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THE EU AND THE CORPORATE IMPUNITY NEXUS

BUILDING THE UN BINDING TREATY ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

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This report is dedicated to the affected peoples and communities around the world who have been impacted by the operations of transnational corporations and who, through decades of sustained resistance, have placed the issue of corporate impunity and access to justice on the international human rights agenda. Some of their struggles have been included in Part 3 of this report.



THE EU AND THE CORPORATE IMPUNITY NEXUS

**BUILDING THE UN BINDING TREATY
ON TRANSNATIONAL CORPORATIONS
AND HUMAN RIGHTS**

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INTRODUCTION

CSR versus regulation: the asymmetry of power between corporations and the public interest

For decades, affected communities around the globe have been resisting the modus operandi of transnational corporations (TNCs) in their territories and workplaces and documenting systemic human rights violations and the track record of corporate impunity with their lives and their deaths. Corporate impunity is embedded in and protected by an ‘architecture of impunity’ that legitimises and legalises the operations of TNCs. This architecture has been established through free trade and investment agreements, the World Trade Organisation (WTO), the structural adjustment policies of the International Monetary Fund (IMF), World Bank and other financial instruments and the aggressive push for public-private partnerships (PPPs). At the core of this architecture is the infamous investor-state dispute settlement (ISDS) system, a private arbitration system that allows TNCs to sue states whenever they consider that their future profits are threatened by new measures or policies aiming at improving social and environmental protection. Thus, it neutralises the function of the state, whose primary responsibility is to defend public interest and protect the well-being of its citizens and the planet from corporate interests. This asymmetry of power works in the following way: hard international law is upheld by treaties and ISDS mechanisms, while voluntary soft law through Corporate Social Responsibility (CSR) and other mechanisms is advocated for TNCs.

Furthermore, the development of multi-stakeholderism has provided a framework that enables TNCs to usurp core political roles in democratic institutions. The role of TNCs in the workings of the UN system is becoming increasingly pervasive, especially since the creation of the Global Compact and the corporate-funded UN Foundation and as can clearly be seen in the current round of negotiations on binding obligations for TNCs at the United Nations (UN).

The EU’s defence of corporate interests and opposition to the UN treaty on TNCs and human rights

In 2014, a new initiative was launched to put an end to TNCs’ impunity and bring justice and reparation to affected communities: United Nations Human Rights Council (UNHRC) decided to create an Open-Ended Intergovernmental Working Group (OEIGWG) with the mandate “to elaborate an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises”¹. Negotiations are now underway on the instrument, which will take the form of an international treaty (“UN Treaty” or “binding treaty”²). As was expected, the corporate sector has sustained its outright opposition since the beginning. Contrary to the United States (US), which has consistently rejected the very principle of a binding treaty, after some initial reluctance, the EU eventually agreed to engage in the process. However, it has taken multiple actions to delay and obstruct the process from within.

The debate on the Treaty at the UN clearly reveals two opposing visions. One approach is based on voluntary mechanisms designed by transnational corporations – which can be summed up by the all-encompassing term ‘corporate social responsibility’ – and the private sector taking a leading role in elaborating the norms and rules that should apply to them. The second approach, based on countless examples (some of which are briefly presented in this report), argues that voluntary initiatives have never stopped TNCs from committing human rights or environmental violations. It also points out how TNCs can even use these voluntary measures to grab more power and influence. Therefore, only binding regulations and liability can make a genuine difference in corporate behaviour and due to the very nature of TNCs, new international law and international liability mechanisms are required.

The EU, TNCs and their lobbying groups, together with other ‘Northern’ states, have been vocal in supporting the first approach. As this report will demonstrate, the EU’s position on the proposed UN Treaty and the arguments it uses to weaken the case for an ambitious one are closely aligned with, if not identical to, those of transnational corporations.

Similarly, previous attempts to introduce legally binding instruments on TNCs at the UN, such as the one made in 2003, were thwarted by an alliance of big corporate business and Western governments that defended a non-binding approach. This alliance succeeded in getting the voluntary UN Guiding Principles on Business and Human Rights (UNGPs) approved in 2011, which have proved to be insufficient to stop corporate abuse and bring justice to affected people.

The responsibility of the EU

This report includes a collection of case studies³ that illustrate how corporate impunity works and highlight the failures of current approaches – particularly the various CSR-based mechanisms – to address human rights violations and provide effective remedy to affected peoples and communities. The case studies also show that, contrary to what is often claimed by European TNCs or many European decision makers, European TNCs cannot be considered ‘models’ due to the impacts of their operations on people and the environment, especially (but not exclusively) outside of Europe. They reveal a pattern where European corporations outsource their worst impacts to the Global South, with the help of the architecture of impunity.

When facing criticism for their activities abroad, European TNCs are quick to shift the blame to host governments: they argue that they are merely implementing projects approved by national governments and are following the rules set by them. This is echoed in the discourse of both the international corporate lobby groups and the EU, which claim that only states and governments are subject to human rights obligations and duties under international law. Our case studies demonstrate, though, how European or North American corporations influence national governments and push them to adopt policies favourable to their business interests through lobbying, corruption or the use of investor protection mechanisms.

The EU itself has a long history of an ‘open-door’ policy for big business and its lobbyists and of granting an ever-larger role to the private sector in the drafting of regulations and policies. It has pioneered the kind of trade and investment agreements that introduce a hierarchy that puts corporate interests above human rights. Thus, it can be said that European trade policies facilitate the kind of environmental or human rights violations that the UN Treaty would seek to address. The same is true of other flagship EU policies such as its raw material initiative, its development policies which are increasingly focused on privatisation and public-private partnerships, or its climate policies which encourage European TNCs to develop controversial energy projects with dubious ‘green’ credentials in the Global South. Seen in this light, the EU’s position on the UN Treaty process is no accident.

Photo: Tom Page



PART 1

CORPORATE CAPTURE VERSUS BINDING REGULATIONS

The 20th and 21st centuries saw the rise of the power of transnational corporations. TNCs have succeeded in concentrating economic wealth and control at unprecedented levels and developing an all-encompassing web of political influence, which together make them more powerful than many states⁴. This phenomenon has resulted in an alarming rise in the number of human rights, labour and environmental violations caused by their activities. Their legal structure and value chains are becoming increasingly complex, which enables them to exploit legal loopholes and institutional and legislative weaknesses to ensure their impunity.

Transnational corporations employ lobbying strategies to stop or bypass any new law or regulation – whether local, national or international – that might interfere with their activities or their strategic interests. This lobbying goes well beyond trying to make their voices heard by decision makers involved in political and regulatory processes. It is ultimately about controlling, shaping and sometimes replacing these processes to make sure that their outcomes do not affect the profits and the dominance of big business and, if possible, generate even more profit and power for them. This is what we call ‘corporate capture’. To achieve this, TNCs crowd out other voices through numerous ‘traditional’ means (lobbying, ‘public relations’, revolving doors, sponsorships, advertising, communications, media relations, funding politicians, political parties, think tanks and other research institutes, etc.) or by developing new mechanisms such as multi-stakeholder forums that give the private sector a leading role in ‘regulating’ itself.

‘Corporate capture’ now exists at varying degrees at all levels of government, including supranational organisations such as the EU and, increasingly, the UN. Paradoxically, corporate capture can also be the result of attempts to introduce new regulations or legislation to address some of the most urgent issues and egregious misdeeds of TNCs. Corporate groups respond to such challenges and criticisms by developing voluntary schemes or norms, sometimes with the support of allies from academia, government or even the NGO sector, and by setting up self-regulatory entities that are supposed to address the issues. Thus, thanks to their integration into the crafting of the solutions to corporate impunity, corporations have the power to derail any attempt to pass meaningful regulations. As Hernández Zubizarreta states,

The reinterpretation of legislation in favour of capital and transnational corporations and the regulatory asymmetry this causes vis-à-vis the rights of the unprotected majorities are undermining the rule of law, the separation of powers and the very essence of democracy. Now more than ever in history, law is being used to benefit political and economic elites. At the international level, this allows corporations to operate free from regulatory controls and with a high level of impunity⁵.

A prime example of this logic is the fight against climate change, where TNCs, including the ones from the fossil fuel industry, have largely escaped direct regulation of their greenhouse gas emissions and have succeeded in pushing ‘market-based mechanisms’ such as emissions trading and other corporate ‘solutions’ as the only way to tackle the climate crisis. Another example is the political debate at the UN on the legal accountability of TNCs, which will be discussed at greater length in Part 2 of this report.

In the following section, we discuss multi-stakeholderism in the context of the increasing role of transnational corporations not only in the core of the global neoliberal economic model, but also in setting priorities for policy and decision-making, as they gradually take over the functions of long-established democratic processes and institutions.

From CSR to corporate capture

There is continuity between the industrial paternalism of the 19th and early 20th century and today's heralding of 'corporate social responsibility', 'sustainable development' or 'multi-stakeholder forums' by transnational corporations. What all these have in common is the goal of protecting corporate profits and their public image by developing channels that are effectively controlled by the corporations themselves and that do not impose binding obligations on them. This is the preferred response of big business when confronted with the human and environmental impacts of their operations. They seek to make it appear as though they are addressing the issues, when, in fact, their actions aim to keep their profits and power intact. While they have co-opted words such as 'sustainable development', 'human rights', 'climate', 'environment' and 'responsibility' from civil society, when used in corporate discourse, these terms are void of substance.

TNCs use CSR and similar mechanisms to gain social acceptance for their operations at both the local and global level. Locally, they aim to win the support of vulnerable or 'neglected' communities by promising them jobs and economic growth. They also attempt to woo local authorities and organisations by providing resources to build schools or hospitals or to groups lacking resources, such as sports clubs. Globally, they seek to counter criticism of their negative social and environmental impacts by building a new image for themselves as 'green' and 'responsible' through the implementation of 'global best practices'. The same logic is at work in the current emphasis on the private sector's role in achieving the 'Sustainable Development Goals' (SDGs).

TNCs use CSR and similar mechanisms to gain social acceptance for their operations both at the local and global level.

Their so-called 'consultations' of the local people are often one-sided informational meetings in which only the positive aspects of the project or the company are presented. But the reality on the ground is very different from the picture they paint. First, the number and quality of jobs created usually fall well short of the false promises advertised on business websites and brochures. Secondly, people are strongly affected by the social, environmental and health impacts of TNCs' operations. In too many countries, small peasant and other local communities opposing transnational corporations are persecuted, criminalised or even murdered or forcefully displaced⁶. Even in these cases, TNCs continue to promote their 'good intentions' and their CSR policies as a strategy to cover up issues or refute claims that they are to blame. On the rare occasion where they do accept to compensate affected communities – often after decades of struggle – they do so without acknowledging their responsibility or recognising people's rights.

Furthermore, transnational corporations have also managed to change the model of decision-making processes to give themselves a more central role and to become the agenda setters. One cornerstone of this strategy is the development of 'multi-stakeholderism', which began in the 1990s. In 1995, the Commission on Global Governance recommended a change in governance and decision-making along the following lines: "*This will involve reforming and strengthening the existing system of intergovernmental institutions, and improving its means of collaboration with private and independent groups*"⁷. Similarly, in 2008, the Helsinki Process on Globalisation and Democracy concluded that:

States still are and will continue to be the central actors in international organisations and as negotiators of international agreements. Nevertheless, for example civil society and the private sector should be given a more prominent role in preparing and implementing agreements as well as monitoring compliance with these agreements⁸.

Multi-stakeholderism has now gained so much importance that it is even mentioned under goal 17 of the Sustainable Development Goals: "*encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships*"⁹.

Though on the international agenda since the 1990s, multi-stakeholderism gained new momentum in 2008 when the World Economic Forum (WEF) convened an international expert group to forge its response to the global financial crisis. Published in 2010, the *Everybody's Business: Strengthening International Cooperation in a More Interdependent World* report included a comprehensive proposal on multi-stakeholderism as one of the concepts for the WEF Global Redesign Initiative (GRI). As Harris Gleckman explains:

Over the 18 months of the GRI programme, WEF created 40 Global Agenda Councils and industry-sector bodies to craft a range of theme specific governance proposals. Each Council consisted of a mix of the corporate, academic, government, entertainment, religious, civil society, and academic worlds. Their 600-page report centres on these thematic proposals, plus a series of policy essays and organising principles that lay out the WEF framework for a multi-stakeholder governance system. What is ingenious and disturbing is that the WEF multi-stakeholder governance proposal does not require approval or disapproval by any intergovernmental body. Absent any intergovernmental action the informal transition to [multi-stakeholder governance] as a partial replacement of multilateralism can just happen¹⁰.

Many multi-stakeholder forums are sector-focused. More well-known examples include the Roundtable on Sustainable Palm Oil, the Roundtable on Responsible Soy, the Marine Stewardship Council, the Forest Stewardship Council, the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the Kimberley Process on diamonds mined in conflict areas, to name a few.

As explained by Nora McKeon, “In governance terms, multi-stakeholder initiatives for standard setting are embedded in a ‘liberal pluralism’ model based on the hypothesis that the public good will emerge from the procedure of bargaining and balancing the different interests of different parties”¹¹. The different parties or ‘stakeholders’ – a concept that also comes from the business world – are representatives of employers’ organisations, corporations, trade unions, civil society organisations and public authorities. They gather in a consultative body or a forum for negotiations with the objective of coming to a ‘consensus’ on issues on which their interests are totally opposed. The consensus-based philosophy of multi-stakeholderism allows corporations to oppose ambitious proposals behind closed doors without the cost of appearing publicly as the ones responsible for obstructing the adoption of necessary regulatory measures.

Multi-stakeholderism allows corporations to oppose ambitious proposals behind closed doors.

Hiding behind a pleasant discourse on the need for a ‘participatory approach’, multi-stakeholderism denies the existence of power imbalances and assumes that ‘stakeholders’ pursuing private interests (which are typically over-represented in these forums and have much more resources) and those defending the public good are on equal footing. Multi-stakeholderism also turns a blind eye to the major conflicts of interests that emerge. A classic example is the participation of oil and gas companies in climate talks: they present themselves as the ones best placed to find or even be the solutions to climate change, when they have in fact created the problem and continue to fuel it daily through their activities.

It is not surprising, then, that the ‘solutions’ coming out of these spaces are corporate-friendly. They favour market-based approaches and promote voluntary norms and commitments in the place of state regulation. The voluntary norms or certification schemes adopted create the illusion that progress is being made in resolving the issues at stake. In reality, though, they are usually weak and always lack effective implementation mechanisms. The absence of sanctions for norms violation allows transnational corporations to continue to enjoy a positive public image without having to make any concrete changes to their practices on the ground.

