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PARALLEL SESSION 1.3 THE COMMERCIAL DETERMINANTS OF NON-COMMUNICABLE DISEASES

**Title: Reducing the impact of Trans-National Corporations on non-communicable disease: the nutcracker effect**

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# Introduction

Transnational corporations (TNCs) have a major impact on non-communicable disease (NCD) through their considerable social, economic and political influence in the globalised market economy and within individual countries. Positive or adverse effects on population health occur through production methods and products, shaping social determinants of health (SDH), and their influence on regulations governing TNC activities (1, 2). TNCs can contribute to health inequities if health effects arising from their practices have disproportionately adverse impacts on socially or economically disadvantaged populations or provide greater benefits to already advantaged groups (2). Over the last few decades TNCs have become powerful in shaping the world and influencing the physical environment, food systems, working life, systems of governance, leisure and even ideas (3). By 2015 31 of the world’s largest 100 economic entities were countries and 69 were corporations (4).

This paper firstly reviews the positive and negative health impacts of TNCs. It then reviews the existing regulation of TNCs and argues that these need to be extended if the health-harming activities of TNCs are to be curtailed. The paper suggests that a nutcracker action between top-down regulatory mechanisms and bottom up civil society pressure is required. Such action would aim to change the global economic and trading regime in order to safeguard human rights.

# Positive and negative impacts on NCDs

TNC operations can provide direct health benefits: e.g. through providing essential medicines (5) or information technology to support telemedicine or health information storage. Investment by TNCs within countries that contributes to economic growth and development (6) can have a positive effect on the social determinants of NCDs such as employment, working conditions and education (7). TNCs often pay higher wages than domestic companies in host countries, and may provide improved employment opportunities for women in developing nations (8). Taxation revenues from TNCs may allow for expanded social and health services. Some TNCs practice corporate social responsibility (CSR) by assessing and acting to improve their social, environmental or health impacts. This may provide health benefits to those affected and can improve business performance (9, 10).

Adverse impacts in terms of NCDs also arise from TNCs’ products and practices (2, 7, 11), and less directly from their influence over policy and regulation. TNCs can act to limit regulation of their products or practices affecting health by lobbying governments and international bodies (2) and taking part in policy development (12). Globalised market structures enable TNCs to relocate operations, strengthening their bargaining power; with governments to limit regulatory constraints, with labour organisations to reduce wages, or with suppliers to cut costs (2). This may also result in restriction of national governments’ fiscal and political space for social and economic investment (13) which has implications for health outcomes generally, and health equity in particular (14). The influence of TNCs through trade and investment treaties potentially affects the nutritional quality of the food supply and may weaken national governments’ public health regulatory capacity (12). Declining trade union power weakens a countervailing influence over regulatory environments.

Operational practices of TNCs leading to poor working or living conditions are frequently found in low and middle income countries and some high-income countries (15, 16). For example, adverse health impacts arising from extractive industry TNC operations include occupational injuries from accidents and exposure to harmful substances which may affect workers or populations near mines (17). Secondary processing of mining products can produce toxic by-products, especially in countries with weak regulatory environments. Other adverse health impacts may arise from the impacts of TNC operations on high pollution or deforestation (18-20) threats to food production for local populations (21), climate change (22), or poorly constructed infrastructure leading to harmful industrial accidents. TNC products may themselves have adverse health impacts. For example, food and beverage TNCs often produce ultra-processed, high-energy/low nutrient foods that are strongly linked to rising rates of obesity globally, which is a risk factor for NCDs such as heart disease, cancer and diabetes (23). Thus the potential impact of TNCs on NCDs is massive and growing annually as the power and reach of these corporations is extended.

# Existing regulation of TNCs

National regulation of TNC practices and products that affect risk of disease or injury can contribute to reduced NCD risk. Significant differences exist between countries concerning the health impacts of TNC practices, including in relation to occupational injury and wages and environmental protection legislation. These differences suggest that effective government or international agency regulation is an important determinant of health impact (14).

Some international regulation of TNC practices does occur. Global TNC operations are underpinned by a range of discretionary guiding principles, norms (24), fiduciary obligations, corporate responsibility measures (25) and recommendations on food production and food safety (26). These legally non-binding measures can enable or constrain TNC’s activities in balancing corporate, government, employee and citizen interests. The OECD Guidelines for Multinational Enterprises (27) is the only comprehensive code for corporate conduct endorsed by many governments, covering employment and industrial relations, bribery, the environment, consumer interests, science and technology, competition, and taxation. The International Labour Organisation (ILO) ‘Multinational Enterprises’ (MNE) is the (only) ILO instrument that provides direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices (28).

