

The Campaign Draft "Treaty on Human Rights and Transnational Corporations and Supply Chain" and The OEIGWG Chairmanship Elements for a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights

A COMPARATIVE ANALYSIS



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The Campaign Draft "Treaty on Human Rights and Transnational Corporations and Supply Chain" and The OEIGWG Chairmanship Elements for a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights: a Comparative Analysis



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PRESENTATION

In an unprecedented historical moment the Third Session of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) will take place at the end of October 2017. This event comes at a time when the representation of Ecuador, who chairs the Intergovernmental Working Group, is under the responsibility of Res. 26/9 of the Human Rights Council (HRC) to present a document with elements for the legally binding instrument, thus inaugurating a new phase in which it is expected that the States and other international actors will be more involved or resistant to the process. In other words, the agenda around the treaty will be a concrete reality that will test the capacity of qualified civil society organizations and research centers to express the historical yearnings of those affected by human rights violations committed by transnational corporations (TNCs), which were hitherto protected by the framework of non-binding rules.

It is in a moment of such importance that Homa - Human Rights and Business Centre releases the following document which is a comparative analysis between the Campaign to Dismantle Corporate Power and Stop Impunity Draft "Treaty on Human Rights and Transnational Corporations and Supply Chain" and the "Elements for a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" published by the Chairmanship of the OEIGWG¹.

¹ For the purposes of this document the OEIGWG Draft "Elements for a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" will be called "Elements for a Legally Binding Instrument" and can be found at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf.

Aiming to build an analytical instrument of the proposals for the civil society, the first version of the Campaign Draft was used as the parameter for the analysis², dictating how the objective comparison between the two drafts that composes the first part of this paper is divided. The second and final part brings a strategic analysis pointing important differences between the two proposals.

1. AN OBJECTIVE COMPARISON:

Preamble

The Campaign's Draft preamble declares that the Treaty seeks the promotion of principles contained in several important Human Rights Declarations³ and the establishment of obligations for both States and TNCs. Also, it recognizes that globalization has created huge asymmetries of power between States, communities and corporations in terms of access to justice and the protection of people's human rights, as well as acknowledging that many international trade and investment instruments are inconsistent with human rights. In addition, it emphasizes that States have extraterritorial obligations to protect human rights and that these rights are universal, indivisible, interrelated and transversal, and that all must be recognized, protected and promoted in a fair and equal manner, on the same footing and with the same emphasis.

On the other hand, the OEIGWG's draft, although also references others previous Conventions and Resolutions about Human Rights (among them, the

² The first version of the Campaign to Dismantle Corporate Power and Stop Impunity Draft "Treaty on Human Rights and Transnational Corporations and Supply Chain" was used to develop the analysis contained in this document. The final version still wasn't launched by the Campaign and will be available in the Third Session of the OEIGWG. For more information, visit the Campaign website: <<http://www.stopcorporateimpunity.org>>.

³ The Human Rights Declarations mentioned are: the Charter of the United Nations; the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Declaration on the Right to Development; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; the Convention relating to the Status of Refugees and the Declaration on the Rights of Indigenous Peoples.

"Norms")⁴, clearly reaffirms the UN Guiding Principles on Business and Human Rights. Moreover, the draft emphasizes that the document is a result of the Resolution 26/9, approved in the Human Rights Council, and that it reflects the discussions held in the first two sessions of the working group. Additionally, the OEIGWG's document affirms that the obligations of the Treaty must be consistent with the principles of sovereign equality and territorial integrity of States and that International Organizations shall not adopt or promote any international norm or decision that could limit the achievement of the purpose and objectives of this legally binding instrument, as well as the capacity of the Parties to fulfill their obligations.

Part I: General Framework

Principles and rights

In this part, the Campaign's Draft explicitly says that international human rights law has primacy over all other legal instrument and that States remain the fundamental subjects of international law. Furthermore, it specifies that the rights covered by the Treaty are: those recognized in the ten main international human rights treaties; particularly economic, social, cultural, civil, political and labor rights; the right to development, self-determination and a healthy environment, and all rights concerning indigenous peoples and native communities. The Campaign Draft puts the TNCs as potential human rights violators, having the direct obligation to respect human rights.

On this matter, the OEIGWG Chairmanship Elements for a Legally Binding Instrument also expresses that Human Rights obligations have primacy over trade and investment agreements. However, it affirms that the rights covered by the Treaty are all internationally recognized human rights, having special protection those that concern self-determination, access to justice, access to effective remedy,

⁴ The international legal relevant instruments referred in an open and inclusive way by the OEIGWG draft are the UN Charter, Universal Declaration of Human Rights, ICESCR and ICCPR, Vienna Declaration and Programme of Action, ILO Core Conventions, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Universal Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of People with Disabilities, the UN Convention against Corruption, the Declaration on the Right to Development.

participation and inclusion and non-discrimination. In addition, it recognizes special protection to any group considered vulnerable, such as refugees, women, people with disabilities, and indigenous peoples amongst others.

