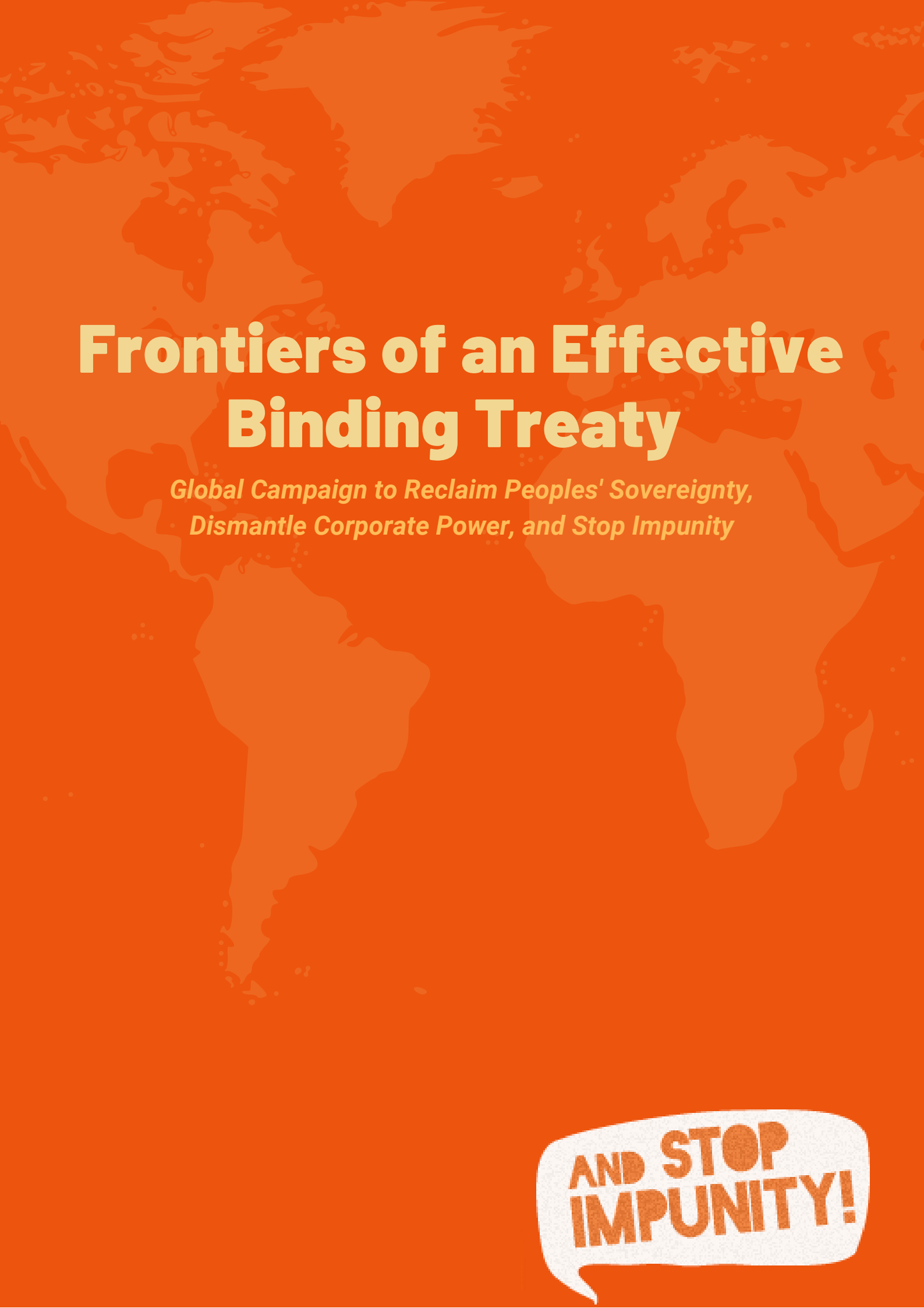




Frontiers of an Effective Binding Treaty

*Global Campaign to Reclaim Peoples' Sovereignty,
Dismantle Corporate Power, and Stop Impunity*

**AND STOP
IMPUNITY!**

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Introduction

March 2023

This document compiles the reasoning and most important arguments the Global Campaign¹ puts forwards regarding content that must be considered in the elaboration of an ambitious and effective Binding Treaty on Transnational Corporations (TNCs) and Human Rights as mandated by Resolution 26/9. A consolidation of the demands of affected communities, indigenous peoples, trade unions, social movements, and civil society organizations, the proposals spelled out here are necessary so the Treaty can effectively regulate the activities of TNCs. They are key to addressing the asymmetries generated by the immeasurable power TNCs exert over their value and production chains at the expenses of States' and peoples' sovereignty.

This document is complementary to the official written contributions of the Global Campaign (Annex I) submitted in the framework of the inter-sessional period (8th - 9th sessions) of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG). There, we analyse the proposals and amendments made by States in previous sessions stressing which articles we believe should be supported, which could be improved, and those we recommend are rejected in the elaboration of the 4th draft to be published in July 2023.

The themes and arguments we expose here are taken from and reflected in different articles of the 3rd revised draft with comments from States. They consolidate over a decade of work and extensive consultations, but they are also part of a living process. Our allies, and all those working to reclaim peoples' sovereignty, dismantle corporate power, and stop impunity, are welcome to comment and suggest provisions, arguments, precedents, and amendments that might strengthen our voice and the effectiveness of the future Binding Treaty.

1. The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power, and Stop Impunity (Global Campaign) is a network of over 250 social movements, civil society organisations (CSOs), trade unions and communities affected by the activities of Transnational Corporations (TNCs).

