Recasting the Die

Towards Strengthening Democratic Control of the Power of Transnational Corporations

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- There is a need for greater democratic control of the power of Transnational Corporations, which are key drivers of a new paradigm of international economic and social power relations that control 80% of international trade. Emphasizing the necessity of combating »corporate capture,« it highlights three policy areas where the power of TNCs has been particularly evident—investment regimes, taxation systems, and labor in the context of human rights.

- In addressing the democratic deficits and the massive power of TNCs in these three areas it is argued that there is a need for civil society and governments not only to develop specific responses in each area but also to move beyond the level of addressing each individually to finding common ground for a more comprehensive approach. For example, the nascent status of strategic corporate research in regard to campaign strategies to build union power and forge broader social movement alliances needs a broader horizon that includes investment and taxation and possibly other areas as well.

- Finding effective answers and building democratic institutions of regulation at the local and national level will be inadequate if not directed toward creating and strengthening supranational and cross-border approaches. The glaring democratic deficits in current structures of global governance must be countered with global cooperation toward enhancing democratic involvement and control of multinational corporations.

Dialogue on Globalization

Contents

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Executive Summary

The past 30 years of economic globalization have been driven by a neoliberal triad of privatization, liberalization, and financialization enormously aided by technological and logistical advances. Transnational corporations (TNCs) have not only reaped enormous benefits from this development, but have been key drivers of a new paradigm of international economic and social power relations beyond the nation-state. Today, TNCs and the global value networks of production, supply, distribution, and sales that they control account for 80% of international trade. As such, there is a need to examine more closely the context in which this kind of economic power operates. What kind of rules and legal agreements govern TNC operations? How do TNCs benefit from and influence the existence (or lack) of regulation? What is the role of democratic control mechanisms, and how can they be strengthened?

This paper addresses the issue of TNC power and the need for increasing democratic control over it. Emphasizing the democratic and human rights of citizens and the necessity of combating »corporate capture,« it highlights three policy areas where the power of TNCs has been particularly evident—investment regimes, taxation systems, and labor in the context of human rights—to analyze the current situation and to discuss political alternatives. For each of these areas, the discussion examines key issues arising from the actions of TNCs, their impacts on socio-economic development, on democratic rule and the balance of power relations. Lastly, it critically assesses the institutional context and major problems generated by neoliberal policies. Based on this analysis, ideas are mapped out for possible alternatives, including what these entail in regard to policy recommendations.

Based on the democratic deficits and the massive power of TNCs in the three areas, there is a need not only to develop specific responses for each one, but also to move beyond the level of addressing them singly to finding common ground for a more comprehensive approach. Analytically linking these three fields is an essential step toward understanding the power of TNCs and developing capacities and strategies for democratic responses within existing governmental and institutional channels and through active societal engagement. Parliamentary debates and initiatives are an essential element in raising public awareness and pointing to legal steps toward strengthening democratic regulation.

Democratic responses to corporate capture also need to be anchored broadly in society, a prospect that would be greatly enhanced by fostering the multi-organizational perspectives of alliances, networks, and campaigns by unions and other civil society organizations. Obviously, in a globalizing world, the issue of redressing the power imbalance between TNCs and society cannot be raised solely at the local or national level. Finding effective answers and building democratic institutions of regulation will be inadequate if they are not directed toward creating and strengthening supranational and cross-border approaches. To facilitate sustainable and comprehensive change, it will be essential to dismantle existing structures created by and for TNCs and to replace them with structures, policies, and mechanisms of comprehensive democratic regulation.

1. Introduction

The past 30 years of economic globalization have been driven by a neoliberal triad of privatization, liberalization and financialization aided enormously by technological and logistical advances. Under pressure from the United States and its industrialized allies, flanked by the supportive policies of the international finance institutions, governments throughout the world began opening their economies to foreign products and capital. Transnational corporations (TNCs), in particular, reaped enormous benefits from this nascent development, becoming key drivers of a new paradigm of international economic and social power relations beyond the nation-state.

In 2011 researchers based at the Technological Institute of ETH Zurich published the first comprehensive map of global corporate control. Their research showed that 737 company groups (top holders) controlled 80% of transnational corporations. Looking closer, one can identify an even smaller nucleus of 147 companies that controls about 40% of TNCs. Three-quarters of these companies are in the financial sector. »We find that transnational corporations form a giant bow-tie structure and that a large portion of control flows to a small tightly-knit core of financial institutions. This core can be seen as an economic 'super-entity' that raises new important issues both for researchers and policy makers.« (Vitali et al. 2011: 1).

TNCs have become the central actors in the world economy in the past decades. At the global level, the value chains of production and supply dominated by TNCs (Lakhani, Kuruvilla and Avgar 2013) are responsible for 80% of international trade and are determining how developing and emerging countries are integrated into the global economy (UNCTAD 2013). According to Reinert (2005: 7), »In effect historical experience shows that [the] opening up for free trade between nations of very different levels of development tends first to destroy the most efficient industries in the least efficient countries (The Vanek-Reinert Effect) ….« As a result, TNCs have not only been able to vastly increase the sales of their finished products, but they have also considerably expanded their access to low-paid labor, unfinished goods, and raw materials. Above all, relaxed capital controls unleashed a scramble to attract foreign investment and relocate financial assets to tax havens. TNCs took advantage of their growing market access and used »regime competition« among governments to »shop« for efficiency and cost benefits for their production and supply operations and to shield their profits from taxes (Streeck 1992).

As explained by Crotty (2005: 78), neoliberal globalization unleashed productive capacities that outstripped the growth of aggregate demand, intensified product competition, and created a »shift from 'patient' finance seeking long-term growth to impatient financial markets that raised real interest rates, forced NFCs [non-financial corporations] to pay an increasing share of their cash flow to financial agents, drastically changed managerial incentives, and helped shorten NFC planning horizons.« This process, called financialization, can be defined as referring »to both the enhanced importance of financial versus real capital in determining the rhythm and returns expected from investments, and the increased subordination of that investment to the demands of global financial markets« (Rossman and Greenfield 2006: 55). The resulting triumph of »shareholder value« as a new business strategy among TNCs has lifted the exercise of property rights to exclusive heights of power (Dore 2008: 1102). TNCs expect (and demand) blue-ribbon protection for their investments from states, continuously lobbying and pressuring for more protection as well as less democratically mandated fiscal regulation by government for the common good. They are ready and willing to use their power to exercise the rights to the array of protection they have accrued nationally and globally.

Both the development of global value networks and financialization »are integrally related as they are both part of a broader change in the economy towards the neoliberal vision of free markets that facilitate movement of goods and capital across borders with limited state regulation or intervention. Indeed, the two operate in tandem and reinforce each other. MNC strategies for outsourcing, relocation and the formation of global value chains are dependent on the ability to raise and shift capital across national borders as well as a relative freedom to repatriate profits or leave them offshore« (Morgan 2014: 185).

Have economic globalization and deregulation completely freed TNCs of rules and control mechanisms for governing their operations? Not exactly. The global economy is full of rules and regulations, but whom do they benefit the most? TNCs seem to have done quite well in this regard. They operate under highly enforceable rules that protect them as foreign investors, increase states' obligations to further their economic well-being, and regularly involve labor market deregulation, barriers to unionism, and reduction or waiving of tax requirements. In this context, the more pertinent questions are these: Who makes the rules, and who benefits from them? Who benefits from the lack of rules and from a lack of democratic control? Can TNCs be controlled democratically? Is there a democratically based approach to subordinating »the rules-based logic of private companies to democratic oversight« (McCallum 2013)?

This paper addresses the issue of TNC power and the need for increasing democratic control over it. Emphasizing the democratic and human rights of citizens and the necessity of combating »corporate capture,« it highlights three policy areas where the power of transnational corporations has been particularly evident—investment regimes, taxation systems, and labor in the context of human rights—to analyze the current situation and to discuss political alternatives. For each of these areas, the discussion examines key issues arising from the actions of TNCs, their impacts on socio-economic development, on democratic rule and the balance of power relations. Lastly, it critically assesses the institutional context and the major problems generated by neoliberal policies. Based on this analysis, ideas are mapped out for possible alternatives, including what these entail in regard to policy recommendations.