While it has been suggested that global reporting initiatives for TNCs are proxies for formal regulations, they lack mandatory and verifiable reporting systems; mechanisms for monitoring corporate activity and compliance on an ongoing basis; and enforcement mechanisms effective beyond national boundaries. TNCs may sign up to such initiatives to enhance their corporate social responsibility, although scepticism has been expressed about the value of CSR in making significant differences to the adverse health impacts of TNCs (29). However, those that have been instituted include the Corporate Responsibility Index, which challenges companies to devise and deliver responsible business strategies. It does so by conducting gap analysis, benchmarking against industry peers, and recognising and communicating achievement. The London Benchmarking Group is the global standard for measuring and benchmarking corporate community investment. Global Reporting Initiative is an international independent organization that helps businesses, governments and other organizations understand and communicate the impact of business on critical sustainability issues such as climate change, human rights, corruption and many others. FTSE4Good Index Seriesis designed to measure the performance of companies demonstrating strong Environmental, Social and Governance (ESG) practices. FTSE4Good indexes can be used in relation to financial products, research, benchmarking and general reference. The Carbon Disclosure Project runs the global disclosure system that enables companies, cities, states and regions to measure and manage their environmental impacts.

The UN Global Compact is another initiative to encourage businesses to adopt sustainable and responsible policies and to report on their implementation (25). Arnold notes four limitations of the UN Global compact: a) lack of definitional clarity on key concepts eg "sphere of influence" and "complicity“ in human rights abuses; b) Lack of clarity on the distinct duties of corporations and other business enterprises as opposed to those of nation states; c) limited guidance regarding measuring and reporting compliance; d) and a lack of penalties or repercussions for failure to adhere to the principles beyond being delisted for failing to file annual progress reports (30).

While the UN Global Compact is presented as a progressive exercise in global governance, arguably it actually underpins the neoliberal regime and is a highly exclusionary, corporate-led strategy to legitimate and thus reproduce the growing social power of TNCs across the world, and particularly in the global South. It does so by institutionalizing and thereby depoliticizing anti-corporate struggles that seek social protection from market forces, and by discrediting the drive to tame corporate behaviour through legally binding codes (31, 32).

None of the voluntary codes described above have an explicit health focus. They contrast starkly with the legally binding World Trade Organization and regional trade agreements and IMF loan conditions which set the policy context for governments and TNCs. The UN has worked for several decades to create enforceable global human rights standards for businesses, with limited success (33). Despite a legacy of effort, evaluation of TNC regulatory approaches and their health affects remains emergent and there is much more that can be achieved.

# Key regulatory measures required

“Global governance for health must be rooted in commitments to global solidarity and shared responsibility; sustainable and healthy development for all requires a global economic and political system that serves a global community of healthy people on a healthy planet”. The Lancet-University of Oslo Commission noted (34 p. 630).

Despite recognising the importance of establishing global governance systems to reduce inequities the Lancet-University of Oslo Commission didn’t really tackle the question of how this governance might come about and what the political barriers might be. Determining this is a crucial question in the fight to reduce non-communicable disease. Wiist argues that reform of TNCs should be at the institutional level rather than of individual corporations, industries or products (35). There needs to be a global system of governance for TNCs that has as its central aim ensuring that their activities do not endanger population health or human rights and are respectful of the countries in which they operate.

Regulatory measures which have been suggested on the basis of research and civil society advocacy can be grouped under the following headings:

* **Formal international agreements**
* **Revision of international/national laws**
* **Improved monitoring of TNC activity**
* **Ensuring conflicts of interest are reduced**
* **Regulatory support for alternative economic forms to TNCs**

## Formal International Agreements

TNCs often evade laws designed to minimise their adverse impacts on health and well-being in national jurisdictions because of their unprecedented economic, financial and political power, transnational character, economic and legal flexibility and their complex structures. This evasion is especially the case in low and middle-income countries where regulatory structures, enforcement of these, or the ability to monitor TNCs may be relatively weak. Reducing TNC impact on NCDs urgently requires enforceable international and national agreements and legislation. Options for immediate measures are discussed below.