On the whole, the combination of multi-stakeholderism and voluntary norms favours only transnational corporations. On one hand, the political power of TNCs grows as they are increasingly integrated into decision-making processes and legitimised in doing so. On the other hand, their activities on the ground are allowed to

remain in a 'business-as-usual' mode where their operations continue to violate workers and communities' rights and destroy the environment and climate without being held legally responsible for any of the damage they cause.

How TNCs have become deeply embedded in the UN system

Corporate infiltration of the UN system is nothing new. Initially, TNCs had to go about their lobbying activities "discretely" and inconspicuously, as they were not considered legitimate stakeholders in multilateral institutions and negotiations. To get around this obstacle, they infiltrated these institutions using governments (or non-governmental organisations) that had succumbed to their pressure and agreed to defend their opinions and interests. TNCs began to play an active, official role in the UN in the 1990s, particularly after the launch of the Global Compact in 2000, and have been given considerable weight in negotiations within international institutions¹². There was no longer any need for them to work in the shadows: the corporate takeover of multilateral negotiations was now entirely legal. As Susan George states, "[TNC] penetration of the UN was not sneaky or sly – they were invited in through the front door by the then Secretary General himself. The instrument is called the United Nations Global Compact (UNGC) and it exemplifies the ambitions of the Davos Class to manage the world"¹³.

It is important to understand that this phenomenon is the result of a systematic strategy. The corporate capture of UN bodies has enabled TNCs to thwart – or at least undermine – processes aimed at addressing the shortcomings inherent in certain global operations whenever their business interests might be at stake. In this sense, the excessive influence on the UN system that corporate lobbyists have accumulated is obstructing progress in finding potential solutions to the biggest and most challenging social and environmental crises the world is currently facing.

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (1993) states, in point 8, that democracy is based on the will of the people, freely expressed, to determine their own economic, political, social and cultural systems¹⁴. Paradoxically, only a year after the declaration was adopted, UN Secretary-General Boutros Boutros-Ghali stated that "TNCs need to be more clearly associated with international decisions" and that "*the participation of corporations in the development of a new transnational social order is all the more important ... to invent new rules and new practices in the sphere of competition*"¹⁵. It is surprising to note how similar these words are to those uttered by businessman David Rockefeller in 1997: "*In the sixties, business leaders like me were more or less on the side-lines, watching the negotiations roll out. But now we are at the helm, and we are writing a good part of the agreements ourselves*"¹⁶.

The Global Compact is probably the cornerstone of corporate invasion of the UN. But what is it exactly? The Global Compact is essentially a voluntary initiative that aims to align corporate strategies and operations with ten universal principles on human rights, labour, the environment and anti-corruption¹⁷. Thousands of corporations – including a significant number of TNCs accused of human rights crimes and violations – have been eager to sign up. However, because it is a voluntary initiative and there are therefore no sanctions for violations of its principles, attempts to expose crimes by these companies have proved fruitless. Yet, the significant credibility given to the Global Compact within the UN system has given TNCs privileged access to intergovernmental decision-making spaces. The Global Compact has thus been accused of simply being a means of 'blue-washing' that enables corporations to clean up their image and reputation without changing their behaviour¹⁸.

Former Secretary-General Kofi Annan saw this as a way of democratising the UN by moving away from the organisation's exclusively multilateral intergovernmental composition. However, the reality at the UN is very different. The first organisations of this so-called new 'civil society' to be directly involved in UN decision-making processes were not just any organisations: they were exclusively corporate organisations. For-profit entities are now granted more legitimacy and influence in decision-making processes, while public interest organisations – the genuine 'civil society' – are side-lined.

The excessive influence of corporate lobbyists on the UN system is obstructing progress in finding solutions to global crises.

One of the most revealing examples of the increasingly entwined relationship between UN institutions and the corporate world would undoubtedly be the creation of the United Nations Foundation during the same period (1998). It was set up thanks to businessman Ted Turner’s billion-dollar donation to the UN in support of UN activities. The foundation is the main source of private funding for the UN and works much like a fundraising platform: it establishes partnerships with different entities to raise funds for UN programmes, including a number of transnational corporations such as ExxonMobil and Shell. As noted in an article by Chelsea Clinton, Vice Chair of the Clinton Foundation, and Devi Sridhar, a global health expert, the donors “*have structurally aligned the objectives of global agencies with their own objectives*”¹⁹, while there is “undeniably a direct link between financial contributions and WHO focus”²⁰. Although it is not lobbying in the strict sense of the word, corporate donations used by the foundation may influence UN decisions. In addition, the UN is now dependent on this funding. By influencing the UN and cultivating a feeling of growing dependency on corporate contributions and solutions²¹, the activities of transnational corporations now go beyond the scope of clear-cut corporate capture mentioned earlier.

The Global Compact paved the way for the corporate takeover of various UN bodies, as illustrated by several studies that highlight the way the majority of UN bodies have succumbed to corporate lobbying and power. This includes WHO, whose funding is now largely dependent on donations from the private sector (namely pharmaceutical and even tobacco corporations)²²; the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP), which are both involved in partnerships with several major TNCs from different sectors²³; the increasing presence of corporate lobbying and corporate capture in the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity²⁴; the partnership between the Bill Gates Foundation and the International Fund for Agricultural Development (IFAD)²⁵; and the partnership between the Office of the United Nations High Commissioner for Human Rights and Microsoft²⁶. These are all examples of the growing presence of corporate lobbying within the UN, and this list is by no means exhaustive.

The asymmetry of influence between transnational corporations and civil society is even starker in informal spheres than in formal lobbying venues.

This new conception of the UN and of “civil society” is typical of the current mainstream discourse which dictates that the solution to international issues is to be found in public-private alliances. The Sustainable Development Goals (SDGs) follow the same logic. Western countries, and particularly European ones, are using the SDGs to argue that TNCs can play a positive role in the new international configuration. This is the argument behind establishing an international public-private partnership and, consequently, inviting TNCs to partake in negotiations in multilateral institutions. It is not unreasonable to ask how exactly these corporations can contribute to sustainable development when their activities contribute to human rights abuses and when they prevent, through their expansion, certain countries in the Global South from “developing”.

Photo: Darius Norvilas



Photo: UN Geneva



The European Union: a pioneer of corporate capture?

Corporate capture and ‘multi-stakeholderism’ are perhaps even more strongly embedded in EU institutions than at the UN. The private sector has historically been given a key role in European processes, particularly by the European Commission which sees the private sector as a natural constituency and an important counterweight to the influence of Member States. Member States have also been keen to defend the interests of their ‘national champions’ in EU policies. This structural bias has only become more acute over time, to the point where multi-stakeholderism is now part of every EU decision-making process. Today, Brussels, the European capital, is host to an estimated 30,000 lobbyists, or one for each civil servant working for the Commission²⁷. As such, it comes in second only to Washington DC in that respect. On the other hand, the workings of the EU itself – with its remote, complex institutions and little democratic accountability – do not make it easy for citizens and civil society to make their voices heard.

EU institutions have a variety of formal channels through which lobbyists can influence decision-making processes, ranging from traditional lobbying of lawmakers to meetings with the Commission during the very early stages of regulation-making. All these channels are overwhelmingly dominated by corporate lobbyists because of the huge asymmetry in human and financial resources and access to information. Another important vehicle for corporate capture is the advisory or expert groups created by the European Commission at the beginning of a legislative process to ‘provide expert opinion and guidance’. Industry representatives are very often over-represented in these groups and, as a result, decision makers heed their voices more than others. This issue had been exposed many times by NGOs in the past. It has been proven that the corporate-dominated composition of expert groups in fields such as financial regulations or car emissions standards have an impact on the quality of policy and they do not usually act in the interest of people and planet²⁸.

Corporate capture also involves the use of more informal means, such as the organisation of events and forums where civil servants and the private sector appear side-by-side and corporate funding of think tank reports. More generally, a culture of privileged access has been developed – one that leaves the doors of EU institutions wide open to lobbyists and even encourages revolving doors between the private sector and all levels of EU bureaucracy, from EU commissioners and directors to policy officers and interns. European institutions have been marred by a long history of scandals and controversies around privileged access²⁹, conflicts of interests³⁰ and revolving doors. One of the most recent and egregious examples was the appointment of former EU Commission head Manuel Barroso as an adviser for Goldman Sachs. Needless to say, the asymmetry of influence between transnational corporations and civil society is even starker in these informal spheres than in formal lobbying venues.

Given the strong culture of formal and informal involvement of lobbyists in decision-making, it is not surprising that proposals of mechanisms to ensure lobbying transparency have always been met with resistance by EU bureaucrats. Despite the recognition 13 years ago that a lobbying transparency register with mandatory measures was needed³¹, these have still not been adopted today³². The EU has similarly failed to tackle the issue of revolving doors and conflicts of interests despite the scandals. In this respect, and on related issues, the EU Commission has always preferred voluntary guidelines and non-binding rules and seems averse to anything resembling effective, binding regulations.

A prime example of how corporate capture has been institutionalised to make it easier for TNCs to challenge or rewrite regulations is the ‘Better Regulation Agenda’. This agenda was set up by the European Union in 2015 under pressure from Member States with strong deregulatory cultures such as the UK and Sweden³³. This process ultimately undermines the very concept of law-making and regulation, whose purpose is to defend the public interest. The rationale behind it is that the EU regulates too much (i.e. imposes unnecessary ‘red tape’ on Member States and citizens). This initiative opened the door to industry, which has always been eager to influence both the making of new laws and the revision of existing legislation³⁴. Justified by claims on the need for ‘simplification’, the real aim is to lower costs for industry and give private corporations the power to set the regulatory agenda.

Proposals of mechanisms to ensure lobbying transparency have always been met with resistance by EU bureaucrats.

One of the aims of the Better Regulation Agenda is to prevent new ‘unnecessary’ legislation from being passed. To do so, draft bills are put to a ‘test’ to determine if they are necessary or not, which involves holding consultations, conducting impact assessments and other mechanisms - all strongly biased in favour of the private sector³⁵. The Commission also created a system called Regulatory Fitness and Performance (REFIT) to review existing legislation and determine whether laws are ‘fit for purpose’ or not.

The Better Regulation Agenda is only one of the more visible examples of a broader tendency in European policies to prefer market-based instruments and industry self-regulation to binding objectives and regulations.

In many ways, the Better Regulation Agenda is only one of the more visible examples of a broader tendency in European policies to prefer market-based instruments and industry self-regulation to binding objectives and regulations. When it comes to energy and climate policies, for instance, the EU continues to promote its flawed emissions trading system as its key policy because it affords corporations a certain flexibility, even though it has been proven ineffective for a variety of reasons. One obvious proof of its failure is how the handout of free carbon credits to polluting industries has not resulted in effective change. In the meantime, the EU continues supporting and funding the development of large-scale gas infrastructure throughout the continent, all for the benefit of Big Oil and other private players and in the name of energy independence. On the issue of air pollution, the EU Commission has effectively allowed the car industry to ‘co-write’ the rules and decide if and when they should become applicable, in spite of the Dieselpgate scandal (discussed in Part 3 of this report) and the thousands of premature deaths caused by the failure to introduce stronger rules.

It should come as no surprise, then, that the European Commission has always favoured voluntary standards and corporate-led initiatives for addressing issues of corporate accountability. Faced with a growing demand for binding regulations both at the national level and in the European Parliament, the European Commission and Council continue to promote the implementation of the UN Guiding Principles and similar non-binding international instruments as the only way to go. They do so while repeating the mantra that European companies are ‘leading by example’ on this issue. This seems to suggest that they are trying to turn CSR into a tool that gives European TNCs a ‘competitive advantage’ over competition from the US or China.

Today, European institutions are focussing on the SDGs as a framework to justify an even greater shift towards public-private partnerships and its funding corporate projects, including through its development aid. In 2015, in response to an official challenge by a group of nine national parliaments from different Member States led by Danielle Auroi (one of the architects of the French ‘duty of vigilance’ law discussed in the next section) called the “green card initiative”, the European Commission confirmed that it was not contemplating any binding legislation on corporate accountability and chose to base its CSR strategy on the UN Guiding Principles and other non-binding mechanisms.



How the French ‘duty of vigilance’ law made it past corporate lobbyists

Local and national governments are also prone to corporate capture. On issues of corporate accountability, big business has managed to find allies in national governments (particularly in Western Europe) who are willing to defend its voluntary, CSR-based approach. Several attempts have been made in recent years to initiate judicial proceedings against the parent companies of TNCs involved in human rights violations (for example, the cases filed in the UK and the Netherlands against the impacts of Shell’s operations in Nigeria). Furthermore, numerous national campaigns demanding binding national legislation for TNCs and access to remedy for affected communities and workers have also been launched. They all came up against strong opposition from national and international corporate lobby groups and, as a result, were unable to win the support of national governments. Both businesses and governments argued that CSR and non-binding mechanisms such as the UN Guiding Principles were the right and reasonable answer to the problem. The recent adoption of the French law on the ‘duty of vigilance’ was the first time that civil society was successful in introducing binding mechanisms that go beyond the business-as-usual voluntary, CSR approach.

The French law on the ‘duty of vigilance of parent and subcontracting companies’³⁶ was passed on March 27, 2017. The result of years of campaigning by civil society in collaboration with a handful of tenacious Members of Parliament, the law is an important step forward in the fight against the impunity of transnational corporations. The massive lobbying by the private sector and its allies within the state against the bill managed to slow down progress and water down the law’s content, but they were unable to prevent it from being passed.

Despite these drawbacks, this law is undeniably an international breakthrough. It has become one of the references in the current debate on the UN Treaty on TNCs and human rights. For the first time, parent and outsourcing companies are now legally obliged to “*identify risks and prevent serious violations of human rights and fundamental freedoms and harm to the health and safety of both people and the environment*” that may result from the activities of their corporate group (subsidiaries, controlled companies) and their supply chain (subcontractors, suppliers) both in France and abroad. Their civil liability may be incurred and they may be ordered to pay compensation to the victims. Consequently, the law addresses the legal complexity of TNCs as well as the different commercial relations they may have with business partners.

To get the law adopted, its defendants had to go through a tough obstacle course, which took almost three and a half years due to the relentless attempts of lobby groups and the French Senate to thwart it. The first bill was tabled in November 2013, but it took more than a year before it was scheduled for debate in the French National Assembly. Officially, the socialist government supported the bill, which had been introduced by all of the left-wing parliamentary groups. In reality, however, the ministers were divided on the issue; the Ministry for the Economy and Finance lent a sympathetic ear to the corporate lobby groups.