1. Scope of the Treaty should be on TNCs and other business enterprises with a transnational character

Trade and investment regimes and treaties have created an international legal framework that protects corporate profits to the detriment of the peoples and the planet. This architecture of impunity allows TNCs to evade justice and interfere in democratic processes thus violating the sovereignty of States. The intricate legal and economic structure of TNCs, combined with their economic power and extensive capacity for influence and corruption, allows them to exploit legal loopholes and slip through the cracks of domestic legislations. There is therefore a significant regulatory gap in international human rights law enabling these powerful entities to violate human rights and environmental standards with relative impunity—a gap a strong and effective Binding Treaty will be able to fill. Ensuring corporate legal accountability across borders is thus essential for guaranteeing TNC accountability in an era where capital flows freely, but justice does not. The scope of application of the future binding treaty must then be to regulate the activities of TNCs and other business enterprises with a transnational character, as mandated by Resolution 26/9.

The change in the first revised draft (2019) to broaden the future the scope of the future Treaty to "all business", which the Chair is now unilaterally attempting to impose in their Guidelines for the intersessional period, is a tactic to dilute the content of the future Treaty. By putting on the same level corporations already subject to national control and TNCs, they make the application of the future treaty impossible. By expanding its scope to "all businesses", eliminating a clear reference to TNCs, the Treaty would establish common provisions to enterprises with very different structures and activities, thus compromising its effectiveness. Not only it would mean mixing apples and oranges, but it would also saturate the Treaty's enforcement mechanism. These changes are very much in line with the arguments corporate representatives and their political allies, mainly from the Western Group of States, have defended in previous sessions of the OEIGWG.

Lastly, throughout the negotiation sessions, the majority of participating countries have emphasized the importance of adhering to the mandated scope. Therefore, maintaining the scope on TNCs and other business enterprises with a transnational character is vital for preserving not only the future treaty's effectiveness but also the democratic nature of the process.

2. <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session9/2023-03-igwg-9th-guidelines-intersession.pdf>

2. Primacy of human rights

It is essential that the future treaty reaffirms and effectively implements the primacy of international human rights law over economic activities, and trade and investment agreements and legislation, in accordance with Articles 1 (Purposes of the United Nations) and 103 of the UN Charter.

The primacy of human rights in international law means that individuals and communities have the right to seek redress for human rights violations, and that adjudicators must ensure that remedies prevail over commercial interests. This may include the right to seek remedy for harm suffered, the right to seek justice through criminal proceedings, and the right to seek other forms of redress.

The principle of the primacy of human rights is fully consistent with Art. 103 of the UN Charter, interpreted in conjunction with its preamble and articles 55 and 56. Moreover many modern constitutions include the primacy of fundamental rights.

3. Obligations for TNCs in International Human Rights Law³

There is a widespread misconception that only States, as formal subjects of International Law, can be held accountable for human rights violations. Next to it there is also a fear that, if the future Treaty establishes obligations to TNCs, the latter will automatically become subjects of International Law, undermining the sovereignty of States and their jurisdiction over a given territory. Neither of these concerns are reasoned within current international jurisprudence, as we will explain below. First, States jointly establishing concrete obligations to TNCs in the international level reflects just another way of them collectively exercising their regulatory power as representatives of the peoples. Second, these obligations will be of extreme relevance to support States regulating TNCs at the national level, giving them the upper hand when facing power asymmetries and circumventing corporate capture. Finally, establishing concrete obligations to TNCs in International Human Rights Law States is a means for States to fulfil their obligation to cooperate internationally to create an enabling environment for the realization of human rights.

3. For further information on the importance of establishing obligations for TNCs, see this document of arguments: https://www.stopcorporateimpunity.org/wp-content/uploads/2022/10/Arguments-direct-obligations-for-TNCs_GlobalCampaign-2.pdf

Establishing obligations for TNCs under International Human Rights Law only means that there would be an international legal threshold for decisions rendered by judges and juries of sub-national, national and international courts, as well as by administrative jurisdictional bodies, in the absence of national legislation or when such legislation is deficient or contrary to the Treaty.

In various legal spheres, we already have binding legal frameworks that establish obligations for corporations without making them formal subjects of International Law. Furthermore, it is never too much to remind us that the responsibilities of TNCs must be different, independent and separate from the responsibility of States. First, they are different because while States must respect, protect and fulfil human rights, companies must respect them, prevent violations and comply with judicial or quasi-judicial remedies defined by adjudication bodies. Second, their being independent only means that threatened or affected communities and individuals should be able to sue a corporation directly, without the need to sue a State. Finally, they need to be separated because one should not be able to choose whether to sue the State or the corporation⁴. Therefore, there is clearly no overlap among the obligations of States and those to be established for TNCs. While States must respect, protect, implement, comply, not discriminate and promote international cooperation on human rights, TNCs must have the obligation to respect, prevent and provide remedies in compliance with judicial decisions.

Establishing clear obligations to TNCs is thus necessary to ensure the effectiveness of the future Treaty, as non-specific obligations may delay the accountability process under domestic frameworks and hinder procedures for affected communities to access justice. To safeguard the human rights of communities affected by the activities of TNCs, the future Treaty cannot be relegated to a complementary role that is subsumed to national legislations. In this context, it is important to once again reject the informal proposals presented by the Chair (2022) that aim at depriving the future Treaty from its transnational character.

4. Joint and several liability along the value chain

To guarantee the full protection of human rights the future Treaty must cover all activities along the value chains of TNCs. The understanding of value chains must comprise all companies that contribute to the TNCs' operations, including contractors, subcontractors, or suppliers of goods and digital and non-digital services with which the parent company or controlling company established formal or informal business relationships.