The OEIGWG proposal establish a General obligation of international cooperation for the States and a duty to prepare human rights impact assessments prior to the conclusion of trade and investment agreements, with the purpose to identify inconsistencies between preexisting human rights treaties and subsequent agreements and to refrain from entering into such agreements where such inconsistencies are found to exist. The OEIGWG elements recognize a responsibility of the State for private acts if they fail to act with due diligence to prevent violations or abuses of rights or to investigate and punish acts of violence, and for providing compensation.

Definitions for the purposes of this Treaty

The Campaign's Draft precisely defines several concepts such as: transnational corporation, supply chain of a TNC, home State, host State, official international economic and financial institutions, financial entities, TNC directors, affected individual or community, due diligence and extraterritorial obligations. Transnational corporation is defined as a company (or a group of them) that operates in more than one State, being controlled (directly, indirectly, economically or otherwise) by a decision making center. On the other hand, the supply chain of a TNC is defined as companies outside the TNC that contribute to its operations (including contractors, subcontractors and suppliers). The liability, according to this draft, extends throughout the entire supply chain, including investors, IFIs and banks.

OEIGWG's proposal, by its turn, clearly affirms that "the present instrument does not require a legal definition of the TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character".

Part II. Obligations of Transnational Corporations (TNCs)

The second part of the campaign's draft treaty is dedicated to establishing obligations of Transnational Corporations. This part is divided in four minor topics as follows: general obligations; TNC's obligation to respect human rights; TNC's obligation of transparency in relation to respect for human rights; and finally, TNC's obligations to avoid the risk of violating human rights.

General obligations

In the section entitled General Obligations, the draft displays which TNCs are subject to such obligations, indicating that it applies to "all TNCs that have one or more Home State, Host State or a State affected by the TNC's operations, which is a State party to this Treaty". In this regard, the draft document proposed by the OEIGWG defines the scope of application of the mentioned instrument as covering "all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure". It also establishes that it applies to all acts that violates human rights committed by the previously mentioned entities, "including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them. In addition and yet related to this matter, the OEIGWG's document settles which TNCs and OBEs can be considered "under the jurisdiction of the State Party", establishing those as "any TNC and OBE which has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned".

Furthermore, in the same topic, the Campaign's Draft institutes provisions with respect to: 1) prohibition to engage in activities that may create a risk of impairing the enjoyment of human rights; 2) obligation derived from international law, regardless of municipal law; 3) States' duties to regulate national companies; 4)

the responsibility of financiers; and 5) parent company's' liability throughout their chain of suppliers.

Nevertheless, with the exception of obligations derived from international law, the OEIGWG's proposal is silent in relation to those subjects. Although it mentions the duty of TNCs to respect human rights, the document doesn't directly prohibit TNCs to get involved with activities that may jeopardize those rights, it only states that "TNCs and OBEs shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights"; likewise, in spite of stating clearly that the measures apply to all companies (including subsidiaries and all other related enterprises throughout the supply chain), it doesn't establish shared liability between parent companies and their chains of suppliers. Finally, there is no reference in the whole document about the issues mentioned above in numbers three and four.

TNCs' obligations to respect human rights

On the other hand, the second section of part two is dedicated to settling norms to ensure TNCs' respect for human rights. In this way, seeking to accomplish such norms, this section regulates the following issues: 1) prohibiting TNCs of collaborating, at any level, with human rights violations; 2) non discrimination on any grounds (it specifies a long list of prohibited discriminations); 3) respect for women's rights; 4) respect for labour rights and prohibition of using any forced or child labour; 5) respect for migrants' labour rights; 6) respect for traditional peoples' rights; 7) respect for environmental rights; 8) respect for peasant farmers' work; 9) respect for biodiversity and traditional knowledge; 10) prohibiting TNCs of speculating on the commodities market; 11) regulations of internet related TNCs and respect for the consumer's' right to privacy and freedom of expression; 12) duty to comply with legal and regulatory tax provisions; 13) prohibiting TNCs of channeling their operations through tax havens; 14) responsibility of the financial sector for funding projects that risk the enjoyment of human rights; 15) prohibiting TNCs of threatening or harming communities who are negatively affected by their

operations; 16) duty to acknowledge the chosen representatives of the local communities as legitimate discussion partners.

Regarding this section, the OEIGWG's draft doesn't cover any of the specific protections and obligations to respect human rights established in the campaign's instrument. It only institutes a set of general obligations of "TNCs and OBEs to respect all human rights, regardless of their size, sector, operational context, ownership and structure" and also that they "shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains".

