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Perspectives about a Treaty on Transnational Corporations: Triumphalist Activism vs. Facts Reality

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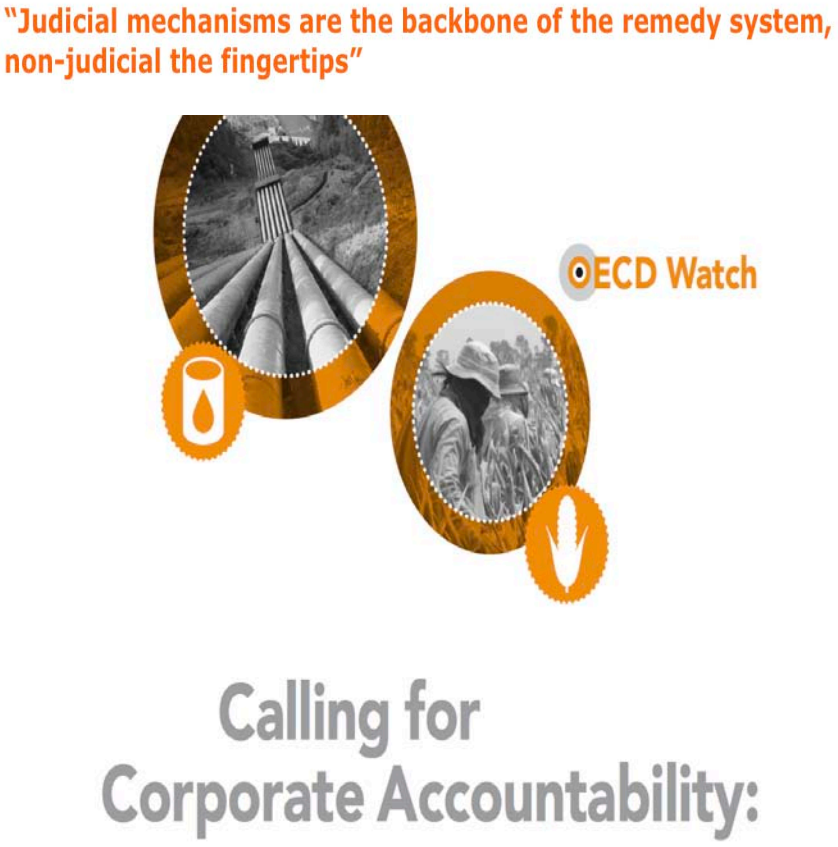
The wording of the last part of the Report of the third session —held at the end of October— of the Working Group of the UN Human Rights Council that discusses a Draft of a binding Treaty on transnational corporations, raised doubts in some NGOs about how the debate will continue, whether there will be a fourth session of the Working Group and even whether it will subsist or cease to exist. Indeed, the text of the last part of the Report of the third session raises questions as to its interpretation. There are on the one hand the Recommendations of the Chairperson-Rapporteur of the Group and on the other the Conclusions of the same Working Group. The Chairperson-Rapporteur **Recommends** that a fourth session be convened for 2018.



Last year in the Recommendations of the Chairperson-Rapporteur it was said that the third session of the Working Group **should** be convened. This year, the President Rapporteur only **Recommends** convening the fourth session. In the Conclusions of this year's Working Group, a call for a fourth session is not mentioned at all. In contrast, in last year's Conclusions of the Working Group the following session was mentioned: ... "to be held before **the third session** and the corresponding new working program".

But in addition, and this is more important than the literal interpretation of the text of the Report, in the conclusions of this year's Working Group it reads: "(c) The Working Group requests the President-Rapporteur to hold informal

consultations with the States and other relevant stakeholders **on the way forward for the development of a legally-binding instrument "**... (our translation from English).

The "way forward" reminds us of what happened with the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights prepared by the Covenant's Committee. We participated in the Committee's discussions that lasted six years. No other NGO participated. Only at the end did the International Commission of Jurists join. When the Project of the Covenant's Committee (which was not very good but not entirely bad) came to the Human Rights Commission, it finally put it aside **and appointed a Special Rapporteur to prepare a new project** that was more deficient than the Committee's, which was the one that was finally approved. This whole process lasted from 1990 to 2009. With this background, it is possible that the "way forward" that the Working Group refers to may consist of the Group disappearing upon the decision of the Human Rights Council and that the latter names a rapporteur to continue dealing with the subject. But more revealing about what can happen are the frustrated attempts that have been occurring for more than 40 years in the UN (and in other spheres) to bestow a legal framework for the activities of transnational corporations.

1) In the 70s there was a draft Code of Conduct for transnational corporations from the Commission of Transnational Corporations of the Economic and Social Council that was finally abandoned;

2) The same thing happened with a draft Code of Conduct on Technology Transfer that was discussed at the United Nations Conference on Trade and Development (UNCTAD) at the same time;

3) The draft Norms prepared by a Working Group of the Human Rights Sub-Commission and approved by it in 2003 were buried by the Human Rights Commission in 2005, which approved a Resolution inviting the Secretary General of the UN to designate a Special Rapporteur to address the issue.

