

Policy Brief on the Legally Binding Instrument to Regulate the Activities of Transnational Corporations

July 2022

Introduction

This policy brief is intended to inform the campaign's reference group members on the process of the negotiation process taking place within the United Nations Human Rights Council (UNHRC) in Geneva, Switzerland, for a Legally Binding Instrument (the "Binding Treaty") to regulate the activities of transnational corporations and other business enterprises. The UN Human Rights Council is an intergovernmental body within the United Nations system responsible for strengthening the promotion and protection of human rights throughout the world by addressing situations of human rights violations and formulating appropriate binding (Treaties, Conventions, Declarations) and recommendations.

The Alternative Information and Development Centre (AIDC) hosts the secretariat of the Southern Africa Campaign to Dismantle Corporate Power, which is in turn part of the Global Campaign to Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity. As part of the Global Campaign, AIDC has been an impelling force in influencing the Treaty process since its inception in 2014 and had participated in the setting up of the Global Campaign in 2012. This document includes the positions of the Global and Southern Africa Campaign and recommendations to the South African Department of International Relations and Cooperation (DIRCO), the South African Mission in Geneva, and all member states within the UNHRC.

Context and Background

In July 2014 the UN Human Rights Council passed a historic Resolution (A/HRC/RES/26/9) for the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The treaty process was first sponsored by Ecuador and South Africa and was supported by five Asian members of the UNHRC, namely Indonesia, Philippines, Vietnam, India, and China as well as some Latin American states and the majority from Africa (Algeria, Benin, Burkina Faso, Congo, Côte d'Ivoire, Ethiopia, Kenya, Morocco, Namibia, and of course South Africa). (NAME) This historic process continues through the Open-Ended Intergovernmental Working Group (OEIGWG) at the UNHRC in Geneva and is chaired by Ecuador, which held its seventh session from October 25-29, 2021. This resolution for a binding treaty follows decades of protests, resistance and demands by affected communities, discussions at state

and UN level about the plague of corporate human rights violations. The international community has developed a series of soft legal instruments, culminating in the 2011 UN Guiding Principles on Business and Human Rights, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. The UN Guiding Principles on Business and Human Rights (UNGPs) are considered by many to be a weak and ineffective approach consisting of the adoption of voluntary guidelines for businesses. Many scholars, UN experts, African States and even the European Parliament argued that such voluntary commitments, while clearly useful, cannot fully prevent gross human rights violations (such as child labour, labour rights abuses, and land grabbing) committed by transnational corporations, their subsidiaries, and other entities across their global value chains.

A contested process

The process has been highly contested. The October 2021 Session of the UNHRC was very well attended with 65 governments - more than the UN climate summit in Glasgow 2021. So, this Binding Treaty process remains a very central piece of international work. Participation within the UNHRC is through regional groupings, such as the Africa Group, the Asian Group, the Latin America Group and the European Group, and so on.

The content of the draft of the Treaty, despite still being weak to address the global phenomenon of corporate impunity, according to many social movements, civil society organisations, and States from the Global South, has been receiving fierce opposition from most governments of the Global North (U.S., EU bloc, Canada, Australia, South Korea, etc.) and from the transnational corporations themselves, which are represented in the UNHRC by the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE). One of the arguments behind this opposition was that the 2011 UN Guiding Principles were sufficient to regulate business and therefore no new treaty was needed. All EU countries (who only speak as bloc) in the UNHRC tried to oppose the project, and the EU itself, after the project was approved, tried to obstruct it by making its contribution conditional on extending the scope of the treaty to all companies, and thus to all domestic companies, small and big.

The U.S. had stayed out of the process for 3 years, but returned in October 2021. From the beginning the U.S. tried to thwart several strategies and questioned the need for a binding treaty when there were instruments such as the UNGPs. They also tried to derail the process by questioning the Ecuadorian chairmanship and arguing that the chairmanship should be in the hands of a neutral person, such as an academic. Perhaps a link here to show evidence – e.g.

