

The new global corporate law

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The global economic crisis that unfolded in 2009 was significant not just for the questions it raised over the power of big finance, but also for the attention it drew to other crises facing our planet – notably food, ecology and care work. What has been given less attention is the national and international legal systems that underpin these crises and the way legislation has been skewed in favour of capital and transnational corporations.

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

A recent example is the case of transnational oil corporation Chevron, which conditioned signing the investment agreement with YPF on Argentina's Vaca Muerta oil field upon the adoption of reforms to federal and provincial laws. Chevron's proposals were set out in a series of "strictly confidential" documents, which focused on the maximum amount of taxes the provinces could charge the company, the duration and characteristics of the concessions, and tax stability for the oil company and its subsidiaries. The proposals favouring the oil corporation were written into the new law on hydrocarbons, which the Argentine Congress approved on 30 October 2013 in order to "promote investments in exploration".¹

This is a very clear example of how corporations intervene in regulations designed to control them, which is leading to a profound crisis of democratic institutions and popular sovereignty, the violation of the separation of powers and the rule of law, and the contractualisation of legal norms and economic relations. Finally, it also places the rights of corporations above the rights of people through the privatisation of legal norms and institutions. Transnational corporations approve legal norms “de facto”, and states (in this case, the Argentine state) dedicate themselves to upholding the logic of the market and guaranteeing unlimited profits for corporations.

From the rule of law to a new global corporate law: legal certainty

The evolution of global capitalism from the mid-nineteenth century to the present has served to consolidate and strengthen the pivotal role of transnational corporations in the global economy, as well as their increasing dominance over multiple areas of life. Today, transnational corporations have greater economic power than many states: the annual revenues of Walmart, Shell and Exxon Mobil, for example, are larger than the gross domestic product of countries such as Austria, South Africa and Venezuela.² Major corporations also have tremendous political power, not only in relation to nation-states – as can be seen in their obvious influence in advancing economic counter-reforms and the suppression of social rights – but also at the international level, in multilateral institutions such as the UN “through various models of multi-actor initiatives”.³

On a legal level, the contracts and investments of transnational corporations are protected by a multitude of norms, treaties and agreements that make up a new global corporate law, the so-called *lex mercatoria*. There are, however, no adequate counterweights or real mechanisms to control the social, labour, cultural and environmental impacts of their operations.⁴ The rights of transnational corporations are shielded by a global legal framework based on trade and investment rules that are imperative, coercive and executive in nature, while their obligations are remitted to a fragile international human rights law system and to national legal systems weakened by neoliberalism. In this context, ‘corporate social responsibility’ and voluntary codes of conduct that cannot be legally enforced have emerged as a form of soft law.⁵

Legal certainty for whom?

In spring 2006, the headlines of Spanish newspapers blared, “Evo Morales decrees the nationalisation of Bolivia’s oil and gas” and “Repsol YPF says it will defend its rights”.⁶ Since then, every time attempts are made in Latin America to reclaim state sovereignty over natural resources, energy and key sectors of the economy, transnational corporations defend their investments by resorting to a concept that has become key: legal certainty.

In early 2010, Spain’s Senate Committee on Ibero-American Affairs approved a report on the role of Spanish corporations in Latin America.⁷ In the report, countries in the region were classified based on their “level of legal certainty”: Mexico, Peru and Colombia were among the safest, whereas Cuba, Venezuela, Ecuador and Bolivia were listed among the least secure. The report also regrouped countries

according to the business opportunities and incentives for foreign direct investment they offer, assuming that the countries that provide the most legal certainty are precisely the ones with the best prospects for the operations of transnational corporations.

It is clear that this use of the concept of legal certainty only refers to the new global corporate law. Thus, it would appear that the idea of legal certainty is only understood in the framework of the *lex mercatoria*, as its sole purpose is to protect the contracts and defend the business interests of transnational corporations.

However, the fact that this interpretation of legal certainty is used repeatedly does not make it any less questionable. It does not make much sense to argue, on the one hand, that the judicial concepts and international practices and principles – including equity, unjust enrichment and good faith – can be used only to regulate relations between states and not with private enterprises, when, on the other hand, international arbitration tribunals – like the World Bank’s International Centre for Settlement of Investment Disputes – that were created to resolve conflicts between states are, in fact, used to rule on disputes between states and transnational corporations.