In adopting this resolution, the Member States of the Commission, practically unanimously, including those that had so-called "progressive" governments, yielded to the pressures of transnational corporations. Only the United States and Australia voted against it, arguing that the Commission should not deal in any way with transnational corporations. In July 2005, the then Secretary General of the United Nations, Kofi Annan, completed the regressive work of the Human Rights Commission in this matter by appointing John Ruggie as a special representative to study the issue of transnational corporations. Ruggie was his principal advisor in the Global Compact, a conglomerate of large transnational corporations —created at the initiative of the Secretary General of the UN in 2000— which works together with the General Secretariat itself. Many of the companies that are part of the Global Compact stand out for having a curriculum loaded with repeated acts of corruption and violations of human rights. In June 2011 the Human Rights Council of the United Nations, which had replaced the Commission on Human Rights, **unanimously approved by all the Member States** the Principles elaborated by Ruggie, which were subjected in this way to the will of transnational economic power.

In other areas we can mention:

1) The rejection, when the Statute for an International Criminal Court was debated in Rome in 1998, of the proposal made by the French Government to include legal persons in said Statute. This proposal was supported by only one NGO, the Lelio Basso Foundation. All the other NGOs present in Rome —around a thousand— abstained from supporting the French proposal so as to not irritate the United States so that it would accept the Statute, to which it never adhered to at the end. Including legal persons in the Statute implied opening a door for the trial by the International Criminal Court of transnational corporations involved in serious violations of human rights.

2) The obstacles that the employers' representation currently present within the International Labour Organisation to establish binding standards for TNCs.

3) At the local level the French law of 2017 on the duty of surveillance of transnational corporations was guillotined by the Constitutional Council. The French Parliament approved in February 2017 a law called the duty of vigilance of transnational corporations (loi nº 2017-399), technically inaccurate, but which provided for sanctions for transgressor companies. Required by the parliamentary right, the French Constitutional Council, always sensitive to the business lobby, declared the part of the law that provided for sanctions to be unconstitutional.

The assessment of the prospects for achieving the approval and implementation of a Treaty that frames the activities of transnational corporations needs to be put in the context of the situation and the relationship of world forces, where the omnipotence of transnational economic power can be attested, and to which all States submit submissively. This is reflected in the instances with true power of decision within the United Nations. Some NGO activists report that the United States, which until now had not participated in the Working Group debates, appeared this year to lobby with the European Union and other states. The United States argued that, in order to continue functioning, the Working Group requires another mandate from the Human Rights Council. This position has already been advanced by its pawns in the text, at least ambiguous, of the Recommendations of the President-Rapporteur and the Conclusions of this year's Working Group, analysed above.

The United States has the habit of intervening in the UN when it wants and as it wants and now it does it at the last moment to dictate to the other countries what needs to be done with the complicity of the EU. There are those who rule and those who obey. It should be recalled, amongst other cases, that when the first two optional protocols on the Convention on the Rights of the Child were discussed, the United States —which was not been a party to the Convention (and is one of the few States in the world that has not yet ratified it) and thus should not have intervened in the discussion of said optional protocols— actively participated in the debate to eliminate said protocols; an objective which it achieved in good measure.

Hence to write as two activists do in a note that can be found in Viento Sur (https://webmail.sfr.fr/fr_FR/main.html#read/VF_newsletter/19264): *"We must emphasise the fundamental active participation and the political pressure of the social movements, NGOs and communities affected by human rights violations that* ***managed to overcome*** *the blockade of the EU and other States trying to endanger the continuity of the process"* is totally subjective and alien to the reality of the facts and / or an attempt to overvalue the activism of some NGOs. Furthermore, what is stated in the same note is inaccurate: ***"The recommendations of the presidency cannot be modified by any State now or blocked by the European Union or the United States."***, for the Recommendations of the President-Relator are not even endorsed by the conclusions of the Working Group; they are just Recommendations and the Human Rights Council is empowered —lobbying and pressure from the great powers willing— to terminate the mandate of the Working Group and, if it comes to the case, appoint a Special Rapporteur.

We think that it is correct to take the discussion to the heart of the UN, as a way to publicise —a bit— the denunciation against the TNCs. But it must necessarily be accompanied by the denunciation —inside and outside the UN— of the negative role of states —despite the demagogic discourse of some of them— and of the decision-making bodies within the UN, which are instruments at the service of the great powers and of transnational economic power. The triumphalist declarations of some activists and NGOs imply taking on the grave responsibility of deceiving the victims of transnational economic power instead of, as it should be, trying to make them aware about the true scope of the problem.

Finally, in the very unlikely case that a treaty was approved —which would still be significantly weakened— it should be noted that a treaty is binding only for those states that sign it and formally adhere to it. Therefore, to speak of a "binding treaty" is a redundancy, because a treaty is, in accordance with international law, always binding on the states that sign it and adhere to it with the formalities established by its domestic law. It is hard to imagine the governments of the great powers signing and their respective parliaments ratifying the adhesion to a treaty that limits the activities of transnational corporations; and that sanctions the violations committed against economic, social and cultural rights and against human rights in general.

Exceptionally, all states are bound to respect the so-called peremptory norms of international law, derived from custom or from written texts such as the Universal Declaration of Human Rights and defined by Article 53 of the Vienna Convention on the Law of Treaties of 1969: *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*---------- ---------- ----------