TNCs' obligation of transparency in relation to respect for human rights

The third section of part two seeks to regulate and define TNC's obligations of transparency related to the respect of human rights. It includes providing precise and detailed information to the public on all the company's activities, contracts and operations, financial performance, impact assessments, partners, corporate management structures, among other activities. It also establishes that TNCs must disseminate information through the appropriate means, must be completely transparent in relation to advocacy and lobbying, and commit to verify their suppliers. Referring back to the OEIGWG's draft instrument, it does not institute any direct transparency obligation to TNCs. Nevertheless, it does establish the necessity of "a procedure of periodic evaluation of subsidiary enterprises throughout the supply chain in relation to their respect of human rights".

TNCs' obligation to avoid the risk of violating human rights

Finally, the last section of part two is dedicated to creating provisions to regulate TNC's obligations to avoid the perpetration of human rights abuses and violations. The norms in this section provide accountability for any diverse impact of TNC's on human rights, indicating their duty to take "adequate measures for their prevention, mitigation and, where appropriate, remediation" and establishing their liability in case of violations.

Accordingly, it imposes the duty for TNCs to guarantee the participation of the affected individuals or communities, holding consultations with potentially affected people and organizing consultations and decision-making processes without any intimidation. On this matter, the OEIGWG's draft establishes that "TNCs and OBEs shall prevent human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes" and that "TNCs and OBEs shall design, adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations". It also declares that they "shall use their influence in order to help promote and ensure respect for human rights".

Furthermore, it imposes that "all concerned TNCs and OBEs shall adopt a 'vigilance plan' consisting of due diligence procedures to prevent human rights violations or abuses, which shall include inter alia, the risk assessment of human rights violations or abuses in order to facilitate their identification and analysis; a procedure of periodic evaluation of subsidiary enterprises throughout the supply chain in relation to their respect of human rights; actions aimed at risk reduction; an early warning system; a set of specific actions to immediately redress such violations or abuses; and a follow up mechanism of its implementation, notwithstanding other legal procedures, liabilities and remedies recognized in the present instrument".

Part III. Obligations of States

General obligations of states in relation to TNCs

The Campaign draft declares that states obligations are both territorial and extraterritorial, and address the home state's' obligation to control the activities of TNCs based in their territory, taking all necessary measures to adapt their national law in line with international law obligations, holding them liable for the harm they do to the enjoyment of human rights. Also, according to the Campaign Draft, home states must guarantee access to justice to individuals whose rights are affected by

TNCs activities, regardless of the nationality of the victim or the place where the violation of human rights occurred.

Other important ordinance sets that trade and investment agreements, economic, environmental or labour agreements between states must be compatible to the international human rights framework. It also establishes that TNCs shall not receive preferential treatment and that States shall avoid all types of collaboration with TNCs condemned for human rights abuses.

On the other hand, the OEIGWG's Draft establishes that states have a General obligation to respect, promote and protect all human rights and fundamental freedoms at the national and international level and a general obligation of international cooperation, having the primary responsibility to protect against human rights violations within their territory and jurisdiction by third parties. Although, state parties' obligations regarding the protection of human rights do not stop at their territorial borders. It also prescribes that States are responsible for private acts if they fail to act with due diligence to prevent violations of rights, investigate and punish and provide compensation for the victims, and that they have the duty to prepare human rights impact assessments prior to the conclusion of trade and investment agreements to prevent inconsistencies between human rights treaties and the agreements. Furthermore, it reaffirms the primacy of human rights law over trade and investments agreements and States' duty to observe such primacy when dealing with violations committed by TNCs.

Regarding the contracting procedures between States and TNCs and OBEs, the former shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that the TNCs and OBEs that they have commercial contracts with do not use immunities or privileges as shields against legal civil liability. Finally, the draft also establishes State's' obligation to adopt legislative measures to ensure access to justice concerning abuses or abuses perpetrated by TNCs and OBEs and their subsidiaries throughout the supply chain domiciled outside their jurisdiction.

States' obligation to respect human rights

The Campaign Draft establishes that States shall not create risks for the enjoyment of human rights within or outside their territory (including through the establishment of a framework for investment), or conduct themselves in a way that impairs other states or international organizations of protecting human rights from the conduct of TNCs. It also provides that States must refrain from aiding, assisting, directing or coercing another state or international organization in such a way that results in avoiding protecting human rights from TNCs violations. The document provides that States' duty to respect human rights applies to the activities of public enterprises and extends to the acts or omissions of TNCs acting under state instructions, management or control. Last but not least, the Campaign Draft establishes that States must adopt preventive measures to respect human rights.

On the other hand, according to the OEIGWG Chairmanship Elements for a Legally Binding Instrument, the State Parties shall be responsible for actions or omissions of TNCs and OBEs when the latter: [a] Act under the instruction or control or direction of a State Party and violate human rights in this process; [b] Perform activities entrusted to them under the State Party's legislation to exercise elements of governmental authority or delegation of political power or government authority; [c] Perform activities that the State Party acknowledges and adopts as its own.