2. Investment Rules and Protection

Over the past three decades, there has been a massive increase in the flows of foreign investment. Measured in U.S. dollars at current prices and current exchange rates, inward foreign investment stock grew from almost $700 billion in 1980 to more than $22 trillion in 2012. During the same period, outward foreign direct investment stock rose from some $550 billion to more than $23 trillion.[1] A closer look at the forces behind this extraordinary growth reveals that TNCs based in developed countries are driving global FDI outflows, while such outflows from developing economies are not growing as in the past. As UNCTAD reported,

> Developed-country TNCs made acquisitions largely in other developed countries, resulting in a higher share of the group in total FDI projects (both cross-border M&A transactions and greenfield projects). FDI flows for greenfield projects alone, however, show that developed-country TNCs are continuing to shift capital expenditures to developing and transition economies for their stronger growth potential. (UNCTAD 2012b: 5)

TNC investment policies are often closely tied to and even determined by other powerful investors, among them banks and investment, hedge, and pension funds. States' involvement in the international investment regime varies depending on the level of their economic development and their capacity to influence international decision-making processes. The leading industrialized states have been at the forefront of proactively devising and supporting investment rules favorable to the activities of TNCs, while developing countries have been far more likely to be confronted by those rules, by the pressure to »sign on« to the dominant path of development and market access, and by the perceived need not to be underbid by erstwhile competitors for TNC investments. States that become highly dependent on foreign investments by TNCs may be well aware that these investors are primarily interested in turning a profit for their business. Yet they need to highlight their promise of growth and development.

While a certain contingency usually surrounds economic risk, TNCs are keen on ensuring that their investment is protected from, or at least insured against, potential political and social risks. Free trade agreements (FTA) and bilateral investment treaties (BIT) are two prominent and prevalent state instruments of TNC investment protections. Such agreements epitomize both the power imbalances between states, for example between industrialized and developing states, and the ways in which policies favoring private interests and limiting the role of the state are being pushed forward. International institutions also play an integral part in promoting foreign investment. Local communities of consumers, workers, and their representative organizations, such as trade unions and other civil society organizations, are at the receiving end, so to speak, but with little in the way of a democratic voice regarding investment decisions.

2.1 The International Investment Regime

As FDI has grown exponentially over the past three decades, TNCs, with the support of the governments of their home countries, have been able to construct an international investment regime (IIR) of rules and procedures tailored to secure and protect the profitability of their investment interests. Over the past few decades, the institutionalization of this regime has been advanced by various means. Among the most important are the inclusion of trade-related investment measures (TRIMs) and a financial chapter in regard to the World Trade Organization (WTO) discussions on the liberalization of services; the development of a large set of new guarantees for investors in the multilateral system (for instance, through the World Bank), in the »plurilateral« system under the Organisation for Economic Co-operation and Development (OECD), and particularly through a vast array of more than 3,000 binding bilateral and regional or bi-regional investment agreements.

When first conceived and promoted by industrialized states and international institutions such as the World Bank and the International Monetary Fund, the IIR targeted developing countries and former colonies with the

1. UNCTADSTAT, United Nations Conference on Trade and Development, (Inward and Outward Foreign Direct Investment Stock, 1980-2013). http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx. For a definition of Foreign Direct Investment (FDI) stock see http://data.oecd.org/fdi/fdi-stocks.htm.

stated purpose of promoting FDI by providing private investors (such as TNCs) with stable political and economic climates and protection for long-term capital investment. Numerous studies, however, have found no significant correlation between a country's willingness to sign agreements with expansive foreign investor protections and its ability to attract FDI. Moreover, this proclaimed purpose certainly does not explain why trade and investment agreements between industrialized countries—such as the Comprehensive Employment and Trade Act (CETA) recently negotiated between Canada and the European Union (EU), or the Transatlantic Trade and Investment Partnership (TTIP), under negotiation between the United States and the EU—need to include recognition of the IIR. The current IIR has grown far beyond its originally stated purpose. As demonstrated (but certainly not openly proclaimed), one of its underlying impacts is in the name of protecting private foreign investments to inhibit government's ability to enact non-discriminatory public interest policies—that is, labor, environmental, health, financial, safety, and other policies that via regulation might put constraints on foreign investors' profit-making ability.

To this end, the burgeoning IIR has fostered the establishment of international dispute settlement procedures called investor-state dispute settlement (ISDS). This mechanism—unique to FTAs and BITs and consisting of ad-hoc panels of three lawyers that litigate disputes between private investors and states—elevates individual foreign corporations to a status equal with a sovereign nation's government. It empowers investors to bypass domestic legal systems of host states, go before extrajudicial international arbitration tribunals, and directly challenge public interest policies and government actions as alleged violations of the broad »rights« granted by the investment agreements. These tribunals have limited transparency, and more important, lack democratic accountability. Their existence and operation is a direct challenge to state sovereignty, as they have proven willing to explicitly contradict the policies of national governments in ordering states to compensate foreign firms for alleged profit losses resulting from domestic public interest policies.

2.2 Regulatory Framework of the IIR

What are the main institutional elements of the IIR? Beginning with the multilateral agreements and rules, these would be the WTO, World Bank, and OECD. At the heart of the IIR is the WTO, which from its inception in 1995 has been driving the creation of legally binding multilateral rules on investments. According to Sauvé (2006), »[T]he most important elements are the Agreement on Trade-Related Investment Measures (TRIMs), the Agreement on Subsidies and Countervailing Measures (ASCM), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the Dispute Settlement Understanding (DSU).« This architecture of rules goes well beyond traditional trade and investment issues, imposing binding limits on non-discriminatory policies, including public interest law and regulations, while extending new »rights« to pharmaceutical corporations, banks, and other TNCs. Moreover, when coupled with privatization policies, it presents lucrative opportunities for TNCs to use investments as primary instruments for pursuing market access (Sauvé 2006).

The World Bank has enacted policies on investment that complement those of the WTO. In 1965 the bank created the International Centre for Settlement of Investment Disputes (ICSID) as a multilateral structure for investment governance. The ICSID manages the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which was drafted by the bank. The convention came into force in 1966 and has been signed by 159 states and ratified by 150 states (the so-called contracting states). This convention establishes a framework under which foreign investors can challenge domestic policies in investor-state disputes.

The other international institution, the OECD, has a less comprehensive membership, but because it is an economic instrument of the most developed and powerful countries, its importance is undisputed. The OECD has three main legal instruments for international investment and regulating trade in services.[2] The first instrument is the OECD Codes of Liberalisation. These are implemented through policy reviews and country examinations, relying on »peer pressure« to encourage unilateral rather than negotiated liberalization. As the International Monetary Fund (IMF) has acknowledged, »[The] OECD code on capital liberalization has provided a helpful instrument for exerting pressure on member countries to lift controls.«[3]

2. OECD, http://www.oecd.org/investment/mne/investmentinstruments.htm.

3. https://www.imf.org/external/pubs/nft/op/214/index.htm.

The second OECD instrument is the Declaration and Decisions on International Investment and Multinational Enterprises (OECD 2012). The Declaration, first adopted in 1976 and revised and expanded since then, consists of four elements: Guidelines for Multinational Enterprises, a set of voluntary rules of conduct for multinational enterprises; National Treatment Agreement, according to which adhering countries should grant foreign-controlled enterprises on their territory treatment no less favorable than that accorded in like situations to domestic enterprises; the Conflicting Requirements Agreement, which encourage countries to cooperate to avoid or minimize the imposition of conflicting requirements on multinational enterprises; and International Investment Incentives and Disincentives, in which the signatory countries recognize the need to give due weight to the interests of adhering countries affected by laws and practices in this field and endeavor to make measures as transparent as possible. The third OECD instrument, the so-called Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD 2011), makes it a crime to offer, promise, or give a bribe to a foreign public official to obtain or retain international business deals. The convention has been signed by all OECD countries and by several non-OECD countries.