4. Nevertheless, both States and TNCs could be held jointly liable in certain circumstances. If a company is sued but does not respond, the State, as guarantor of human rights, shall provide remedy to victims and affected communities. In this case, their capacity to sue the company to obtain compensation should be maintained.

This means that accountability must also be applied upwards, so that investors, shareholders, holdings, economic conglomerates, banks, and pension funds that finance TNCs can be held responsible for human rights violations committed by the TNCs they financially support.

The inclusion of actors up and downstream of the chain is essential to break the logic whereby social, environmental and economic responsibilities are externalised along TNCs' chains and hidden behind the corporate veil. The Treaty must then set a comprehensive and adequate framework of criminal, civil, and administrative legal liability that must be joint and several. Each and all the parties can be then held individually responsible for the entire obligation, as well as for a portion of it. Overall, joint and several liability along the value chain serves as a mechanism to ensure that all parties involved in a particular human rights and environmental violation are held accountable for any harm caused and that adequate remedy is provided to the affected communities and individuals.

In terms of precedents, the UN ECOSOC General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Paragraph 42, will describe how the corporate veil compromises the access of effective remedy for people affected by human rights violations. The Rome Statute and the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families set a specific framework for joint liability. Finally, UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples) and UNDROP (United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas) set the basis for both the State and the communities to hold TNCs liable, including joint liability.

5. Jurisdiction and International Tribunal⁵

To guarantee the implementation of the UN Binding Treaty and enforcement of the obligations set out by this instrument, and in case of failure of domestic complaint mechanisms, affected persons and communities shall be able to proceed before the courts of the home and host States of TNCs, in the States where the TNC carries out substantial activities, in the States where the human rights violations occurred or risks to occur, in the States where the affected persons or communities are a national or domiciled, or in the States where the TNC has its main assets.

5. For further information, see the Document of elements for an International Tribunal on TNCs and human rights: https://www.stopcorporateimpunity.org/wp-content/uploads/2022/10/Elements-Tribunal_Oct2022-1.pdf

Furthermore, it is necessary to entrust the control of compliance and sanctions for non-compliance to an international tribunal before which TNCs would be accountable, and which would act in a coordinated and complementary manner with State jurisdictional bodies. The need for an accessible institution to enable the judicial sanctioning of human rights violations is justified on the one hand by the ineffectiveness and inefficiency of existing mechanisms, and on the other hand by the need to avoid a new instrument whose usefulness and *raison d'être* will be paralysed by ineffectiveness in its implementation. It is worth reminding that the creation of an international judicial mechanism had already been suggested by a document elaborated by the Chair in 2017 (Elements, 9b.1).

Inspired by this document from the Chair, the Global Campaign proposes a new paragraph in art.15.8: ***State Parties shall decide for the establishment of an international judicial mechanism for the promotion, implementation and monitoring of the legally binding instrument, in the form for instance of an International Court on Transnational Corporations and Human Rights.***

It is also important to support the provision about connected claims, which will allow, for instance, the possibility of judging a parent or controlling company and its subsidiary or other companies with which it has businesses relationships operating abroad before the same court. This inclusion in the 3rd revised draft is an important first step to then establish the joint and several liability of TNCs across their global value chains.

Finally, the compliance monitoring mechanism of the proposed Committee, in the current draft, is still very fragile and does not guarantee the effectiveness of the already limited demands that the text imposes on States, especially because it lacks any complaint mechanism. It is essential to have a clear definition of the criteria for the election of possible candidates designated by the States to integrate the Committee for both the International Court and for the Treaty body, which must explicitly exclude people linked to the business sector, with vested interests, or in conflict of interests, to prevent undue corporate influence. The competences of the Committee should also be strengthened and include the possibility of receiving complaints against TNCs. Finally, the Committee's recommendations must also be binding.

Regarding access to jurisdiction, it is essential to reject unconditionally the general principle of *forum non-conveniens*, and to defend the use of the principle of *forum necessitates*. It should also be acknowledged that it is unsubstantiated to suggest that *forum necessitates* would open way to forum shopping, as some businesses representatives have claimed. The reality on the ground is that communities affected by TNCs violations have barely the resources to pursue legal justice at all, let alone to choose more favourable courts. Forum shopping is typical of TNCs, not of peoples affected by their violations.

6. Rights of affected persons and communities

The future Treaty should establish strong and effective provisions to guarantee the rights of those threatened or affected by TNC activities through mechanisms of redress such as access to precautionary measures, effective remedy and compensation for damages, guarantees of non-repetition, and rehabilitation and satisfaction of any human rights violations.

Article 6 of the current revised draft indicates that, in an effort to prevent human rights violations [and as part of the required due diligence measures], business enterprises shall '[Ensure] that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consultations'.

Interestingly, the use of 'consultations' does not reflect the phrasing found in most sources of international law. The UN Declaration on the Rights of Indigenous Peoples itself promotes the right to free, prior and informed consent. While this may seem like a minor difference on the page, this has major consequences on the ground. This change removes the communities' right to decide on their own development trajectory and instead favours transnational corporations' interests. It is clear from the testimonies of affected communities, especially those affected by extractive projects, that the procedural right to free, prior, and informed consent must be linked with a more substantial right: the right to say no.

The binding treaty must impose a standard of consent as opposed to consultation. To give force to the intentions of article 6, to prevent rights violations, communities and other affected parties must be placed at the centre of the decision-making process. This also implies that consultations must be conducted independently from the TNC and that consultations organized by the communities themselves shall be officially recognized. Finally, it is key to incorporate the amendments that aim at reinforcing the provisions of articles related to the rights of victims/affected people and communities (mainly articles 4, 5 and 7).