Furthermore, the *pacta sunt servanda* principle (“what is agreed obliges”) is conveniently interpreted to serve as a basis to guarantee contracts signed with transnational corporations in the past. By way of example, and citing the case of Bolivia again, *El Mundo*’s editorial from May 2006 reads: “Morales, with his hasty, populist and counterproductive measure, has violated an international agreement without taking the consequences into consideration.”⁸

At the same time, *rebus sic stantibus* clauses (“as things stand”, meaning nations agree to abide by treaties as long as the circumstances remain unchanged) are ignored, as the defendants of corporate positions insist that agreements signed by previous governments must be respected in the name of legal certainty. *El Mundo* even went so far as to state that the decree on the nationalisation of hydrocarbons in Bolivia “detonates economic freedom”, which raises the question: “What certainty will foreign companies have to invest Bolivia from now on, knowing that their business can evaporate in only a few hours?”⁹ This completely ignores the fact that Evo Morales’ electoral triumph was linked to a programme that included nationalisations, not to mention existing protection via the considerable international human rights treaties this country has ratified. Once again, the new government’s attempt to modify neoliberal rules brought to light the ironclad judicial armour that protects the rules and interests of transnational corporations.

In any event, it is worth insisting here that legal certainty is an international principle that is not linked solely to economic arguments: true legal certainty would situate international human rights law above the new global corporate law. In other words, in theory it puts the interests of the majority of the population above those of the minorities that control economic power.

The Bolivian case (Venezuela and Ecuador have also taken similar measures) illustrates that the state has the legitimate power to modify laws and contracts with transnational corporations if these agreements violate national sovereignty and the fundamental rights of the majority of the population. Bolivia’s new

constitution, in accordance with article 53 of the Vienna Convention, establishes that human and environmental rights prevail over trade and investment norms. One must also not forget that all states have the obligation to defend the public interest and national sovereignty.

Therefore, it seems inappropriate to hide repeatedly behind the concept of legal certainty to justify putting commercial interests before the effective fulfilment of human rights obligations. It is disquieting that Spain's Senate Committee on Ibero-American Affairs considers as models of legal certainty countries such as Colombia, the most dangerous country in the world for unionists, Mexico, where generalised impunity reigns according to the Permanent People's Tribunal,¹⁰ and Peru, where indigenous organisations face severe government repression. And, along the same lines, diplomatic stances following the coup d'état in Honduras in 2009 bear the question: Did the European Union withhold all manner of diplomatic protest to the crimes committed because the signing of the free trade agreement with Central America was at stake?

To give greater visibility to the asymmetry between the protections for transnational corporations' operations and the lack of monitoring on their socio-environmental impacts, the Permanent People's Tribunal has been analysing cases involving more than 50 transnational corporations present in Latin America.¹¹ During its hearings, numerous women and men representing affected communities and hundreds of European and Latin American social organisations demanded that the protection of the genuine principle of legal certainty be made effective, based on defending the interests of the whole of society.

To transform the current economic system, we must urgently limit the power of transnational corporations and invert the international normative pyramid so that the rights of social majorities are put at the top. The current legal framework for transnational corporations brings to light the diversity, heterogeneity, fragmentation and contradictions in the international norms in place. There is a need to establish better coherence among these norms, which must be based on putting human rights at the top of the normative pyramid.

In addition to this central idea, other proposals can be formulated: peoples' sovereignty and the right to self-determination should dominate the normative framework on international relations; the right to food and health must be excluded from business transactions; the right to property must be limited and subordinated to public interest; and investment and trade norms must be made subordinate to international human rights law in a binding and effective way. All of these proposals are to ensure that the people take back "in a democratic and participatory society, the power to define their own destinies".¹²

Transatlantic Trade and Investment Partnership: A paradigmatic example

The Transatlantic Trade and Investment Partnership between the European Union and the United States (TTIP) aims to open market access and eliminate as many tariff and regulatory barriers (e.g. basic social and environmental protection measures) between both partners that limit the accumulation of wealth in the hands of large corporations. Under negotiation since 2011, the agreement contains both form and substance aspects.