Another mark of economic globalization has been the proliferation of regional free trade agreements and other regional treaties that cover foreign direct investment, portfolio investment, or both. There are many examples of regional investment agreements. They differ in rules and scope, but for the purposes here, it suffices to focus on examples from the two most powerful regional organizations: the free movement of capital provisions of the EU and the Chapter 11 provisions of the North American Free Trade Agreement (NAFTA).

In the EU, the free movement of goods, persons, services, and capital has been established and recognized as one of the basic principles, guaranteed by the union and respected by all member states. By contrast, NAFTA's Chapter 11 goes beyond recognizing the principle of the free movement of capital to establish a whole new set of broad, substantive »rights« for foreign investors and an investor-state procedure that empowers foreign investors to privately enforce these rights by challenging domestic laws and regulations before extrajudicial tribunals. NAFTA stipulates that the procedures agreed upon to govern this investor-state process should adhere to the World Bank's ICSID convention or the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). According to the nongovernmental organization (NGO) Public Citizen, NAFTA was the first regional agreement to emphasize granting special rights to foreign investors and restricting states' ability to regulate investors through environmental, health, and other requirements:

> NAFTA's extreme rules have been replicated in various U.S. »free trade« agreements, including CAFTA, and bilateral FTAs with Peru, Oman, Korea, Panama and Colombia.
>
> These special privileges provide foreign investors rights to own and control other countries' natural resources and land, establish or acquire local firms and to operate them under privileged terms relative to domestic enterprises. The scope of the »investments« covered by these rules is vast, including derivatives and other financial instruments, intellectual property rights, government licenses and permits, as well as more traditional forms of investment. The pacts provide foreign firms with a way to attack domestic public interest, land use, regulatory and other laws if they feel that a domestic policy or government decision has undermined the firms' new »trade« pact privileges, such as by contravening their »expectations« (Public Citizen 2014).

This kind of broad investor protection would be expanded further under one of the most high-profile regional agreements—the Trans-Pacific Partnership (TPP), between the United States and 11 Pacific Rim countries—which is still under negotiation. As proposed, the TPP would build on the NAFTA investor-state model, extend it to additional countries, and expand the array of domestic policies that foreign investors could challenge. Formal acceptance of such procedures in the TPP would then surely become the bottom line in the ongoing negotiations between the United States and the EU for the TTIP.

Finally, bilateral and bi-regional agreements are also powerful instruments of the IIR. According to recently published UNCTAD data, in 2012 there were more than 2,800 BITs and another 340 treaties with investment chapters. The TTIP as well as the nearly completed CETA between the EU and Canada represent current high-profile examples of these kinds of agreements. They focus on investment provisions (as with BITs) or contain such provisions as part of a broader trade agreement (as with TTIP). Usually bilateral investment agreements cover only FDIs, but some of them also include portfolio investments. Most empower foreign firms to pursue investor-state dispute settlement under the arbitration procedures of the World Bank's ICSID convention or the framework established by UNCITRAL.

If adopted, TPP, CETA and TTIP would go beyond WTO provisions, creating a more expansive set of constraints on domestic regulations and a broader set of rights for investors. Indeed, most BITs and trade agreements with investor provisions extend well beyond obliging states to provide foreign investors national treatment and most-favored-nation treatment. Many require states to guarantee foreign firms a »minimum standard of treatment« that includes »fair and equitable treatment,« a vague responsibility that has been interpreted broadly by investor-state tribunals to include an obligation by governments to provide a »stable regulatory framework« that conforms to investors' expectations. Tribunals have ruled that the creation of new regulations, such as one might expect to see in response to financial or climatic crises or emergent consumer concerns, can violate the »fair and equitable treatment« obligation by frustrating foreign investors' expectations.

Many investor-state awards against governments' public interest policies have been »won« by the foreign investor on the basis of such obligations. In addition, many BITs and trade agreements contain rules broadly prohibiting expropriation of private investments. Tribunals have interpreted these terms as allowing foreign investors to demand taxpayer compensation for non-discriminatory domestic regulations that they deem as »indirect expropriations« for diminishing the value of their investment. Such expansive foreign investor »rights« surpass those afforded to domestic firms under most countries' legal systems.

2.3 Dispute Mechanisms and Procedures

As noted, BITs and trade agreements with investment provisions have established a parallel system of law, drawing on convention and treaty frameworks under the auspices of the World Bank and the United Nations and using the ISDS system, which exists outside the jurisdiction of national court systems. ISDS was originally intended to enable foreign investors to seek compensation if »a host government expropriated their plant or land and the domestic court system could not provide a means for fair compensation,« but today the original provisions are being interpreted and used much more broadly, thus comprising what amounts to »an alarming two-track system of justice that privileges foreign corporations« (Earthjustice et al. 2012).

According to statistics compiled by UNCTAD for 2013, there were at least 57 investor-initiated cases regarding international investment agreements. This nearly matched the previous year's record number of 58 new claims by investors against states under ISDS procedures. Indeed, while no more than 50 total investor-state cases were launched during the system's first four decades, corporations have initiated more than 50 investor-state cases in each of the last three years. The scope of domestic policies that TNCs are challenging in these cases has grown to include health, tobacco, natural resources, finance, the environment, oil and gas extraction, land use, transportation, renewable energy, toxins and other public interest policies (UNCTAD 2014).

The extrajudicial ISDS tribunals of three private sector lawyers who decide such cases are not bound by precedent, the opinions of the state, or any meaningful appeals system. If they decide that the challenged domestic policy violates one of the investor protections in a trade agreement or an investment treaty, they are free to order taxpayer compensation of the amount they choose, in addition to compound interest, and to require the government to pay the investors' tribunal costs and legal fees. The penalties imposed by investor-state tribunals have been growing sharply. In 2012, a tribunal ordered Ecuador to pay $2.3 billion in fines and interest—equivalent to the government's annual expenditure on health care for half the population—to an oil firm, although the tribunal acknowledged that the firm had broken Ecuadorian law[4]. Even when governments win cases, they often must pay their own tribunal and legal costs, which average $8 million per case. In numerous instances, the lawyers on the tribunals have also served as board mem-

4. The U.S. Company Occidental Petroleum Corporation sued Ecuador for having canceled its operating contract in 2006. The authorities' argument at the time was that the company had illegally transferred a portion of its shares to a Canadian company. http://justinvestment.org/2012/10/icsid-orders-ecuador-to-pay-1-7-billion-to-occidental-petroleum-interview-with-the-ecuador-decide-network/.

bers or attorneys for the corporations bringing the cases. There are no meaningful conflict of interest rules, and most attempts to remove tribunal members for exhibiting bias have failed. A handful of investment law firms have joined the litigation boom and now dominate the business (Eberhardt and Olivet 2012).

Trade unions have voiced their concern over the existence and proliferation of this nontransparent and anti-democratic system, which endangers the domestic policy space for meeting such public policy objectives as labor rights, environmental protection, and the provision of public goods. As the OECD's Trade Union Advisory Committee has written, »[T]rade unions are opposed to the inclusion of such ISDS provisions in investment treaties. The other key concern is to balance the rights and obligations of investors and promote human rights, labour rights and environmental standards through commitments to comply with ILO core labour standards and other human rights under the ILO MNE Declaration, the UN Guiding Principles and the OECD-Guidelines for Multinational Enterprises« (TUAC 2013). In addition, at the World Congress of the International Trade Union Confederation (ITUC) held in Berlin (19–23 May 2014), participants adopted a new trade and investment model that includes a campaign to oppose ISDS, support for a financial transaction tax, and mobilizing »all available international instruments« to tame corporate power.[5] Notwithstanding growing concerns about the existing investment regime, the negotiations for new mega-regional agreements with ISDS, that is, TPP and TTIP, run the risk of consolidating the existing investment regime and its asymmetric features favoring the power of transnational corporations.