7. Prevention against corporate capture

The Treaty must include concrete measures against the influence of TNCs throughout the process of preparation, negotiation, and implementation of the future Binding Treaty. The effectiveness and enforceability of the future Treaty depends on it.

The future treaty must also protect the domestic and international policy space of States against undue interference by TNCs. This is to say that States should refuse to give TNC representative the means to influence relevant policies that have an impact on human rights in their bilateral, regional, multilateral, or other trade and investment agreements. Therefore, it is key to incorporate in the future Treaty the amendments that aim at strengthening provisions to impede corporate capture both in its prevention clauses and in articles related to its implementation (mainly article 6 and article 16).

8. The term “violation” should substitute, or at least always accompany, the term “abuse”

The term "abuse" creates a false hierarchy between States that violate human rights and TNCs that may cause human rights abuses, implying that TNCs cannot commit violations and therefore have no legal obligation to respect human rights. According to the prevailing theories on Human Rights in International Law, a violation is characterized as such if there is an offence to human dignity, and not by whom caused it, if a State, a person or a TNC.

For these reasons, it is imperative to include the term "violation" alongside "abuse," as proposed by Cameroon in Article 1.2, and to standardize this terminology throughout the articles of the future treaty.

9. The term “victim” should be followed by “affected people and communities”

Historically, social movements that have been affected by the activities of transnational corporations have claimed the use of the term “affected people and communities” instead of victims when referring to those suffering human rights violations caused by TNCs. First, the term victim is very restrictive, suggesting that a human rights violation may occur and cause harm to one single individual. Bringing in the “affected” perspective means emphasising that most human rights violations, although in different degrees, will have consequences to entire communities, sometimes even a whole region or country.

Furthermore, the term victim implies a *fait accompli*, while the future Treaty should also protect the rights of communities and peoples at risk of being affected by the proposition of a certain project or legislation which will have consequences to their lives and territories. It is very important for movements and organisations part of the Global Campaign that the rights of affected people and communities are protected, so that it is guaranteed to the collective e.g. the right to be informed of the proceedings, the right to legal assistance, and the right to information. Furthermore, the Global Campaign suggests the incorporation of “holders of individual and collective rights” so trade unions are explicitly encompassed by this definition.

Therefore it is important to include the term “affected persons and communities” next to “victims” in the definition of Art.1.1 and standardized throughout the text.

10. References to the domestic law of the States

Throughout the current revised draft there are plenty of references to the domestic law of States. However, in several countries judicial systems may be flawed, deficient or partial. The future Binding Treaty must be able to protect human rights against violations committed by TNCs in their operations and along their value chains, and to do so it must be able to establish a common threshold to all parties.

References to domestic law in the current draft Treaty not only recharacterizes its international animus but it also risks its effective implementation. If the implementation of the Treaty is limited to national prerogatives, the Treaty loses its meaning, moves away from its original mandate and risks becoming a “toothless”, ineffective instrument.

It is therefore necessary to reject all provisions asserting the prerogative or supremacy of the domestic law of States that would undermine the effectiveness of the future Treaty. The exceptions are references i) to national law that is more protective of human rights, ii) to dispositions that claim for international judicial cooperation in the prosecution of violations, and iii) to provisions determining ways in which domestic law must adapt and comply with the draft Treaty.

A good international reference in this regard is established by the International Labour Organization (ILO). First, in ILO Convention 98, it is determined that the rights encompassed by it will be applicable to all member States of the organisation, even if they have not ratified the Convention (yet). Second, in its Constitution, Art. 19.8, it is Stated that no international standard should undermine any national law, custom, ruling or agreement that is more favourable to workers. Both stipulations should be emulated by the draft Treaty for the effective protection of communities and individuals affected by the activities of TNCs.

11. The term “mitigation” should be replaced by “prevention” if it refers to Human Rights violations

On the one hand, due to the nature of the crime, human rights violations should not be mitigated, but prevented—accepting mitigation means accepting a certain level of violation of a human right. There is never mitigation enough to having violated the rights of a person or community. Risks, on the other hand, can and should be mitigated in certain circumstances.

In the third revised draft, some States amendments positively aim to reinstate this issue by deleting the term "mitigation" when it refers to violations, as it cannot be seen as a preventive measure.

12. References to environmental harm

As cases such as Chevron-Texaco in Ecuador, the BHP oil spill in Gulf of Mexico and Total in France evidence, it is impossible to address climate change without recognizing the insurmountable impact TNCs play both in emissions and in environmental disasters. Global by nature, environmental crimes are intrinsically connected to human rights violations. So much so that in July 2022 the UNGA passed Resolution A/76/L.75 recognizing the right to a clean, healthy, and sustainable environment as a human right.

Many other cases related to toxic substances, or the impact of agro-industrial food systems, also show how corporations are contributing to environmental pollution and the destruction of biodiversity, harming both the people and the planet.

The Global Campaign understands that the Binding Treaty, because of the inextricable connection between human and environmental rights, must ensure that both are integrally protected. There should, therefore, be references to climate change and environmental rights beyond the preamble, also in chapters dedicated to the definition of victims, harm and liability.

13. References to Due Diligence laws and mechanisms⁶

Due diligence establishes an internal process through which companies identify the risks of their activities and ways to prevent or mitigate them. Due diligence is thus “a mean”, but it does not establish an outcome, “a result”. It does not in itself allow for reparations, but rather tries to prevent them from occurring through the development of unilateral internal company processes for assessing and orientating the company’s behaviour, without external control. On many occasions, the norms that regulate these mechanisms use terms such as “mitigation” of harm which, as mentioned, is not compatible with a human rights perspective.

6. See the position paper of the Global Campaign on the Due Diligence Directive in discussion in the European Parliament: <https://www.stopcorporateimpunity.org/global-campaign-Statement-on-the-process-towards-the-european-directive-on-mandatory-due-diligence/>; and see also the Global Campaign’s position paper on due diligence : <https://www.stopcorporateimpunity.org/Statement-2/>

Due to the lack of effective monitoring and enforcement mechanisms, TNCs can use Due Diligence to evade responsibility, especially when it is seen as the only criteria adjudicators should take into account when defining liability. Liability of TNCs regarding human rights violations should not be determined by a list of precautions eventual perpetrators themselves decide they must take, but by the actual harm caused to individuals, communities, and the environment. It must be up to the judge to decide if the company complied with the needed prevention measures according to broader criteria, as those already applied under the duty of care, for common law systems, or other criteria of civil liability for continental law systems.

Furthermore, any reference to Due Diligence in the Binding Treaty should i) make clear its encompassing scope of application (the whole of global value chain, up and downstream); ii) include clear sanctions and administrative, civil and criminal liability regimes when transnational corporations do not comply with their obligation; iii) cover all human and environmental violations; iv) ensure the primacy of human rights over any trade and investment instruments; v) provide for specific obligations, separated and independent from those of States, for TNCs and international financial institutions involved in violations; vi) include provisions to improve access to justice and vii) establish a multi-party body (State, unions, human and social rights organisations) that monitors complaints and reparations.

Due diligence must not be a central concept in the Binding Treaty, but rather an auxiliary obligation, linked to prevention and established as a direct obligation for TNCs.

14. Liability

a) Criminal liability

Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedy for victims and affected communities. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be forced to change their practices to prevent similar violations in the future.

There are domestic precedents for holding corporations criminally liable for their actions, such as in cases of environmental pollution or fraud. For example, in the United States, the Enron scandal resulted in the criminal prosecution of several corporate executives, including the CEO. In France, Total S.A. was found criminally liable for environmental pollution in 2010. These precedents demonstrate that it is possible to hold corporations criminally liable for their actions, even when those actions involve complex and far-reaching consequences. Brazil also recognizes the criminal liability of legal entities in its environmental legislation.

There are also precedents in international law for criminal liability of TNCs for human rights violations. For example, the International Criminal Court (ICC) has jurisdiction over corporations for certain crimes under its jurisdiction, including war crimes and crimes against humanity. The Rome Statute of the ICC also provides for individual criminal responsibility for corporate officers and executives who are involved in such crimes. Furthermore, these other international conventions also establish criminal liability to TNCs: The United Nations Convention against Corruption (UNCAC), the ILO Convention on the Worst Forms of Child Labour, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

b) Civil liability

In article 8.4 of the current revised draft, is important to ensure that there is a presumption of liability of the parent or controlling company when i) this company controls, supervises or has influence over the company directly violating human rights; ii) this company has control or supervision over the specific activity causing the violation and when iii) this company could have foreseen the harm.

The fact that the liability is assumed, and the company has to discharge the presumption implies per se a reversal of the burden of proof. Furthermore, this article implies joint liability to all companies involved. Art. 8.4, therefore, should be undoubtably defended.

Furthermore, the demand for strict liability for dangerous activities, for their very nature, should also be maintained in the 4th draft.

ANNEX

Written Contributions in the Framework of the Inter-Sessional Period (8th-9th Sessions) of the Intergovernmental Working Group on Transnational Corporations and Human Rights

Joint-contribution by American Association of Jurists (AAJ), Associação Brasileira Interdisciplinar de AIDS (ABIA), Centre Europe - Tiers Monde (CETIM), Corporate Accountability (CAI), FIAN International, Friends of the Earth International (FOEI), International Association of Democratic Lawyers (IADL) and the Transnational Institute (TNI), all organizations with ECOSOC status

**On behalf of the Global Campaign to Reclaim Peoples' Sovereignty,
Dismantle Corporate Power and Stop Impunity**

Introduction

Within the context of the inter-sessional consultations leading up to the 9th session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), this document consolidates the written inputs from the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power, and Stop Impunity (the Global Campaign). Comprising over 250 social movements, trade unions, civil society organisations, and communities affected by the activities of Transnational Corporations (TNCs), the Global Campaign has been advocating for the regulation of TNCs under Human Rights International Law for over a decade. The process established by Resolution 26/9 is thus of great significance to our members who actively engage in the process, and work tirelessly to ensure it follows its mandate and intended purpose.

These written inputs are the result of the extensive work undertaken by affected communities, movements, lawyers, and activists from organisations that collectively represent over 260 million people. They aim to both underline textual proposals that we consider indispensable and propose new language to consolidate or strengthen some provisions of the current and collectively developed revised draft. These inputs are based on our historical claims, and on concrete proposals and amendments presented by the Global Campaign during the last negotiation sessions. They also take into account the sustained work and textual contributions of many States that, like us, are committed to the building of a Treaty that answers to the needs of those affected by violations committed by TNCs.

The diligence and dedication of these rightful parties has been tireless. The third revised draft, with the comments added by States during the 7th and 8th sessions, built upon over 8 years of negotiations, includes provisions and proposals that reflect the needs and proposals arising from those parties. Even if gaps still exist and although its content needs further consolidation, this text is the only legitimate basis for negotiation. Accordingly, our inputs are exclusively referring to its dispositions and comments. We therefore reiterate here our strong rejection of the Chair's informal proposals, which are part of a manoeuvre and a diversionary strategy to undermine the process and the mandate of Resolution 26/9. At the outset, the Chair's proposals are in complete contrast with the agreements and the methodology adopted at the end of the 7th session. Moreover, they are straying from the mandate established by Resolution 26/9, introducing new content that reflects exclusively the Chair's positions and that represents a threat to the democratic character of the process.

We are confident that our contributions, alongside those of committed States, will shape the legal architecture that must ultimately protect the interest of affected communities and rights-holders and assure the responsibility and sanction of TNCs that violate human rights. Given our sustained commitment to the process, the strength of our arguments, and the continuing negative consequences of the activities of TNCs on the lives of billions of people all over the world, we are confident that our voices will be heard, and our suggestions incorporated into the inter-sessional consultations, the 9th session, and the final text.

Preamble

- PP13bis: New article proposed by Palestine
→ This proposal shall be incorporated into the next draft to guarantee the protection of the human right to a clean, healthy and sustainable environment, as recognized by UNGA Resolution A/76/L.75.
- PP11: Amendment by Cameroon and South Africa
→ This proposal shall be incorporated into the next draft to align this paragraph with the original scope and to recognize that TNCs have obligations to respect human rights along their value chains.
- PP11 bis: New article proposed by Palestine
→ This proposal shall be incorporated into the next draft to reaffirm the primacy of human rights, especially in regards to other trade and investment provisions.
- PP18 ter and PP18 quater: New paragraphs proposed by Cameroon
→ This proposal shall be incorporated into the next draft to recognize that TNCs have obligations in international human rights law.

Article 1

- Art.1.1: Amendment by Cameroon and Palestine
→ This amendment shall be integrated in the next draft to include the term "affected persons and communities" next to "victims". Furthermore, the Global Campaign suggests the incorporation of "holders of individual and collective rights" so trade unions are explicitly encompassed by this definition. This shall be standardised throughout the text.
- Art. 1.2: Amendment by Cameroon
→ The proposal to add the term "violation" next to "abuse" must be incorporated and standardised through the next draft. The exclusive use of the term "abuse" implies a fictional hierarchy between States that would violate human rights and TNCs that may only abuse them, as if TNCs did not have an explicit obligation to respect human rights.
- Art.1.3: Amendment by Cameroon
→ This amendment is important to comply with the original scope established by the mandate of the OEIGWG in Resolution 26/9. It shall therefore be incorporated into the next draft.
- Art.1.5: Amendment by Palestine
→ This amendment shall be modified to also include financial capital that finances TNCs. It follows the Palestinian proposal with new language in green:
*1.5. **"Business relationship"** refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, ~~or any other structure or relationship as provided under the domestic law of the State~~, entities in the value and supply chain, any non-State or State entity linked to a business operation, product, or service even if the relationship is not contractual, as well as ~~including~~ activities undertaken by electronic means. **The business relationship shall include***

financial entities as investors, shareholders, banks and pension funds that finance the activities of TNCs.

Article 2

As clearly stated by Resolution 26/9, it is necessary to make the regulation of the activities of TNCs, within the framework of the provisions of the Binding Treaty, the main purpose of this process. We propose that the first paragraph of this article reads as follows.

- The Global Campaign would like to propose the following new paragraph for Art.2.1.0: *To regulate the activities of transnational corporations and other business enterprises of transnational character within the framework of international human rights law.*
- Art.2.1a: Amendment by Egypt, China, Cuba, Iran and Bolivia
→ This proposal shall be incorporated into the next draft to comply with the scope established by Resolution 26/9.
- Art.2.1c: Amendment by Egypt / Art.2.1e: Amendment by Brazil and Panama:
→ Proposals to delete the term “mitigation” when referring to human rights violations or abuse shall be incorporated into the next draft. On the one hand, due to the nature of the crime, human rights violations should not be mitigated, but always prevented and fully repaired. Risks, on the other hand, can and should be mitigated in some circumstances.

Article 3

In Art.3.1 we propose to combine the amendments of Egypt/Pakistan and Palestine/Namibia, as follows:

This (Legally Binding Instrument) shall apply to transnational corporations and other business enterprises of a transnational character along the value chain.

Article 4

The proposal by Cameroon to change the title of this article to “**Rights of Affected Individuals and Communities/Right of victims**” shall be incorporated into the next draft. This change is necessary to guarantee the rights of all individuals, communities and workers that are affected or might be affected by violations of human rights.

Throughout the article, States have proposed amendments and new language necessary for the effective protection of individuals, communities and workers against violations of human rights by TNCs. These proposals shall therefore be incorporated into the text:

- Art.4.2 c and 4.2 d: Amendment by Palestine
- Art.4.2f: The amendments by Palestine and Cameroon/Namibia are both very important, and should thus be merged as following:
4.2f: be guaranteed access to legal aid and information held by businesses and others and legal aid relevant to pursue effective remedy, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples, as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control,

communications and other relevant documents. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure;

- Art.4.2f ter and 4.2f quater: New paragraph proposals from Palestine and Cameroon
- Art.4.3 bis: New article proposed by Cameroon

Finally, all amendments proposed by the Plurinational State of Bolivia, and supported by several States, on the inclusion of peasants' rights throughout the articles, should be accepted and incorporated into the future Treaty.

Article 5

In order to strengthen the provisions of this article, it is key to support and incorporate the following amendments into the next draft:

- Art.5.1: Amendment by Cameroon, South Africa and Palestine
- Art.5.2: The amendments by Cameroon and Palestine could be merged. The paragraph would read as follows :
*States Parties shall take adequate and effective measures to guarantee **all rights of a safe and enabling environment for** persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity. **This obligation requires taking into account their international obligations in the field of human rights, and their constitutional principles. State Parties shall take adequate and effective measures including, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seek to exercise their right to peacefully protest against and denounce abuses and violations linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work.***
- Art.5.3: Amendment by Palestine
 → This amendment is important to guarantee the international character the Treaty must have. As judicial systems in several countries may be flawed, deficient or partial, the implementation of the Treaty cannot be a national prerogative exclusively. References to domestic law of states, thus, should be limited to i) national law that is more protective of human rights, ii) dispositions that claim for international judicial cooperation in the prosecution of violations, and iii) provisions determining ways in which domestic law must adapt and comply with this draft Treaty.
- Art. 5.3bis: New article proposed by Cameroon

Article 6

The article on prevention is a pillar of the future Treaty. This is the article where obligations for TNCs¹ should be stipulated, in addition to and separated from the obligations listed for States. Furthermore, this article should ensure that due diligence mechanisms are obligations of results and not only of means.

- Art.6.1: Amendment by Egypt, Pakistan and Philippines
→ This amendment shall be incorporated into the next draft so the future treaty complies with the scope established in Resolution 26/9 and article 3.
- Art.6.1 bis: New article proposed by Cameroon
→ This proposal shall be incorporated into the next draft to ensure States adapt their laws and behaviour to prevent human rights violations in the context of business activities of transnational character.
- Art.6.2: Amendment by Egypt and Cuba
→ This amendment as well shall be integrated to comply with the original scope, to standardise the term “violations”, as well as to delete the term “mitigate” which weakens the provision.
- Art.6.2 bis: New article proposed by Cameroon
→ This proposal is key to recognise the obligations of TNCs to prevent human rights violations.
- Art.6.3b: Amendment by Panama, Mexico, Brazil and Palestine
→ This amendment seeks to establish that violations shall not be mitigated but rather prevented, as stated before. The term “abuses” should be changed to “violations”, and it shall be incorporated into the next draft.
- Art. 6.4: Amendment by Cameroon
→ This amendment is important because it suggests another external entity to monitor business due diligence, but it should also include a public mechanism of control.
- Art.6.4c: Amendment by Palestine and South Africa
→ This amendment is very important to allow communities to be consulted, as a possibility to enshrine the “Right to say NO” to corporate projects in their territories. This amendment is also important because it states that consultations must be carried out by a public body and not by TNCs.
→ The obligation to carry out meaningful consultations is not enough to guarantee respect for the right to participate in decision-making of the interested populations. Therefore, it is necessary to add the term “*mandatory*”:
6.4c: Conducting meaningful and *mandatory* consultations...
- Art. 6.4d bis: New proposed paragraph from Palestine
→ This important proposal adds to meaningful consultations The Right to Say No, guaranteeing communities on the ground have control over their territories and their ways of living.

¹ See here our [document of arguments on the importance of recognizing and establishing clear and proper obligations for TNCs](#).

- Art.6.4f bis: New proposed paragraph from Cameroon
→ This proposal shall be incorporated into the next draft as it will provide a mechanism for financial guarantees to already vulnerable affected communities.
- Art. 6.8: Amendment by Cameroon
→ This amendment is very important, and shall be incorporated into and integrated in the next draft, as it strengthens the provision on prevention of corporate capture.
→ We propose to add “philanthropic institutions” that also have to be identified as corporate capture actors.
- Art.6.8 bis and ter: New articles proposed by Cameroon
→ These proposals shall be incorporated into the next draft, as they rightly point out the role of International Financial Institutions in corporate violations. These proposals rightly aim at establishing obligations for these entities.

Article 7

- Art. 7.1bis: New article proposed by Palestine
→ This new article is very important to guarantee that those violating human rights are not determining how these same violations should be remediated. It shall therefore be incorporated into the next draft.
- Art.7.2: Amendment by Palestine
→ This amendment is very important to strengthen the right to information of those affected. It shall therefore be incorporated into the next draft.
- Art.7.3: It is important to keep the language “*States Parties shall provide adequate and effective legal assistance to victims throughout the legal process*”, which is the most favourable for those affected.
- Art.7.3d: Amendment by Palestine
→ This amendment shall be incorporated into the next draft in order to remove legal obstacles as the *forum non conveniens* and to add the term “violations”.
- Art.7.5: Amendment by Palestine
→ This amendment shall be incorporated into the next draft to enshrine the reverse of the burden of proof, needed to fulfil the right to access to remedy.
- Art. 7.2, 7.5, and 7.6: Amendments by Palestine
→ These amendments, just as 5.3, also guarantee that references to domestic law of States are there to expand the human and environmental rights of affected individuals or communities—and not to their detriment. As such, they shall be incorporated into the next draft.

Article 8

To safeguard the rights stipulated by the treaty, and to guarantee accountability in case of their violation by TNCs or other businesses along its value chain, the Treaty must explicitly establish **administrative, civil and criminal regimes of liability for natural and legal persons in the context of human rights violations committed by TNCs**. Criminal liability for TNCs will work both as a deterrent

and as a mechanism to provide remedies for victims of human rights violations. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be legally obliged to change their practices to prevent similar violations in the future.

- Art. 8.1 and 8.2: Amendments and support by Palestine
→ These two articles shall be incorporated into the next draft; just as Art. 5.3, they reference domestic law of States to expand human and environmental rights of individuals and communities.
- Art.8.3 and 8.8: Amendments by Palestine
→ These two amendments shall be incorporated into the next draft. The first allows for the establishment of concrete liability provisions and a regime of sanctions in case of violations of human rights committed by TNCs. The second is key to guarantee that national legislations establish criminal liability to legal persons for human rights violations.
- Art. 8.7: Amendment by Palestine
→ This amendment shall be incorporated in this paragraph about due diligence. It is important to highlight that, due to the lack of effective monitoring and enforcement mechanisms, TNCs can use Due Diligence to evade responsibility. Liability of TNCs regarding human rights violations should not be determined by a list of precautions eventual perpetrators must take, but by the actual harm caused to individuals, communities, and the environment.
Any reference to Due Diligence in the Binding Treaty should i) make clear its encompassing scope of application (the whole of global value chain, up and downstream); ii) include clear sanctions and administrative, civil and criminal liability regimes when transnational corporations do not comply with their obligation; iii) cover all human and environmental violations; iv) ensure the primacy of human rights over any trade and investment instruments; v) provide for specific obligations, separated and independent from those of States, for TNCs and international financial institutions involved in violations; vi) include provisions to improve access to justice and vii) establish a multi-party body (State, unions, human and social rights organisations) that monitors complaints and reparations. The amendment shall thus be incorporated into the text. Due diligence can not be a central concept, but rather an auxiliary obligation, linked to prevention and established as a direct obligation for transnational companies.
- Art.8.10 bis: New article proposed by Palestine
→ This amendment is important to establish the joint and several liability of parent companies along their value chains. It shall therefore be incorporated into the next draft.
- Art. 8.10 ter: New article proposed by Palestine → This amendment is also important for the establishment of criminal liability in the context of human rights violations committed by TNCs.
- In order to guarantee the effectiveness of the provisions of this article, the amendments made by Brazil and China in Art.8.5, 8.6 and 8.7 shall be rejected.
- **New proposals from the Global Campaign :**
8.11: The parent company, the outsourcing companies it uses, their respective subsidiaries, and all persons with whom the parent and its outsourcing companies have business relationships and/or which are part of their global value chains, shall be jointly and severally liable for the obligations established in this (Legally Binding Instrument.)

The obligation to assume this joint and several liability shall be directly applied by judges where the existing legal framework in force in the home and/or host states or in the states where the affected persons or communities are based or domiciled is not adequate for the implementation of this (Legally Binding Instrument).

*8.12 TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, **whether** (home states, host States or States affected by the operation of TNCs). To this end :*
a. TNCs have obligations derived from international human rights law. These obligations exist independently of the legal framework in force in the host and home States.
b. TNCs and their managers, whose activities violate human rights, incur criminal, civil and administrative liabilities as the case may be. c. The obligations established by the present instrument are applicable to TNCs and to the entities that finance them.

Finally, it is crucial to reject the proposal for an Article 8bis made by Brazil, as it will limit the capacity of the future Treaty to ensure access to justice and remedy for affected individuals, communities and holders of individual and collective rights.

Article 9

There are many important amendments that strengthen provisions widening the jurisdiction of courts to judge human rights violations committed by TNCs. They should therefore be incorporated into the next draft.

- Art. 9.1: Amendments by Palestine and South Africa
- Art.9.2: Amendment by Palestine
- Art. 9.1b, Art.9.1c, Art.9.2, Art.9.2d bis, Art.9.5: Amendments by Palestine
- Art. 9.3: Amendment by South Africa

Finally, to protect the provisions of this article, and thus the effectiveness of the future Treaty, it is key to reject the amendments that aim at weakening the text:

- Art. 9.3: Amendment by China
- Art. 9.4 and 9.5: Amendments by Brazil

Article 14

- Art. 14.3: Amendment by Palestine
→ This article, with the amendment, is very important to guarantee that only domestic law that is more protective of human and environmental rights than those stipulated by this Treaty prevail
- Art. 14.5a and 14.5b: Amendment by Palestine
→ In order to strengthen the provisions that aim at re-affirming the primacy of human rights over trade norms and agreements, it is important to incorporate these amendments

→ The Global Campaign would like to propose a slight change in Art.15.5b: instead of “**be compatible**”, the paragraph should say “**adjust and strictly comply**”

Article 15

One of the most serious limitations of the current draft is the design of the compliance monitoring mechanism. As currently established, the Committee is very weak and unable to guarantee the effectiveness of the provisions of the Treaty, even when they are as limited as those imposed on the States by this draft. Article 15 should, therefore, include the possibility for affected people and communities to file complaints against TNCs, and to make the Committee's recommendations binding.

Furthermore, the Global Campaign understands that it is essential to establish, in complementarity to the Committee, an International Tribunal² that receives individual and collective lawsuits in the event of human rights violations committed by TNCs directly or through their global production chains, even if this is done, during the Conference of States Parties, ex-post the adoption of the Treaty—as suggested in the Elements Paper published in 2017 by the Chair of the OEIGWG.

In this sense, we propose to add the following provisions:

New proposals from the Global Campaign:

15.4.a.bis: The Committee receives and considers complaints submitted by victims and affected communities concerning the activities of transnational corporations that act in contradiction to this legally binding instrument. 15.4.a.2bis: States Parties recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Treaty.

15.4.b.bis: The decisions rendered by the Committee shall be binding and shall be followed by action by transnational corporations and other business enterprises of transnational character, States Parties and related organisations (such as a special fund for victims, administrative sanctions for the companies concerned by the decisions, etc.).

15.4.c.bis: The Committee may also make recommendations to States parties to guide them in their strategies to regulate transnational corporations' activities in order to prevent human rights violations. For this purpose, the latter may be assisted by independent experts and professionals in the fields in question.

The Global Campaign also proposes a new paragraph in art.15.8 (inspired from the language used in the Elements Document published by the Chair of the OEIGWG in 2017): **State Parties shall decide for the establishment of an international judicial mechanism for the promotion, implementation and monitoring of the legally binding instrument, in the form for instance of an International Court on Transnational Corporations and Human Rights.**

² See here our [document of elements for an International Tribunal on TNCs and human rights](#).

