

Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

for their second session, 24 – 28 October 2016

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This submission by CIDSE, Friends of the Earth Europe, Brot für die Welt, the International Baby Food Action Network and SOMO focuses on three core elements of a future treaty:

1 Adequate access to remedy

The treaty should include provisions aimed at preventing abuses and ensuring access to remedy for victims. It should affirm the State duty to protect against abuses committed by corporations and codify States' extra-territorial obligations, such as according to the Maastricht principles.

2 Effective enforcement mechanisms

The treaty should establish instruments and mechanisms that ensure the enforcement of the obligations enshrined therein.

3 The Treaty and the trade and investment regime

The treaty should clearly stipulate the primacy of human rights over corporate rights in relation to trade and investment agreements.

The analysis and proposals are based on a [seminar](#) with legal experts, advocates of affected communities and European NGOs within the [Treaty Alliance](#), where different options were presented and discussed. The views expressed in this submission are solely those of the NGOs who are filing this submission.

1 Adequate access to remedy

In order for the international legally binding instrument on TNCs and other business enterprises with respect to human rights (hereafter referred to as UN Treaty) to protect victims' rights, the drafters need to include concrete provisions which aim to ensure that adequate access to remedy and effective enforcement are provided for. To this end, the following elements ought to be covered in the treaty:

Overcoming obstacles in accessing remedies at the national level

For the treaty provisions to address the current lack of victims' access to remedy, it needs to remove the – well documented – obstacles to remedy at the national level, both in the country where a human rights abuse takes place as well as in the home country of a company.¹ In light of the current barriers to access to remedy at the national level, the following issues should be dealt with in the treaty:

- Developing legal approaches to hold parent companies accountable for human rights abuses by their subsidiaries (see further discussion below);
- Ensuring that all types of business relations (e.g. including supply and investment relations) are covered;
- Prioritising special provisions for TNCs because of their cross-border reach and influence whilst including provisions in relation to all business enterprises²;
- Including provisions about transparency and access to information (including operations of private actors which have a bearing on public interest matters);
- Requiring legal action from both host and home States in case of (alleged) abuses, treating denial of access to remedy as a human rights violation by the State(s) concerned;

- Opening access to TNCs' home State courts by abolishing the doctrine of *forum non conveniens* in such cases;
- Making a provision for class action and legal aid in appropriate cases;
- Shifting the burden of proof on the defendant companies if the affected plaintiff is able to establish a prima facie case;
- Having a provision of preventive (interim) remedies, like injunctions that could be used by rights holders to preempt harmful impacts of corporate projects;
- Requiring full reparation, proportional to the gravity of the harm and of the abuses and guarantees of non-repetition³;
- Administrative fines should not preclude the possibility of criminal proceedings;
- Considering that judicial delays constitute a major obstacle to effective access to remedy, the treaty should encourage States to require resolution of cases by courts within a reasonable time (it should also describe various factors which define reasonable);
- Company-led grievance mechanisms as well as arbitration /mediation should never be conditioned on waiving access to judicial remedies for violation of human rights.

Lifting the corporate veil

In court cases, claimants face significant problems in holding parent companies liable, because they are not generally liable for human rights abuses committed by their subsidiaries. The treaty should require States to mitigate this obstacle by adopting measures appropriate to their legal systems, which can include:

- Clarifying specific exceptions to the corporate veil;
- Recognizing all companies of a group as one company by applying the enterprise principle.

Extraterritorial obligations and mutual legal assistance

The treaty should affirm the State duty to protect against abuses committed by corporations and codify States' extraterritorial obligations, such as according to the Maastricht principles.

As noted above, the treaty should oblige States to ensure access to remedy in home State courts for human rights violations occurring in a host State. The treaty should include provisions on mutual assistance and cooperation amongst States (e.g., in relation to collection of evidence, freezing of corporate assets, extradition, enforcement of judgments), as well as on capacity building. This would facilitate collection of evidence, judicial fact finding, and the enforcement of judgments delivered by competent courts.

2 Effective enforcement mechanisms

Irrespective of the duty bearer (State and/or business) the treaty should ensure enforceability. Ensuring effective enforcement under the treaty requires thorough discussion and prioritization in the negotiations. There are different options for enforcement of the treaty, varying in possible effectiveness, reach, and powers. These include:

▶ Domestic courts

See discussion under access to remedy.

▶ Regional courts

The treaty could utilize the potential of regional courts to deal with alleged human rights violations by TNCs and any other businesses, depending on (developments in) the mandate of the different regional courts.