2.4 Alternatives

Considering that there is a demand and a need for an IIR that actually promotes sustainable development, an alternative approach is necessary. This conclusion has already compelled a growing number of developing countries to reject the established investor-state system as inhibiting health, environmental, financial, and development policies while failing to attract greater FDI. Countries like South Africa, Ecuador, and Indonesia are in the process of terminating their existing investor-state pacts, while India is contemplating the same, and Brazil continues to refuse to be bound by investor-state treaties. These policies need to find broadly based support in civil society, not only in the countries that have embarked on a path of critical review or abstention regarding ISDS, but in other countries as well.

The alternative would be to replace the current IIR and ISDS with a democratic framework in which the interests of those affected by TNC investments can be articulated and are not subordinated to those of investors. States and governments need to be able to regain space to implement democratically determined social and economic policies that benefit workers, consumers, the environment, and development. Domestic courts accountable to a democratically created and predictable system of law are the proper legal fora for dispute resolution. Moreover, a newly constructed IIR would go a long way toward establishing a workable, democratically legitimate canon of rules for investors by recognizing and incorporating international standards, among them the ILO's core labor standards and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.

2.5 Recommendations and the Way Forward

The primary goal is to first dismantle the current ISDS system through pressure on national governments to terminate treaties containing ISDS, withdraw consent from ISDS arbitral forums, and refuse to recognize investor-state awards. Decisions already taken by several governments to annul ISDS commitments should be supported. At the same time, it is crucial to be able to exclude the existing ISDS from future investment and trade treaties and those currently under negotiation, in particular the TTIP negotiations.

The long-term goal is to replace the existing IIR with one that integrates a comprehensive framework of international authoritative agreements, including the core labor standards of the ILO and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Guiding Principles, and the OECD Guidelines for Multinational Enterprises. All of these instruments have gained international recognition and

5. Sustainable Jobs, Secure Incomes and Social Protection, resolution adopted at the 3rd ITUC World Congress, Berlin, 18–23 May 2014, http://congress2014.ituc-csi.org/IMG/pdf/ituc-3co-e-6_b_-sustainablejobs-en-210x297-01-3.pdf. (2014.12.06).

have been signed onto by transnational corporations and employer representatives. A truly democratically controlled IIR should enable the role of public finance to be strengthened and development goals to be determined through citizen participation and democratically mandated public institutions. This would underscore the importance of exempting public services from being undercut and undermined by such agreements.

A related measure that would support such long-term goals this general development could be in the form of demands by trade unions, workers, and general stakeholders to have a stronger voice in the control of investment decisions made by funds to which they have contributed. In Germany, for example, the pension fund Metallrente, in the metalworking industry, is controlled by the responsible trade union (IG Metall) and the employers' association (Gesamtmetall) through a cooperative arrangement.

To achieve the above goals, it is essential to build an understanding of the IIR issue through critical analyses and the promotion of educational forums for citizens. A key element in this approach is to involve trade unions and other civil society organizations in putting this issue on the public and political agendas. Beyond exposing the scandal of TNC investment behavior and the spread of »corporate capture« because such dealings contradict democratic norms and practices, these organizations have a contribution to make in drafting a model investment policy through participatory consultations, such as that proposed by the European Trade Union Confederation.[6] Consultations concerning the development of models for embedding investment practices in a democratically controlled context will logically also require (and be in need of) ongoing contributions from political parties.

3. Taxes and new business models

Over the past decade there has been a growing awareness that financialization has been the main driver of business restructuring, including outsourcing and offshoring, and the massive spread of global value networks. As explained above, financialization has as much to do with the subordination of all corporate operations to shareholder value as with protecting corporate financial gains from taxation, avoiding taxes via restructuring, and carrying out a reorganization of production and supply (with a variety of known harmful effects on workers' remuneration, access to information, collective bargaining, and other employment rights).

While most trade unions have only recently begun to point to tax avoidance and its impact on workers,[7] public sector unions have for some time been confronted by their ramifications for state policies and services funded by taxation. Taxes are a public good, essential to funding state economic development goals, pursuing social priorities (including public services), addressing inequalities, and counteracting market failures, especially when dealing with externalities. In addition, dwindling corporate tax revenues go hand-in-hand with cutbacks in tax administration, including auditing capacities. In the Netherlands, for example, the chance of a business being audited is currently once every 43 years.

On the other hand, the tax arbitrage game of TNCs has become a quite lucrative business for such private interests as accountants and law firms. Rising corporate profits have not resulted in increased tax revenues from TNCs. As the OECD reports, »In fact, on average, the opposite is happening. . . . [O]n average, MNCs pay 5 percent in corporate tax, while small companies pay around 30 percent.«[8] For their part, state and local governments in both developing and developed countries have found themselves in intense competition, so-called beauty contests, to attract TNC investments by providing lucrative tax incentives while either reducing services or raising workers' taxes or both. Workers, too, may be directly affected by TNC restructuring for tax reasons. While the current international discussions of policies to curtail tax evasion, in particular at the OECD and the IMF, are encouraging, in light of divergent interests, it is hardly imaginable that despite its dysfunctional nature, the present system is looking at a thorough overhaul in the making.[9]

6. See also the Resolution on investment policy published by the European Trade Union Confederation, http://www.etuc.org/documents/etuc-resolution-eu-investment-policy#.VIRQbGdD5wE (2014.12.06).

7. See, for example, Report on a Global Unions Meeting on Tax Planning, http://www.tuac.org/en/public/e-docs/00/00/0D/FE/document_doc.phtml.

8. OECD, »OECD Urges Stronger International Co-Operation on Corporate Tax,« press release, 2013, http://www.oecd.org/newsroom/oecd-urges-stronger-international-co-operation-on-corporate-tax.htm.

9. OECD, Action Plan on Base Erosion and Profit Shifting, Paris, 2013, http://www.oecd.org/ctp/BEPSActionPlan.pdf; International Monetary Fund, »Spillovers in International Corporate Taxation,« IMF Policy Paper,

3.1 Separate Enterprise-Arm's Length Principle (SE-ALP)

Evidence recently publicized of widespread and far-reaching tax avoidance by transnational corporations shows that the existing system for assessing the profits of such firms and apportioning those profits between countries is dysfunctional. The flaw is the failure to treat multinationals according to the economic reality of their operations as integrated firms under central direction. Instead, a principle has become gradually entrenched that they should be taxed as if they were separate enterprises in each country dealing independently with each other: the separate enterprise-arm's length principle (SE-ALP).

International tax treaty provisions are still based on models drafted under the League of Nations in 1928, when international investment consisted mainly of loans.[10] The treaty models give the investor's state of residence (or home country) the primary right to tax income from investment (interest, dividends, fees, and royalties), while a host country where a business is legally located can tax its profits. Few multinationals had emerged by the 1920s, and the rules were adapted for them, requiring branches and affiliates in different countries to be treated as if they were independent entities dealing at arm's length with each other.

This creates a perverse incentive for multinational companies to create complex corporate structures to avoid tax as well as other forms of state regulation. For example, FTSE 100 companies have 34,216 subsidiary companies, joint ventures, and associates, including 8,492 in tax havens that levy little or no tax on corporate profits.[11] Under current practice, they are all treated as separate taxable entities even though they have common shareholders, boards of directors, strategies, logos, and websites. In the past few decades, tax-driven corporate restructuring has mushroomed, using complex structures designed to take advantage of national tax rules, especially regarding where a company is considered to be resident, and where its sources of income are located. While tax evasion is clearly illegal, cases of tax avoidance, often a gray area of compliance, are growing. In simplified terms, three stages and types of structure can be identified.