The substance elements include proposals on eliminating labour rights and European environmental regulations, deregulating the financial sector, opening up public services (water, electricity, education, health, transportation, welfare) to the private sector, patent protections for pharmaceuticals, the consumption of genetically modified products, and public procurement, among others. The TTIP's form and legal principles will be part of the judicial armour that limits the exercise of democracy and peoples' sovereignty, as was attempted in Bolivia as we described earlier.

The TTIP is not just a trade agreement; it is a new founding treaty at the service of transnational corporations. The legal approach used for the TTIP is not neutral: inequality and asymmetry are the agreement's building blocks. The chain of normative control it will build can be broken down into the various links that make up global corporate law. Greater public awareness of the agreement's opacity, lack of transparency and reinterpretation of the formal elements of the rule of law is needed in order to dismantle it to protect people.

The TTIP's lack of democratic legitimacy

Secrecy and lack of transparency are also basic elements of the TTIP. Trade and investment rules are being elaborated beyond the reach of parliaments and citizens. Citizens do not know who the negotiators are, what criteria are being used, or what decisions are being made. The entire process is shrouded in secrecy based on an alleged technical complexity that "requires trust" and "discretion among negotiators", as the texts under discussion are kept even from public representatives.

Practices related to the treaty's elaboration go against the EU's own communitarian norms, which establish that the European Parliament will be kept adequately informed about international treaties using full transparency at each stage of the negotiations. Instead, economic lobbies representing transnational corporations and the interests of the dominant classes play a central role. Advisors, meetings, proposals and the linkages between political power and transnational corporations are part of the "legislative power" from which the TTIP emanates.

Its origin dates back to the Atlantic Council meeting of 1967, the Transatlantic Business Dialogue of 1995 and the biannual US-EU summits that followed. The proposed agreement was drafted years later by the United States-European High Level Working Group on Jobs and Growth set up in 2011. Between January 2012 and April 2013, 92 per cent of the meetings conducted by Brussels on the treaty were between the Commission and private lobbies – that is, in 520 of the 560 meetings held the EU sat at the table with corporations, while only 40 meetings were with groups representing the public interest. This trend was maintained between July 2013 and February 2014, when at least 113 of the meetings were conducted with private companies, which represents 74 per cent of the total.

The TTIP process

The whole negotiation process for the TTIP violates the basic principles of the rule of law – that is, democracy's procedural guarantees (transparency, the separation of powers, parliamentary debates, etc.). The agreement will establish legal certainty through binding mechanisms that protect corporate investors; this is the complete opposite of human rights norms, whose negotiating processes are open to proposals and debate and whose outcomes provide very little legal certainty.

The TTIP negotiation process also illustrates how laws and economic relations are contractualised: legislative procedures are eliminated and replaced by asymmetrical contract-based or accession-based systems, which infringe on the separation of powers and the sovereignty of peoples and nations. With the TTIP, secret meetings between technocrats and representatives of transnational corporations replace the European Parliament's legislative procedures. Proposals on legislation are substituted by documents drafted by private actors, and parliamentary debates, by bills that are only submitted for ratification.

Among the other trends that the TTIP exemplifies and that violate the rights of the people are 'regulatory inflation' leading to the hyper-specialisation and technical complexity of norms due to transnationals' pressure on governments,¹³ vague and obscure clauses, and the incorporation of annexes containing substantial elements that water down rights and obligations.¹⁴

Re-regulating in capital's favour

The interconnections between trade and investment norms, and between transnational corporations and institutions, have allowed TNCs to obtain what they could not win at the World Trade Organisation or through bilateral or regional trade or investment treaties and agreements. In this dense network, every agreement or treaty serves as the basis for the next, which generates a model of never-ending negotiations that continuously shift the balance towards corporate interests. In the case of the TTIP, the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) and the Trade in Services Agreement (TISA) are part of such a perpetual process of negotiation. This highly asymmetrical war ensures that if one treaty is abandoned, another has already been prepared to replace it. That is why the entire trade and investment model imposed by capital and transnational corporations must be rejected, not just specific agreements.