It also establishes that States must take any necessary action, including the adoption of legislative and other necessary measures to prevent human rights violations committed by TNCs and OBEs. Furthermore, State Parties shall adopt legislative and other measures to require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes, including codes of conduct, and to identify and address human rights impacts resulting from their activities. Such measures shall apply to all the TNCs and OBEs in their territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain.

In conclusion, it provides that States shall adopt adequate measures to ensure that TNCs and OBEs in their jurisdiction report periodically on the measures they have adopted to prevent the violations and abuses of human rights.

States' obligation to protect human rights

According to the Campaign's Draft, the States' obligation to protect human rights implies in taking the necessary measures to ensure that TNCs and their supply chain do not impair the enjoyment of human rights in the following circumstances: 1) When the harm or threat of harm originates or occurs on its territory; 2) When the state concerned is the home state (The TNC, or its parent or controlling company, has its centre of activity or its main place of business, is registered, domiciled or conducts substantial business activities in the State concerned); 3) When there is a reasonable link between the state concerned and the conduct it seeks to regulate, such as: [a] the company has assets that can be seized to enforce a court ruling; [b] there is evidence or eyewitness in the country; [c] there are members of the company in the country who are facing legal action; [d] the company carried out part of its incriminated operations in that country; and [e] the conduct constitutes a violation of a peremptory norm of international law.

The Campaign Draft further establishes that TNCs contracting with states must be subjected, prior to the signing of the contract and on a regular basis, to the supervision of states authorities and civil society meeting the following requirements: [a] an open, informed and organized process of participation of civil society and affected communities; [b] mechanisms for monitoring the conformity of the corporation's activities with human rights standards; [c] safe mechanisms of complaint by the affected communities in the home states.

On the other hand, according to the OEIGWG Chairmanship Elements for a Legally Binding Instrument, States shall respect, promote and protect all human rights against violations or abuses within its territory and/or jurisdiction by third parties, particularly TNCs and OBEs, and guarantee access to remedy for victims of such violations or abuses, taking all necessary and appropriate measures to ensure access to justice and effective remedy, adapting domestic legislation to the

provisions of this instrument and establishing enforcement measures that comply business enterprises to respect human rights.

The referred document also establishes that States shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that fully comply with all requirements as established in this instrument. Following on that, it specifies that States should adopt measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains, adopting and undertaking human rights and environmental impact assessments that cover all areas of their operations, and reporting periodically on the steps taken.

It ensures that State Parties shall require TNCs and OBEs to implement effective due diligence policies and processes, including codes of conduct, and to identify and address human rights impacts resulting from their activities, including subsidiaries and all other related enterprises throughout the supply chain. Additionally, States shall promote adequate consultation processes with the participation of all relevant actors. Last but not least, it determines that States shall adopt adequate measures to ensure that TNCs and OBEs in their jurisdiction report periodically on the measures they have adopted to prevent the violations and abuses of human rights.

The liability of TNCs and their directors

Regarding the liability of TNCs and their directors, the Campaign Draft understands that "State Parties should establish administrative, civil and criminal liability for TNCs and their directors, also considering that such liability should be extended to their whole supply chain". The OEIGWG Chairmanship Elements for a Legally Binding Instrument recommends the same, since it affirms that States must adopt "legislative and other necessary measures to regulate the legal liability of TNCs [...] in administrative, civil and criminal fields". This draft also recommends that

"criminal legal liability must cover the acts of those responsible for the management and control of TNCs".

The Campaign's Draft affirms that State Parties "shall consider financial institutions as liable or in complicity when they finance TNCs and their supply chains". The OEIGWG document, in its turn, does not mention this liability, although it can be inferred when it proposes that "State Parties shall strive to ensure that [...] financial institutions [...] do not adopt or promote any international norm or decision that could harm the objectives of this legally binding instrument".

State Parties shall compel - according to the Campaign Draft - TNCs to publish the list of all entities in their supply chain. This specific measure is not predicted in the OEIGWG's Draft, although another aspect of transparency remains present, when it establishes that "States shall adopt adequate measures to ensure that TNCs and OBEs in their jurisdiction report periodically on the measures they have adopted to prevent the violations and abuses of human rights".

According to the Campaign, State Parties shall demand due diligence of TNCs and establish their liability in relation to this binding procedure. The OEIGWG Chairmanship Elements for a Legally Binding Instrument also suggests something similar, since it reinforces that "State Parties shall adopt legislative and other measures to implement due diligence procedures and promote decent work in all the operations and the supply chains of TNCs and OBEs under their ownership or control".

The burden of proof (including the proof of due diligence of the parent company or the holding companies in cases where it is applicable) lies with the TNCs, as the Campaign suggests. The OEIGWG Draft also mentions the shift of the burden of proof. State Parties, as the Campaign proposes, have to cooperate with one another in the investigation, prosecution and adjudication of TNCs and in the enforcement of court decisions. The OEIGWG Elements presents a similar vision, since it suggests that "State Parties shall mutually cooperate to prevent, investigate, punish and redress violations or abuses of human rights".