First, and most basic, is a »stepping stone« arrangement by TNCs. An operating affiliate in one country (source) can contract for services performed by another affiliate in another country. The payments it must make for such services may be booked as an expense, representing a deductible sum in regard to its taxable business profits in its country of operation. These payments flow out of the country to one or more affiliated holding companies in a country with suitable tax treaties, such as the Netherlands, Switzerland, or Singapore, where they will be booked as income subject to no or low withholding taxes. The bulk of the income of the source affiliate is passed through this conduit, leaving it with only a nominal level of profit, to a »base« affiliate in a classic tax haven, such as Bermuda or the Cayman Islands, that does not tax such profits.

Second, these companies began to reorganize their operations to exploit tax advantages offered by states. In the 1990s, competition to attract inward investment led many countries to provide tax holidays, which were especially lucrative for mobile businesses. This type of tax avoidance has been hard to combat, because these affiliates are not mere letterbox companies receiving only »passive income«, but actually represent operating businesses.

Third, building on this tax strategy, corporations began to reorganize their legal structures by splitting various functions and assigning them to affiliates organized or located to minimize tax. TNCs have long been aware of the disparate and fragmented nature of tax laws across countries and localities, in addition to laws that protect information about their bank-held assets from foreign tax authorities. But it became much easier for them to exploit these mismatches with the shift to the digital economy, which greatly facilitated international communication, enabling firms to manage their own global value chains (GVCs) and to deal with customers anywhere in the world. For example, sales to customers can typically be booked to one affiliate, while others deal with such activities as marketing, customer support, delivery, and

Washington D.C., http://www.imf.org/external/np/pp/eng/2014/050914.pdf.

10. For more detailed treatment, see Sol Picciotto, *International Business Taxation* (1992), http://taxjustice.blogspot.be/2013/06/international-business-taxation.html, and Sol Picciotto, »Is the International Tax System Fit for Purpose, Especially for Developing Countries?« ICTD Working Paper 13, 2013, http://www.ictd.ac/sites/default/files/ICTD%20WP13_0.pdf.

11. The FTSE 100 Index lists the top 100 companies on the London Stock Exchange that have the highest market capitalization. http://en.wikipedia.org/wiki/FTSE_100_Index. See also Action Aid. 2011. Addicted to Havens. The Secret Life of the FTSE 100, http://www.actionaid.org.uk/sites/default/files/doc_lib/addicted_to_tax_havens.pdf (2014.12.06).

logistics. Amazon in Europe separates the functions of sales and website operation (attributed to Amazon SARL Luxembourg) from customer support, warehousing, and order fulfillment, which are done in each country close to its customers.

As Oxfam has reported[12], there are several studies that question the efficacy of providing tax incentives as a means of attracting foreign investment. And in 2012, UNCTAD, in its »Investment Policy Framework for Sustainable Development,« warned that the »general corporate income tax regime should be the norm and not the exception and proliferation of tax incentives should be avoided as they quickly lead to distortions, generate unintended tax avoidance opportunities, become difficult to monitor, create administrative costs and may end up protecting special interests at the expense of the general public« (UNCTAD 2012a: 37). Besides access to natural resources, the key determinants of a country's ability to attract FDI are political and macroeconomic stability, an educated workforce, good transport, electricity and telecommunications infrastructure, and large markets, and labor costs, most of which are financed through the payment of taxes. Empirical studies do not show the tax environment to be a key driver of foreign investment. Such tax incentives are, in effect, a government trade-off, designed to subsidize big (international) business to the detriment of citizens' social welfare and the provision of public goods. There is an urgent need for measures to reverse competition for FDI, as it only serves to drive tax revenues downward.

The massive erosion of state tax bases through the aggressive tax avoidance policies of corporations, in particular TNCs, has become a hotly debated political issue in many countries, especially in light of the austerity measures taken by (or forced upon) governments that severely downsized social services. Numerous examples of tax avoidance by such brand name firms as Apple, Google, and Amazon along with the uncovering of bank-assisted tax evasion schemes for individuals have helped to create political pressure for cross-country reform. At the September 2013 G20 meeting in St. Petersburg, the Committee on Fiscal Affairs of the OECD was charged with developing reform proposals. Those put forward in its Action Plan on Base Erosion and Profit Shifting, however, aim only at patching the current system.[13] The OECD clearly avoided tackling the current taxation regime's fundamental flaws, which result from the separate enterprise-arm's length principle in tax treaties. Indeed, its action plan (para. 14) explicitly rejects any move toward »formulary apportionment.« The main objection cited is that whatever the technical merits, it would be difficult or impossible to reach political agreement on such a system. Yet the attempt to strengthen the existing system in the plan is also fraught with political difficulties. Indeed, in many respects it is a recipe for generating conflicts among states, leading each to try to modify or interpret the rules to grab a larger share of the tax base.

The most positive immediate improvement is likely to be a reform proposal to create more transparency. This would not be a major change, but it would satisfy the explicit G20 mandate to establish a global template for multinationals to prepare and submit a country-by-country report for all countries where they do business. Trade unions and NGOs favor this step, but its comprehensiveness and implementation are still up in the air. As always, there are extensive lobbying efforts by business to restrict the scope of such reports and to keep them confidential to tax authorities and out of the public domain. These efforts should be resisted.

3.2 Alternatives

What clearly seems necessary is to reorient international tax rules and place them on a more realistic and just foundation. For taxation purposes, TNCs need to be treated as single firms, instead of the unrealistic fiction that they are a loose collection of separate and independent entities in each country. The aim should be, as the G20 leaders demanded in the 2013 St. Petersburg Declaration, reforms to ensure that companies are taxed »where economic activities take place and value is created.« Such reforms are essential to bringing TNCs back into national tax systems and contributing their share to the quality of infrastructure and institutions they rely on for their business activities. Over the past decades, TNCs have used their economic power regarding investments as well as the vast financial reserves they command to leverage differences in national tax systems

12. See http://www.oxfam.org/en/pressroom/pressreleases/2013-09-01/tax-evasion-damaging-poor-country-economies.

13. http://www.oecd.org/ctp/BEPSActionPlan.pdf

In the area of tax policy, corporate capture both drives and uses state beauty contest competitions for their monies. As such, existing institutions can hardly be relied on to formulate the kind of fundamental changes that are in order, especially since they are the preserve of a closed network of technical specialists dominated by tax advisers, reinforced by a revolving door between the public and private sectors. The announcement by the EU Commission (summer, 2014) that it would launch an investigation of prominent corporate tax evaders, among them Apple, Starbucks, and Fiat, in regard to state subsidy regulations may be little more than a public relations move.[14] What is needed is a much broader and better-informed public debate, both at the national level as well as internationally, such as the past debates over a financial transaction tax (to which it could certainly be linked).[15] Local and national tax policies concerning TNCs need a basic overhaul, and at the same time there needs to be cross-country coordination of this restructuring process to ensure its effectiveness and reduce the ruinous competition that has cut so deeply into public budgets.

A group of civil society organizations with the above aims has issued a call for establishing an Independent Commission on International Corporate Taxation (ICRICT) to foster a public dialogue and political momentum for such reform.[16] Although this is a very recent development, and general proposals have not yet been presented, it is the kind of initiative that could generate the necessary momentum for change.

3.3 Recommendations and the Way Forward

Considering that the overall goal is to link TNC tax policies to principles of corporate accountability toward the communities and countries in which they operate and to bolster cross-country solutions based on international norms and guidelines, it is absolutely essential to eliminate the separate enterprise-arm's length approach in favor of unitary taxation of TNCs. This entails introducing top-down allocation of tax revenues based on a TNC's consolidated income statement. Top-down allocation is a more superior method for adequate reporting on the geographical distribution of incomes provided that there are sufficient safeguards that allow tax authorities and other government administrators to cross-check and verify the reliability of the reporting process. This would in turn necessitate policies designed to foster transparency and data exchange as well as the introduction of comprehensive and public, country-by-country reporting by TNCs, including specific information on employment, business restructuring, and key decision centers (public disclosure).