The process has been kept on track thanks to the support of many governments of the Global South, progressive parliamentarians, affected communities, civil society organisations, social movements and trade unions from all continents. It is now in the actual negotiations' mode, preparing a fourth draft of the Treaty, possibly to be negotiated in October 2022.

The Ecuadorian mission, which still presides over the process, presented its 2nd and 3rd draft of the treaty so again, a more formal type of negotiation was initiated, first in 2020 and then the 3rd draft in October 2021.

The southern governments have remained on top of the process. The South African Mission in Geneva has played a prominent role in making important statements, in the early years, however its active role has diminished worryingly over the years. Many African missions/countries such as Namibia, Mozambique and Algeria have been supportive of the process, although to varying degrees. Cameroon, for example, was very open to working with the Global Campaign during the 7th session in 2021 and supported the comments the Campaign added to the draft articles of the treaty. Algeria and Egypt have been very consistent in support and quite articulate for a treaty and in Asia, Palestine the Philippines and Indonesia have remained fairly consistent and strong.

A number of Latin American governments, such as Ecuador and Bolivia, have generally been very supportive, although their representatives in Geneva have changed. These countries played a prominent role in leading the process that culminated in the adoption of the UN Declaration on the Rights of Peasants and other People Working in Rural Areas, in 2018. Cuba and Venezuela have lost ground due to certain circumstances and changes in the political situation at home, but have always supported the campaign. Brazil, on the other hand, has been more aligned with Northern countries, making several comments and proposals to remove important elements of the treaty or weaken key provisions.

Palestine has been one of the most outspoken states, on the content of the treaty. The Palestinian representative, leading the mission at the UNHRC, had a compelling influence at the last UNHRC session in October 2021.

In Asia, India has been rather placid on the matter while China has taken the opposite approach and has been quite involved in the process. China sent 6 representatives from its international treaty department in 2019. Although China is supportive of the process, they are apprehensive on the matter at the same time, especially with regards to the extraterritorial obligations of TNCs, as they are unclear as to what this means for their state-owned enterprises and corporations. On the other hand, although originally voting for the Resolution, Russia, has done an about-face and even questioned the presence of civil

society in the process. Although it is not sympathetic, Russia is, however, still in the process, though it is unclear what will happen in the 8th session in 2022 given the recent developments and the war in Ukraine.

The current draft of the binding treaty

On March 16, 2022, at the 49th session of the UN Human Rights Council, Ambassador Emilio Izquierdo of Ecuador, as Chair and Rapporteur of the Open-ended Intergovernmental Working Group on Transnational Corporations (TNCs) and Human Rights (OEIGWG), presented the report of the 7th session of the OEIGWG to the Human Rights Council. In its preamble section (PPT7), the third draft of the treaty text states that 'the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State and that States must be protected against human rights abuse by third parties, including business enterprises within their territory, jurisdiction, or otherwise under their control, and ensure respect for and implementation of international human rights law'. Both the report and the current draft (third draft) of the treaty are full of ambiguities and with a tendency to reduce or eliminate the binding nature of the treaty for TNCs. A summary of the third revised draft of the Binding Treaty can be accessed [here](#), and the [Global Campaign's statement upon the release of this draft can be accessed here](#).

The Global Campaign, jointly with the Treaty Alliance, has expressed its concerns around the tone of the report presented in March in a form of a letter to the Chair of the OEIGWG: "We were deeply surprised and concerned to hear you putting so much emphasis on the importance of voluntary norms. It cannot be ignored that these norms have already proven their inefficiency in tackling corporate violations and impunity. What is more, during the last session of the OEIGWG, practically all States and actors highlighted and agreed on the need to elaborate binding norms. This discourse that places voluntary standards at the center of the debate is unacceptable in that it promotes a demobilization around the need to elaborate a legally binding international treaty on TNCs and human rights."

The Global Campaign also noted that the Chair-Rapporteur failed to mention in his presentation, how the negotiations will continue and how the future challenges of this historic process will be addressed, especially because of his proposal for the creation of a group of 'Friends of the Chair' announced at the end of the 7th session of the OEIGWG in October 2021. This group could jeopardize the transparency and plurality of the process.