Remedy for the impairment of human rights by TNCs

The Campaign Draft affirms that "State Parties have the obligation to make effective remedy mechanisms that are sensitive to gender issues and all other forms of discrimination and access to justice available to individuals threatened or affected by the activities of TNCs". The OEIGWG Chairmanship Elements for a Legally Binding Instrument also proposes that "State Parties shall guarantee access to justice and to effective remedies to every person, especially to indigenous peoples; women; girls and children; persons with disabilities; refugees; or any group considered vulnerable".

The Campaign Draft also indicates that State Parties shall take the necessary steps to ensure that complaints can be filed against TNCs in national and international jurisdictions, including the International Court. The OEIGWG Elements also mentions this topic, when it proposes that "State Parties may decide that international judicial mechanisms should be established, as for instance, an International Court on Transnational Corporations and Human Rights."

State Parties, as it is suggested by the Campaign, must adopt national laws that regulate territorial and extraterritorial responsibility in order to allow individuals and communities affected by TNCs' practices to file complaints at national courts. The OEIGWG Draft presents similar propositions, when it appoints the national mechanisms, discusses justice access and suggests the inclusion of a broad concept of jurisdiction that would allow the victims of violations to obtain remedy either in the county where it was caused or any other where the TNC has substantial presence.

The Campaign also suggests that Home or Host States of TNCs shall not apply the doctrine of forum non conveniens in cases of complaints of human rights abuses committed by TNCs. In a similar way, the OEIGWG Chairmanship Elements for a Legally Binding Instrument mentions that States Parties should observe "the limitation to the use of the doctrine of forum non conveniens".

State Parties, accordingly to the Campaign, shall prohibit the use of State public security personnel and/or armed forces, through either employment or inducement, by TNCs. OEIGWG Draft, however, does not mention this topic.

Safeguarding human rights against undue political influence by TNCs

The Campaign Draft displays a great concern about the corporate capture. Regarding this point, states shall protect the policymaking processes and government bodies from the undue influence of commercial and other vested interests avoiding all kinds of conflict of interests. For this matter, the States Parties shall be transparent and accountable, especially in relation to affected communities and individuals, in regards to all dealings with the TNCs, documenting and disclosing the files of contracts and other dealings with TNCs and related information to the public. States Parties shall institute multi-year bans on the "revolving door" between State agencies and TNCs, and vice versa.

States Parties shall prohibit TNCs from making financial contributions to political parties or candidates and shall prohibit the use of State public security personnel and/or armed forces, through either employment or inducement, by TNCs.

The OEIGWG Chairmanship Elements for a Legally Binding Instrument does not address this topic in any way.

Part IV. Obligations of international governmental organisations and obligations in trade and investment agreements

The fourth part of the Campaign Draft is divided in three topics as follows:

Human rights obligations of IFIs

The Campaign Draft displays that the conduct of an international governmental organisation (IGO) is attributable to the States governing it as a group. A harmful conduct may implicate those States in a breach of their human rights obligations. Hence, the international governmental organizations obligation to avoid such conduct gives rise to a variety of human rights related obligations. States parties agree that these obligations include the duty of international governmental organisations to abstain from supporting any activities of TNCs or their supply chains that violate human rights. Any conduct of the IGO or its

management that contravene these obligations stands to be corrected by suitable disciplinary, administrative or other measures including the possibility of affected people to seek legal redress against the respective organization. An special concern is related to International Financial Institutions, as the World Bank and the International Monetary Fund, that must respect all relevant norms and rules of international law in general.

Regarding this subject, the OEIGWG Chairmanship Elements for a Legally Binding Instrument establishes recognition of the primacy of human rights obligations over trade and investment agreements. Also, International Organizations shall not adopt or promote any international norm or decision that could limit the achievement of the purpose and objectives of the legally binding instrument, as well as the capacity of the Parties to fulfill their obligations. Such organizations include the UN and their specialized agencies, funds and programs and other international and regional economic, finance and trade organizations.

General obligations

In the second section of the fourth part of the Campaign's Draft, some general obligations are stipulated. State Parties shall guarantee that the UN and its agencies, funds and programmes and other IGOs promote respect for and the full application of the provisions of the Treaty and follow up on their effectiveness. Also, they shall take measures to guarantee the participation of affected communities and victims. According to this document, IGOs must contribute to the regulation of financial transactions and speculations, and take measures against practices of tax and wage evasion, transfer pricing, corruption (active and passive) and trading in influence. Mechanisms that give commercial interests greater influence over public interest, such as lobbying and financing public policy, among others, must not be reproduced.

The Campaigns Draft also establishes that before engaging in international obligations, States shall carry out a Human Right Impact Assessment (HRIA). The HRIA shall be carried out before authorising an activity to begin, to continue or before any adjustment is made. The population must be informed and needs to

participate in the elaboration of the HRIA, that should be performed in good faith and in correct time, making all important information on the process public. The affected person's right to appeal the HRIA's conclusion or to question any aspect of the process must be guaranteed.