In support of this fundamental change in the taxation of TNCs, it would be necessary to develop state tax laws that restrict or prohibit capital flight. The introduction of a global (or at least regional) financial transaction tax would be one of the means of returning TNC assets and business profits to the social environment in which they have been accumulated. Such measures will necessarily require the elimination of treaty provisions that, for example, ban capital controls, including in agreements currently under negotiation (TTIP and TPP). To be effective, such policies also need to be closely coordinated with the changes in the international investment regime proposed in the previous section.

Moving forward to achieve these goals will necessitate having a broad public debate on the destructive influence of corporate capture and the growing need for investing in improved public infrastructure and institutions: schools, hospitals and health care, public spaces and community centers, public transportation, and so on. Exposing the scandal of corporate tax avoidance and raising demands for tax justice locally, nationally, and globally is an important step in raising awareness and reframing the debate. Crucial support for political and legal initiatives needs to be developed through capacity building in trade unions and other civil society organizations regarding tax policies and their relationship to TNC restructuring, employment, and quality public services.

Internationally, campaigns for tax justice at the local or national level could be flanked by strategies aimed at

14. See http://www.businessweek.com/articles/2014-06-11/europe-launches-a-fresh-assault-on-tax-deals-for-apple-starbucks, June 11, 2014.

15. Recently, the focus of the debate has shifted from the pros and cons of a global tax, the so-called Tobin Tax, to more specific proposals in the EU (financial transaction tax) and the United Kingdom (Robin Hood tax). These debates, however, are not centered on TNCs, but on the financial sector in general.

16. The development of this proposal, announced mid-2014, is supported by a preparatory group comprised of individuals representing the following organizations: ActionAid UK, Alliance Sud, CCFD-Terre Solidaire, Christian Aid, Council for Global Unions, Global Alliance for Tax Justice, Oxfam, Public Services International, Tax Justice Network, and the World Council of Churches. See the report issued by Transparency-Initiative at http://www.transparency-initiative.org/wp-content/uploads/2014/09/TAI_TaxandDevelopment_FULL_OCT14.pdf.

submitting OECD complaints based on Chapter XI (Taxation) of the Guidelines for Multinational Enterprises. In this context, such activities could also serve to develop concepts for new global governance institutions to administer a globally constructed and more equitable tax system.

4. Labor and Employment in the Context of Human Rights

Transnational corporations are the driving force behind the growing integration of world trade and the increasing global division of labor. Indeed, one of the most visible marks of globalization is the capacity of TNCs to produce and source according to their own business model almost anywhere in the world. The global expansion of production under the control of TNCs has unleashed a massive and continuous restructuring of production processes and work routines marked by precarization, flexibility, outsourcing, and agency work, profoundly affecting labor markets in both developing and developed countries. TNCs have constructed their production and sourcing through global value networks with regional clusters (i.e., NAFTA, the EU, South America, China, India) that today control some 80% of world trade (OECD et al. 2013: 7). This spreading web of activity enables TNCs to leverage economic differences among localities and use the fragmented and heterogeneous nature of country-specific regulations of employment to arbitrage labor costs for greater profits. Even the OECD recognizes that globalization has increased the downward pressure on wages and curtailed the bargaining power of workers and their unions:

> Another important impact of globalisation and GVCs concerns wages and inequality. Recent OECD work estimates that, while other factors are the main drivers, at least 10% of the decline in the share of labour in national income is due to globalisation and in particular to the pressures arising from the relocation of parts of production in GVCs and from import competition from companies producing in countries with low labour costs. Increased (international) competition not only reduces the size of the rents that employers and workers share, but also decreases the bargaining power of workers (OECD 2013: 22).

Environmental scandals and countless human rights violations by TNCs have been widely reported by the media in the last decades, particularly in developing countries dependent on the exploitation of their natural resources and their largely unskilled labor force for economic survival. Precarious employment relations and child labor abound in such settings, regardless of whether the work is subject to some form of regulation or contract (formal) or not (informal). Such disregard for human rights is not, however, limited to such cases. Indeed, precarious employment is rapidly becoming the »standard« work relationship throughout the world, fuelling social disruption, deprivation, and poverty.

These kinds of situations have made evident that the growing economic and political power of TNCs is rarely accompanied by growth in entrepreneurial responsibility. A »good« production location is still defined by low wages, precarious legal protection for workers, weak environmental protection, low (or no) corporate taxes, and weak (or non-existent) trade union representation. Human and workers' rights as well as social responsibility are subordinated to the corporate objectives of profit maximization. Voluntary agreements that extoll business ethics and corporate social responsibility seem appealing in writing, but in fact, as most studies have shown, have had very limited effect on these developments, primarily because they are voluntary declarations by corporate management and are not legally binding. Unions and other civil society organizations have constantly endeavored to monitor TNCs and have been effective in their campaigns to expose labor and human rights violations. Beyond the scandalizing of individual cases, unions in particular have negotiated framework agreements and begun to build cross-country networks in transnational companies. They often, however, find themselves in a David versus Goliath battle when it comes to convincing policy makers of the need for and importance of effective sanctions against financially powerful multinational players.

4.1 Statements, Codes, Principles, Norms, and Regulatory Initiatives

In contrast to the areas of investment and taxes, in which TNCs and their allies have constructed a protective institutional environment against public and democratic control of their activities, the field of employment and labor relations is defined more by a patchwork of »self-regulatory initiatives,« such as corporate codes of conduct, social labeling, certification schemes, and social auditing (ILO 2001). In spite of such activities, there remains a glaring absence of a comprehensive, coherent, and binding regulatory framework. Private interest governance has risen to fill the gap opened by liberalization in the globalizing economy instead of supplementing an institutional framework of governmental legal standards. Often it serves to protect hegemonic interests and dominant positions, and because of the non-governmental status of the promulgators and participants and a general lack of recourse to judicial remedy, the character of private interest governance is voluntary. Without substantial input and control by unions, civil society organizations, and political forces, corporate social responsibility (CSR) easily degenerates into nothing more than cosmetic measures.

In the field of employment relations, this voluntarism poses an enormous challenge in regard to the implementation of internationally recognized labor standards in the interest of decent working conditions. As guidelines, these codes usually contain no formal or special procedures for implementation; instead, there is an underlying assumption that they will be integrated into standard corporate operations and that existing measures will ensure that all responsible corporate sites will comply with the policies set out in the code by central management. In the end, to achieve compliance, most codes incorporate procedures for internal or external monitoring, the latter being more common among corporations interested in (or pressured into) espousing transparency (OECD 2001).

To be sure, the ILO's core labor standards have over time gained increasing recognition as a common platform of labor standards.[17] They are referenced, at least in general terms, in all of the most widespread initiatives and agreements addressing TNC policies in the area of employment and labor relations. For example, they are referenced in the highly popular UN-sponsored Global Compact, a membership-based corporate social responsibility initiative for businesses that express a commitment to ten universally accepted principles in the areas of human rights, labor, environment, and anti-corruption.[18] The Global Compact has more than 12,000 corporate participants and other stakeholders from more than 145 countries, making it the largest voluntary corporate responsibility initiative in the world. There is, however, no independent monitoring or enforcement of member adherence to the principles. The only obligation for participating companies is the submission of an annual self-compiled communication on progress (COP). No one reviews the content of the report, and there is no procedure for complaints. The only penalty for not reporting for two years in a row is to be delisted, even though there is a set of integrity measures, including a procedure for dialogue in the case of allegations of serious violations of the Global Compact's overall aims and principles.