From November 2013 to January 2015, corporate lobby groups sought to use the newly created multi-stakeholder forum, the French CSR Platform³⁷, to halt the bill in its tracks. After refusing to allow a debate on the draft bill to be held within the Platform, MEDEF (*Mouvement des Entreprises de France*, the main French employers’ association) and AFEP (*Association française des entreprises privées*, the French Association of Private Companies) did their utmost to delay the publication of the Platform’s opinion. They demanded that this opinion be adopted by consensus, which they did in order to prevent the more ambitious demands of civil society from being publicised and to hush the voices of dissent among the business representatives themselves. Furthermore, private sector representatives wanted the CSR Platform to be used to promote ‘good practices’ and the companies’ ‘improvement processes’, which involved fulfilling their ‘ethical’ commitments and the implementation of voluntary norms. This is concrete proof that this type of multi-stakeholder bodies is indeed used to stifle debates in order to slow down the approval and weaken the content of public policies. Since then, the most critical civil society organisations have abandoned the Platform³⁸.

The recent adoption of the French law on the ‘duty of vigilance’ was the first time that civil society was successful in introducing binding mechanisms that go beyond the business-as-usual voluntary, CSR approach.

A second version of the draft bill (altered after negotiations with the ministry) was debated in the French National Assembly in February 2015. But corporate lobbyists still tried to have the last word and kept attacking the proposal in the media. AFEP chairman said in an interview, “I have not met a minister, and that includes the Prime Minister, who could look me straight in the eye and say, ‘I’m behind this bill’ (...) I have been assured that it will not get through parliament”³⁹.

More than a year after it came into force, the French law on corporate duty of vigilance is still being attacked by big business.

Throughout the legislative process, corporate groups fuelled an out-and-out disinformation campaign against the bill, which they called ‘repressive’ and ‘based on a logic of punishment’, even though it focuses primarily on prevention. They also criticised the draft law for creating ‘legal insecurity’ for companies and claimed that it represented a threat to French companies, which could potentially lose their competitive edge on the global market⁴⁰. This lobbying battle delayed the final adoption of the law until early 2017, just weeks before national elections.

More than a year after it came into force, the French law on corporate duty of vigilance is still being attacked by big businesses. Since Emmanuel Macron, who was the bill’s main opponent while Minister of Economy, has assumed the presidential office, AFEP is said to have requested a moratorium on the implementation of the law. In 2018, in the context of the debate on the draft Action Plan for Business Growth and Transformation (PACTE, for its acronym in French), some corporate executives demanded ‘administrative simplification’ in exchange for allowing some vague formulas about corporations’ need to ‘consider their social and environmental impacts’ to be introduced into French commercial law. They also complained about the new binding obligations imposed on them. During the Global Compact France’s General Meeting, Danone CEO said:

If company executives agree to take a considerable step by following the recommendations of the [Notat-Senart] report, a number of control mechanisms that are imposed today and represent an excessive burden should be suppressed (...). The Sapin 2 law and the duty of vigilance have created new obligations. I would prefer to use 80% of these resources on the ground instead of complying with the reporting requirements of these laws⁴¹.

The same line of argument developed in France against any kind of accountability and binding regulations for transnational corporations is being used in other countries where similar legislation has been proposed.



Photo: Adam Jones



Photo: OMAL



Photo: Colin Toogood



Photo: BUND Bundesverband



Photo: Checho Maripe

PART 2

EU AND TNCs UNITED AGAINST THE UN TREATY?

The current negotiating process at the UN towards a binding international treaty on transnational corporations began in June 2014 with the adoption of Resolution 26/9 by the United Nations Human Rights Council. Created by the resolution to oversee the process, the Open-Ended Intergovernmental Working Group (OEIGWG) met in 2015, 2016 and 2017 to discuss the scope and character of a future treaty. During its fourth session in October 2018, the OEIGWG will start negotiating the content of the Treaty based on the “Zero Draft” text submitted by Ecuador, the OEIGWG Chair, in July 2018⁴².

There is a need for a binding international treaty to address the gaps in national and international legislation and confront the complex legal structures of transnational corporations in order to make parent and outsourcing companies accountable for the impacts of their decisions and production patterns throughout the globe. This is why the UN OEIGWG process, which is happening in parallel to similar developments in various countries, has generated a lot of hope in civil society.

Unsurprisingly, corporate lobby groups are unanimously opposing this attempt to elaborate and pass a binding international treaty on TNCs. The United States government has been vocal in its rejection of such a Treaty, just as it had been to previous attempts to regulate transnational corporations. While the European Union has backed away from such outright opposition to the Treaty process, it has nevertheless adopted the strategy of actively undermining it from within. The EU’s arguments and positions have been very closely aligned with those of the corporate lobby groups active at the UN level, namely the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE).

This section of the report contains a more detailed analysis of the Treaty process at the UN. It begins with a bit of the history of similar negotiations held in previous decades and a closer look at the EU and the corporate players involved in the process, with a focus on the similarities between their positions.



Undermining progress towards a binding treaty for TNCs

The current OEIGWG's work on a legally binding instrument is the most recent attempt to regulate transnational corporations at the UN, but it is not the first. Previous efforts were made to update international law and fix legal loopholes that enable corporations to evade responsibility for their crimes. These attempts were, however, stamped out by the fierce lobbying efforts and direct opposition of Western countries and employers' organisations, represented in this case by the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE) (see section below).

In the 1970s, for example, the ECOSOC Commission on Transnational Corporations was made responsible for developing binding codes of conduct for TNCs. Yet, between 1993 and 1995, before these codes could be concretised, the Commission was dissolved (ECOSOC resolution 1994/1 of July 14, 1994) at the request of the then-Secretary General Boutros Boutros-Ghali and the draft codes of conduct were shelved. Later, in 2003, the UN Sub-Commission on the Protection and Promotion of Human Rights initiated a process recommending the creation of a legal framework that would enable effective monitoring of TNC activities. It too met a similar fate. The ICC and the IOE were quick to protest, urging governments to ensure that the Human Rights Commission⁴³ dropped the Sub-Commission's draft norms. As a counterproposal, the two organisations argued for the adoption of voluntary standards, which they considered more effective, as they would not hinder corporations' entrepreneurial initiative and freedom⁴⁴. In 2005, the draft norms were shelved once again, and voluntary standards now known as Professor John Ruggie's 'Guiding Principles on Business and Human Rights' (UNGPs) were adopted in 2011.

Given the ineffectiveness of these voluntary standards, a fresh attempt to get talks for a binding treaty underway began in 2014, which drew on previous aborted attempts. However, the defenders of the corporate status quo, including Western countries and the business community, quickly sprang into action to try to put an end to the initiative.

The vote on the 2014 UNHCR resolution generated a division between the countries of the Global South, which were in favour of a binding treaty, and the richer countries, which wished to prioritise voluntary standards, in particular the UNGPs. Resolution 26/9 was passed despite opposition from all Western countries.

Major countries where the headquarters of large TNCs are located, such as the United States and Canada, still oppose the creation of this treaty and do not even participate in the OEIGWG. While Russia voted in favour of creating the Working Group in 2014 and is participating in the negotiations, it has expressed its reluctance towards the adoption of a binding treaty.

Since the beginning of the negotiations, the EU and the majority of its Member States have been undermining the process and have expressed a lack of trust in it. While repeating its willingness to engage and participate in the discussions, the EU has in fact been very obstructive.

Before the first session of the OEIGWG was held in 2015, the EU set four conditions for its participation:

- **The Chair of the Intergovernmental Working Group would have to be 'neutral' (i.e. not Ecuador). This condition was eventually withdrawn, although the EU has repeatedly criticised the way Ecuador is coordinating the process.**
- **Priority would have to be given to the application of the United Nations Guiding Principles on Business and Human Rights.**
- **The Treaty would have to cover all companies and not just transnational corporations.**
- **The private sector would have to participate in the elaboration of the treaty.**

After monopolising the entire first day of discussion by opposing the adoption of the agenda, the EU eventually left the room and boycotted the first session of negotiations. Among European countries, only France remained as an “observer” (a status that does not officially exist).

In 2016, it was only under strong pressure from civil society (including a petition signed by 90,000 Europeans) that the EU accepted to attend the second negotiating session. It was present but kept a low profile in the debates.

The EU eventually left the room and boycotted the first session of negotiations.

In 2017, the EU participated in the third negotiating session where it seemed to engage more concretely on the substance of the issues. However, on the last day, when it came time to adopt the conclusions, it questioned the validity of the OEIGWG’s mandate beyond this third negotiating session and called for the adoption of a new resolution by the UN Human Rights Council. It had the support of the United States, which did not participate in the OEIGWG, but sent a representative to weigh in during informal intergovernmental meetings held during a break in the formal session.

Two months later, in December, the EU attempted – but failed – to halt the process by proposing an amendment to the UN budget that would cut funding for the OEIGWG at the meeting of the Fifth Committee of the UN General Assembly in New York⁴⁵.

Finally, during informal consultations on July 17, 2018, the EU representative again challenged the whole process and proposed two alternative options to be put to the vote in the UN Human Rights Council via a new resolution: (i) reaffirm the mandate for two more sessions; and (ii) commission a group of experts to work with governments and civil society organisations. Both proposals were immediately rejected by Ecuador.

Back in October 2017, the EU had already tried to question the format of the negotiations and proposed organising consultations within the Forum on Business and Human Rights, created in 2011 to monitor the implementation of the UNGPs. It is a multi-stakeholder forum with a strong representation of transnational corporations, their lobby groups and corporate law firms. Acceptance of this proposal would meet the EU’s demand for greater involvement of the private sector in the process. But it would also call into question the legally binding nature of the text that is the subject of the negotiations.

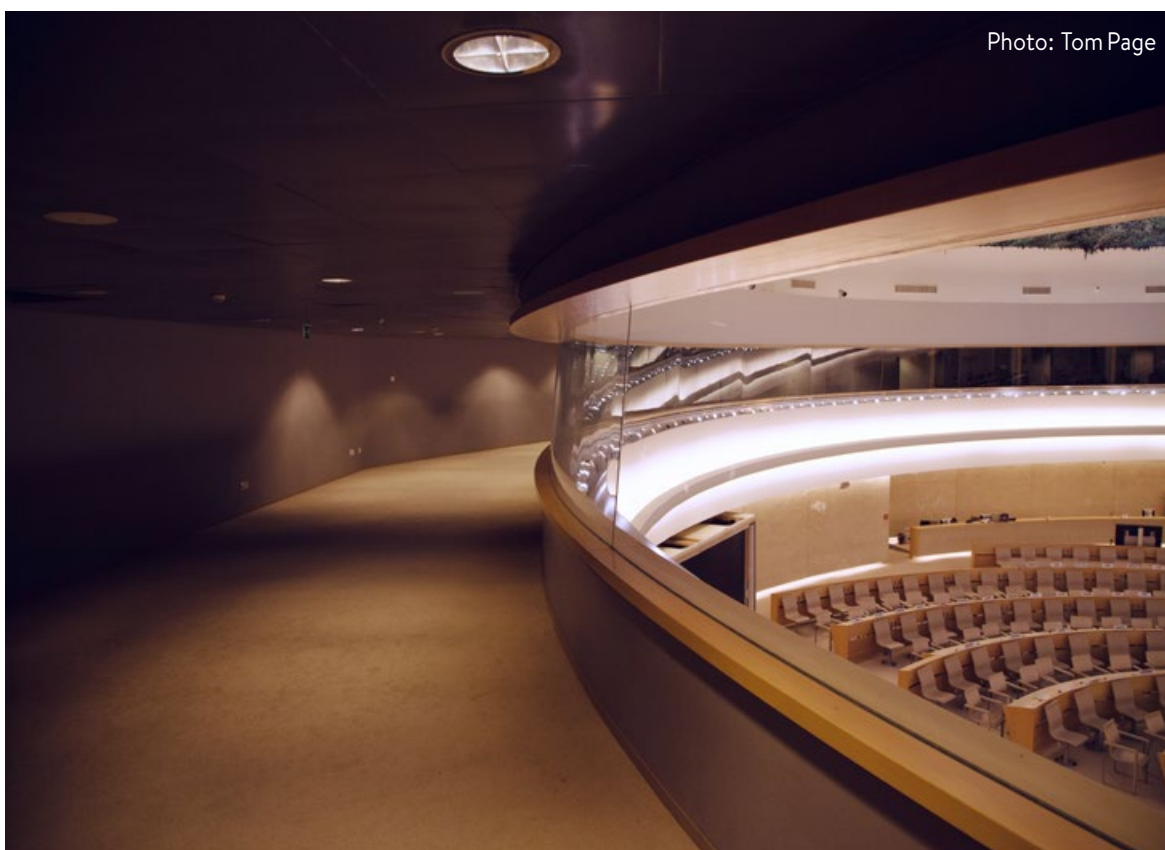


Photo: Tom Page

ICC and IOE: the voice of business at the UN

The ICC and the IOE are the two main organisations that represent transnational corporations in the UN system. Both organisations share the same objectives, often work together and defend the corporate viewpoint on trade-related issues and international legal instruments concerning human rights and the environment. At the 2nd session of the OEIGWG, the same person represented both organisations.

In relation to the OEIGWG and the proposal for a legally binding instrument for TNCs, they have closely collaborated with two other business lobby groups: the World Business Council for Sustainable Development (WBCSD), created during the Rio Earth Summit in 1992 and also based in Geneva, and the Business and Industry Advisory Committee to the OECD (BIAC).

The International Chamber of Commerce (ICC)

Founded in 1919 in the aftermath of the First World War, in a political and economic context marked by the total absence of structured international business networks, the ICC is an international organisation that aims to represent the interests of private companies all over the world. It defines itself as “*the unique representative of the business community, representing all sectors and all regions, uniting thousands of businesses and business federations in its national committees in more than 120 countries*”⁴⁶.

The ICC has had consultative status with ECOSOC since 1946 but became more deeply involved in the UN system in the 1990s. Finally, the UN General Assembly (which is in charge of all legal matters and also recommends new observers) granted the ICC observer status at the UN in December 2016, even though the organisation does not meet the criteria set by the Assembly itself. The UN justified its decision by highlighting the importance of giving greater opportunities to the business community to contribute to the realisation of its goals and programmes⁴⁷. For the first time in its history, an organisation representing corporate interests acquired a prestigious position at the UN. Indeed, prior to this unprecedented decision, the list of observers was mainly limited to non-member countries such as the Vatican and Palestine, intergovernmental organisations such as the European Union and the African Union, international organisations such as the International Committee of the Red Cross, as well as regional public banks.

