Regulation of transnational corporations

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International policy debate about the national and supranational regulation of TNCs was re-launched in 1974 with the NIEO Declaration (UNGA 1974a) which in Clause 4 announced:

The new international economic order should be founded on full respect for the following principles: […]

> *Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;*

Several of the other principles which constitute the Declaration would also involve corporate regulation for their achievement. These included: technology transfer, action to stem declining terms of trade, and 'full permanent sovereignty of every State over its natural resources and all economic activities'. (See Maynard (1983) for a discussion of previous international initiatives directed in various ways to the regulation of transnational corporations.)

It is important to recognise that the fundamental demands of the G77 in relation the regulation of TNCs were about reforming the relations of unequal exchange between North and South which are mediated by TNCs. These relations of unequal exchange were (and still are) evident in relation to taxation (including transfer pricing and other strategies for erosion of the tax base). They were/are evident in relation to pricing, including unequal relations between the prices of labour, commodities, and light manufactures compared with the prices of imported consumer and producer goods inflated through monopoly pricing power. They were/are evident in the capacity of TNCs to extort tax and regulatory concessions as a condition for investing. The claims of the developing countries for special and differential treatment in trade and finance, based on claims of solidarity and histories of centuries of exploitation, were also a key plank in the development aspirations of the Global South.

The demands of the G77 regarding the new international economic order confronted the interests of the TNCs and their home governments head on; the corporations seeking to maximising the return on investment; home governments seeking to look after their TNCs and to maximise import earnings for the country. The rich countries were / are also concerned to defend the perceived legitimacy of foreign direct investment by TNCs in developing countries and to this end were willing to denounce bribery, corruption, extortion and environmental crimes and create schemes which gave the appearance of discouraging such practices.

Code of conduct on transnational corporations

In 1974 the Economic and Social Council of the UN (EcoSoc) set up the Commission on Transnational Corporations and the Center on Transnational Corporations with the mandate to draft a code of conduct for transnational corporations. From 1977 the work of negotiating the Code was centred on the Intergovernmental Working Group on a Code of Conduct for Transnational Corporations (Sauvant 2015). In its 1976 report the Commission included as annexes the claims urged upon the Commission by various country groupings. The issues to be addressed according to the countries of the Global South are revealing.

The notes submitted by the G77 highlighted, as issues calling for regulation:

1. Preferential treatment demanded by transnational corporations (TNCs) in relation to national enterprises.
2. Lack of adjustments by TNCs to the legislation of the host countries in the matters, *inter alia*, of foreign investment and policies concerning credits exchange, fiscal matter, prices and commercial matters, industrial property, and labour policies.
3. The negative attitudes by TNCs towards the renegotiations of original concessions if such exist and if this should be considered necessary by the Government of the host country.
4. The refusal Of TNCs to accept exclusive jurisdiction of domestic law in cases of litigation.
5. Direct or indirect interference in the internal affairs of host countries by TNCs.
6. Requests by TNCs to Governments of the country of origin to intercede with the host Government, with actions of a political or economic nature in support of their private interests.
7. The refusal of TNCs to accept the exclusive jurisdiction of domestic law in the question of compensation on nationalization.
8. Extension by TNCs of laws and regulations of the country of origin to the host country.
9. The activities of TNCs as instruments of foreign policy, including for intelligence purposes, contrary to the interests of the host country.
10. The contribution of TNCs in the maintenance of racist and colonial regimes and support of policies of apartheid and foreign occupation.
11. The role of TNCs in the illegal traffic of arms.
12. Obstruction by TNCs of the efforts of the host country to assume its rightful responsibility and exercise effective control over the development and management of its resources, in contravention of the accepted principle of permanent sovereignty of countries over their natural resources.
13. Tendency of TNCs not to conform to the national policies, objectives and priorities for development set forth by the Governments of host countries.
14. Withholding of information of their activities by TNCs, making host countries unable to carry out effective supervision and regulation of those activities.
15. Excessive outflow of financial resources from host countries due to practices of TNCs and failure to generate expected foreign exchange earnings in the host country.
16. Acquisition and control by TNCs of national, locally capitalized enterprises through controlled provision of technology among other means.
17. Superimposition of imported technology without any adaptation to local conditions, creating various types of distortions.
18. Failure by TNCs to promote research and development in host countries.
19. Obstruction or limitation by TNCs of access by host countries to world technology.
20. Imposition of restrictive business practices, inter alia, on affiliates in developing countries as a price for technical know-how.
21. Lack of respect of the socio-cultural identity of host countries.