Another initiative toward regulating multinational corporations is the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[19] This is certainly the most comprehensive document in the area of labor principles, but while it has the authority of being the outcome of tripartite negotiations—among governments, employers, and trade unions—the declaration's main shortcoming is that it is not a binding instrument and contains no enforcement mechanism, although it is universally applicable. Its interpretation mechanism has achieved a degree of functionality, but only when cases have been referred to the ILO Committee on Freedom of Association (CFA) for review. The CFA has dealt with a range of cases that involve TNCs over the years, with several of them having resulted in either legislative changes or better enforcement.

Another, more recently developed instrument directed at establishing principles for TNC operations is the UN Guiding Principles on Business and Human Rights adopted in 2011.[20] After many years of debate, the principles became UN policy for operationalizing the Protect, Respect and Remedy Framework for business and human rights that was adopted in 2008. The framework is based on three tenets: the duty of the state to protect against human rights abuses by third parties (including business), the corporate (business) responsibility to respect human rights, and the need for more effective access to rem-

17. The four core labor standards are part of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work and embody the principles on fundamental rights expressed in eight ILO conventions: freedom of association and the right to collective bargaining (ILO Conventions 87 and 98), elimination of all forms of forced labor (ILO 29 and 105), abolition of child labor (ILO 138 and 182), and the elimination of discrimination in respect to employment and occupation (ILO 100 and 111). See http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

18. See http://unglobalcompact.org/.

19. http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (2014.12.06).

20. See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

edies, both within business as well as in the realm of politics.

An important concept to be promoted by the guiding principles is due diligence, which is presented as an ongoing process undertaken by a business to identify, prevent, mitigate, and account for how it addresses actual and potential adverse human rights impacts in its operations. Due diligence applies to both legal obligations and voluntary processes. Its application is seen as a means of promoting the notion that companies need to acquire information about the human rights consequences of a decision before making said decision.

As this is a relatively new instrument it might be too early to assess its full impact and relevance. However, because it lacks any enforcement or a complaints mechanism of its own, its potential lies in its incorporation into other instruments, such as updated OECD guidelines, and in its complementarity to the ILO core labor standards and other norms and guidelines. At the same time, there is legitimate concern that the principles, in particular the concept of due diligence, will be captured by a pervasive consultancy business advising TNCs on interpreting the provisions and incorporating them into their public statements on corporate social responsibility.

In contrast to the codes with single TNC jurisdiction, multi-stakeholder initiatives have gained some traction in upholding labor standards, as they have a generally broader mandate and include a broader range of parties. As the name implies, they consist of representatives from different constituencies. Corporations and civil society organizations are always involved, whereas trade unions have limited their involvement generally for reasons of ineffectiveness. In some cases, government agencies may be participants, in which case they may be called public-private partnerships. Whatever their organizational form, their mandate is usually defined in terms of monitoring or auditing labor conditions.

Many of these types of schemes were initiated by NGOs as models for particular industry or product standards. In some cases, such as with the Ethical Trading Initiative (ETI) or the Forest Stewardship Council, membership was open to companies as well as NGOs and labor unions. The earliest instances of this type of voluntary regulation appeared in the apparel industry, the first most widely known organization being the Fair Labor Association (FLA). The FLA stemmed from negotiations initiated by US president Clinton in 1996 in the wake of reports of child labor in the industry. Because its policy is to work with the companies that fund it to improve their internal monitoring systems, the FLA has been widely criticized for lacking autonomy. Original participants, including trade unions and church groups, withdrew early on in favor of supporting such organizations as the Workers' Rights Consortium and the Clean Clothes Campaign, both of which are industry independent and are allied with trade unions (Fichter 2013: 396).

Another instrument that seems to be growing in importance is the OECD's Guidelines for Multinational Enterprises, originally adopted in 1976 and most recently revised in 2011. They apply to all TNCs headquartered in the countries that have signed the guidelines. The governments of these countries are required to set up national contact points (NCPs) to receive and to assist in resolving complaints of alleged violations of the guidelines. Most complaints concern violations of the right to freedom of association and collective bargaining, but complaints have also been filed related to precarious work, disclosure of information, forced labor, discrimination, health and safety, the environment, and corruption.

The latest update of the guidelines has resulted in a number of significant improvements, with, for example, the inclusion of a new human rights chapter; the adoption of a general recommendation to conduct due diligence to avoid and address adverse impacts; an application of the guidelines to supply chains and other business relationships; a broadening of the scope of the employment chapter to include workers in indirect employment relationships as well as employees; and a strengthening of the government-backed complaints mechanism. Still, the effectiveness of the guidelines in curtailing violations of labor standards has been extremely limited. The remediation process can be quite drawn-out; there is no requirement for the accused TNC to recognize the complaint; and governments may allocate resources and recognition to their own NCPs as they see fit, which can greatly affect the manner in which a particular contact point handles a complaint.

Global framework agreements (GFAs) are an instrument developed by unions to negotiate the recognition and application of international labor standards (based on ILO conventions) and provide procedures for handling violations of such standards at TNCs. In contrast to the usually unilateral and voluntary nature of initiatives based on corporate social responsibility, GFAs are bilateral agreements between TNCs and global union federations (GUFs). As implied by the term *framework*, a GFA provides a forum for social dialogue between labor and capital. It also sets minimum labor standards, defines basic principles of labor relations, and opens space for building union representation. In most cases, this space, or arena of labor relations, extends beyond the formal organizational boundaries of the signatory TNC to cover all the operations of a TNC and parts of its global value network. By the end of 2013, more than 100 agreements had been signed, with 92 of them functional.[21] To date, negotiating and signing of GFAs is still largely a European phenomenon, with only 17 being concluded with non-European TNCs.

While the importance of this growth in numbers should not be underestimated, putting the agreed measures into practice—that is, implementation of existing GFAs—is arguably key to their success as transnational trade union policy. Recently completed research shows that implementation has been limited and has proven shortcomings, regardless of the particular national environment (Fichter et al. 2012). The few cases of successful implementation have so far been more the result of mobilized union pressure resulting in positive corporate responses, rather than GFAs' clearly defined policies and procedures. Union capacity building is a necessary foundation for ensuring that the negotiation and implementation of GFAs will be effective, especially when confronted by management resistance.

If GFAs are to gain more legitimacy and recognition as a means of establishing dialogue, attaining minimum standards, and fostering labor relations, then there is a need to incorporate a more systematic and robust multi-organizational approach into the overall GFA process of negotiation and implementation. The widespread incidence of non-implementation and cases of partial or subsidiary-specific implementation provide evidence that implementation needs to be treated as part of a multi-organizational practice development process starting with the initiative to negotiate a GFA (Fichter, et al. 2014).

21. The non-functional agreements are those GFAs in TNCs that have merged, been acquired, or have folded.

4.2 Alternatives

Although the concerted efforts of trade unions and civil society organizations to hold TNCs accountable for their treatment of human and labor rights in their business operations have led to substantial progress, there remains room for improvement in their record. In the absence of a functional and comprehensive binding legal instrument, a more strategic use of the variety of existing instruments could produce better results. For example, GFAs have proven to be effective when they are actively backed and promoted by trade unions in the workplace. Signed agreements create the preconditions for exercising the rights recognized in the agreement, but without union and worker voices, TNCs tend to be content with advocating their CSR commitments. Unions, in particular the global unions, have responded by making concerted efforts to build transnational union networks both within single TNCs and stretching across their networks of suppliers, subcontractors, and other business partners.

Despite the advances made by unions and civil society organizations to strengthen their transnational activities, progress has been limited. That the only means currently available to curtail corporate abuses are societal based and dependent on mobilizing collective strength to contest corporate power highlights the pressing need for a binding or enforceable instrument that holds TNCs accountable for labor rights and human rights violations. To be sure, a strengthening of state labor legislation, through more comprehensive coverage and improved implementation, would certainly help curtail abuses of human and labor rights. A global approach is also needed, however. In this regard, it is important to note that in June 2014, the UN Human Rights Council passed a controversial resolution to establish a working group »to prepare a treaty imposing international human rights legal obligations on transnational corporations.«[22] Potentially, this process, independent of its outcome, could serve as a reference point for constructing a canon of binding instruments embedded in international human rights law to regulate the activities of transnational corporations and other business enterprises.