According to the Global Campaign, "this new body, composed by representatives of some States, could have considerable influence in upcoming important decisions regarding the

content of the future instrument, which will therefore have considerable implications for the next steps of the process”.

The importance of a Binding Treaty

The resolution towards the first international legally binding instrument comes at a time when extractivism is accelerating in various sectors in Southern Africa with particular emphasis on mining and agrarian extractivism and devastating social, economic, climate and environmental impacts for the communities where these investments have been made and the countries as such. Transnational Corporations engage in tax and wage evasion and damage the economies of our countries. In addition, Transnational Corporations operating across the Southern African region enjoy impunity when they violate human rights and destroy the environment. The case of Lonmin, which massacred workers in Marikana in 2012, is a very clear example of this. 10 years later, there is still no justice for dead miners or their families and no instrument of enforcement. A binding international instrument can be imperative in contributing to stop this impunity but also to give communities in our countries the right to say ‘NO’ to extractivism and investments that are harmful to their communities and their lives.

The impunity and power of Transnational Corporations is currently so great that there is an obscure legal system that allows TNCs to sue countries – the Investor State Dispute Settlement (ISDS) mechanism, enshrined in many trade and investment agreements and treaties. The same is true of World Trade Organisation agreements, where existing disputes have pitted the European Union, Australia, China and other economically developed countries as plaintiffs against the Global South and poor countries. The adoption of a Binding Treaty could be beneficial, not only to the communities directly affected but also to the states in the Global South and poor countries.

A strong and effective binding treaty on TNCs and human rights is also needed so that local communities can hold corporations accountable. AIDC and the Southern Africa Campaign to Dismantle Corporate Power intend to continue to influence the process and content of the treaty to include the rights of communities to say no to corporate business models that are harmful to people and the environment, such as extractivist activities, and other key elements to ensure the treaty contributes to closing the gap in international human rights law.

Key demands

AIDC, the Southern African Campaign, and the Global Campaign therefore advocate for the realization of a robust treaty, particularly on the following issues:

- Scope of the Treaty: The target of this process is the power and impunity of TNCs and all entities across their global value chains, and covering all Human Rights
- Primacy of human rights: The legally binding international instrument must reaffirm the hierarchical superiority of human rights norms over trade and investment treaties and develop specific state obligations in this regard (rejection of investor-state dispute settlement - ISDS – clauses, which typically allow foreign investors to bring arbitration proceedings against national governments)
- Direct obligations for transnational corporations: The Treaty needs to establish direct legal obligations for TNCs, not only for States.
- Responsible solidarity: In order to cover all transnational activities, the Treaty must cover all the activities of all the entities along the global value chain of the TNC, including subsidiaries, contractors, subcontractors.
- International court: in order to be enforceable, the Treaty needs to include a judicial implementation mechanism, such as an International Court on TNCs, and other compliance institutions
- Rights of affected persons and communities: The Treaty shall recognize the moral and legitimate authority of the persons and peoples affected by TNCs activities. Human Rights, Environmental Rights defenders and whistle blowers shall be protected and local communities must have the right to say no to harmful projects in their territories.
- Protection from corporate capture: The Treaty shall include concrete measures against the influence of TNCs during the whole process of preparing, negotiating and implementing the future binding international instrument.

Creating awareness on the Binding Treaty and increasing mobilisation

The regional Campaign to Dismantle Corporate Power and AIDC in the case of South Africa will continue to raise awareness of the Binding Treaty process in the region and strengthen alliances with strategic partners.

A national webinar on Binding Treaty and the Right to Say No was held in Mid-June 2022, co-organised with CALS and PSI. This webinar laid the foundations for a national Binding Treaty Indaba to happen mid-July hosted by CALS, AIDC and other partners.

A regional Reference Group workshop on the Binding Treaty in late July 2022. The above national processes will also lay the groundwork for a stronger regional workshop on the Binding Treaty to be held in July 2022.

The Southern African campaign will also have a strong presence at the October 2022 UNHRC session in Geneva with trade unionists associated with the Marikana massacre condemnation.