The TTIP deregulates transnational corporations' obligations in terms of human rights and environmental protection at the same time as it re-regulates or seeks to protect their rights to operate freely and to make profit. Its aim is to eliminate all barriers – tariff or non-tariff – that hinder the development of free trade and investment.

The TTIP includes four normative transformations that have devastating effects on the rights of the people: downwards harmonisation, regulatory convergence, arbitration tribunals and the agreement's normative principles.¹⁵

Downwards harmonisation is a practice by which controls and standards that limit capital are systematically downgraded: if controls on the financial sector are stricter in the US, European regulations will be taken as the basis; if EU labour laws offer more protection to workers, US norms that deregulate workers' rights will be adopted (the US has not ratified 70 of the International Labour Organisation's conventions on collective bargaining, freedom of association, forced labour, strikes or child labour). Harmonisation is achieved by deregulating the rights of people in all areas that are susceptible of "being bought or sold", since by the logic of capitalism, barriers that exempt collective goods such as water, health or food from market profit must be abolished. Furthermore, responsible public procurement policies that take into

account the labour rights of employees and subcontractors, the promotion of fair trade, the elimination of the gender gap and environmental protections clash with the idea of repealing all regulations that may act as an obstacle to opening public markets up to trade and investment.

Regulatory convergence means that corporate lobbies acquire an unexpected level of participation in the drafting of legislation – a well-known phenomenon in the elaboration of standard norms. The proposed Regulatory Cooperation Council for the TTIP will bring together the heads of the most important regulatory agencies in the US and Europe and will serve as a regulatory filter of all EU norms believed to be in conflict with the agreement.¹⁶ It will operate independently from member states and institutions, as a supranational legislative power that is beyond any democratic control.

Private tribunals for investor-state dispute settlement constitute another system operating in parallel to national and international legal systems to favour the interests of transnational corporations. It is *justice for the rich* as only corporations can file complaints against states and there are no formal provisions to allow host states to file cases against foreign investors. Transnational corporations can choose jurisdictions and have no obligation to exhaust all national remedies first. There are further obstacles to making these hearings open to the public. What is more, corporations can even resort to these tribunals to appeal the decisions of ordinary courts, yet the rulings of such private arbitration courts cannot be appealed.

The TTIP's *normative principles* – such as just and equal treatment, national treatment, most-favoured nation or the 'umbrella clause'¹⁷ – are open to creative and expansive interpretation by law firms and arbitrators in favour of corporate power, and are very efficient in the defence of the interests of transnational corporations by building a fortress around their rights. Moreover, existing legal principles such as the abuse of law, unjust enrichment, good faith or equity will be subordinated to principles regulated by the TTIP, due to their mandatory nature. The principles of 'most favoured nation' and 'just and equal treatment' oblige countries to extend any advantage granted to national investors to foreigners. This means that national investors cannot receive any aid from the state, as it would mean violating the national treatment principle. Public support for national solidarity economy enterprises or short supply chains that ensure food sovereignty will have to be extended to transnational corporations from the agribusiness sector. Furthermore, with the 'national treatment' principle, it becomes very difficult to reverse the privatisation of a public service due to the high costs it would imply if transnationals decided to sue the state in international arbitration courts for financial compensation.

In sum, the TTIP is to be part of a legal-political framework of domination, which marks a profound rupture in the hierarchy and the normative pyramid of the human rights protection system. What is more, there is clearly a democratic deficit in global economic institutions, including the arbitration tribunals that remain beyond national judicial powers' reach.

Controlling transnational corporations: the Ruggie framework

Voluntary multilateral instruments adopted in recent decades clearly reflect this rupture in the normative hierarchy of the human rights protection system. In 2005, ignoring the draft *Norms on the Responsibility*

of Transnational Corporations and other Business Enterprises adopted by the UN Sub-Commission for the Promotion and Protection of Human Rights two years earlier, the UN Secretary General appointed a special representative on the issue of human rights and transnational corporations. He gave in to pressure from the International Chamber of Commerce and the International Organisation of Employers – institutions that represent major corporations from around the world – that had asserted that the Sub-Commission's draft norms undermined the rights and legitimate interests of private enterprises. They also argued that human rights obligations were to be met by the states and not by private actors.