22. See http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first- step-toward-treaty-on-transnational-corporations-human-rights-obligations/. The resolution's mandate is regarded as controversial by both council member states and interested civil society organizations, including Human Rights Watch and Earthjustice.

4.3 Recommendations and the Way Forward

None of the instruments and organizational approaches presented above represents a fully satisfactory means of regulating TNCs in terms of employment and labor relations. They all have shortcomings, in particular in regard to their implementation. These shortcomings need to be addressed and, for example, in the case of GFAs, strategies developed for improving their applicability and usage. Equally important, however, would be considerations for the more comprehensive use of these instruments through linkage. Until today, unions and labor-oriented civil society organizations have seldom developed and practiced an integrated approach combining the use of these different instruments. For example, there is language—i.e., due diligence in the UN Guiding Principles on Business and Human Rights—that could be used to strengthen the effectiveness of GFAs. Additionally, the importance of functional NCPs under the OECD Guidelines for Multinational Enterprises is an issue to be considered. To the extent that TNCs are concerned with their public reputation, there would seem to be room for unions and other civil society organizations to be more exacting in their demands that TNCs adhere to their own claims of sustainability goals and concern for human rights.

In this field, enormous progress would result from the recognition of labor rights as human rights and their delineation in a legally binding international treaty. This should be recognized as a long-term goal toward which the process of its realization is equally important. Pushing forward on spreading such »private« regulations as GFAs or multi-stakeholder initiatives in a complementary fashion can contribute to a better understanding and recognition of international labor standards and the need to combat human rights violations. Furthermore, the role of the ILO should be emphasized in regard to maintaining a coherent understanding of international labor standards as embodied in ILO conventions and recommendations, as well as in the ILO Declaration of Fundamental Principles and Rights at Work and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. As the number of references to international labor standards (in heterogeneous forms) increases in bilateral and regional trade agreements, it is important to have the expertise of the ILO at hand.

A more immediate activity that could bring short- as well as long-term improvements in labor and human rights would be to invest resources in building transnational union networks. Even today, such networks are proving to be effective in strengthening union input and worker voices in regard to TNC policies. Information exchanges, strategy consultations, and even common activities in support of protecting labor rights are practical examples of how it is possible to challenge the existing asymmetry of power between TNCs and employees.

Union networks can be augmented by developing alliances among unions and other civil society organizations to tackle labor rights violations in global value networks. Good examples of such alliances are the Clean Clothes Campaign and the Workers' Rights Consortium, both of which are NGOs that have union involvement and have worked closely with unions for many years to stop labor rights violations.

As part of such organizing efforts, a focus of activities can be directed toward scandalizing gaps between TNC claims of good citizenship and poor practices. In particular, the reality of CSR proclamations should be subjected to testing.

Strategies and concepts should be developed for changing the »rules of the game« of global governance. At present, TNCs operate largely on the basis of their own corporate rules. Building a broader social movement driven by alliances of unions and civil society organizations would bring other interests to the fore and promote interest mediation and a (re)negotiation of positions and interaction. Indeed, building an effective and powerful coalition of interest representation in this sense opens the opportunity to achieve a constructive and productive dialogue with at least some TNCs.

5. Conclusion, Questions, and Ideas

From the presentation of the democratic deficits and the massive power of TNCs in the areas of investment regimes, taxation systems, and labor in the context of human rights, it seems self-evident that there is a need not only to develop specific responses in each area but also to move beyond the level of addressing each individually to finding common ground for a more comprehensive approach. The power of transnational corporations is the base line for redressing the imbalance of power between corporations and society and counteracting corporate capture. To be sure, specialist understanding in each of these fields is important, but not to the exclusion of that particular field's relevance to and impact on the other fields. Foreign investment decisions are not made without considerations of labor costs, skill levels, or employment regulations, nor are they made without consideration of tax laws and capital controls. Even more, treaties protecting expansive foreign investor »rights« enable TNCs to directly challenge states' labor laws, financial transaction taxes, and capital controls. Tax avoidance is not only an outcome, but more relevantly a key element of financialization. In all three areas, TNCs have amassed huge wealth that is then used to influence and exert power to both change the rules in their favor and stymie the introduction of new rules governing their global behavior.

As such, the nascent status of strategic corporate research in regard to campaign strategies to build union power and forge broader social movement alliances needs a broader horizon that includes investment and taxation and possibly other areas as well. Addressing the power of TNCs and the imbalance of power that they have created to their advantage needs to be comprehensive, because the imbalance in itself creates major barriers to change in all three areas under discussion. Such issues as corporate governance and accountability, corporate protections in trade and investment treaties, corporate media control and influence, and corporate leverage in the political process are just some of the issues on the agenda.

Following from this is the general problem of the inability of national governments to adequately regulate TNCs across borders and the need for a democratic and effective global infrastructure of regulatory institutions and strong inputs from trade unions and other civil society organizations. At present, binding global rules exist only where TNCs want and favor them (i.e., investor-state dispute procedures), but not where environmental, labor, or tax issues would be detrimental to their immediate profit interests. This is the logic fueling the race to the bottom in regard to investment, taxes, and labor.

Economic globalization—driven by financialization, deregulation, and liberalization—has enormously benefitted TNCs, enabling them to amass unprecedented means of economic and political power. At best, this has been a mixed blessing for the vast majority of mankind. To paraphrase Piketty (2014), transnational corporations are at the center of capitalism unfettered, providing tremendous benefits to the rich, who keep getting richer, while more and more of the rest of society are falling far behind. Even when there have been some economic benefits for other segments of the population, they have been crisis prone, wrought with uncertainty, and precariousness. Of more significance, this growing imbalance has increasingly undermined democratic institutions and weakened the effectiveness of democratic voices. Governments have a mandate to shoulder the burden of protecting the dispossessed but are being deprived of the financial, economic, and structural means. In essence, there is an obvious and dangerous imbalance of power—featuring on the one hand, hugely powerful private corporations operating globally, and on the other, a spreading societal fragmentation with dysfunctional locally and nationally mandated public institutions—that threatens to become more solidified and further weaken the democratic fiber of society. Corporate capture aptly epitomizes the dynamics of this relationship.

Can »society« strike back democratically and politically in the sense of redressing the current imbalance and curtailing the power of multinational corporations? Are there policies, strategies, and activities that can create opportunities toward revitalizing the means of democratically controlling multinational corporations? What steps can be taken to initiate a wide-ranging and participative debate of the issues and work with policy makers, politicians, trade unions, and civil society organizations to address the detriments of corporate power and end corporate capture?

This paper has presented a variety of responses involving the major areas of corporate power: investment, taxation, and labor. Analytically linking these three areas is an essential step toward understanding the power of transnational corporations and developing the capacities and strategies for democratic responses, both within existing governmental and institutional channels and through active societal engagement. Parliamentary debates and initiatives can raise public awareness and point to legal steps toward strengthening democratic regulation. Democratic responses to corporate capture also need to be anchored broadly in society, a perspective that would be greatly enhanced by fostering a multi-organizational perspective within alliances, networks, and campaigns among unions and other civil society organizations.

It is obvious that in a globalizing world, the question of redressing the power imbalance between transnational corporations and society cannot be addressed solely at the local or national level. Finding effective answers and building democratic institutions of regulation will be inadequate if not directed toward creating and strengthening supranational and cross-border approaches. The glaring democratic deficits in current structures of global governance must be countered with global cooperation. Such cross-border efforts to counteract the power imbalance between TNCs and society are evident, such as those pursued by national and global unions in respect to transnational corporations and their global value networks. To facilitate sustainable and comprehensive change, it will be essential to dismantle existing structures created by and for TNCs and to replace them with structures, policies, and mechanisms of comprehensive democratic regulation. This is the challenge ahead.

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