The paper submitted by Argentina, Barbados, Brazil, Colombia, Ecuador, Jamaica, Mexico, Peru, Trinidad and Tobago and Venezuela highlighted 11 provisions which should appear in a code of conduct for TNCs with detailed elaboration of each of the 11 provisions:

A. The transnational corporations shall be subject to the laws and regulations of the host country and, in case of litigation, they should be subject to the exclusive jurisdiction of the courts of the country in which they operate;
B. The transnational corporations shall abstain from all interference in the internal affairs of the States where they operate;
C. The transnational corporations shall abstain from interference in relations between the Government of a host country and other States, and from perturbing those relations;

D. The transnational corporations shall not serve as an instrument of the foreign policy of another State or as a means of extending to the host country provisions of the juridical order of the country of origin;
E. The transnational corporations shall be subject to the exercise by the host country of its permanent sovereignty over all its wealth, natural resources, and economic activities;
F. The transnational corporations shall be subject to the national policies> objectives and priorities for development, and should contribute positively to carrying them out;
G. The transnational corporations shall supply to the Government of the host country pertinent information about their activities in order to ensure that these activities shall be in accord with the national policies, objectives, and priorities of development of the host country;
H. The transnational corporations shall conduct their operations in a manner that results in a net receipt of financial resources for the host country;
I. The transnational corporations shall contribute to the development of the scientific and technological capacity of the host country;
J. The transnational corporations shall refrain from restrictive business practices [followed by a list of 21 restrictive business practices experienced in Latin America];
K. The transnational corporations shall respect the socio-cultural identity of the host country.

The negotiation of the Code was closely contested from the start (Maynard 1983; Sauvant 2015). The 1983 version (Commission on Transnational Corporations 1983) includes extensive bracketing indicating the key areas of disagreement. In 1988 the UN Secretary General prepared a draft which was distributed informally. In May 1990 the Chairperson of the Commission submitted to EcoSoc a draft based on the Secretary General's 1988 draft (Chairman of the Commission on Transnational Corporations 1990) but with all of the outstanding issues resolved in accordance with the requirements of the Western European and Others Group (Sauvant 2015). However, by this time the debt trap had been sprung, structural adjustment was being implemented, bilateral investment treaties (protecting investors) were widespread and the agreements which comprise the WTO Including TRIPS) were taking shape. The countries of the Global North, the UK and US in particular, were determined not to achieve agreement on the Code (Sauvant 2015).

The death of the Code was not the end of the Commission on Transnational Corporations. Further resolutions at EcoSoc had the effect of reversing the direction of work undertaken through the Commission. In Resolution 1992/36 EcoSoc asked the Secretary-General to boost research, technical assistance and fund raising to support 'privatization, administrative deregulation and demonopolization of economic activities' (expanding the space for TNCs). In Resolution 1993/49 EcoSoc stressed "the importance of the role of foreign direct investment, in particular that of transnational corporations, in privatization processes, and reiterates the invitation to the Secretary-General to enhance studies and technical cooperation programmes in this area, in accordance with Economic and Social Council resolution 1992/36 of 30 July 1992". Structural adjustment in accordance with the Washington Consensus (Williamson 2000) was the paramount policy paradigm.

In December 1994 the Commission on Transnational Corporations was replaced by a new Commission, on Investment and Transnational Corporations under the aegis of UNCTAD, changed in 1996 to the Commission on Investment, Technology and Related Financial Issues, and abolished in 2008. The Centre was abolished in 1992 (CETIM 2012; Hamdani and Ruffing 2015).

The immediate response of the rich countries to EcoSoc's 1976 code of conduct initiative was the OECD Guidelines for Multinational Enterprises (OECD 2011). The OECD guidelines put 'national treatment' of foreign owned enterprises right up front (TNCs to be treated no less favourably than domestic enterprises) and then set out a range of corporate 'shoulds', generally along the lines of corporate social responsibility including industrial relations, environmental responsibility, combatting bribery and extortion. The OECD guidelines respond to some of the issues highlighted in NIEO but they are non-binding and many of the principles are widely and publicly flouted with no

consequence for the corporations. While the provisions in the Guidelines requiring state compliance are binding, there are no disciplines on TNCs. Human rights were not included in the first version of the Guidelines in 1976 but were added in 2011 after the code of conduct initiative had been defeated and the developing countries had shifted their focus from the Code initiative under EcoSoc to the Human Rights Commission (UN Commission on Human Rights 2003).