ICC chairman Sunil Barathi Mittal reacted to this news by saying:

*[T]his is huge recognition of the role that business can play in contributing to a better and peaceful world. There is only one route to meeting the many challenges that face our society – from climate change to mass migration – and that is for governments and civil society to work hand-in-hand with the private sector*⁴⁸.

Obtaining observer status does not give one decision-making rights as such, but it does offer formal benefits. Observer status is more one of prestige, elevating the ICC to more than just an ordinary civil society organisation like an NGO. Even if merely symbolic, the decision is symptomatic of the corporate capture of UN institutions.

The International Organisation of Employers (IOE)

Founded in 1920, the IOE is an international network comprised of more than 150 employer organisations and corporations in over 140 countries. It defines itself as the voice of business “*in social and labour policy debate taking place in the International Labour Organization, across the UN and multilateral system, and in the G20 and other emerging processes*”. However, its main mission is to “*promote the economic, employment and social policy environments necessary to sustain and develop free enterprise and the market economy*”⁴⁹.

For the first time in its history, an organisation representing corporate interests acquired a prestigious position at the UN.

Unlike the ICC, the IOE does not have observer status at the UN. It does, however, enjoy consultative status with ECOSOC, which gives it the status of a civil society organisation. It is interesting and even striking to note that one of the IOE representatives at the UN has held an executive position for many years at Coca-Cola, one of the biggest TNCs in the world with a record in human rights violations.

The progressive integration of ICC and IOE reveals a new vision of how the UN should be run.

In February 2018, IOE circulated a note mapping the position of different countries on the OEIGWG and the creation of a binding instrument. In the note, it also invited its national members to lobby their own governments to oppose the ‘elements’ circulated by Ecuador at the 2017 session and to make sure the working group “takes better notice of business’s concerns and views”⁵⁰.

The progressive integration of these two organisations into the UN system reveals a new vision of how the UN should be run: one that reflects the prevailing ideology that “what is good for business is good for society”⁵².

The UN Global Compact, even if controlled by transnational corporations, refrained from direct criticism of the OEIGWG on a legally binding instrument. Nevertheless, it made sure to reiterate when the working group was established that “the UN Guiding Principles remain the authoritative global standard for addressing adverse impacts on human rights linked to business activity”⁵³.

The positions and arguments defended at the UN and in other international fora by the ICC and the IOE are closely mirrored by similar organisations at other political levels as well. National or bilateral chambers of commerce and national employers’ organisations have deployed very similar arguments to oppose national binding agreements on transnational corporations (see, for example, the section on the French ‘duty of vigilance’ law above).

Photo: Fabian Ceballos



Photo: Lucie Pinson/Amis de la Terre France



Photo: Teekid



Photo: OMAL



Has the EU turned into a corporate lobby group at the UN?

The European Union has emerged as a key opponent to an ambitious legally binding treaty for TNCs within the OEIGWG process. Rather than frontally opposing the treaty process as the US has done, the EU seems to have chosen, in close alliance with corporate lobby groups, to influence the process from within and control its outcomes. Its strategy seems to be to steer it towards mechanisms that would address some of the criticisms aimed at the UN Guiding Principles and similar voluntary instruments, without changing the general legal and economic architecture on which the power and impunity of transnational corporations is based.

It is important to note that the EU is represented in the Working Group by a representative of the European External Action Services (EEAS) – an executive institution of the EU that does not directly represent EU Member States. This representative has no mandate to negotiate on behalf of the 28 Member States or to speak in their name on the substance of the issues, since the object of the Treaty only falls partially, at the most, within EU jurisdiction. The EU is not even a member of the United Nations; it is only an observer. If we consider how the Human Rights Council, an intergovernmental body, works, the EU is usually represented by one of its Member States. This is not the case for the process on the binding treaty. Are there too many interests at stake to give this role to a government representative? By contrast, no representative of the African Union, Mercosur or the Association of Southeast Asian Nations has ever been present at the negotiations.

EEAS is under the authority of the High Representative of the Union for Foreign Affairs, Federica Mogherini, who was named by the EU Council (in other words, by Member States) and is also vice-president of the EU Commission. Internal Commission documents that we have been able to access show that the positions defended by the EU delegation in Geneva are the object of close coordination with other Commission directorates, including Trade, Justice, Employment, Development and Internal Market and Industry, and with the Commission's Secretariat General.

One EU institution that does not seem to have much influence on EEAS, however, is the European Parliament: the only democratically elected institution in the EU. It has adopted several resolutions in favour of adopting legally binding norms on transnational corporations and human rights⁵⁴. A number of Members of European Parliament, along with national MPs of the Global South, have created an inter-parliamentary network in support of a binding treaty in October 2017. They extended their call to local authorities in 2018⁵⁵.

Looking at the positions and arguments defended by the EU delegation in the OEIGWG, it is impossible not to notice their resemblance to the ones put forward by corporate lobby groups such as ICC and IEO (see pages 22-24). It appears that the aim is to stop the process from advancing towards an ambitious treaty that creates binding obligations for transnational corporations and the means to enforce these obligations and to ensure that the corporate approach (based on voluntary CSR, multi-stakeholderism and private sector-led SDGs) remains the only acceptable framework.



THE EU AND THE CORPORATE IMPUNITY NEXUS

KEY ARGUMENT:

There is no need for a binding treaty for transnational corporations. The focus should be on implementing the UN Guiding Principles.

What corporate lobby groups say

The UN Guiding Principles remain the authoritative global standard for addressing adverse impacts on human rights linked to business activity.

Global Compact website⁵⁶

We have seen tremendous progress in implementing the UNGPs by business. This progress is not sufficient, but it must continue and be encouraged; accordingly, other international efforts such as this process, should reinforce this implementation.

ICC oral statement, 2nd session, 2016

What Treaty proponents say

This argument disregards the question of impunity and contradicts evidence on the ground⁵⁷ from the affected peoples. As compliance with the UN Guiding Principles is voluntary, there are no sanctions for non-compliance.

As former UN expert Alfred de Zayas explains, voluntary norms aim to “give the impression that things are happening, that gaps are being filled and that the situation on the ground is improving, whereas the reality is that nothing is happening, nothing is changing.” De Zayas adds that it “makes perfect sense that transnational corporations are backing Ruggie’s principles when they know that they can disregard them.”

What the EU says

The UN Guiding Principles on Business and Human Rights endorsed by consensus in the Human Rights Council remain the authoritative framework for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

EU oral statement, 3rd session, 2017

Our motto remains: implementation, implementation and implementation.

EU oral intervention, 2nd session, 2016

Except otherwise referenced, all documents quoted here can be found on the OEIWG’s web page:

<https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>

KEY ARGUMENT:

The problem does not lie with international law, but rather with national legislation and the failure of national judicial systems to provide access to remedy.

What corporate lobby groups say

The problem is not the absence of a binding international instrument on business and human rights, but States’ failure or lack of capacity to implement and enforce their own domestic laws and existing international human rights treaties that they have ratified. (...) We need States to meet their existing obligations as required under the UNGPs, and we need more effective and comprehensive law enforcement in general. Indeed, in the absence of robust national laws and policies, enforcement, and judicial and non-judicial remedy mechanisms at the local level, foreign-imposed “solutions” are unlikely to have long-term, sustainable and replicable impact for rights-holders.

ICC-IOE written statement, 3rd session, 2017

What the EU says

We cannot emphasise enough that States must implement existing obligations (...). How can victims expect to have access to justice and to remedy in cases of abuses related to business activities in a State where the legislation fails to comply with existing international human rights law? In a State where the judiciary system is not independent? In a State where corruption impacts negatively on the fulfilment of all human rights?

Voice of the Victims Panel, 2017

What Treaty proponents say

The concentration of economic and political power in the hands of a few hundred transnational corporations often enables them to sway national decision-making processes. They take advantage of the “architecture of impunity”, the complexity of their legal structures, trade regulations and the jurisdiction of arbitral tribunals which make it possible for them to bypass national jurisdictions. Transnational corporations also take advantage of the differences in legislative and tax regulations that apply in different countries. In short, the degree of economic and political power wielded by transnational corporations make it impossible for many countries to ensure that TNCs abide by their laws.

KEY ARGUMENT:

Obligations in international law are for states, not private companies.

What corporate lobby groups say

International human rights law binds States, not private entities. Non-State actors, including business, do not have the democratic mandate or the authority to assume the same responsibilities and functions of Governments (...). Establishing international human rights obligations directly on business when these duties often do not exist at the national level also suggests that States may be seeking to pass the buck onto private entities for their own failure or unwillingness to protect their people's rights.

ICC-IOE, written statement, 3rd session, 2017

What the EU says

It appears that provisions extend obligations with regard to all rights into companies when the international community has, until now, been unable to agree on a treaty stating that companies are at least subject to obligations for international crimes. Could the Chairperson-Rapporteur respond to this challenge?

Draft EU questions on the Elements⁵⁸

What Treaty proponents say

Several documents, including the Universal Declaration of Human Rights, as well as international conventions on the environment, corruption, organised crime and labour⁵⁹, recognise that legal entities have certain responsibilities in regards to international law⁶⁰.

Giving TNCs direct obligations does not mean elevating their status to that of a state, nor does it cast doubt on the ultimate prerogative of the state⁶¹.

KEY ARGUMENT:

The Working Group should address all forms of enterprises, not just transnational corporations.

What corporate lobby groups say

Any work to promote respect for human rights must include all businesses, not simply transnational corporations or other businesses that may have a transnational character.

IOE, oral statement, 2nd session, 2016

What the EU says

The focus on solely transnational corporations, as foreseen in the process set out by resolution 26/9 which divided the Human Rights Council, neglects the fact that many abuses are committed by enterprises at the domestic level, thus undermining a fundamental element of the UNGPs that cover all businesses, regardless of whether firms are transnational.

EU, written declaration, 2nd session, 2016

What Treaty proponents say

It is true that all business activities, irrespective of whether it is a transnational or a domestic corporation, should respect human rights. However, the complex legal and economic structure of TNCs (the asymmetry of power vis-à-vis states) and their extensive lobbying capacity mean that they easily slip through the cracks of domestic law. Due to the inherent differences between TNCs and domestic corporations, the justiciability issues involved cannot be considered to be addressed in the same way.

KEY ARGUMENT:

Business should be involved in the Working Group and in drafting the Treaty.

What corporate lobby groups say

What are the mechanisms in the process here to take into account the realities and the interests of business? We are very committed to the principle of multi-stakeholder dialogue which has become part of the fabric of business and human rights. Companies are part of the solution to human rights challenges.

ICC oral statement, 3rd session, 2017⁶²

What the EU says

The European Union recalls that the global consensus reached on the UN Guiding Principles on Business and Human Rights came as a result of broad, sustained and in-depth consultations with States and all stakeholders. We believe that any possible further steps regarding the international legal framework for business and human rights at UN level must be inclusive, firmly rooted in the UN Guiding Principles and address all types of companies.

EU opening oral statement, 3rd session, 2017⁶³

What Treaty proponents say

Giving corporations the power to ‘co-write’ the rules that would apply to them is a central element of the ‘corporate capture’ model that has become widespread at the level of the EU and, increasingly, the UN (see Part 1 of this report). The emphasis on reaching ‘consensus’ with TNCs means that no significant action will be taken to address their impunity and the profits derived from it.

KEY ARGUMENT:

The Treaty process should not interfere with trade and investment agreements

What corporate lobby groups say

Language in the ‘elements’ on the aim to assert the primacy of human rights responsibilities in trade and investment regimes, including by imposing international human rights obligations on international organisations, lacks the necessary detail and appreciation for how these differing legal regimes co-exist. (...) The ‘elements’ paper, however, does not appear to contemplate the use of such trade regimes in a requisite nuanced manner that balances the protection of human rights and the free flow of trade.

ICC-IOE, written declaration, 3rd session

What the EU says

Much has been said this week regarding rights and obligations of investors. These legitimate issues are being discussed in other forums, but it may be worth recalling two important points: Nothing precludes a sovereign State from imposing obligations an investor in its territory. Fully aware of concerns raised by some investment disputes in the past, we have been fully engaged in a comprehensive process of reforming investment agreements. We are actively participating in in-depth discussions in this respect at the multilateral level, more precisely in UNCTAD and UNCITRAL.

EU oral statement, Voice of the Victims Panel, 2017

What Treaty proponents say

Countless case studies, including some of the ones presented in this publication (see Part 3), show that trade and investment agreements, including enforcement mechanisms such as investor-state arbitration, (ISDS) are a key element of the ‘architecture of impunity’ that allows transnational corporations to go unpunished for their violations. Addressing the discrepancy between the binding character of international trade and investment law, which favours transnational corporations, and the non-binding character of current CSR mechanisms, is therefore central to the purpose of the OEIGWG.

Given the entrenched nature of collaboration with private sector lobbyists in European institutions and that the positions defended by the EU in Geneva are exactly the same as those put forward by corporate lobby groups (as illustrated by the table above), it can be assumed that the EU representatives have had extensive contacts with private sector lobbyists. After all, EU delegates in the OEIGWG have constantly complained about the lack of engagement with the corporate sector. However, apart from a few events early in the process (such as a proposed meeting between EEAS and a representative from the US oil giant Chevron, arranged by the PR firm Edelman, and EEAS meetings with civil society organisations), official requests for information have not yielded any evidence of such contacts with lobbyists⁶⁴.

How is this possible? One interpretation could be that EU civil servants are now so closely aligned with corporate interests and so heavily under the influence of the corporate world view that they do not need be 'lobbied' any more. Another reason is that the EU is withholding some of this information, arguing that they did not receive authorisation from 'third parties' or that some documents cannot be disclosed because of the confidentiality obligations inherent to international negotiations. This would be a convenient cover for the corporations' attempts to influence the negotiations far from the public eye. Similarly, internal EU documents keep referring to 'informal' consultations with corporations and NGOs, on which no further information is given, as if dubbing lobbying meetings as 'informal' was sufficient to justify not disclosing information about them in spite of established EU regulations.

On the other hand, internal documents and various testimonies show that EU representatives in Geneva have repeatedly complained about the active role played in and outside the OEIGWG by civil society organisations and representatives of the communities affected by corporations' operations. They claimed that the UN was being hijacked by a 'leftist' agenda. It is undeniable that the presence and active participation of organised civil society in the OEIGWG process has played a significant role in building and sustaining momentum towards the negotiations of a binding treaty. This active engagement, along with the commitment of some governments such as Ecuador, has kept the process dynamic and disturbed the cosy tête-à-tête between transnational corporations and governments that is usually the norm in international circles.