*Formalise a Binding UN Global Treaty on Business and Human Rights with mandatory regulations and accountability structures*

The adoption of a Binding UN Treaty on Business and Human Rights is perhaps the most crucial reform if the adverse impacts of the activities of TNCs on NCDs are to be reduced. It also shows well the ways in which the nutcracker effect can operate. There are many civil society organisations advocating for a binding UN treaty. and they have kept up pressure on the UN to ensure the treaty is progressed.

The 4th session of the UN Human Rights Council open-ended Intergovernmental Working Group on Transnational Corporations and other business enterprises with respect to human rights ((OEIGWG) ) was held in October 2018. The meeting concerned the negotiation of a “[zero draft](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf)” legally binding instrument as well as a [draft optional protocol](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF) presented by the Chairperson-Rapporteur of the working group prior to the session. States and civil society made concrete proposals regarding the content and language of a draft treaty. Approximately 300 civil society representatives, including from NGOs, social movements, affected community representatives and trade unions were present in the negotiations The Trade Union movement has assessed the zero draft positively (36) as it contains the following provisions:

* A requirement for businesses to adopt and apply human rights due diligence policies and procedures;
* A strong focus on access to effective judicial recourse for victims of human rights violations;
* A basis for “parent-based extraterritorial jurisdiction”, which will allow workers to have access to justice in the home countries of multinational companies; and
* Mutual legal assistance and international cooperation between states in transnational cases.

They suggest improvements to the draft could include:

* A re-statement of the duty of businesses to respect human rights throughout their operations;
* Explicit recognition that human rights standards have primacy over trade and investment agreements;
* Alignment of due diligence provisions with the existing UN Guiding Principles on Business and Human Rights; and,
* Creation of a strong international enforcement mechanism beyond the frameworks which have been proposed so far for the Treaty.

If this binding treaty is finally adopted and implemented then the adverse health impact of TNCs could be reduced.

## Revision of National/International Laws

### Stop TNC Tax avoidance and evasion

Implementing national and international taxation regimes/agreements to stop TNC taxation avoidance and evasion within nations is a pressing issue. Taxes collected by governments are vital to helping them deal with NCDs. Most of the costs of the direct and indirect impacts of TNCs on health (via mechanisms discussed earlier) are externalised by the TNCs to national governments; for example the costs of monitoring air pollution and proving health services to treat NCDs. The loss of revenue from TNC tax avoidance and evasion practices is large and if prevented would mean there are many more public goods with which to promote health through action on social determinants of health, and to prevent and treat NCDs. The size and power of the ‘Big Four’ global auditing firms presents a dilemma for regulators. These firms, with opaque partnership structures, audit 98 per cent of corporations with turnover of $US1 billion or more (37).

*Strengthen and standardise national laws relating to occupational health and safety and labour conditions and protecting trade unions*

TNCs employ many people around the world. The regard they pay to occupational health and safety is shaped by the legislation of the countries in which they operate. The main NCDs affected by TNC occupational health and safety is likely to be mental illness and occupational-caused cancers and respiratory diseases. Legislation is generally tougher and more enforceable in rich countries. For example, while it is difficult to make exact comparisons between jurisdictions, workplace fatalities in South Africa’s mining industry are four times higher than those in Australia (38). While Australian McDonald’s workers are protected by minimum wage provisions in the Fair Work Act 2009, in the US taxpayers subsidise employment of McDonald’s franchise workers and other low-wage workers (39).

Improved occupational health and safety has resulted from many years of lobbying and advocacy from trade unions. Trade unions play a vital role in monitoring and advocating for workers’ rights yet the rights of trade unions themselves are being eroded, making them less effective. Thus their rights to operate effectively need to be protected.

The ILO as a specialist agency of the UN is vital to providing an international voice for the implementation of the Sustainable Development Goal (SDG) of Decent Work. It focusses on four strategic objectives; employment, social protection, social dialogue, and rights at work (40). As part of this program of work it encourages TNCs to act responsibly through encouragement rather than any legally enforceable mechanism.

### Increase liability of TNC Board members and Executives

In most countries the liability of TNC board members and Executives for adverse health and environmental impacts stemming from their negligence is limited (41).

## Improved monitoring of TNC activity

The activities of TNCs are not subject to much scrutiny. Increased monitoring through a health and human rights lens is vital. Ways in which this can happen are discussed below.