The OEIGWG Elements mentions that the States have the duty to prepare human rights impact assessments prior to the conclusion of trade and investment agreements, including the identification of any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements. Also, it shall refrain from accepting the agreements in which such inconsistencies are found to exist. However, the document doesn't mention any of the others topics above.

Specific obligations

The third section of part fourth is dedicated to settling specific obligations regarding IGOs. According to the Campaign Draft, States Parties shall: 1) give priority to the compliance with the obligations established by the Treaty and international human rights law over obligations established by trade and investment agreements or national rules; 2) reject the inclusion of arbitration clauses that give international arbitration bodies jurisdiction over state-investor dispute resolution processes.

Also, the States must agree to cooperate in taking all the necessary measures at their disposal to guarantee that the IFI's are especially observed and regulated, and if applicable, hold them responsible for the redress of the damage caused by the failure to comply with these obligations. If the IFIs or other regional development banks (through the conditions imposed) violate human rights, these entities must be held responsible for the impacts of their actions.

The OEIGWG Chairmanship Elements for a Legally Binding Instrument actually reaffirms the primacy of human rights law over trade and investments agreements and aims to establish specific State obligations in this regard. Nevertheless, it does not mention IFIs in particular or arbitration clauses.

Part V: International mechanisms of control and enforcement

Following the fourth part, the fifth one explores possibilities to control and redress human rights violations perpetrated by TNCs.

International Court on TNCs

The Campaign's Draft proposes an International Court on TNCs. The Court shall have the capacity to receive, investigate and judge complaints against TNCs and OBEs for the abuses of the rights and shall protect the interests of the communities and the people who are adversely affected by the operations of TNCs, which includes ensuring their full redress and imposing sanctions on these corporations and their directors. The Court's rulings and sanctions must be enforceable and legally binding.

On this matter, the OEIGWG Chairmanship Elements for a Legally Binding Instrument propose that State Parties shall decide what international judicial and non-judicial mechanisms should be established for the promotion, implementation and monitoring of the instrument. Also, they give 2 suggestions: 1) State Parties may decide that international judicial mechanisms should be established, as for instance, an International Court on Transnational Corporations and Human Rights; 2) State Parties may also decide to strengthen existing international judicial mechanisms and propose, for instance, special chambers on Transnational Corporations and Human Rights in existing international or regional Courts.

International Monitoring Centre on TNCs

Besides a court, the Campaign's draft establishes an International Monitoring Centre on TNCs. It would be responsible for evaluating, investigating and inspecting the impacts of TNCs' actions and practices. The Centre would be able to issue recommendations and would be managed collectively by Governments, social movements and other civil society organisations.

OEIGWG's proposal, by its turn, suggests a Committee on the issue of Business and Human Rights, which will have, among others, the following duties: 1)

Examining the progress made by State Parties in achieving the realization of the obligations undertaken in the instrument; 2) Assess, investigate and monitor the conduct and operations of TNCs; 3) Conduct country visits in accordance to its mandate; 4) Examine the periodical reports according to its mandate; 5) Receive and examine communications according to its mandate. The Committee shall also consist in eighteen experts of high moral standing and recognized trajectory in the field covered by the Instrument. The members of the Committee would be elected by State Parties from among their nationals and shall serve in their personal capacity, consideration being given to the main different legal systems, equitable geographical distribution and gender balance.

Part VI. International mechanisms of cooperation for investigations and the enforcement of rulings

In this part, the Campaign draft discusses the importance and the mechanisms of the international cooperation in civil, administrative and criminal matters. The objective is to allow the States actions to be in harmony, enforcing the ruling and effectiveness of the obligations listed above.

In this perspective, States must assist each other during the investigations, prosecutions and judicial proceedings, informing the violations conditions and what measures are being taken. Another important action is to celebrate bilateral and multilateral agreements that can facilitate and express how the cooperation will work.

While expressing this, the campaign mentions that International Organizations shall not adopt or promote any decisions or norms that could limit the fulfillment of the purpose and objectives of the Treaty. These objectives include the obligation of all States and other agents to promote and protect human rights, the principle of cooperation which is essential to the effectiveness and shall be understood as a "general obligation of international cooperation", and it also includes the need of mutual assistance as one of the main objectives to tackle the abuses and violations and as an important mechanism for the access to information and protection of witnesses who assist courts and tribunals.

The actions must seek to facilitate legal assistance, exchange information, coordination of legal actions (to speed and adequate the process, allowing the transfer of proceedings), cross board investigation, participation of the victims and recognizing enforcing foreign judgments. It is important to note that it has national and international levels and judicial and non-judicial mechanisms.

Although both the documents seek the same objectives and measures to be taken, the campaign proposes a Committee of eighteen experts of high moral standing and recognized trajectory in the field covered by this Instrument formed by State Parties.

