporated into counter-hegemonic practice. Contracts should

XVI Demands for greater democratic control of international financial and trade institutions, regional and bilateral trade and investment treaties and national and infra-State legislation are essential. But the alternative use of law also involves promoting and defending international human rights legislation, sovereign national legislation and regulations at non-State level.
be renegotiated so as to dispute large corporations’ normative ascendency, using law that safeguards majority rights. Codes of conduct, for their part, will only be useful to social movements if they help cultivate their ability to organise themselves and encourage dynamics of struggle and resistance.

- Official law is part of the hegemonic structure of domination and may become a counter-hegemonic instrument only through subordination to political action. Democratic confrontation and the dynamics of resistance cannot be subordinated to legal systems, just as the judicialization of the various forms of struggle and mobilisation should not be conditioned by this process, as their sources of legitimacy, their “ways of doing things” and even their languages are in most cases irreconcilable.

In the drafting of the *International Peoples’ Treaty for the Control of Transnational Corporations*, account was taken of both the potential and the fragility of the alternative use of law, and hence of the need to articulate peoples’ struggles and resistance together with a reinterpretation of international law; for the *Peoples’ Treaty* draws on legal and political variables and the dynamics of resistance.

### 3.14. The transformation of international law

The *International Peoples’ Treaty* is rooted in a conception of international law radically different from the official one, with a perspective situated far from the diplomacy of States and inter-state bodies. We believe with Rodríguez Garavito that “there is a ‘top down’ conception of international law narrated from the viewpoint of political and economic elites and focussed on the State as sole legitimate actor in international relations”\(^{111}\). Consequently, forms of public action must be reconstructed outside the traditional view of the State:

> International law has never been concerned primarily with mass movements, save in the context of self-determination and the formation of States. (...) It has treated all other popular protests and movements as ‘outside’ the State, and therefore illegitimate and unruly. This division has been based on a liberal conception of politics, which sharply distinguishes between routine institutional politics and other extra-institutional forms of protest\(^{112}\).

Moreover, the rights of social majorities are seen as tied to the historic liberal concepts of *progress* and *development* – a barrier that social movements must overcome. For as the economist José Manuel Naredo says, “a blind faith in
progress or in democratic-mercantile rituals sidelines grassroots involvement and thereby opens the way to regression and despotism”\textsuperscript{113}. Thus the notions of State, development, progress and human rights need to be radically reinterpreted, and the liberal harmony that has been established between international law and development done away with. The distinguished legal expert and professor Balakrishnan Rajagopal believes that:

First and Third World lawyers could have been much more critical of development as a master narrative for ensuring human dignity through market-led prosperity, if they had paid more attention to the radical democratic tradition in the Third World and the West. These traditions include the seventeenth-century \textit{levelers}, the eighteenth-century \textit{sans culottes}, the nineteenth-century chartists and agrarian populists, the nineteenth-century peasant rebellions in the colonies and twentieth-century women’s movements and advocates of worker councils and environmental justice\textsuperscript{114}.

“From its origins, international law has always been an ambivalent instrument”, says Pureza, who considers that “its relation with international power has always been dual: on one hand, it has been laid down to set forth in legal terms the preferences of the most powerful countries; on the other, it has been laid down to set limits on the international behaviour of those same countries”\textsuperscript{115}. Thus this Treaty adheres to a “bottom-up” vision of international law, in the wake of the mobilisation and struggle by, for example, indigenous peoples to secure International Labour Organisation (ILO) Convention 169, or the United Nations Declaration on the Rights of Indigenous Peoples.

The \textit{International Peoples’ Treaty for the Control of Transnational Corporations} is linked to a radical transformation in international law – a transformation that should be consistent at least with the following substantive principles.

First, States cannot be the only pillar on which to build international legitimacy; repossessing and reworking conventional legal instruments means challenging the dominant paradigm of political and legal order. Thus, indigenous peoples’ right to be consulted, as provided in international human rights law, is given new meaning and reconstructed in permanent consultation assembly processes. Peoples are characterised as constituent subjects of international law, able to propound and proclaim new rights.

The fragmentation of international law into separate and supposedly autonomous spheres allows transnational companies and corporate powerbrokers to impose
the political and economic rules of big business on the majority, reinterpreting international standards in the interests of dominant sectors. Accordingly, it is vital and urgent to invert the international legal pyramid and to provide a new normative codification to clearly indicate that international human rights law – including international labour and environmental law – is hierarchically superior to national and international trade and investment rules, in view of its imperative nature and its obligations erga omnes, i.e. of the whole international community and for whole international community.