### Mandatory health impact assessment

Corporate HIA is in its infancy but early studies suggest a CHIA can highlight areas in which the operation of an individual TNC is detrimental to health. They can also provide an overview of the activities of a TNC. A further form of soft regulation would be the requirement for TNCs to undergo periodic health impact assessment of their whole way of operation. A CHIA (42) has been developed and pilot tested in relation to McDonald’s (43) in Australia and Rio Tinto in Australia and South Africa (44). The structure of the CHIA is shown in Figure 1. It has proved useful to provide an overall picture of the ways in which a particular TNC’s products and practices are likely to influence NCDs. In terms of our CHIA analysis of McDonalds, we were able to highlight the following aspects of their operations that are likely to have a detrimental impact on NCDs:

* Consumption of McDonald’s cheap ultra-processed food and sugary drinks can contribute to increased levels of overweight and obesity and consumption is encouraged by McDonald’s marketing strategies
* Ease of access through drive through outlets and home delivery also influence consumption.
* There is an association between consumption of McDonald’s products, lower socio-economic status, and children and young adults; with implications for health equity

*Improved internal auditing of TNCs*

Regulation is also required in terms of the international global financial operating environment which sets up a system highly favourable to TNCs. International regulation to disallow artificial structures that are the global tax havens utilized by TNCs for auditing purposes is one potential measure (45).

### Auditing of corporate social responsibility initiatives

Increasingly TNCs are claiming that they operate in a social responsible manner. Whether or not this is the case should be subject to external review. The value of this is shown by such examples as when a review of McDonald’s philanthropic initiatives showed that the contributions were mainly from public donations although framed as coming from the corporations and that only twenty percent of the cost of Ronald McDonald’s Houses comes from McDonald’s and the other eighty percent is raised elsewhere (46). The positive image of the philanthropy increases the desirability of its products even though they are unhealthy.

## Ensuring conflicts of interest are reduced

Conflicts of interest exist when TNCs are able to influence the agenda of international agencies and national governments in ways that are designed to serve their commercial interests. Very often the practices that maximise profits are bad for health and human rights. Yet TNCs have many ways of bringing their influence to bear on policy including:

1. setting up “front” NGOs that are promoting an TNC agenda rather than a public good one (despite being presented as civil society organisations) (47);
2. establishing industry associations designed to influence government agendas, which lobby governments and international agencies hard on issues that might affect profits, e.g. concerning soda taxes;
3. employing former public servants and politicians to conduct lobbying due to their inside knowledge of government systems;
4. involvement in determining regulatory structures governing their activities;
5. making donations to political parties.

Much tighter regulations on conflicts of interest are required to curbs such practices. The establishment of new norms that ensure that regulation aims to privilege health and well-being concerns rather than rather than those of business desire for increased profitability.

## Regulatory support for alternative economic forms to TNCs

David Korten, who warned of the dangers of the growing power of TNCs in 1995 in his seminal book *When Corporations Rule the World*, argues that their power will only be reduced when TNCs are split up and reduced in size. He argues this will make the necessary oversight possible and would enable better regulation by governments (48). Korten also argues that small and medium sized business enterprises should be fostered because they have links to local communities and are likely to be more responsive to local communities. Co-operatives also have much promise as forms of economic development that are more focused on people’s needs and less solely on profits. Regulatory support to make the establishment and operation of local co-operative activity would enhance local control and empowerment.

# **Bottom-up pressure: The Role of Civil society**

Globally there are many civil society groups campaigning against the practices of TNCs which threaten health. Some of their activities are global and involve coalitions of actors (see Box 1 for example of Extra-territorial Obligations Consortium) and others operate within countries sometimes in response to threats to people’s local environment and own health.

**Box 1: The Extra-territorial Obligations Consortium**

The Extra-territorial Obligations Consortium is a network of over 140 human rights and related CSOs and academics (49). It promotes the Maastricht Principles on Extra-territorial Obligations in the Area of Economic, Social and Cultural Rights. There were issued in September 2011 by experts from universities and organizations located in all regions of the world including current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council. The focal areas are all relevant to TNC impact or influence (50).