The active engagement of civil society and affected communities has disturbed the cosy tête-à-tête between transnational corporations and governments that is usually the norm in international circles.

Internal documents show that the EU Commission wants 'business and human rights' and 'corporate social responsibility' issues dealt with under the umbrella of the 'Sustainable Development Goals' (SDGs). This position is revealing of the EU's vision on CSR, which portrays it as a means to promote and subsidise European TNCs in the name of their contribution to 'development'. The Commission has recently spurred the creation of a subgroup on CSR within its 'multi-stakeholder' platform on SDGs. The minutes of its first meeting show both BusinessEurope, the principal European corporate lobby group, and CSR Europe, another lobby group representing TNCs, opposing any form of binding regulations on transnational corporations and promoting the UN Guiding Principles and private-led SDGs as the way forward⁶⁵.

Created by former EU Commission vice-president Etienne Davignon, who is still the president of CSR Europe, this lobby group represents 45 transnational corporations from around the world, including Total, Volkswagen, Engie, BASF, Toyota and Coca-Cola⁶⁶. It claims to have "more than 150 meetings with EU institutions per year" and to help its members "shape CSR-related policy at European level"⁶⁷. It is particularly active in promoting SDGs and the role of the private sector in achieving them.

The close alignment between the EU and corporate interests has potential consequences for the positions of other governments as well. Indeed, the EU delegation has also been lobbying other governments to side with them against the most ambitious proposals in the OEIGWG negotiations. There is a long history at the international level and at the UN of governments from the Global South being bullied into supporting Western countries and opposing rules that could affect Western TNCs. The global power imbalance that exists is reproduced within the UN system and thus, negotiations and decisions made within the UN reflect this imbalance. The OEIGWG on human rights and transnational corporations is no exception to this rule.

PART 3

EUROPEAN TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (CASE STUDIES)

As we have shown above, in the international debate on a binding treaty on TNCs and in the OEIGWG, the EU has largely sided with the corporate world in seeking to perpetuate a voluntary, CSR-based approach designed by the private sector itself, through ‘public-private partnerships’ or ‘multi-stakeholder forums’ heavily tilted towards corporate interests. Although the EU is constantly reiterating its so-called ‘smart mix of voluntary and regulatory solutions’, its favoured approach is solely based on voluntary and corporate-led measures, except for some reporting obligations. It is also using the debate on business and human rights to promote an even greater role for TNCs on global issues – for instance, in the implementation of the UN Sustainable Development Goals.

This role played by the European Union (essentially the Commission, the Council and most Member State governments, whereas the European Parliament is more favourable towards regulations) is no coincidence. It is the reflection of the entrenched ‘corporate capture’ of the EU, which results in a pro-business, anti-regulation bias and allows large companies to essentially ‘co-write’ regulations with the EU. It also reflects the EU and European TNCs’ old habit of treating CSR as nothing more than a potential competitive advantage – so they can claim to be ‘better’ than their US, Chinese or Russian competitors – but with no real accountability. This approach results too often in outsourcing severe social and environmental impacts to countries outside Europe, primarily in the Global South, and then blaming the policies of these countries’ governments for their impacts.

For over a decade, social movements, trade unions and affected communities in Latin America, Africa and Asia have been exposing and resisting human rights violations and the environmental destruction caused by the operations of European TNCs. Their analysis has often been linked to the EU trade and investment policies that reinforce the asymmetry between corporate ‘rights’ and human rights. Corporate impunity was exposed during the Permanent Peoples Tribunal (PPT) Hearing on “The European Union and Transnational Corporations in Latin America: policies, instruments and actors complicit in violations of the Peoples Rights” (2006-2010)⁶⁸, in which 48 cases in various sectors involving corporations from the more powerful countries of the EU were judged. The verdict of the jurors of the PPT Session in Madrid in 2010 reaffirmed the need for a legal binding framework to address corporate crimes.

The last section of this report presents several case studies involving European TNCs from different sectors and with headquarters in different countries. Most of these case studies (the full version of which is available online) were written by experts and civil society organisations from across Europe as part of the European Network of Corporate Observatories (ENCO), as well as by Global South organisations directly involved with affected communities. ENCO’s objective is to foster cooperation between European NGOs and media organisations dedicated to researching and monitoring corporate power.

These case studies, which aim to paint a more accurate picture of European transnational corporations and their human rights footprint beyond CSR, illustrate several points made elsewhere in this report:

- There is a strong case for an ambitious binding Treaty due to the inadequacies and deficiencies of current legal frameworks (national and international) when it comes to addressing systemic violations by TNCs and making parent companies accountable for them.
- Current approaches and CSR-based mechanisms fail to address human rights violations and provide effective remedy to their victims. Some of the examples show corporations using CSR approaches as a way to deflect criticism and refuse to take genuine accountability, only offering voluntary ‘compensation’ instead.
- The way European corporations influence governments and encourage or push them into policies favourable to their business interests debunks the frequent argument put forward by European TNCs to deflect criticism of their human rights and environmental record: that their projects stem from agricultural, industrial or infrastructure policies set by national governments and that they are merely following the rules established by those governments.
- Finally, there are deep linkages between certain EU flagship policies and human rights and environmental violations committed by European TNCs. This is particularly true of the EU’s effort to develop comprehensive and corporate-biased free trade agreements all over the world. The same could be said of its raw material initiative and its development policies that are increasingly focused on privatisation and public-private partnerships. It also holds true for its climate policies, which have encouraged European TNCs to develop so-called ‘green’ energy projects in the Global South that generally result in land conflicts and environmental degradation.

The complete versions of the case studies are available online at:
<http://multinationales.org/Treaty-report-case-studies>





KiK and the Karachi fire: a test case for corporate responsibility in transnational supply chains

By **Goliathwatch**
(Germany)

In 2012, a fire in a textile factory owned by Ali Enterprises in Karachi, Pakistan led to the death of 260 workers and left 30 others injured, some severely. Seventy percent of all of Ali Enterprises' sales went to German clothes retailer KiK, which has stores in ten European countries: Austria, Croatia, Czech Republic, Germany, Hungary, Italy, Poland, Slovakia, Slovenia and The Netherlands. KiK has its garments produced by subcontractors in Germany, Poland, Turkey and five Asian countries: Bangladesh, Cambodia, China, Indonesia and Pakistan.

The disaster shines light on the poor conditions in textile factories in Pakistan, which are, in part, due to the absence of adequate government supervision. Even though it was proved that Ali Enterprises had violated fire protection rules, the criminal investigation against the company in Pakistan ended without an indictment. Twenty percent of all exports from Pakistan go to the EU.

KiK has been accused of failing to exercise due diligence and duty of care. The German corporation's strong business relationship with Ali Enterprises required it to do more to ensure that the working conditions at its subcontractor's factories were adequate. KiK commissioned regular factory visits and

had the working conditions audited by firms such as RINA Services S.p.A., but this was not enough to prevent the workers' deaths. This case thus demonstrates that voluntary CSR tools, such as the SA8000 certification standard used by KiK, are insufficient. It is interesting to note that RINA Services has been taken to court in Geneva and Italy because of its failure to implement the SA8000 certification processes properly. This kind of failure is widespread in the social audit industry.

Shortly after the fire, KiK offered about €1000 per victim. A lawsuit was filed at a German regional court in 2015 to demand compensation and in August 2016, the court accepted jurisdiction and granted legal aid to the claimants. Nearly four years after the disaster, as a result of the negotiations facilitated by the International Labour Organisation and the German Ministry of Economic Cooperation and Development, KiK agreed to pay an extra US\$5.15 million in damages to those directly impacted by the fire. However, it continues to refuse to pay damages for pain and suffering or to officially acknowledge its responsibility, as the claimants had asked. The case before the regional court is still pending.

BHP and the collapse of Samarco's Fundão Dam in Brazil

By **War on Want** and
London Mining Network (UK)

The catastrophic failure of the Fundão tailings dam in Minas Gerais, Brazil on November 5, 2015 spilled 45 million cubic metres of mining waste into 637 km of the Doce River and its tributaries. The disaster affected the water supply, agriculture, fishing and tourism and thus the livelihoods, social life and health of hundreds of households along the river and on the nearby Atlantic coast. Recovery of the Doce River will be a large-scale and long-term undertaking. Authorities and other relevant parties are only now realising the amount of effort that this will require.

The company responsible for the disaster is Samarco Mineração S.A., a joint venture between two transnational corporations: Brazilian-based Vale corporation and BHP, an English-Australian TNC. The three lawsuits initiated by the Brazilian state are progressing slowly, as is a recently filed lawsuit against BHP in Australia. One of the issues that may be important in these claims is the responsibility of transnational corporations in cases, such as this one, where they are part of a Non-Operated Joint Venture. BHP claimed that it was not the operator in this joint venture and, therefore, had little to do with overseeing the risks of the operations. It has

been suggested, though, that the two transnational corporations did participate in the risk committees for the mine and its tailings dams and should have been aware of the risks.

The mining corporations have set up a foundation called Renova, which is responsible for environmental remediation along the Doce River and providing compensation to the affected people. This was done in response to the civil lawsuit filed against them by Brazilian authorities. Renova has carried out some civil engineering work in the upper parts of the Doce River basin, but it is incomplete. Some people receive small payments of financial compensation for their loss of livelihood. However, it is still not clear what their future will be like and whether the remediation efforts will ever be sufficient for them to return to their previous livelihoods, such as fishing and river-side agriculture. Assistance to affected communities in relation to the environmental remediation work is in the hands of Renova, which they perceive as a subsidiary of the corporations that caused the environmental damage and their loss of livelihood, and there is not enough pressure on Renova from the state to act quickly.



Syngenta: Hazardous agrochemicals in India

By **MultiWatch** (Switzerland)

SYNGENTA

Yavatmal is a cotton growing region in Central India. From July to November 2017, a number of cotton farmers and labourers were poisoned while spraying insecticides. At least 50 died and over 1,000 became sick, some of which remained ill for months. Several factors can explain why the death toll was so high that year, but the deaths must be understood as part of an already dire situation involving pesticide use in small-scale cotton production. For many small farmers, cotton production is not very profitable, even in years with normal growing conditions. When pest populations increase, farmers come under even greater pressure to save their crops to avoid becoming more indebted. Furthermore, the state has drastically reduced its extension services. This means that farmers depend solely on the advice and instructions of pesticide dealers.

Syngenta, a former Swiss TNC that is now Chinese-owned, manufactures one of the pesticides involved in this case: Polo. Its active ingredient, diafenthiuron, is classified as slightly hazardous by the Government of India and highly hazardous by the Pesticide Action Network (PAN) India. By law, pesticide manufacturers such as Syngenta must provide training to users and ensure them access to personal protective

equipment and the necessary medical equipment in a case of poisoning. This doesn't appear to have been done in this case. Additionally, the pesticide packaging must provide safety information in the local languages. There are indications that this was not the case, as the information was not provided in Marathi, the local language. Therefore, Syngenta can arguably be held partly responsible for these pesticide poisonings, even if other actors, such as government institutions and pesticide dealers, were more directly involved.

Western agrochemical manufacturers are repeatedly criticised for selling highly hazardous products in India without ensuring that farmers are adequately informed of the dangers of their use and the necessary protective measures. Some chemicals are not even authorised for use in the EU, such as Syngenta's herbicide, Paraquat. A coalition of NGOs submitted a report to the Food and Agriculture Organisation of the United Nations (FAO) and the World Health Organisation (WHO) to denounce Syngenta and other EU-based chemical companies for violating the (voluntary) International Code of Conduct on Pesticide Management. However, these UN bodies have failed to deliver any specific recommendation.

Shell in the Argentinian Patagonia

By **Observatorio Petrolero Sur**
(Argentina)

Royal Dutch Shell plc claims to share the climate goals set by the Paris Agreement. In the province of Neuquén (in the Argentinian Patagonia), however, its local subsidiary, Shell CAPSA, is part of a group of corporations involved in the development of unconventional gas and oil (shale and tight sands) since the beginning of 2010, alongside other US and European corporations such as Chevron, BP, Total, Wintershall and Statoil.

The development of shale gas in Argentina offers a clear illustration of how TNCs manage to influence and control government policies. The international oil and gas industry successfully got new legislation passed to serve its interests. Provincial governments set up opaque companies to capture some of the economic benefits of new oil and gas projects. The former CEO of Shell CAPSA was even nominated Minister of Energy and Mining in 2015. When he accepted the position, he still owned shares in Royal Dutch Shell plc and made several decisions that favoured Shell's interests; criminal charges have been filed against the former CEO for his involvement in these events. To make things worse, unconventional oil and

gas development is increasing pressure on the environment and threatening traditional productive activities.

A series of irregularities appeared in Shell's operations in Argentina. Wells were drilled in the immediate surroundings of the Auca Mahuida protected natural area in violation of environmental safeguards. The Mapuche communities affected by the projects were not properly consulted and the ethnic and cultural pre-existence of the indigenous peoples of Argentina and their right to territory enshrined in the Argentine Constitution were not recognised. Peasant families who had occupied government land for decades saw their access to land threatened by the oil industry. This led civil society organisations to submit a joint declaration to the UN Human Rights Committee in 2016 and, in 2017, to present another document to the UN Committee on Economic, Social and Cultural Rights. The only time that Shell acknowledged adverse impacts of its operations on a local Mapuche community was when it signed a voluntary compensation agreement, which did not recognise indigenous rights as such, leaving many frustrated.

SHELL

Pollution and violence around a Glencore copper mine in Peru

By **MultiWatch** (Switzerland)

GLENCORE

The Tintaya Antapaccay copper mine in Peru was acquired by Glencore, the Swiss mining and commodities giant with headquarters in Zug, when it absorbed the mine's previous owner, the British transnational corporation Xstrata, in 2013. As is always the case with large mining projects undertaken by TNCs in the Global South, the mine's operations have caused extensive pollution in the area and triggered social and environmental conflicts. Important protests against the mine took place in 2012, mainly on the issue of water pollution. They were brutally repressed by the Peruvian police and two protestors died as a result.

After these events, Peruvian and international civil society organisations took several actions to hold the mining corporation accountable. The first one focused on the issue of water pollution. A coalition of NGOs investigated the matter and submitted a complaint to the UN Special Rapporteur on the Human Right to Water and Sanitation and the UN Working Group on Business and Human Rights, which was created to supervise the implementation of the non-binding UN Guiding Principles. They also presented the complaint to the Swiss and Peruvian governments. To date, this complaint has not generated concrete results. No measures have been taken to resolve the problem of water pollution and Glencore denies having any responsibility in the matter.