The special representative position was assumed by John Ruggie who concluded his mandate in 2011 by publishing a report advocating for the implementation of the “protect, respect and remedy” framework via *Guiding Principles on Business and Human Rights*, precursor of the *Global Compact*. The same year, the Human Rights Council approved his framework, even though the *Report of the Secretary General on the Work of the Organisation* for 2012 affirmed that these principles do not create any “new legal obligations”.

The 11th guiding principles of the Ruggie framework states that: “*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*” The core principle is that the responsibility to respect is additional to that of complying with laws and national human rights protection norms. Being voluntary, the basis of the Ruggie framework is similar to that of corporate social responsibility, by which corporations voluntarily accept to adopt unbinding, internal ethical codes of conduct – many say as a public relations exercise to hide damaging activities.

However, one of the biggest obstacles to eradicating human rights violations committed by transnational corporations is precisely the fact that efforts are not invested in creating new obligations under international law. While some institutions and NGOs believe that the Ruggie framework represents some progress, the truth is that it simply reproduces the same logic used in the past few decades: they are merely guidelines that are not binding in nature – for neither states nor corporations – and therefore, are unenforceable. Moreover, to continue betting on voluntary measures implies that human rights violations by corporations only exist when state responsibility arises; in other words, in some cases transnational corporations – unlike all private individuals – can infringe the law without suffering any sanctions.

How, then, can we possibly neutralise global corporate power with such fragile judicial instruments? The volunteer and non-binding nature of the obligations of transnational corporations gathered in the Ruggie Principles contrasts with the legal fortress protecting the rights of transnational corporations, which is made up of imperative, executive and coercive norms, such as those being regulated in the TTIP. The normative asymmetry is undeniable, and being normatively superior, global corporate law imposes itself at the top of the human rights protection system.

The International Peoples Treaty

The proposal to elaborate an *International Peoples Treaty on the Control of Transnational Corporations* is being developed within the framework of the global campaign to “Dismantle Corporate Power and Stop Impunity”.¹⁸ Campaign members believe that, along with strengthening resistance to transnational corporations, it is essential to promote effective mechanisms for social redistribution and control on large corporations in order to advance in the medium term towards a change in the socioeconomic paradigm. As we move forward with the construction of alternative models for society and the economy – ones that do not have what Polanyi called the “profit motive”¹⁹ as a pillar – it is key to ensure that the rights of individuals and the peoples prevail over *legal certainty* for major corporations.

Therefore, in order to create instruments that exert real control over corporations’ operations, various social movements, indigenous peoples, trade unionists, jurists, activists and communities affected by the practices of transnational corporations have jointly elaborated the *International Peoples Treaty*: “The Peoples Treaty is a radical alternative proposal. Its objectives are, on one hand, to propose control mechanisms to halt human rights violations committed by transnational corporations and, on the other, offer a framework for exchanges and the building of alliances between communities and social movements in order to reclaim public space currently occupied by corporate power”.

The idea is that the collective work that has led to the treaty’s creation brings together the experience accumulated over the past decade by various struggles against transnational corporations, and against the States and financial institutions that support them. As the proposal for the *Peoples Treaty* states, the aim is to “build and analyse international law ‘from below’, from the point of view of social movements and of resistance struggles of men and women – and not from the economic and political elite’s state-centred vision”.

The different proposals and alternatives that hundreds of social organisations have put forward in this treaty will be made available to the United Nations’ recently created intergovernmental working group on transnational corporations and human rights.²⁰ We feel that a legally binding international framework that regulates the activities of transnational corporations must address a number of key issues.

First, new general premises related to the responsibility of transnational corporations must be established. National and international legal norms must be considered binding for natural and legal persons. Transnational corporations are legal entities and as such, they are both subjects and objects of the law. Therefore, their civil and criminal liability and double indictment must be regulated: the legal entity (the corporation), on the one hand, and the individuals who made the incriminating decision, on the other, can be indicted. Furthermore, transnational corporations’ shared liability for the activities of their subsidiaries (de jure or de facto) and their chain of suppliers, licensees and subcontractors that violate human rights, must also be regulated.

Second, specific regulations for transnational corporations must be adopted, such as prohibitions on the patenting of forms of life, the obligation to pay fair and reasonable prices to suppliers and subcontractors, controls on the activities of security personnel working for multinationals, and the obligation to respect all norms that prohibit discrimination.