An alliance of committed networks and campaign groups around the world are working collectively to organise advocacy activities to address human rights abuses committed by TNCs and other business enterprises including relating to the UN Binding Treaty discussed above. The groups involved are diverse and include: [CETIM](http://www.cetim.ch/), [CIDSE](http://www.cidse.org/) (an international alliance of Catholic development agencies), [Dismantle Corporate Power Campaign](http://www.stopcorporateimpunity.org/), International Network for Economic, Social and Cultural Rights [ESCR-Net](http://www.escr-net.org/node/365115%20), Food First Information and Action Network ([FIAN](http://www.fian.org/)),  International Federation for Human Rights ([FIDH](http://www.fidh.org/en/)), [Franciscans International](http://www.franciscansinternational.org/%E2%80%8E), [Friends of the Earth International](http://www.foei.org/en), [International Baby Food Action Network](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjJw_79-d_YAhVTtJQKHQOtCN0QFggnMAA&url=http%3A%2F%2Fibfan.org%2Fibfan-gifa&usg=AOvVaw1o55H2LcpiCbhtDuL1EGXl)), Public Service International, Pesticide Action Network, Asia and the Pacific (PAN AP), [Transnational Institute](http://www.tni.org/) and the [International Trade Union Confederation](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=12&cad=rja&uact=8&ved=0ahUKEwjU-Kay-t_YAhUBrZQKHYlnBvYQFghYMAs&url=https%3A%2F%2Fwww.ituc-csi.org%2Fcsa&usg=AOvVaw2XyHCyIvIbY9wZ1OaEveS9) ([TUCA](http://www.csa-csi.org/)).

While the actions of civil society organisations are important to more effective control of TNCs, their relationship with TNCs is akin to that of David and Goliath (see example in Box 2). TNCs have much more political and economic power than civil society organisations and can easily outspend them, and influence political decisions much more easily. The work of civil society is constrained by the absence of effective global and national mechanisms to prevent human rights and health abuses. TNCs have the power to enforce SLAPP (Strategic Litigation Against Public Participation) suits against the human rights attorneys and NGOs that have advocated against them.

**Box 2: Examples of Australian civil society action against McDonalds**

Civil society action against McDonald’s Australia involved policy and advocacy coalitions focused on health promotion activities, and countering the regulatory frameworks governing location of fast food outlets, food content of unhealthy food, and its marketing to young people. Local campaigners used wide-ranging strategies to try to stop new fast food outlet construction in three different Australian states. These included letterbox and door knock campaigns, protests, ‘sit ins’, street marches, planting a community garden on a proposed outlet site, and sending thousands of objections to one local council against a McDonald’s planning application. Campaigners also made effective use of social media platforms and electronic direct mail for messaging the community, and initiated several Change.org campaigns and online crowd funding which raised thousands of dollars to send activists to the USA to meet the CEO of McDonald’s global operations (43). Online activism attracted the attention of several high profile and influential international supporters and an Australian human rights campaigner and a law firm offering pro-bono advice (43).

In some cases, TNCs buy off civil society groups. For example the Coca Cola Group has been working for years in partnership with the World Wildlife Federation (WWF), which campaigns for environmental protection. In Australia the ‘Clean Up Australia’ litter abatement strategy is compromised by partnering with business (and taking a stand against a drink bottle deposit scheme)(51).

Civil society is vital to the monitoring and accountability of TNCs. National legislation should protect the rights of civil society to advocate against TNCs on the grounds of human rights and health impacts and organize to protect these rights.

### Shareholder activism

Shareholders can be influential in opposing the actions of the TNCs in which they have shares on the grounds of what has been the environmental and social impact of a company’s activities. In Australia what has been called ‘ideological activism’, is becoming more common and in 2017-18 seven of the Australian stock exchange top 50 companies had an Environmental, Social and Governance –related issue resolution put forward at their AGM by activist shareholders (52). An example of such shareholder activism is that against BHP over the Samarco mine accident in Brazil.

# Conclusion

The activities of TNCs have a significant impact on the environments in which NCD risk is created and maintained. Current regulation of this impact is weak internationally and within countries. Most pressure for change and increased accountability comes from the advocacy of civil society organizations. The work of international, national and local civil society should be supported and encouraged by international agencies and national governments while the growing influence of TNCs over regulatory agenda should be greatly reduced. Top down government regulatory action combined with bottom up civil society action is required to increase the extent of regulation. Actions to create environments which have a low risk of high NCDs must include the regulation of TNC activity.

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