Part VII. Access to justice and damage reparation

The Campaign document emphasizes that equality justice and access to justice is a Human Right stated on the Universal Declaration of Human Rights, although both of them are limited when in dispute with the greater political and economic power of the TNCs and with other issues such as the costs of the judicial system, and the authority and power of other actors.

In this perspective, the Campaign and the OEIGWG drafts emphasizes the rights of the affected communities and the obligation of the States.

Rights of the communities affected by the operations of TNCs

The most essential rights of the affected communities listed on the OEIGWG Elements are: right to information, to justice, to reparation and guarantees of non-repetition of the human rights violations and abuses, effective legal process, just and impartial system for evaluating and quantifying harm. Such rights can be promoted by International Courts and Centers of Monitoring. However, it depends on the recognition of its jurisdiction by states: the need of cooperation contributes for this right once the states must provide information fast enough to be useful to the Court, and also contributing to the effectiveness of the sentence.

The Campaign's Draft talks about the importance of minorities such as indigenous peoples, women, girls and children, people with disability and refugees, among other vulnerable groups, being granted access to justice. This means to

adopt adequate measures according to each reality and the need not only to make it accessible but to give effective judicial remedies to the abuses in a understandable language.

Obligations of States Parties in relation to the access to justice

States must guarantee effective access to justice to the affected individuals and communities, making sure all of their needs, according to their own conception, are being met and to protect the human rights lawyers, defenders and activists. In this way, it is important to facilitate the participation during all the process: human rights lawyers and defenders working against the TNCs shall act in litigation process, providing technical and financial assistance to the affected people and also avoiding their criminalization. In addition, it is fundamental to create protection programmes and rules, such as the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" that allows them to work against the TNCs without being in distress.

According to the Campaign document, both judicial and nonjudicial measures should be effective and accessible, and it is a duty of the state to ensure that the right measures are being taken to reduce regulatory, procedural and economic obstacles that seek to guarantee compensation, reparation, restitution, rehabilitation, measures of satisfaction and non-repetition following an independent, impartial judge and a fair trial.

Part VIII. Mechanisms of participation in the present treaty

The last part of the Campaign draft understands the participation of social movements and other civil society organisations as a key element to strengthen democracy. The measures are the following: recognise their participation and influential role on the decision making process and apply the Treaty when allowing or prohibiting the TNC's activities; considering how they can affect human rights; and making sure that the access to information, environment, health and labour are guaranteed on the private and public activities. Moreover, they must guarantee that

public authorities divulge information on business activities carried out by public or private agents that may have impacts on the population's human rights, especially when the information has been requested by the public.

The OEIGWG Elements does not describes directly any mechanisms of participation, however, it mentions the need for mechanisms of participation are essential to promote the access to justice: individuals and communities must be have their own characteristics and needs considered in order to promote effective measures and process.

2. A BRIEF ANALYSIS OF THE DOCUMENTS AND ITS DIFFERENT NATURES:

An important aspect to be considered when establishing a comparative analysis between the two proposals is that they both come from different players and processes, which inevitably leads to disparate results as well. The proposal of the Campaign is closer to the results of the accumulation of the struggles of social movements and those affected by Human Rights violations committed by companies for decades, expressing more accurately the dimension of the existing gaps in the scope of the national and international regulations on this matter. Whereas the analysis of the the OEIGWG Chairmanship Elements for a Legally Binding Instrument can be made from two perspectives: a more objective and direct one, meaning that, in general, it contains many positive points, but it is also a less ambitious and incisive document regarding the fundamental aspects for the accountability of transnational companies for human rights violations, as we will highlight below; On the other hand, since it not only is a proposal from a State, but also a leading State in the process of negotiation with the United Nations, this limitation can be understood, and even explained, by assuming the strategic calculations used, in order to preserve the field of negotiation, keeping it open and receptive to States, since there is a risk that negotiations will not continue within the Council space, specially concerning the main international powers and other nations that are being pressured by them. Thus, it is possible to understand the more vague language and the more dispersed addressing of some issues in the

OEIGWG Chairmanship Elements for a Legally Binding Instrument; or the option to even avoid more "controversial" points at the moment.

It should be kept in mind that Ecuador, as chair of the open-ended intergovernmental group, has the responsibility of fulfilling its role in a consistent fashion, with a spirit of "reasonableness", typical of the diplomacy in the United Nations. It is also being evaluated in its ability to integrate more State actors into the negotiation. In this way, the sum of these factors may indicate its choice of publishing a document whose "tone" can still be raised during the negotiation process, and through the role of international civil society, calling for changes and adoption of new devices. The main aspects that we would highlight, risking a synthesis of the comparison between the two proposals would be:

1. As expected but also affirmative of the OEIGWG Chairmanship Elements for a Legally Binding Instrument / concern, there is a mention of the fulfillment of the mandate established in Resolution A / HRC / RES26 / 9, as "elements" to start a further negotiation between States and also referring to the text of the Resolution, which repeatedly mentions Transnational Corporations (TNCs) and other business enterprises (OBES). While it does not explicitly address a discussion of the footnote interpretation, it makes clear, in important points, how the scope of application of the treaty and the part concerning the acts subject to its application, for example, that these other business enterprises should have a transnational nature. As explained in scope of application: "In this regard, based on the deliberation of the first two sessions, this proposal considers that the scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure";

2. In the Preamble of the Ecuador draft, there is general reference to international human rights treaties which should serve as a basis and precedent for the content of the Treaty, without seeking the specificity present in the Campaign proposal, for example, an emphasis on the gender issue. However, in its Principles, the "elements" highlight the so-called "vulnerable groups": "Recognition of special protection to victims and particularly to indigenous peoples; women; girls and

children; persons with disabilities; refugees, or any group considered vulnerable according to national, regional or international applicable regulations;"

3. Still in the Preamble, the OEIGWG Elements also mention the importance of the Norms on the Responsibilities of transnational corporations and other business enterprises with regards to human rights. E / CN.4 / Sub.2 / 2003/12 / Rev.2 (2003), which is an important point to be considered while conducting the negotiations, showing that there is already an accumulation, even within the United Nations, of regulations providing for corporate obligations and their accountability for human rights violations. However, at the same time, the document reaffirms the UN Guiding Principles on Business and Human Rights and other such principles and frameworks. We believe that the strategy that will prevail for the continuation of negotiations is that of complementarity between the Guiding Principles and the Treaty. That is, the treaty does not seek to deconstruct the "consensus" reached by the UN when adopting the Principles;

4. We also suggest that the World Health Organization (WHC) Framework Convention on Tobacco Control (FCTC) should be mentioned as an important historical precedent on multilateral agreements related to Human Rights;

5. In its principles, The OEIGWG Elements reaffirm the obligation to respect, promote and protect human rights, both in the national and international level, unconditionally, emphasizing the responsibility of the State to protect and the responsibility of companies to respect. A positive aspect is the mention of the "Recognition of the primacy of human rights obligations over trade and investment agreements", as well as in the text of the Campaign, without, however, providing for the invalidation of all agreements that contradict this provision;

6. The OEIGWG Chairmanship Elements for a Legally Binding Instrument also establish the civil, administrative and criminal responsibility for companies, even providing that the legal liability must also cover those natural persons who are or were in charge of the decision-making process in the business enterprise at the moment of the violation or abuse of human rights by such entity;

7. A general point, which guides the OEIGWG Draft, is the emphasis on state obligations, which are described more objectively and in detail, while presenting a poor text in terms of direct obligations for companies. This is a theme that should

also be brought up from the Campaign proposal, such as the provision for labor obligations;

8. Another central aspect is due diligence. The OEIGWG Elements provide for that logic, both for States, in their duty to supervise / monitor business activity, and for the companies themselves. But how can companies prevent themselves from legitimizing their own standards against institutionally weak states? The Campaign's proposal, in turn, in the prescription on the obligation of the TNCs to avoid risks, establishes the duty of the companies to ensure the participation of the affected people in the management of the situation, taking into account the collective representativeness. We believe that this logic should be incorporated into due diligence;

9. The Campaign proposal is devoted to an important conceptual part. But the OEIGWG Chairmanship Elements for a Legally Binding Instrument generally avoid this confrontation. We believe that with respect to the concept of the value chain in particular, and of those affected by human rights violations, the proposal of the Campaign should be the reference;

10. Concerning extraterritoriality, we note that the theme is diffusely present in the OEIGWG Elements. As when it indicates the need, in the Treaty's Purpose, to reaffirm that the State Parties' obligations regarding the protection of human rights do not stop at their territorial borders; or by the obligation provided at the Obligations of States section, to take measures to prevent and avoid human rights violations throughout the supply chain; and especially in the area of access to justice, the State must adopt measures that inhibit the *forum non conveniens* doctrine;

11. Other key issues are also poorly developed in the OEIGWG Chairmanship Elements for a Legally Binding Instrument, when compared to the Campaign's: the issue of transparency, access to information and public consultation, whose importance is mentioned in the "Elements", but not conditionally, starting from the planning of the enterprise, such as in the Campaign's;

12. A very important aspect is related to Defenders. We believe that the treaty must have a specific part on Defenders and this emphasis is not given on the OEIGWG Elements. The necessary attention to the theme was pointed out in the

recent report of the Special Rapporteur on the situation of human rights defenders, Michael Forst;

13. The OEIGWG Chairmanship Elements for a Legally Binding Instrument also do not highlight the responsibility of financial institutions;

14. Finally, the issue of "corporate capture" is generically quoted in the "access to justice" section of the "Elements" as something that may occur in the judiciary. Just as the creation of an International Court is only suggested, as a mere possibility to be considered. But those are essential issues for the Campaign.



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