Third, the protections that the TTIP provides for the rights of transnational corporations must be neutralised through international human rights law (including international labour and environmental law), which is hierarchically superior to national and international trade and investment norms. This means that compliance with international human rights law is mandatory for the entire international community. This would in effect nullify free trade and investment treaties and agreements that give priority to the privileges and profits of investors and transnational corporations over peoples' rights and international human rights law.

The legal principles linked to free trade and investment norms – national treatment, most favourable nation, most favourable treatment, retroactive application of the treaty or umbrella clauses, etc. – would also be made subordinate to the host state's national norms and to international human rights norms.

Submitting an investor–state dispute to an arbitration body must not be allowed under any circumstances, as it undermines the protection of state sovereignty and the rights of individuals and peoples that are already guaranteed under international human rights law.

Fourth, we propose that bodies like a public centre for the control of major corporations and a world court on transnational corporations and human rights be created. The world court would be responsible for judging transnational corporations and those who run them for violations of the rights of people and nature.

Fifth, states cannot be the only axis upon which international law is built. Therefore, social movements and peoples in resistance must be given due recognition and assume their rightful place as protagonists. As Saguier²¹ says, “the nature of existing agreements, as well as the directions in which they may evolve in the future, can be explained based on the conflicts between subaltern and dominant forces over the construction of different institutional frameworks”. Peoples of the world must unite in recognition that international human rights law is the result of the struggles of millions of men and women and thousands of organisations all around the world. It is precisely within this framework that “a treaty of the present and the future, based on the responsibility and ethics of present and future generations, in the obligation to protect the Earth and its peoples” is rooted.



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Endnotes

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- 7 Senate of Spain (2010). Informe de la Ponencia de estudio sobre el papel de las empresas españolas en América Latina, constituida en el seno de la Comisión de Asuntos Iberoamericanos. IX Legislatura, Boletín oficial de las Cortes Generales, no. 425, March 8.
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- 11 For more information on the Permanent Peoples Tribunal, see: Fondazione Lelio e Lisli Basso Istituto Tribunale Permanente dei Popoli. http://www.internazionaleleliobasso.it/?page_id=207
- 12 Teitelbaum, A. (2010). La armadura del capitalismo. El poder las sociedades transnacionales en el mundo contemporáneo. Barcelona: Icaria, page 24.
- 13 Technical complexity, the fragmentation of norms and the rapid pace of the elaboration process favours transnational corporations that pressure for specific regulations that serve their economic interests. The dismantling of national legislation is one of the new principles affecting legal frameworks.
- 14 The TTIP perpetuates confusion, which was also created in the framework of the WTO, namely in relation to the rights of poor countries and the obligations of rich countries through the use of: epithets that weaken obligations, vague provisions, “havens” to escape from obligations, obscure clauses, and annexes and footnotes that contain important elements on rights and obligations.
- 15 Hernández Zubizarreta, J. (2014). La armadura jurídica del TTIP. Quito, Ecuador: América Latina en Movimiento.
- 16 See http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm and http://corporateeurope.org/sites/default/files/ttip_es.pdf
- 17 See Hernández Zubizarreta, J. (2014), op.cit.
- 18 The organisations that adhered to the Campaign to Dismantle Corporate Power carried out a consultation both among their members (over 150 organisations around the world, including Vía Campesina, World March of Women, Friends of the Earth, Public Services International, Jubilee South, Seattle to Brussels Network, Transnational Institute, Ecologistas en Acción, Instituto Hegoa and Observatorio de Multinationales en América Latina (OMAL) – Paz con Dignidad) and various jurists and academics in order to elaborate the text of the International Peoples Treaty. A broad consultation on the text is being held and will culminate in a global assembly by 2016.
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- 20 Ideas and proposals for advancing work on an International Peoples Treaty on the Control of Transnational Corporations can be found at: <http://www.stopcorporateimpunity.org/wp-content/uploads/2014/05/PeoplesTreaty-EN.pdf>
- 21 Saguier, M. (2010). En el banquillo de los acusados: Empresas transnacionales y violaciones de derechos humanos en América Latina. Buenos Aires: FLACSO.