In October 2017, villagers from the area near the mine turned to the UK High Court to seek justice. In their claim, they argued that Xstrata Ltd. and its Peruvian subsidiary, Xstrata Tintaya S.A., should be held liable for the human rights violations perpetrated by the Peruvian National Police (PNP) during the 2012 protests. The claimants allege that Xstrata requested the PNP's presence at the mine and knew, or ought to have known from past experience, that the police had a propensity to use excessive force. While Xstrata claims the PNP operated independently and that the company cannot be held liable, the claimants contend that there are documents to prove that Xstrata controlled an intelligence-gathering network that shared information with the PNP and paid PNP intelligence officers to conduct surveillance on community members. Xstrata denies that there is any truth to this claim.

A more recent incident in April 2018 shows that Glencore has not changed its practices. Around 40 police officers and members of Glencore's staff attacked the Alto Huarca indigenous community and tried to displace the families. Many of the inhabitants, mostly women, were injured when they resisted. Glencore claims to be the legal owner of the land, but no prior consultation was carried out with the community, nor was financial compensation provided.

Volkswagen and the Dieselgate scandal

By **GoliathWatch** (Germany)

VOLKSWAGEN

In September 2015, it was revealed that Volkswagen had developed and introduced specific software in its diesel cars in order to mislead customers and regulators about the vehicles' emissions in real-life driving conditions. The so-called "Dieselgate" scandal then spread, suggesting that virtually all car manufacturers were engaged one way or another in such practices. Official investigations were launched in many countries, but their varying outcomes illustrate important legal differences between countries, particularly between the US and Europe. The absence of any access to remedy for the victims of environmental pollution was also left glaring.

In the US, Volkswagen and some executives were immediately prosecuted by the Environment Protection Agency and, confronted with the evidence, had no choice but to plead guilty. The corporation has had to pay US\$4.3 billion to date to regulators and to its clients and repair over 80% of the cars it had sold or take them back. Volkswagen has not felt similar consequences in Europe so far -- one case is still before the German Supreme Court. Activists have turned to a new legal strategy before the courts: the fight to get toxic diesel cars banned from major German cities. They had their first victory in Hamburg in May 2018 and the legal battle continues.

Dieselgate also revealed the car industry's enormous influence in Germany and at the EU level. In August 2017, the German government organised a 'national diesel summit' with car manufacturers -- and without civil society -- to publicise a few minor concessions to the industry and help them improve their image. The European Commission took the German government to the European Court of Justice for its failure to hold car manufacturers to account and to take measures to improve air quality. The Dieselgate scandal has also revealed how the car industry has been able to 'co-write' EU environmental standards and make their implementation extremely flexible. For example, the latest diesel emission standards, Euro 6, were introduced in 2016 based on advice from an expert committee with heavy representation from the car industry. Unsurprisingly, even after Dieselgate, they provided a lot of flexibility, allowing automakers to bypass official emissions standards.

Countless studies have revealed the human costs of diesel pollution in Europe and throughout the world in terms of impacts on health and premature deaths. While some car owners were compensated or had their automobile replaced, there is still no avenue for all the other victims to hold Volkswagen and other car manufacturers to account for their actions.

Salini and the Gibe Hydroelectric Complex in Ethiopia

By **Re:Common**

SALINI

The Omo Valley in Ethiopia is characterised by its multiplicity of ecosystems, cultures and languages. The communities living along the valley depend almost entirely on the Omo River. They have established and consolidated specific socioeconomic and ecological practices that are well-adapted to the hard and often unpredictable climate conditions in the region.

Unfortunately, the Ethiopian government had completely different plans for the Omo Valley. It is pursuing the Growth and Transformation Plan (GTP): an impetuous development programme focused on large-scale infrastructure projects and agribusiness, which is resulting in land dispossession. State repression and systematic violations of human and civil rights have been the norm when it comes to the plan's implementation. Made up of three operational hydro projects, with a fourth under construction and a fifth already announced, the Gibe Hydroelectric Complex is a controversial case. It involves a public-private partnership between the Ethiopian Electric Power Corporation (EEPCo), the sole electricity utility in the country that is fully state-owned, and Salini Costruttori S.p.A., an eminent Italian construction firm that has a strong presence in many African countries. There were repeated irregularities in the way Salini was awarded the contracts, despite

the fact that the first two dams had been partly financed by European development aid, which is supposed to involve due diligence⁶⁹. This led to a criminal investigation in Italy in 2006.

Gibe III has been controversial ever since the design phase because it is considered disproportionate to the needs of Ethiopia: it has an installed capacity of 1,870 MW, a height of 250 metres. It has already drastically disrupted the ecosystems of the Omo Valley and the Lake Turkana area. Hundreds of households have been displaced and communities have been forcibly evicted. Without the steady stream of water from the Omo River, Lake Turkana in Kenya, the world's largest permanent desert lake, is destined to greatly decrease in size. This will have dramatic consequences for the environment and for the population of the Turkana region.

Overall, this case study illustrates the dangers that accompany large energy infrastructure projects whenever the interests of a major transnational corporation coincide not only with weak governance in the host country but also very clear willingness from financial institutions to provide funding in spite of alarming project oversights and impacts.

Engie and the Jirau dam

By **Observatoire des multinationales** (France)

ENGIE

In the 1990s, the Brazilian government started to revive plans from the 1970s to build dozens of hydroelectric dams in the Amazon as part of a wider push to 'accelerate growth' through infrastructure development. In 2007, Engie (formerly GDF Suez), a French-Belgian energy conglomerate, was the first non-Brazilian company to be awarded a contract to build and operate a large hydroelectric dam: the Jirau dam in the state of Rondônia, close to the Bolivian border. Jirau is part of a larger hydro complex that includes the Santo Antonio dam built nearby by the Brazilian transnational corporation, Odebrecht.

From the very beginning, the Jirau dam project was embroiled in controversy. The scope of the impact assessment study arbitrarily stopped at the Bolivian border to avoid international complications. The location of the dam was changed without modifying the environmental impact assessment accordingly. When the Brazilian environmental regulator showed signs that suggested it would not authorise the dam, its director was fired by the federal government and the dam was authorised under conditions that have never been fulfilled. Indigenous peoples were displaced, including indigenous peoples in voluntary isolation. The French-Belgian corporation accepted to take limited responsibility for the most direct impacts of building the dam, but not for the wider social and environmental impacts, including problems caused by a rapid influx of people into the area, deforestation and the loss of fisheries. Cases of forced labour were reported on the dam building sites and workers broke out in riots twice – once in 2011 and again in 2012 – over poor treatment. Historical floods devastated the region in 2014, for which the two dams were largely responsible. Even today, local activists are still being threatened and some, murdered.

Engie generated a lot of publicity about the money it had distributed on the ground as 'social compensation' (most of which seems to have been wasted or have remained with intermediaries), but it was hardly enough to cover the social and environmental costs of the upheaval created by the dam. The corporation was awarded large amounts of carbon credits for the Jirau project, even though the climate benefits of large tropical dams are being questioned. In 2014, Engie even used its first-ever 'green bond' – which had been advertised to investors as a way to support renewable energy projects – to complete the financing of the dam.

Even though there have been countless administrative and judicial proceedings launched against Engie or its subcontractors, very few have ended with substantial rulings. This is partly because the executive branch of the Brazilian government has the power to suspend litigation in the name of 'national security'. Typical of large corporations, Engie has always claimed that it was only undertaking a project designed by the Brazilian government and abiding by its rules. Indeed, the Jirau dam was largely supported and funded by the Brazilian government. However, as evidenced by the recent corruption scandals, some sectors of the government have always had very close relationships with the industry and this support has mostly served to protect the profit-seeking decisions of private corporations such as Engie (for example, the decision to modify the dam's location).

The Wind Farm Corridor on the Isthmus of Tehuantepec (Oaxaca, Mexico)

By **Observatorio de Multinacionales en América Latina** (OMAL, Spain)

European corporations Iberdrola, Gas Natural Fenosa, Acciona, Renovalia and EDF are involved in the development of the largest wind farm corridor in Latin America, which is having numerous impacts on the territory and the predominantly indigenous population. The process to build the Isthmus of Tehuantepec Wind Farm Corridor has failed to guarantee the right to free, prior and informed consent. It has involved the use of illegal means to modify community land ownership and false promises to trick the population into signing leases for their land. Even though wind power is considered clean energy, this megaproject is having multiple impacts on the territory, which range from changes to land use and environmental impacts to militarisation and the masculinisation of the territory.

The local population has mobilised to demand respect for the right to consultation, the annulment of the contracts signed in disregard of communal ownership and an end to repression. They also defend energy as a human right, and not a commodity. However, despite the various rights violations and the numerous court rulings still pending,

petitions demanding the cancellation of contracts or the suspension of the projects initiated without prior consultation have produced results in only a few cases. In the meantime, the criminalisation of the population continues to increase.

Through its free trade agreements with Mexico and with funding from the European Investment Bank (EIB), the EU has actively promoted the development of large-scale wind and solar projects – as ‘green energy’ – and the liberalisation and privatisation of the Mexican energy sector. It has done so to create new opportunities for European transnational corporations, including cheap access to carbon credits. What is worse, the local people do not benefit from the electricity generated by these wind projects; instead, the energy is sold to USTNCs established in Mexico.

**IBERDROLA FENOSA EDF
ACCIONA RENOVALIA**

AATIF and Agrivision Africa: the failure of private-sector-led ‘development’

By **ASTM** (Luxembourg) and **FIAN Germany**

**AATIF
AGRIVISION AFRICA**

AATIF is a Luxembourg-based fund initiated by the German Ministry for Economic Cooperation and Development (BMZ) to “contribute to the growth of African farmers and to a reduction of poverty”. Its role is to provide loans to private investors interested in investing in Africa’s agricultural sector. The creation of AATIF comes within the scope of a new policy pursued by European states that marks a deliberate shift from traditional development aid to blending and public-private partnerships (PPPs). Today, the fund holds US\$179 million and its shares are divided up among BMZ, banks and unknown private investors. AATIF is based in Luxembourg because the establishment of such kind of structured fund was not permitted under German law.

AATIF is structured according to a waterfall principle, with three categories of shares linked to different levels of investment risks. Private investors bear the lowest risks (A-shares), average risks are borne by banks (B-shares) and the highest risks, by BMZ (C-shares). First, profits are given to A-shareholders, then to B-shareholders and so on. In case of losses, it is the opposite: losses are compensated by taxpayers. In addition, the fund does not have to pay income tax in Luxembourg.

In 2011, the finance investor Agrivision Africa (Mauritius) received a loan of US\$10 million from AATIF to expand its industrial production of soy, wheat and maize in Zambia, among others for export. It was AATIF’s first transaction. Up to now, Agrivision Africa has purchased 20,000 hectares of land in Zambia. Some of this land had previously been used by local farmers to grow food for their own consumption. In the beginning, the investor promised to create 1,639 local jobs and give back to the local community. However, to increase its profits, the fund invested in the mechanisation and intensification of production on the farms. This turned out to be very profitable for Agrivision and its shareholders (in 2016, US\$4 million in earnings were reported) but for the local population, this resulted in extensive deforestation and job losses. Pay for casual workers on some Agrivision farms was reportedly extremely low. Land conflicts are smouldering between local communities and the private investor. Overall, instead of reducing poverty and helping African small-scale farmers, AATIF’s US\$ 10 million loan to Agrivision resulted in strengthening large-scale industrial farming and a further neglect of basic human rights of local communities.

G4S in the Occupied Palestinian Territories By Novact (Spain)



G4S is a British-based security and outsourcing company that has expanded through lucrative government contracts all over the world, often creating controversy. As corporations such as G4S are hired to perform the ‘lowest’ and most disreputable tasks of government – such as security, detention of migrants, prison management, border control and so on – it can be hard to disentangle the responsibility of governments and those of private corporations for the violations resulting from these services. There is however evidence of lobbying and close proximity between G4S and governments, and it can be said that by offering a ‘low-cost’ way for governments to perform these tasks and to shift responsibility for them to private contractors, corporations such as G4S create an environment that is more conducive to human rights violations.

For example, the involvement of G4S in the Occupied Palestinian Territories, through its Israeli branch, resulted in alleged human rights violations in at least three different contexts. The first violations were reported in several detention centres managed by the company, where minors were held in solitary confinement for days and were often threatened to extract confessions. The second kind of violations

were related to mistreatment of Palestinian women prisoners, especially pregnant ones, in detention centres controlled by G4S.

Finally, the third allegation – covering all G4S operations in the Occupied Palestinian Territories – was the subject of an official complaint brought before the British National Contact Point, a non-judicial mechanism under the non-binding international standard known as the “OECD Guidelines for Multinational Enterprises”. In this case, even though the National Contact Point concluded that there had been violations and that G4S had not implemented its recommendations, no further action was possible. G4S formally sold most of its Israeli assets in 2016 to local investors, but the new owners retained G4S’s management team. The TNC is still active in Israel through a flagship police training centre called ‘Polarity’.

G4S has been the object of yet another complaint under OECD guidelines, this time for its management of the infamous Australian migrant detention centre on Manus Island and the human rights violations committed there.



Crédit Suisse and the Mozambique secret loans scandal

By MultiWatch (Switzerland)



In 2013, Crédit Suisse London and Russian bank VTB London granted a US\$2.07 billion loan to Mozambique via three state-owned companies, unbeknownst to the country’s parliament. The then-president of Mozambique, Armando Guebuza, and a former intelligence chief, Antonio de Rosario, allegedly wanted to finance a major coastal defence project. Of the total, US\$850 million were loaned to a newly created state-owned company, Ematum, through Eurobonds sold to major investors, to set up a tuna fishing fleet with armed escorts to protect it. The fish were to be exported to the EU and the revenues were to be partly used as debt repayment. It is interesting to note that EU fish imports were worth €41 million in 2017.

This plan was never implemented. Prinvest, a conglomerate owned by Franco-Lebanese entrepreneur Iskandar Safa and his brother Akram Safa, was awarded the contract to build this fleet in a shipyard in Cherbourg, France for ‘only’ US\$200 million. This led to questions on where the rest of the money that Prinvest had charged had gone. On top of that, Crédit Suisse and VTB secretly granted more loans to two other Mozambican state-owned companies: US\$622 million, mostly from Crédit Suisse, went to state-owned Proindicus, which used the money to buy twelve

military inspection vessels, radars and other military equipment; US\$535 million from VTB flowed to state-owned Mozambique Asset Management, which was supposed to be used for military security on the coast. Mozambique’s loans from Crédit Suisse could thus be connected to an effort to protect future offshore natural gas production in the country, which would serve the EU’s strategic objective of reducing its dependence on natural gas from Russia.