▶ International court

An international court on transnational corporations, other business enterprises and human rights – possibly operating on the basis of a complementarity principle – could provide victims of business-related human rights abuses access to remedy at the international level. The treaty could include a provision which stipulates that States will explore – in good faith – the possibilities of establishing a court which can issue binding judgments. In such a case, this could also mean that States – among other efforts – seek to amend the Rome Statute to allow prosecution of corporate entities for their role in international crimes.⁴

▶ Treaty body

At the very least, implementation of the treaty provisions need to be monitored by a robust treaty body, which, depending on its mandate, might or might not qualify as an enforcement mechanism. In case the treaty body does not have enforcement power, another institution should be mandated or established to serve as the treaty's enforcement mechanism. For example, it will be important for the treaty body to have a strong focus on prevention, and to have the mandate to monitor and point out where a State failed to prevent business-related human rights abuses. Furthermore, the treaty body should be enabled to provide exceptions to the requirement of exhausting domestic remedies in appropriate cases (e.g. when such remedies are too lengthy, not available, not accessible, or not enforceable).

In light of the above, the treaty body mandate could include the following:

- Monitoring the implementation of the treaty obligations and issuing general comments accordingly, which clarify content and interpretation of the treaty provisions where needed (because treaty provisions cannot be

sufficiently specific and detailed to cover all aspects of each case);

- Receiving regular reports from States and parallel civil society reports on implementation of the treaty provisions and issue concluding observations;
- Receiving complaints against States and – depending on whether the treaty includes direct obligations – against companies;
- Investigating complaints about business-related human rights abuses;
- Making recommendations to both States and businesses;
- The power to take preventive measures: usually, affected communities have no or very few options of preventing harmful impacts from projects. The treaty could introduce the possibility of preventive halting of projects in order to protect communities from potentially harmful impacts;
- Establishing a fund for redress for victims would enhance victims' access to remedy, reparation, and options for remediation;
- Victim representation should be crucial in the work of a treaty body, in order to ensure victims' voices are heard and their perspectives are central to accountability efforts;
- The ICC victim participation framework, and past truth and reconciliation commissions, among others, can provide valuable insights for ways of making victims' voices heard in the process of seeking remedy.

3 The Treaty and the trade and investment regime

Over the past decades, the number of bilateral investment treaties and free trade agreements has grown, without their impact on human rights having been duly assessed or addressed. There are many ongoing discussions on reform of trade and investment agreements, predominantly dealing with how to make the system of investment protection and arbitration more predictable, and to better safeguard the policy space of States, but without fundamentally reforming the substantive protection provisions for foreign investors. The current legitimacy crisis provides a window of opportunity for more far-reaching change.

Trade and investment agreements limit policy space of States for regulations in many areas such as tariffs, intellectual property rights, services, public procurement or investment, which can all be highly relevant for the protection of the rights to food, health, water, education, participation, self-determination and others. In fact, a number of case studies have shown that trade and investment agreements have in some situations become serious obstacles to respecting, protecting and fulfilling these rights.

International law is very fragmented into different spheres, leading to trade and investment interests being given primacy over human rights, despite the States' duty to protect human rights. Through trade and investment agreements, foreign investors are assured much greater protections regarding their interests and rights than in the case of human rights. In situations where human rights obligations conflict with obligations of trade and investment agreements, there is a high risk that a State chooses to give precedence to the latter to avoid the risk of being sued by international investors through investor-to-state dispute settlement (ISDS) or similar mechanisms. The threat of awards with potentially crippling effects for State budgets has the effect that in practice investor rights tend to prevail over human rights.

This imbalance in enforceable rights and protections becomes even more problematic as current trade and investment agreements do not contain any overriding clauses that establish the primacy of human rights and that guarantee full regulatory space and flexibility for States to ensure human rights are respected, protected and fulfilled. Where investment agreements secure far-reaching rights for investors, they do not establish any corresponding social, environmental or human rights duties for corporations. As a result, in investment arbitration cases, human rights considerations and human rights obligations of States are rarely taken into account.

In order to address these human rights risks, the treaty should:

- Contain a hierarchy clause that establishes that in case of conflict between this treaty and another treaty concluded by (at least two of) the Parties, the former shall prevail (in the relationship between the Parties to the latter treaty).

Conclusion

Among both States and civil society organizations, discussions on the content of the international legally binding instrument on TNCs and other business enterprises with respect to human rights still include a wide variety of options in relation to scope, enforcement mechanisms, duty bearers, liability and access to remedy.

However, among civil society organizations there is a clear agreement about the urgent need for a binding instrument to enhance and ensure victims' access to remedy, whether at a national or international forum. <

Endnotes

1. See also the recommendations put forward by the OHCHR Accountability and Remedy Project on improving accountability and access to remedy for victims of business-related human rights abuses.
2. While the proposed Treaty should prioritize TNCs, it should apply to all their subsidiaries and business relationships, as well as to all the companies in their global supply chains, including subcontractors and financiers, and eventually to all companies that perpetrate, or are complicit in Human Rights violations.
3. See also the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
4. However, this development would not be sufficient to address the current accountability gap, since international crimes (genocide, crimes against humanity, and war crimes) cover a much smaller scope of violations than international human rights law.

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