Human rights

Following the defeat of the Code, the focus of advocacy around the regulation of TNCs shifted from EcoSoc and UNCTAD to the Human Rights Commission.

In 2003 the Sub-Commission on the Promotion and Protection of Human Rights, an expert subsidiary body of the then Commission on Human Rights, adopted a set of *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN Commission on Human Rights 2003). The Working Group within the Sub-Commission which drafted the Norms was set up in 1998. The setting up of the Working Group and the development of the Norms reflected, at least in part, continuing civil society advocacy (CETIM 2012).

The focus of the Norms is on human rights generally, not the specific issues of unequal exchange and economic development highlighted in the NIEO in 1974 and raised by the G77 in relation to the proposed code in 1976 (see above). However, the Norms do refer to the Right to Development and respect for national sovereignty:

> *12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.*

The Norms were fiercely opposed by business lobbies generally and by the transnational corporations in particular (Campagna 2004). A central plank in the opposition of business lobbies, and their supporters in the governments of the Global North, was the assertion that international law only applies to states and that if there are obligations which the international community wishes to impose on corporations such obligations must be mediated through domestic law adopted and implemented by states (Campagna 2004; Omoteso and Yusuf 2017). Clearly this proposition was not the view of the Working Group or the Sub-Commission. It also seems contradictory in view of the hundreds of investment treaties, adopted by this time, that explicitly bestow international legal standing on transnational investors. (Kelsey and Wallach (2012) comment that ISDS provisions (see more below) threaten fundamental principles of national judicial systems. ISDS elevates individual corporations and investors to equal standing with agreements' signatory governments, empowering corporations to directly enforce public treaties. Foreign corporations not only circumvent sovereign immunity protections, but are empowered to sue governments to challenge domestic laws and regulations outside of domestic courts.)

The HRC failed to endorse the Norms and in 2005 appointed John Ruggie as Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises. In 2011 Ruggie presented to the Human Rights Council a set of 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UN Human Rights Commission 2011). The Guiding Principles address businesses (from TNCs to small domestic enterprises) and governments. Business entities are urged to obey the law and respect human rights; governments are urged to assist them to do so. There are no binding obligations.

The proposition that international law cannot address transnational corporations directly is absurd. However, as the depredations of TNCs accumulate and the instances of impunity mount (in particular, the decisions of investment tribunals defending the interests of the corporations (Peterson 2009)) the pressure has increased for binding regulation through international law. See Omoteso and Yusuf (2017) for a powerful argument for the establishment of an international legal mechanism which would provide for the criminalisation of breaches of international human rights law by TNCs.

In June 2014, the Human Rights Council adopted resolution 26/9 by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (United Nations Human Rights Council 2023). See the text of the third revised draft of the 'legally binding instrument' being developed by the open-ended intergovernmental working group (Human Rights Council 2022).

At the heart of the draft legally binding instrument is the concept of human rights due diligence that deals with the kinds of provisions in international and domestic law that would be needed to oblige transnational corporations to exercise due diligence in relation to any activities within their penumbra which could breach human rights, and to hold them accountable for such due diligence (Teran 2021).

As with the Norms in 2003, the draft legally binding instrument does not address in detail the specific modalities of unequal exchange which were at the heart of the NIEO. However, it does reference the Right to Development adopted by the HRC in 1987 (UN General Assembly 1987).

The Declaration on the Right to Development is firmly voiced and quite clear about the centrality of the new international economic order. However, the Declaration is just a statement of 'shoulds': "States *should* realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights" (Art 3); "Steps *should* be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels." (Art 10).

In 2017 the HRC appointed the Special Rapporteur on the Right to Development with a mandate to provide practical guidance for the effective realisation of the right to development at local, national, regional and international levels and to explore practical means to promote its implementation. It is perplexing that the 2020 'Introduction to the mandate' (of the Special Rapporteur on the RTD) (UN OHCHR 2020) makes no mention of the work being undertaken on the legally binding instrument (launched in 2014).