When the loans and their potential use for buying weapons were made public, donor countries suspended aid to the country. Mozambique declared insolvency and the country fell into a severe economic crisis. Public spending on health and education had already been shrinking dramatically. The IMF is now urging Mozambique to implement more cuts.

Crédit Suisse London is accused of having violated its due diligence obligations in a context where the loans were obviously risky and would consume an unreasonably large share of Mozambique’s GDP. The bank has also been denounced for charging the country exorbitant fees and interest rates. Investigations are ongoing in the UK and the US. Mozambican civil society is demanding a transparent investigation into the loans and an audit of the country’s debt.



Indra Sistemas: arms for war and the militarisation of borders

By **Centre Delàs** (Spain)

INDRA
SYSTEMS

Indra is one of the main military companies in Spain and one of the leading corporations in the European defence and security sector. Thanks to Indra's strong presence in European lobby groups and close relations with the Spanish government (18.7% of its shares are owned by SEPI, a state enterprise), it is awarded many contracts for lucrative projects. Indra also plays a role in shaping Spanish and EU policies and strategies. For example, together with other TNCs from the arms industry, Indra participated in the drafting of the strategic guidelines of the European Security Research Programme, among others, which led to even more contracts for the Spanish corporation.

This close entanglement of public and private interests in the defence and security sector raises questions on the responsibility (including the legal responsibility) of private arms corporations such as Indra in human rights violations resulting from EU and national policies. When it was decided in 2005 to reinforce the fence at the Moroccan border in Ceuta and Melilla, Indra and two other companies (ACS and Ferrovial) earned 8 out of every 10 euros that was spent on border development.

Thanks, in part, to the lobbying efforts of Indra and its peers, the EU allocated 2 billion euros to reinforcing its external borders between 2007 and 2013, and only 700 million euros to improve the living conditions of refugees and asylum seekers. During the same period, Spain allocated 290 million euros to border control and only 9 million to the European Refugee Fund. European arms giants thus seem to have successfully shaped the response of the EU and the Spanish government to the migration and refugee crisis as a militarised one.

Another example is the current war in Yemen. Using arms with components and electronics produced by Indra, the Saudi-led coalition has bombed several civilian targets, including schools, medical facilities, mosques and markets. Does this not make the Spanish government and Indra (together with other European TNCs and governments) complicit in the human rights violations and alleged war crimes committed by Saudi Arabia, especially when these arms sales appear to be in violation of the Arms Trade Treaty and the European Union Common Position?

Société Générale and US fracked gas exports

By **Amis de la Terre France** (France)

SOCIÉTÉ
GÉNÉRALE

In its quest to dramatically expand the production and export of shale gas, the US oil industry is proposing a staggering number of new pipelines and liquefied natural gas (LNG) export terminals. Most new projects are concentrated on the Gulf Coast – a region already devastated by the oil and gas industry. The French bank Société Générale has emerged as a key financial backer and adviser for new gas infrastructure projects across North America. One such project is the Rio Grande LNG terminal in Southern Texas near the Mexican border, which is one of the three terminals proposed in the area.

LNG has an enormous climate footprint due to methane leakage throughout its life cycle and the huge amount of energy required to transport and freeze gas before it can be exported. Because of these impacts on climate, the whole project appears in contradiction with the Paris Agreement. It also poses serious risks to human rights, health, safety and the environment. Local air pollution will worsen already poor health conditions in the area, not to mention the increased risk of major accidents. Rio Grande LNG and the two other planned terminals constitute a direct threat to the last remaining large-scale ecologically sensitive habitat in Texas, recognised

as one of the richest and most diverse areas in terms of biodiversity in the United States. The right to free, prior and informed consent of native communities has not been respected. Although the company has organised some public meetings, there has been no real consultation with the Esto'k Gna people, nor with any other community living in the area.

In view of its 'duty of vigilance' (enshrined by a new French law passed in 2017), Société Générale should end its involvement in these projects. Otherwise it could be seen as having contributed to these violations through its financing and advisory activities. Banks have begun to acknowledge that they have a responsibility to ensure that their funding does not contribute to human rights violations. Even so, they have so far favoured non-binding, voluntary mechanisms such as the 'Equator Principles'. When a promoter is not able to prove that its project will meet the social and environmental criteria of the Equator Principles, signatory banks are supposed to refuse to fund it or to grant loans to the corporations involved in the project. But experience shows that this very rarely happens, and as a case in point, Société Générale is still involved in the Rio Grande LNG project.

Parmalat and small-scale dairy farmers in Zambia

By **Rural Women Assembly** (Zambia)

PARMALAT

In 1991, when the Movement for Multi-Party Democracy formed government in Zambia, it implemented an aggressive structural adjustment programme designed by the International Monetary Fund and World Bank, along with an economic liberalisation policy. The South African milk processing corporation Bonnita assumed 70% ownership of the national Dairy Produce Board, while Zambian commercial farmers owned the rest. Bonnita was acquired by Parmalat, an Italian corporation now controlled by the French group Lactalis. Italy is one of Zambia's key trading partners and the two countries signed a bilateral investment treaty that encourages, promotes and protects foreign investment. The European dairy industry is among the leading promoters of free trade agreements between the EU and other countries as part of its strategy to develop its exports and take over local dairy companies.

These developments had negative effects on the dairy sector, as support in the form of subsidies and extension services was reduced drastically. Agriculture is the main source of income and livelihood in rural Zambia and accounts for about 20% of GDP. There are three categories of dairy farmers in Zambia: commercial, emergent and traditional/small-scale farmers (mostly women). These farmers, who do not process their milk but sell it to processing companies such as Parmalat, have been detrimentally impacted. The case was submitted to the Permanent Peoples Tribunal (PPT) Hearing on Transnational Corporations in Southern Africa in August 2017 by the Rural Women's Assembly of Zambia.

According to the PPT Verdict⁷⁰, contrary to most foreign direct investment, which is export-oriented, Parmalat has taken over the public dairy distribution network and continues to collect local milk and supply the local market. While the state-owned company had supported farmers through subsidies or by redistributing gains when prices rose, the private network that substituted the public one introduced price discrimination among farmers. Milk prices were set based on the type of farm and this system favoured commercial producers at the expense of small-scale farmers. A contract-funding model has locked small-scale women dairy farmers into an unfair price structure and benefit-sharing mechanism: contrary to commercial farmers, the milk of women dairy farmers is not graded at the point of delivery. While Parmalat previously purchased milk from small-scale farmers, making the company their biggest and ultimately only customer, the corporation has not raised the amount it pays the farmers, even though the cost of feed for cattle, seeds and food products have risen dramatically. Meanwhile, the in-store prices of Parmalat's products have increased by 300%. Farmers can no longer maintain their cattle, which are dying from hunger, while they themselves live in severe poverty. When the affected people complain to Parmalat, the transnational corporation's response has been that it could not afford to pay more for the milk because it was not making a profit.

ACS and the Castor gas storage project

By **ODG** (Spain)

ACS

In 2008, the Spanish government approved the construction of the Castor project, an underground natural gas storage facility in the Terres del Sènia area between Catalonia and the Valencian Community. The corporation in charge of construction was Escal UGS, which was created especially for this project as a subsidiary of Grupo ACS, a Spanish construction and engineering firm with many connections to mainstream political parties. Grupo ACS consists of 47 companies and subsidiaries, including German corporation Hochtief and Australian-based Cimic, has operations in 64 countries and its turnover reached almost 32 billion euros in 2016. At one point, the Castor Project had to be refinanced by the European Investment Bank.

The Castor project has generated adverse social, economic and environmental impacts at the local and state level. As a result of the start-up tests on the infrastructure, more than a thousand small earthquakes (up to 4.2 degrees on the Richter scale) occurred in September and October 2013, causing social alarm and damage to some buildings. When the Spanish government accepted Grupo ACS's decision to renounce the concession, it was decided that the 1.35 billion euros the corporation had received plus other costs of the project were to be charged to gas consumers through their bills over the next 30 years. This has been temporarily stopped due to a complaint lodged at the Constitutional Court of Spain, but the illegitimate payment to the corporation has still not been reversed and the infrastructure built has still not been dismantled.

The Bayer-Monsanto merger: evading accountability?

By **Observatoire des multinationales** (France)



The merger of German chemical giant Bayer with US-based agrochemicals corporation Monsanto will give rise to the largest chemical corporation on Earth. On the heels of ChemChina's acquisition of Syngenta and the merger between Dow and DuPont, this takeover is the latest step towards the extreme concentration of the global chemical industry. Only four multinationals – the three already mentioned plus BASF – now dominate the sector, especially the production and sales of agrochemicals and genetically modified seeds associated with agrochemical use.

Bayer's takeover of Monsanto has also attracted a lot of interest due to both corporations' track records of human rights and environmental controversies. Monsanto is known for having produced Agent Orange, a herbicide used during the Vietnam War, and other well-known toxic chemicals such as Roundup, as well as various genetically modified organisms (GMOs). Bayer, for its part, was involved with the German industrial-war complex during the World War I and II and has been denounced for its production of bee-killing neonicotinoids. Both corporations have also been challenged for their aggressive lobbying and their attacks on scientists and opponents.

In 2016 and 2017, global activists organised the 'Monsanto Tribunal' in The Hague. Composed of renowned international law experts, its jury delivered a scathing opinion on the US transnational corporation's human rights impacts and called for international law to address corporate impunity. There are also numerous lawsuits before the courts of the US judicial system. In August 2018, a Californian court ordered Monsanto to pay US\$289 million to gardener Dewayne Johnson who had fallen ill with cancer after using Roundup. Farmers have filed similar lawsuits against Monsanto in France. Even the Vietnamese government said that it is considering suing Monsanto for the impacts of Agent Orange.

Many are concerned that one of the hidden goals of the Bayer-Monsanto merger is precisely to allow the US firm to escape at least some these proceedings. Depending on jurisdiction and whether it is facing criminal charges or not, Monsanto's liability may not be passed on entirely to Bayer. There are good reasons to fear that the takeover will make it much more difficult for affected people to claim compensation. There is a precedent for this: after the Bhopal disaster, the US chemical corporation Union Carbide was bought out by Dow Chemical and the affected people were never able to hold Dow and its executives to account for alleged damages.

Groupe Bruxelles Lambert: what about the accountability of billionaire shareholders?

By **Observatoire des multinationales** (France)

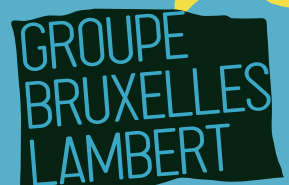
The debate on corporate accountability generally focusses on corporations' responsibility as legal persons and, as far as individual responsibility is concerned, of corporate executives. One issue that is often overlooked is the potential responsibility of shareholders and holding companies. They can influence company decisions and therefore, be challenged for human rights or environmental violations that may result from such decisions. They may exert this influence indirectly through their investment choices or their demands for higher dividends, for instance, or directly through the board of directors.

One such holding company is Groupe Bruxelles Lambert (GBL), owned by Belgian billionaire Albert Frère and the French Canadian Desmarais family, which has a significant number of shares in TNCs such as Pernod Ricard, the cement giant LafargeHolcim, Adidas and the Imerys mining corporation. Until very recently, it was also a major shareholder of Engie (formerly GDF Suez) and Total.

Many of these transnational corporations have been involved in large-scale human rights controversies. Groupe Bruxelles Lambert and Albert Frère played a key role, for instance, in GDF Suez's decision to invest in the Brazilian energy sector and get involved in the Jirau dam project (see this case study

above). Another GBL-owned company, Imerys, is similarly in the spotlight for severe environmental violations at its kaolin mining operations in Barcarena in the Brazilian Amazon.

The Lafarge scandal is one case where the role of shareholding companies such as GBL is now most evident. Following a formal complaint by Sherpa and the European Centre for Constitutional and Human Rights, an official investigation was launched into Lafarge's dealings with armed groups, including Daesh, during the Syrian civil war to keep a cement plant open. The investigation has led to the prosecution of several of the corporation's executives and the TNC itself. Yet, it should be noted that the shareholders of Lafarge – including Albert Frère and Egyptian billionaire Nassef Sawiris, who were both on the Lafarge board of directors at the time and now, on the board of LafargeHolcim – are said to have played a crucial role in Lafarge's decisions to invest in Syria and to maintain a presence there. French and Belgian investigators have summoned representatives from GBL for questioning, searched their offices and even wiretapped them. The recordings from the wiretaps revealed how worried GBL representatives were about being blamed for Lafarge's dealings in Syria⁷¹. No formal charges have been laid so far.