The International Peoples’ Treaty seeks to develop the enforceability and justiciability of the rights of peoples, as opposed to the architecture of impunity protecting the rights of transnational corporations; concepts such as merely voluntary and unilateral accountability, which have colonised the United Nations, should be put aside. In any event, international human rights law provides various principles which only the corporate agenda rejects and reinterprets in favour of multinationals, namely:

• Human rights, and all the standards for their implementation, are universal, indivisible and interdependent.

• International human rights law hinges on the Universal Declaration of Human Rights, together with the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and their optional protocols, jointly forming the International Bill of Human Rights, along with the declarations, guidelines, comments and principles adopted at international level.

• The various sources of international law, as set out in article 38 of the Statute of the International Court of Justice, are constituted by international conventions, whether general or particular, international custom, the general principles of law recognised by legal systems around the world, as the main and original sources of legal norms, and judicial decisions and the teachings of the most highly qualified legal scholars, as extra sources and interpretative guides for existing rules. In international law, custom has the same legal value as international treaties, and customary international law has force and is mandatory. The International Bill of Human Rights is part of this law and is a real peremptory norm – or jus cogens – embodying and protecting the essential interests of the international community.

• Transnational corporations and the international economic and financial institutions must respect the sovereignty of peoples and States, in keeping with respect for the right to development, to a good life and to the commons.
• Transnational corporations, international institutions and States must respect and submit to the provisions of the standards, recommendations and declarations forming international human rights law.

A new international democratic constitution should establish a plurality of principles and human rights for a new era; State ratification of international standards should cease to be the cornerstone of the international order. These new foundations should take account of the following principles:

• That all peoples have the right to self-determination and to freely determine their political status and to pursue their economic, social and cultural development, and to have free access to the autonomous, harmonious, sustainable, self-centred and inclusive development of regions as well as to a good life, to public services and to the commons. The concept of development should be reinterpreted on the basis of new values and proposals emerging from social movements and communities and with respect for the environment.

• That the sovereign equality of States, between peoples and between men and women, together with the fair distribution of wealth and respect for nature, constitute the principles on which a new international political, economic and legal proposal should be built in a framework of international solidarity between peoples and individuals.

• That any new international democratic and egalitarian proposition should be consubstantial with fundamental human rights. The United Nations Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and their respective protocols, along with international conventions, whether general or particular, on human rights, international custom and the general principles of law are the foundations on which to build a new international legal system.

• That it is essential to recast the texts constituting the normative framework on human rights, and that a new constitution-building process is needed to accommodate the demands of men and women as well as of social movements, and to safeguard at least new rights relating to peace, solidarity, a good life, nature, food sovereignty, democracy and the State, international migration, women’s sexual and reproductive health, indigenous peoples and the rights of minorities.

The United Nations Charter enshrines the major powers’ hegemony in international relations. The Security Council has five permanent members with a right of veto,
according to the unanimity principle, allowing any of them, namely the US, France, the UK, China or Russia, to block any decision. This is why a radical transformation is needed to make the defence of social majorities the basic premise of its work; the international institutional framework needs a radical reformulation revolving around the representation of peoples and individuals. Thus, at the least, the right of veto should be abolished and the Security Council should comply with international law, while the number of members and responsibilities of the United Nations General Assembly should be increased, to include representatives of parliaments, peoples and communities so as to build real international pluralism. International law should be linked to the UN General Assembly as the core institution of international pluralism.

The Washington Consensus, now known as the Brussels Consensus, is based on a trio of privatisation, deregulation and institutional crisis in the welfare state. But the rules adopted at EU level clash with the principle of non-regression in the fulfilment of social rights. The 1996 International Covenant on Economic, Social and Cultural Rights provides that the public authorities are obliged to use available resources for the benefit of the rights of social majorities, so to infringe the non-regression rule is to infringe that international covenant, which is a mandatory treaty.

3.15. Building alternatives

The dynamics of resistance, regulation and alternatives in response to transnational companies are advancing simultaneously, in parallel and dialectically, all within a logic of process and with a perspective of transition. It may be said that, in this context, the three perspectives are complementary, and all three in turn require governments, companies and grassroots organisations to establish other legal and socioeconomic systems not based on what Polanyi, referring to the origins of the market system and observing that “within a generation the whole human world was subjected to its undiluted influence,” called “the motive of gain.”

XVII The Committee on Economic, Social and Cultural Rights in its 48th session (30 April to 18 May 2012) “urges the State party, in light of the indivisibility, universality and interdependence of human rights, to take the necessary legislative measures to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights. The Committee also recommends that the State party take appropriate measures to ensure that the provisions of the Covenant are fully justiciable and applicable by domestic courts.”
As part of this same proposal for transition, the aim is to combine demands for both the improvement of existing legislation and the enactment of new rules at national and international level – regarding transparency and accountability, assessment and monitoring of the practices of large corporations, re-nationalisation of certain strategic economic sectors, fair taxation subordinating company profits to the effective realisation of human rights, etc. – aimed at governments and multilateral institutions, with the deployment of alternative projects which, setting out from renewed paradigms not based on the “motive of gain”, may be driven by civil-society organisations so as to progress towards new emancipatory horizons centred on diversity, community, democracy and the sustainability of life.

Both paths are dialectically linked, bearing in mind that, in the words of the economist and professor Miren Etxezarreta, “a proposal, a means or an alternative instrument for resolving a particular problem is not the same as an alternative society whose object is to subvert the existing one.” And, moreover, they are constructed within a logic of process, in the knowledge that, in that same author’s words, “the alternative is the very process of struggle and transformation, a process which needs to be constructed in everyday life, in the struggle for a different society”\(^\text{120}\).

Worker-run businesses, local currencies, responsible public procurement, solidarity lending, ethical banking, fair trade, agro-ecological consumer groups, right-of-use community housing projects, worker cooperatives, social enterprises, short supply chains – all these are examples, to varying degrees and with diverse potentials, of how it is viable to organise human activity otherwise, outside the logic of capitalist accumulation. Thus whereas some of them, especially in Latin American countries, are helping to dispute areas of power with multinationals, others are at a fledgling stage and constitute “testing grounds”, serving on a smaller scale to try out socially and environmentally responsible practices founded on the principles of solidarity-based, feminist and eco-friendly economics\(^\text{121}\). As Ramón Fernández Durán and Luis González Reyes, have written in En la espiral de la energía (In the energy spiral), , “if these small-scale experiments are successful, they will turn into aggregation and emulation nodes facilitating the next phase”; they will constitute “vital beacons and test beds”\(^\text{122}\).

The challenge in this context lies in how to continue articulating real and viable alternatives allowing us to go on devising other ways of conceiving economics. Countless social movements are trying to go beyond capitalist economics and the
State as the immutable pillars of social organisation, seeking alternatives based on solidarity, proximity and participation. Along these lines, radical democracy and human needs are key factors for a new socioeconomic framework in which the productive and financial aspects of the economy are subordinated to people and to caring for life on the planet. All this, as stated in the new Alternative Trade Mandate, is founded on a central premise:

Human rights, democracy and transparency should take priority over corporate and private interests, as should universal access to quality public services, social protection and higher labour and environmental standards.

These are times for individuals and peoples, and let us not forget that international human rights law is the product of the struggles of thousands of organisations and millions of men and women the world over. Hence all the proposals and alternatives that we have set out here are geared to establishing a normative framework, as the International Peoples’ Treaty says, “based on the responsibility and ethics of present and future generations and on the obligation to protect the earth and its inhabitants.” Challenging the fortress of the lex mercatoria and the power of transnational companies is certainly not easy, but any prospect of bringing about changes to really improve peoples’ lives, allow us to live in peace with the planet and seek a radical transformation of our socioeconomic model will inevitably be along this path. And on this path we shall meet again.
acknowledgements

This book is part of the work carried out over the past decade by Observatorio de Multinacionales en América Latina (OMAL), a project launched by the Paz con Dignidad association to investigate and expose the impacts of transnational corporations. We are grateful for its support, that has allowed us to write these pages. We would also like to thank all our companions in this process over the past few years, whether in revising or commenting on texts or in the forums, talks and gatherings that have helped us to build the case set out here; though we are ultimately responsible for its contents, this book would not have been possible without the help of Luis Nieto Pereira, Erika González, Beatriz Plaza, Gorka Martija, Gonzalo Fernández, Amparo Pernichi, Andrea Gago, Pedro Ramiro Sánchez and María González Reyes. Our gratitude also to all those who have contributed in one way or another to this project through their activism in solidarity organisations and bodies such as Hegoa, Ecologistas en Acción, Observatorio de la Deuda en la Globalización, Collectivo RETS, the Transnational Institute, CETIM, CEDIB and in particular the global campaign to Dismantle Corporate Power and Stop Impunity.


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