ENDNOTES

- 1 See resolution 26/9 of the UN Human Rights Council, adopted in June 2014: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9
- 2 The word “Treaty” with a capital ‘T’ will be used throughout the report to refer to the binding treaty on transnational corporations being discussed by the OEIGWG at the UN.
- 3 The full versions of the case studies are available online at: <http://multinationales.org/Treaty-report-case-studies>
- 4 <https://www.tni.org/en/infographic/planet-earth-corporate-world>
- 5 Juan Hernández Zubizarreta (2015). “The New Global Corporate Law”, in *The State of the Power 2015*, Transnational Institute. Online: https://www.tni.org/files/download/01_tni_state-of-power-2015_the_new_global_corporate_law-1.pdf
- 6 In 2017, the murders of at least 207 land and environmental defenders have been documented in 22 countries. See: Global Witness (2017). *At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017*. Online: <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>
- 7 Commission on Global Governance (1995). *Towards the Global Neighbourhood. The Report of the Commission on Global Governance*. Oxford: Oxford University Press. Quoted in Nora McKeon (2017). *Are Equity and Sustainability a Likely Outcome When Foxes and Chickens Share the Same Coop? Critiquing the Concept of Multistakeholder Governance of Food Security*. *Globalizations*, 14:3, 379-398. Online: <http://dx.doi.org/10.1080/14747731.2017.1286168>
- 8 Helsinki Process. (2008). *Final Report of the Helsinki Process on Globalisation and Democracy. A Case for Multi-stakeholder Cooperation*. Quoted in Nora McKeon (2017). *Ibid.*
- 9 <https://sdgcompass.org/sdgs/sdg-17/>
- 10 <https://www.tni.org/en/publication/multi-stakeholderism-a-corporate-push-for-a-new-form-of-global-governance>
- 11 Nora McKeon (2017). *Ibid.*
- 12 With the exception of the ILO, which has had a tripartite structure since its creation in 1919 that includes government, employer and workers’ representatives.
- 13 Susan George (2015). *Shadow Sovereigns - How Global Corporations are Seizing Power*. Polity Press.
- 14 This principle is a reaffirmation of Article 1.1 which can be found in both International Covenants on Human Rights.
- 15 CETIM (1996). *Organisations internationales, droits humains et business*. Online: <https://www.cetim.ch/organisations-internationales-droits-humains-et-business/>
- 16 Cited by Tony Clarke (1997). *Silent Coup. Confronting the Big Business Takeover of Canada*. Canadian Centre for Policy Alternatives.
- 17 UN Global Compact website: <https://www.unglobalcompact.org/what-is-gc/mission/principles>
- 18 Judith Richter (2003). *Building on Quicksand. The Global Compact, Democratic Governance and Nestlé*. IBFAN/GIFA, CETIM and Berne Declaration, 13.
- 19 Chelsea Clinton and Devi Sridhar (2017). *Who Pays for Cooperation in Global Health? A Comparative Analysis of WHO, the World Bank, the Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria, and Gavi, the Vaccine Alliance*. *The Lancet*, 390:10091, January 2017, 5.
- 20 *Ibid.*, 2.
- 21 Barbara Adams and Jens Martens (2018). *The UN Foundation – A Foundation for the UN? Global Policy Forum and Rosa-Luxemburg-Stiftung – New York Office, Bonn/Berlin/New York*, 5.
- 22 See World Health Organisation (2012). *Stratégies et tactiques de l’industrie du tabac pour saper les efforts de lutte antitabac*?. Online: http://www.cipretfribourg.ch/fileadmin/Fichiers/Pdf/OMS_strategies_et_tactiques_de_l_industrie_du_tabac_FR.pdf
- 23 See Friends of the Earth International (2012). *Shell and Corporate Lobbying in the Rio+20 Process*. Online: <https://www.foei.org/wp-content/uploads/2014/03/Shell-and-corporate-lobbying-in-the-Rio-20-process.pdf>
- 24 See Amandine Orsini (2011). *Lobbying industriel et accords multilatéraux d’environnement*. *Revue française de sciences politiques*, 61, 2011/2, 231-248.
- 25 See Friends of the Earth International (2012). *Reclaim the UN from Corporate Capture*, 5. Online: <https://www.foei.org/wp-content/uploads/2013/12/Reclaim-the-UN.pdf>
- 26 This partnership is the first of its kind in the history of the UN human rights system.
- 27 <https://transparency.eu/lobbyistsinbrussels/>
- 28 <https://alter-eu.org/balanced-expert-groups> and https://www.foeeurope.org/sites/default/files/publications/whose_views_count.pdf. See examples involving the financial sector and, more recently, on the Dieselgate scandal, at: <https://www.alter-eu.org/sites/default/files/documents/a-captive-commission-5-11-09.pdf> and http://foeeurope.org/sites/default/files/corporate_capture/2017/foee-ceo-driving-into-disaster-feb2017.pdf
- 29 <https://www.alter-eu.org/yellow-card-for-team-juncker>
- 30 <https://www.alter-eu.org/commission%E2%80%99s-ethics-failures-came-home-to-roost-in-2016> and http://www.foeeurope.org/sites/default/files/conflicts_of_interest/2015/whose_representatives_-_meps_on_the_industry_payroll-update.pdf
- 31 http://europa.eu/rapid/press-release_SPEECH-05-130_en.htm
- 32 <https://alter-eu.org/lobby-transparency-the-devil-is-always-in-the-detail>
- 33 https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en
- 34 http://foeeurope.org/sites/default/files/other/2017/better_regulation_better_for_whom2.pdf
- 35 http://foeeurope.org/sites/default/files/resource_use/2016/how-better-regulation-sabotaged-circular-economy-package.pdf
- 36 For more information on the content of this law and its adoption process, see Friends of the Earth France and ActionAid France (2017). *End of the Road for Transnational Corporations ? From a Groundbreaking French Law to a UN Treaty*. Online: <http://www.amisdelaterre.org/Report-End-of-the-road-for-transnational-corporations-From-a-groundbreaking.html>

- 37 Created in June 2013, under the auspices of the Prime Minister's Office, the CSR Platform is a national platform for the promotion of global action on corporate social responsibility. It "issues opinions on questions submitted to it and formulates recommendations on social, environmental, and governance matters raised by corporate social responsibility" (our translation). It is composed of representatives of corporations, labour, civil society organisations, research institutes and public authorities. See: <http://www.strategie.gouv.fr/chantiers/plateforme-rse>
- 38 To a large extent, civil society organisations have stopped participating in the CSR Platform. Friends of the Earth France and ActionAid France decided to definitively withdraw from it in 2017. In a press release, they denounced the disproportionate weight of the economic subgroup and the failure of multi-stakeholderism. See: <http://www.amidelaterre.org/Les-Amis-de-la-Terre-France-et-ActionAid-France-Peuples-Solidaires-quittent-la.html>
- 39 Pierre Pringuet (2016). Cette loi va pénaliser les multinationales françaises. Libération, 23 March 2016.
- 40 See the AFEP Press release, 31 March 2015: <https://www.contexte.com/positions/proposition-de-loi-sur-la-responsabilite-des-societes-meres-et-entreprises-donneuses-dordre-28012.html>. And the MEDEF Press release, 1 December 2016, entitled "Duty of vigilance: an inefficient law which threatens our economy": <http://www.medef.com/fr/communiquede-presse/article/devoir-de-vigilance-une-loi-inefficace-qui-menace-notre-economie>
- 41 Our translation. Béatrice Héraud (2018). Loi Pacte : les grands patrons veulent plus de simplification administrative. Novethic, 30 April 2018. <https://www.novethic.fr/actualite/entreprise-responsable/isr-rse/loi-pacte-les-grands-patrons-veulent-plus-de-simplification-administrative-145752.html>
- 42 See: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>
- 43 The Commission on Human Rights was the main UN body responsible for developing human rights standards from 1946 to 2006, which is when it was replaced by the Human Rights Council.
- 44 Melik Özden (2005). Sociétés transnationales et droits humains. CETIM, Collection Droits Humains, 83. Online: <https://www.cetim.ch/wp-content/uploads/Transnational-corporation-and-human-rights.pdf>
- 45 See the French coalition's press release on 20 December 2017 at: <http://www.amidelaterre.org/Traite-ONU-tentative-de-sabotage-de-l-Union-europeenne.html> and the one from the global campaign: <https://www.cetim.ch/tentative-de-sabotage-a-new-york-lunion-europeenne-veut-priver-de-financement-groupe-de-travail-onusien-charge-delaborer-traite-stn/>
- 46 ICC website: <http://www.icc-france.fr/chambre-de-commerce-internationale-index-icc-france.html>
- 47 <https://www.un.org/press/fr/2016/ag11876.doc.htm>
- 48 ICC website: <https://iccwbo.org/media-wall/news-speeches/un-general-assembly-grants-observer-status-international-chamber-commerce-historic-decision/>
- 49 Both quotes in this paragraph were taken from the IOE website: <https://www.ioe-emp.org/fr/>
- 50 See http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_20180215_C946_ANNEX_Important_States_in_the_IGWG.pdf and <http://www.ioe-emp.org/index.php?id=4993>
- 52 Friends of the Earth International (2012). Reclaim the UN from Corporate capture, 5. See: <https://www.foei.org/wp-content/uploads/2013/12/Reclaim-the-UN.pdf>
- 53 <https://www.unglobalcompact.org/news/1171-07-16-2014>
- 54 European Parliament Resolution 2015/2572(RSP), 12 March 2015; Resolution 2015/2044(INI), 19 May 2015; Resolution 2015/3035(RSP), 21 January 2016; Resolution 2014/2205(INI), 14 April 2016; Resolution 2016/2219(INI), 14 December 2016; Resolution 2016/2094(INI), 14 February 2017.
- 55 <http://bindingtreaty.org/>
- 56 <https://www.unglobalcompact.org/news/1171-07-16-2014>
- 57 See the case studies in Part III.
- 58 <https://www.asktheeu.org/en/request/5571/response/18001/attach/4/171020%20Final%20EU%20lines%20for%20OEIWG.pdf>
- 59 Melik Özden (2016). L'impunité des sociétés transnationales. CETIM, Collection Droits Humains, 57-80. Online: <https://www.cetim.ch/wp-content/uploads/br-impunit%C3%A9-fusionn%C3%A9.pdf>
- 60 Ibid., 88-89.
- 61 A more comprehensive proposal can be found in the "Treaty on Transnational Corporations and their supply chains with regards to Human rights. Treaty Text Proposal of the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate and Stop Impunity. See: https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf
- 62 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/ICC-GeneralStatement.pdf>
- 63 https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EUOpening_remarks.pdf
- 64 The documents released by the EU following requests by Friends of the Earth Europe and Corporate Europe Observatory are available at the following links: https://www.asktheeu.org/en/request/meeting_between_representatives; https://www.asktheeu.org/en/request/meeting_about_the_un_binding_tre; https://www.asktheeu.org/en/request/correspondence_on_corporate_liab; https://www.asktheeu.org/en/request/eeas_interactions_on_a_un_treaty.
- 65 https://ec.europa.eu/info/events/25-april-2018-subgroup-meeting-corporate-social-responsibility-2018-apr-25_en
- 66 See <https://www.csreurope.org/corporate-members> and <https://lobbyfacts.eu/representative/609ef08d8f98496dbaed9bcd04f5c884/csr-europe-the-business-network-for-corporate-social-responsibility> for their lobbying information.
- 67 https://www.csreurope.org/sites/default/files/CSR_Europe_Services_and_Activities_2017_2.pdf
- 68 See: <http://enlazandoalternativas.org/IMG/pdf/TPP-verdict.pdf>
- 69 Bankwatch (2008). The Gilgel Gibe Affair. Online: https://bankwatch.org/documents/gibe_study.pdf
- 70 See: http://permanentpeopletribunal.org/wp-content/uploads/2016/09/PPT_VERDICT_JHB_August-2017-Final-Version.pdf
- 71 See: https://www.lemonde.fr/international/article/2018/04/24/lafarge-en-syrie-le-role-des-actionnaires-en-question_5289625_3210.html

BAYER
MONSANTO

ACS

INDRA
SYSTEMS

GROUPE
BRUXELLES
LAMBERT

CRÉDIT
SUISSE

PARMALAT



EXECUTIVE SUMMARY

As the UN Open Ended Inter Governmental Working Group (OEIGWG) convenes to negotiate a long awaited international treaty to address corporate impunity, the European Union has emerged as a key opponent to the introduction of binding regulations for transnational corporations, and a stubborn defender of voluntary norms that have proven to be inefficient and insufficient.

As this report shows, this position is not only a reflection of the pervasive corporate capture of many EU institutions; it also highlights the hypocrisy of European decision-makers and corporate leaders, which are always quick to promote themselves as models of responsibility, while remaining blind to the actual impacts of European corporations all over the planet and to the consequences of EU policies for peoples and the environment.

This ground-breaking report is based on contributions from a large range of organisations and experts from across Europe and the Global South, and was facilitated by the ENCO (European Network of Corporate Observatories) network, a newly-established collaboration of European media and civil society organisations to investigate corporate power. From the lobbying and corporate capture prevalent at EU and UN level to the actual environmental and human rights impacts of European transnational corporations, from the legal mechanisms of corporate impunity to the critique of free trade agreements and investor protection mechanisms, it pulls together different strands of research to provide the full picture of what is at stake in the ongoing UN negotiations around an international treaty on transnational corporations and human rights, as the 4th Session OEIGWG meets in Geneva.

This report demonstrates that in effect, EU representatives are saying exactly the same things, with the same arguments and sometimes the very same words, in this UN working group as international corporate lobby groups such as the International Chamber of Commerce or the International Organisation of Employers: that there is no need for a Treaty since existing voluntary mechanisms are sufficient, that business should be part of the negotiations, and (in spite of the overwhelming evidence that their complex legal structures and their economic and political power often allow them to escape accountability and impose their will on national governments) that transnational corporations pose no specific problem in international law.

This is all the more disturbing since European civil society and the European Parliament have repeatedly expressed their support for the UN process towards the negotiation of a binding international instrument on business and human rights. In addition, legislation is being proposed in several European countries (or in the case of France, has been passed in 2017) to make transnational corporations legally accountable for human rights and environmental abuses. But the EU bureaucracy – represented in this case by the External Action Service – is sticking with big business to defend the corporate status quo.

As this report argues, this attitude of the EU should be seen in the light of the growing corporate capture of democratic processes and institutions, both at national and international level. Transnational corporations are increasingly able not only to prevent any meaningful regulation of their operations, but to present themselves as the only “solution” to global challenges. This corporate capture in European Institutions, which has long been criticised is also increasingly evident in the United Nations system, with the creation of the Global Compact, the increasing dependence on private sector funding, and the growing presence of transnational corporations in international forums supposed to regulate their activities, such as Big Oil in the climate talks. The process of drafting an international treaty to address corporate impunity and access to justice for affected communities and sectors, and the interest it is creating in civil society, is seen as a potential disruption of this increasingly cosy tête-à-tête between big business and governments.

The model defended both by the EU and international corporate lobby groups – both in the UN working group on a binding treaty and more generally as a governance model to address global challenges - is based on three pillars:

- A binding international law to protect the interests of transnational corporations through, for instance, free trade and investment agreements and private arbitration mechanisms;
- The private sector legitimised and invited to “co-write” the regulations that would apply to them, or simply substitute regulation with private non-binding standards through the establishment of “multi-stakeholder forums”;
- Voluntary, non-binding mechanisms for transnational corporations, such as the UN Guiding principles on business and human rights, that give them a “responsible” or “green” image, but make no difference whatsoever in terms of access to justice and reparation for affected communities and workers.

This report includes a collection of case studies (the full version of which is available online) written by experts and civil society organisations from across Europe as part of ENCO, as well as by Global South organisations directly involved with affected communities. The cases show that no matter what European politicians and business leaders say about their “leading by example” on corporate responsibility, European transnational corporations are involved in human rights and environmental violations across the planet and largely succeed in escaping accountability. The emphasis put on the old continent’s “respectability” leads to a disturbing pattern of outsourcing the worse environmental and social impacts of European multinationals and European consumption of resources in the Global South. A pattern that is facilitated if not encouraged by key EU policies such as the pursuit of trade and investment agreements or the focus on carbon permit trading.

THE EU AND THE CORPORATE IMPUNITY NEXUS

BUILDING THE UN BINDING TREATY ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS